



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

Judicial Review 87 of 2011

MANOAH KIPYEGON KILACH.....1ST
APPLICANT

JEREMIAH NJIRI KARANJA.....2ND
APPLICANT

PAUL MURIITHI THEURI.....3RD
APPLICANT

MOSES CHERUIYOT RUTO.....4TH
APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST
RESPONDENT

COMMISSIONER OF POLICE.....2ND
RESPONDENT

CHIEF MAGISTRATE, NAKURU LAW COURTS.....3RD
RESPONDENT

RULING

The applicants, Manoah Kipyegon Kilach, Jeremiah Njiri Karanja, Paul Muriithi Theuri, Moses Cheruiyot Ruto are accused persons in Criminal Case No. 26 of 2005 in which they are charged with several offences. The case is pending before the Chief Magistrate's Court. The applicants have brought the application dated 27/7/2011, seeking the following orders:-

- (2) That the court do grant leave to the applicants to institute Judicial Review proceedings in the nature of prohibition to prohibit and stop the 1st and 2nd respondents from prosecuting or continuing with the prosecution of applicants in the above states case;**
- (3) And/or in the alternative, that the applicants be granted leave to commence Judicial Review proceedings in the nature of certiorari to remove and bring into the High Court for purposes of being quashed the proceedings in Nakuru CMCR 26/05;**
- (4) That the grant of leave do operate as stay of the proceedings in CRC 26/05.**

The application is premised on a statement of facts and verifying affidavit of the plaintiffs, the main affidavit having been sworn by Jeremiah Njiiri Karanja on 27/7/2011. Jeremiah Njiiri deponed that he was an employee of Egerton University as Accounts Clerk until 2004, when he was interdicted. On 5/1/05, with the other applicants, they were arraigned in CRC 26/05, for the charges specified in the charge sheet (JNK1). The charges were preferred based on the prosecution witnesses whose statements are exhibited as JMK 2i-xi. The applicants learned that employees of Egerton namely Sylvester Kiptoo and Kenneth Ntongodu instigated their arrest and that the complainants filed Judicial Review application **351/06, Rep v The KACC Ex-party Sylvester Kiptoo and Kenneth Ntongodu**, seeking an order of mandamus to compel the Kenya Anti Corruption Commission to investigate their complaints on suspected corruption, economic crimes and abuse of office offences at Egerton University (JMK 3(a),(b), (c) & (d)); That the court delivered its judgment on 15/10/2011 in which the court directed the Directors of KACC to cause fresh investigations to be carried out, to investigate the Chief Accountant, the Finance Officer, Internal Auditor and DVC (Administration & Finance). He deponed that the people who were to be investigated were the ones lined up as witnesses against them. The applicants are apprehensive that the trial will be highly prejudicial to them and it is in the interest of justice that the investigations be completed before they can be prosecuted.

Prof. J. K. Tuitoek, the Vice Chancellor of Egerton University, the Interested Party herein, swore a replying affidavit on 20/2/2012. He opposed the application for reasons that the applicants had sought leave in Judicial Review 5/2010 for orders of certiorari and prohibition for the same reason but the same was dismissed on 17/2/2010 (JKT1) and the application is therefore *res judicata*. He urged that the applicants will be able to vindicate their case in CRC 26/05 at the full hearing; that the fact that the court in Judicial Review 102/09 ordered investigations to be done does not mean that CRC 26/05 be stayed; that when the court ordered investigations, it was aware that CRC 26/05 was ongoing and did not find it necessary to stay the criminal case and that the main aim of the investigations is to find out whether they were more suspects than the applicants. According to the Interested Party, a fresh audit was done by Ernest & Young and investigations were undertaken by KACC and applicants found to be suspects. He further deponed that none of the prosecution witnesses in CRC 26/05 have been implicated in the offences and stopping the prosecution at this stage would be unfair. According to the deponent, the police are charged with responsibility of carrying out investigations and they were assisted by the KACC and the applicants were found to be suspects. The Interested Party urged the court to dismiss the application.

The 1st applicant filed a supplementary affidavit to the effect that the JR 5/2010 was based on grounds that civil suits had been filed against the applicants and therefore the prosecution in CRC 26/05, was mala fides. In that application, the main ground is that the court ordered further investigations in CRC 26/05. Although there was forensic audit, the court in JR 102/09, ordered further investigation and it has not been demonstrated that any investigations have been carried out by the Director KACC as directed.

The parties filed submissions through their counsel Mr. Ogola for the applicant and Mr. Kisila for the Interested Party. Though served, the respondents did not file any papers nor did they appear at the hearing.

The applicants seek leave of this court to commence Judicial Review Proceedings. All that is required at this stage is for the applicants to demonstrate that they have an arguable case. What is an arguable case for purposes of a Judicial Review application? The Court of Appeal in **Njuguna v Minster for Agriculture (2000)1 EA 184**, the Court said:-

“The test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case that the reliefs sought may be granted on the hearing of the substantive application.”

The same view was followed in **Agakhan Education Services Kenya v Rep & Others (2004)1 EA 3**. The counsel have made elaborate submissions at this stage as if the court were considering the substantive Notice of Motion. Those submissions are not necessary at this stage. I need not go into a detailed examination of the affidavits and submissions in considering whether or not to grant leave.

The applicants rely on the ruling of J. Maraga dated 15/4/2011 in **JR 102/09, Rep v KACC and Interested Party, Egerton University**. The applicants in that case were Silvester Kiptoo and Kenneth Ntogodu who moved the court for an order of mandamus to compel the KACC to investigate a complaint reported by the applicant regarding suspected corruption, economic crimes and abuse of office at the Interested Party's institution. In his ruling, J. Maraga directed that the ruling be served on the Director of KACC to cause fresh investigations to be carried out in the matter by officers who have not been involved in the matter before and appropriate action taken against all those found to be involved in the scam. By then the applicants had been charged in CRC 26/05 following the complaints made by Silvester and Kenneth, the applicants in 102/09. It would be expected that the respondents would respond to this application to explain whether or not the said order of the court has been complied with. It is not for the Interested Party to explain whether or not investigations have been carried out as directed by this court on 15/4/2011.

Prof. Tuitoek deponed that when the order of 15/4/2011 was given, the court was aware of the existence of CRC 26/05, but that if there are other suspects they should be charged. It is true that the court did not stay the proceedings in CRC 26/2005 but if fresh investigations were carried out as per the court order and fresh or other relevant evidence were found, the proceedings in CRC 26/05 would be affected. I think that even if the court did not order a stay of the proceedings in CRC 26/2005, it was necessary to stay the proceedings in CRC 26/05 so that the investigations are done and completed so that the case can be heard and determined once and for all. There is now even more need considering that the KACC did not seem to have complied with court order to carry out further investigations. It is over a year since the court's order, CRC 26/05 is proceeding and yet there is no evidence that investigations have not been commenced. The Interested Party is not in a position to tell the court whether or not investigations have been done, but the respondent who are charged with the said duty. Infact in my view, the Interested Party should not have been allowed to file a reply to the Chamber Summons because leave has not yet been granted to commence judicial review proceedings. **Order 53 Rule 3(2) of the Civil Procedure Rules** provides that the notice of motion shall be served on all parties interested in the matter. My understanding of the above rule is that the Interested Parties should only come into these proceedings after the notice of motion has been filed but not at leave stage.

Whether the application is res judicata: **Section 7 of the Civil Procedure Act** defines res judicata as:-

“S.7 No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Judicial Review proceedings do not deal with the merits of the impugned decision. The purpose of Judicial Review is to check that public bodies (officers) do not exceed their statutory mandate or that they do not carry out their duties in a manner detrimental to the public at large. The challenge relates to the process by which the decision was arrived at, whether it was fair, in accordance with the tenets of natural justice or in compliance with the statutory provisions. Besides, Judicial Review is said to be a special jurisdiction (*sui generis*) whereby the **Civil Procedure Act** and **Rules** do not generally apply, save for **Order 53** of the **Civil Procedure Rules** being the procedural law while the substantive law is found in **Section 8 and 9 of the Law Reform Act Cap 26 Law of Kenya**. The argument that the instant application is *res judicata* because of the ruling in JR 5/2010, does not arise. Even if one were to argue that both this application and JR 5/2010 are Judicial Review applications, the issues are not similar. In JR 5/2010, the applicants wanted the charges levelled against them in CRC 26/05 be quashed on grounds that the charges were malicious and an abuse of the court process. In this case, the applicants seek to have the court order issued in JR 102/09 complied with or the court quash the proceedings in CRC 26/05.

In the end, I do find that the applicants have demonstrated that they have an arguable case because the respondent did not comply with court orders to carry out fresh investigations into alleged corruption and economic crimes at the Interested Party's institution. Leave is granted in terms of prayer 2 and 3 of the Chamber Summons dated 27/5/2011 and the said leave do operate as stay for 90 days.

The substantive Notice of Motion be filed and served within 14 days hereof in default the stay order will vacate automatically. Once the Notice of Motion is filed, the matter be brought up for mention for purposes of the court giving directions as to the hearing. Costs will abide the Notice of Motion.

DATED and DELIVERED this 31st day of July, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Otieno holding brief for Mr. Ogola for the applicants

Mr. Kisila for the respondents

Kennedy – Court Clerk