REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPEAL NO. 289 OF 2011

**IN THE MATTER OFSECTIONS 8 & 9 LAW REFORM ACT *(CAP 26 LAWS OF KENYA)***

***AND***

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

***AND***

**IN THE MATTER OF CRIMINAL PROCEDURE CODE (CAP 75)**

***AND***

**IN THE MATTER OF THE PENAL CODE (CAP 63)**

***AND***

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT (KIBERA)**

**MISC PRIVATE PROSECUTION NO.349 OF 2011**

**MARTIN MAINA.....INTENDED PROSECUTOR**

***VERSUS***

**RIGHT END PROPERTIES LTD.....1ST ACCUSED**

**ASHRAF SAVANI.....2ND ACCUSED**

**MADATALI S. CHATUR.....3RD ACCUSED**

**STEPHEN OYUGI OKERO.....4TH ACCUSED**

***AND***

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO FILE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

***BETWEEN***

**ASHRAF SAVANI.....1ST APPLICANT**

**MADATALI CHATUR.....2ND APPLICANT**

***VERSUS***

**CHIEF MAGISTRATE'S COURT KIBERA.....1ST RESPONDENT**

**MARTIN MAINA.....2ND RESPONDENT**

**THE OFFICER COMANDING KILIMANI POLICE STATION.....3RD RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT**

**THE ATTORNEY GENERAL.....5TH RESPONDENT**

## R U L I N G

On 16th November 2011, the two Exparte Applicants herein Ashraf Savani and Madatali S. Chatur filed an application by way of Chamber Summons dated 16th November 2011 under a Certificate of Urgency seeking leave to commence Judicial Review proceedings for orders of Certiorari and Prohibition against the Respondents herein and that leave if granted do operate as stay of execution of the warrant of arrest issued in Misc. Private Prosecution Case No.349 of 2011 and proceedings in the said case pending the hearing and determination of the Judicial Review application.

The Application was placed before Hon. J. Majanja on the same date it was filed (16th November, 2011) and after hearing Counsel for the Exparte Applicants, J. Majanja granted leave to commence Judicial Review proceedings against the Respondents as prayed in the application and directed that leave granted operates as stay in terms of Prayer 4 of the application.

Aggrieved by these orders, the 2nd Respondent Mr. Martin Muya filed the current application dated 18th November 2011 seeking ***inter alia*** that the Chamber Summons dated 16th November 2011 together with the affidavits and statutory statements in support thereof be struck out with costs and that the orders issued on 16th November 2011 granting the applicants leave to apply for Judicial Review remedies and that leave granted do operate as stay as aforementioned be set aside. The application also seeks that the 2nd Respondent be struck out from the suit with costs.

The application is premised on the following grounds:

1) THAT no copy of the Orders sought to be quashed is annexed to the said application.

2) THAT no or no sufficient reason or explanation has been adduced as to this failure.

3) THAT the Court lacks jurisdiction to grant the Applicants' prayers as they seek to challenge the merits of the Order as opposed to the procedure of obtaining the Orders.

4) THAT Judicial Review cannot stand against a private individual.

5) THAT the 2nd Respondent has a Constitutional Right to initiate the private prosecution against the applicants.

6)THAT the said application was made in bad faith is bad in law and an abuse of court process.

In opposing the application, each of the two exparte applicants filed Replying affidavits sworn on 13th December 2011. I have also come across an affidavit sworn by No.82649 P.C. Isaac Ogutu titled ***"Replying affidavit for the 3rd & 4th Respondents"***

On the face of it, the said affidavit is not expressed to be sworn in opposition to the application filed by the 2nd Respondent on 18th November 2011. From paragraph 3 thereof, the affidavit is meant to be a response of the 3rd & 4th Respondents to the Misc Private Prosecution Case No.349/2011 intended to be prosecuted by the 2nd Respondent herein.

As the affidavit is not sworn and filed in opposition to the application under consideration and the 3rd & 4th Respondent informed the Court on 16th December 2011 that they were not taking any position in this application, I will disregard the said affidavit in its entirety for purposes of this ruling.

To advance their respective positions, the main parties in the application namely the 2nd Respondent and the Exparte Applicants filed written submissions which they highlighted before me on 13th February 2012 and which I have carefully considered together with the authorities cited.

The Applicant opened his submissions by attacking the two Replying affidavits sworn by the Exparte Applicants herein urging that they should be struck out as their ***jurat*** is on a separate page.

Mr. Wena for the Exparte Applicants ***(hereinafter referred to as the Respondents)*** did not respond to this prayer by the Applicants when making his submissions in opposition to the application.

I have looked at the two verifying affidavits and have noted that it is true that their ***jurats*** are in separate pages. I am however not inclined to strike out the said affidavits as I am of the view that the existence of the ***jurats*** in separate pages of the affidavits is an irregularity of form which has nothing to do with the substance of the replying affidavits. No prejudices will be caused to the Applicant if the order sought is not granted while a lot of prejudice will be occasioned to the Respondent if the affidavits were struck out since this will have the effect of removing the basis of their opposition to the applicants Notice of Motion.

In any event under Article 159 (2) (d) of the Constitution of Kenya 2010 the Court is enjoined to administer justice without undue regard to procedural technicalities.

In this case in the interest of justice, I decline to strike out the two replying affidavits sworn by the Respondents and I find that they are properly on record.

In support of the application, Mr. Maina urged the Court to set aside the Exparte Orders issued on 16th November 2011 on two grounds. The first ground advanced by the applicant is that the Exparte Applicants in their application for leave failed to satisfy the mandatory requirements of the law that the decision sought to be quashed must be attached to the application. It is the applicant's case that the Respondents attached to the application the order extracted in Misc. Criminal App. No.349/11 directing that warrant of arrest be issued against the Respondents but not the warrant of arrest itself which is what the Respondents sought and obtained leave to apply for orders of Certiorari to have it quashed. It was further argued that failure to attach the warrant of arrest was fatal to the application for leave.

I have read through the Chamber Summons application dated 16th November 2011 on the basis of which the exparte orders now being challenged were issued and I have confirmed that though Prayer 2 thereof which was granted sought leave to apply for Orders of Certiorari to quash the warrant of arrest issued in Misc. Private Prosecution Case No.349/2011, the said warrant of arrest was not attached to the verifying affidavit sworn in the matter. Only an order extracted from the court proceedings was annexed thereto. The question that then arises for the courts determination is whether this omission makes the application for leave fatally defective or incompetent as to justify setting aside of the Exparte Orders

granting leave. Order 53 Rule 7(1) of the Civil Procedure Rules which is the provision of the law the Respondents are said to have violated by not annexing the warrant of arrest to the application states as follows:

"In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court"

In my understanding, Order 53 Rule 7 of the Civil Procedure Rules does not provide that the order sought to be quashed by Orders of Certiorari must be attached to the application seeking leave. It only provides that a copy of such an order must be lodged with the courts Registrar verified by an affidavit before hearing of the motion in which validity of the order is being challenged.

From a reading of Order 53 Rule 7(1) of the Civil Procedure Rules, I find that though a party challenging validity of an order or decision seeking to have the same quashed by orders of certiorari may attach the impugned decision or order to the verifying affidavit sworn to verify facts in the statutory statement in the application for leave, a party who fails to do so at the leave stage may still do so at a later stage provided copy of the said order or decision verified by affidavit is lodged with the courts Registrar before hearing of the Notice of Motion for Judicial Review or a satisfactory reason is given to the court regarding why this has not been done.

Given my interpretation of Order 53 Rule 7(1) of the Civil Procedure Rules, I find that failure of the applicant to annex a copy of the warrant of arrest to the verifying affidavit in the application seeking leave was not fatal to the application and it did not make the said application incompetent. There is therefore no justification to set aside the Exparte orders granted on 16th November 2011 on that reason alone.

In case I am wrong in that finding and the failure to exhibit the said warrant of arrest to the application was a violation of Order 53 Rule 7 (1) of the Civil Procedure Rules, I find that bearing in mind the guidance given by the Court of Appeal in the case of the Aga Khan Education Service Kenya –Vs- Republic & Others, C/Appeal No.257/03 on how courts should exercise jurisdiction to set aside leave granted, I would be hesitant to exercise my discretion to set aside the exparte orders issued on 16th November 2011 as prayed.

In this case the Court of Appeal had this to say on the subject:

**"We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of*certiorari*is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set aside".**

In this case the Judge who heard the application exparte must have established that the applicant had made out a ***prima facie*** case in order to grant leave on the basis of the application as it was presented before him without an attachment of the said warrant of arrest. In any case, the order annexed to the verifying affidavit in bundle of documents marked MC -1 clearly shows that there was a court order directing that warrant of arrest be issued against the two Respondents and one other person. Exhibiting the said order was in my view sufficient compliance with order 53 Rule 7(1) of the Civil Procedure Rules at the leave stage.

Leave having been granted, the same cannot be set aside simply because of the omission to exhibit the

actual warrant of arrests since failure to do so did not make the Applicants' case so hopeless that it had no chances of success at the hearing of the substantive motion. Besides, pursuant to that grant of leave a Notice of Motion was subsequently filed that now sought orders of certiorari to quash the orders issued by the subordinate court to have warrant of arrests issued against the Respondents and not to quash the warrant of arrests themselves.

Given that Order 53 Rule 4 of the Civil Procedure Rules provides that the Notice of Motion should be accompanied/supported by the statutory statement and verifying affidavit sworn at the leave stage and the said order was annexed to the Respondent's verifying affidavit at the leave stage, I find that the issue of whether or not the Respondent properly complied with Order 53 Rule 7(1) of the Civil Procedure Rules has now gone beyond the determination of this court at the leave stage and ought to be determined at the hearing of the substantive motion.

The second ground advanced by the applicant in support of his application to set aside the exparte order is that leave should not have been granted for orders of prohibition since the same had already been overtaken by events.

Mr. Maina relying on the case of Kenya National Examination Council –vs- Republic Exparte Geoffrey Gathenji Njoroge & Others, Civil Appeal. No.266 of 1996 argued that as prohibition is powerless against decisions which have already been made, the order of prohibition would not be available to the applicant as the decision to issue warrant of arrest had already been made.

With utmost respect to Mr. Maina, I find no substance in this submission since Prayer 2 of the application for leave sought leave to apply for orders of prohibition to prohibit the 1st Respondent, the Chief Magistrate's Court Kibera from bringing or hearing charges in relation to Misc. Private Prosecution Case No.349 of 2011. Leave had not been sought to prohibit the 1st Respondent from issuing a warrant of arrest. As it is obvious from the pleadings in this case that the said private prosecution case is still in its preliminary stages, I find that the order of prohibition in terms set out in Prayer 2 of the application for leave is still available to the Respondents if they manage to establish their case to the satisfaction of the trial court in the hearing of the substantive motion.

In view of the foregoing, I find that this is not an appropriate case for this court to exercise its discretion to set aside the exparte orders granted on 16th November 2011. I accordingly decline to set aside the said orders as prayed in Prayer 3.

Another argument put forward by the applicant is that the application attacks the merits of the decision to issue warrant of arrest and not the procedure employed in arriving at that decision and that therefore the remedy of Judicial Review is not available to the Respondents.

This appears to be the basis for the prayer seeking to have the entire application struck out with costs as can be seen from Prayer 2. However, it is my view that whether the application challenges the actual decision and not the process in arriving at that decision is a matter to be investigated and determined at the hearing of the substantive motion. Secondly, the order is incapable of being granted since in any event the application is already spent. It was spent the minute court granted leave and made other orders on 16th November 2011.

Turning now to Prayer 4 seeking that the 2nd Respondent's be struck out from the suit with costs, I agree with the applicant that the remedy of Judicial Review is not available against individuals sued in their private capacities. Judicial Review is a challenge on administrative action. Remedies in Judicial Review can only be issued against public or statutory bodies, subordinate courts or inferior tribunals or public officers where it is claimed that any of them has either abused its or their powers by either acting illegally or in excess of their jurisdiction or where they have failed to perform their public duties. Put in another way Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties". Since the

applicant has been named as the 2nd Respondent herein in his individual and private capacity he is not amenable to Judicial Review. Consequently, the application succeeds in Prayer 3 with the result that the Applicant being the 2nd Respondent is hereby struck out of the suit.

To facilitate hearing in this matter since the Notice of Motion has already been filed, parties in this matter are directed to attend the court on 21st March 2012 for mention for directions. The 1st, 3rd, 4th and 5th Respondents to be served with mention notice.

Since the application has only partially succeeded, I will not make any order as to costs.

DATED, SIGNED and DELIVERED by me at Nairobi this 6th day of March 2012

**C.W. GITHUA**
**JUDGE**
***In the presence of:***

Florence – Court Clerk

Mr. Maina for Applicants

M/s Mac Asila for Respondents