



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc. Appli. 339 of 2006**

**FRANCIS GICHUKI MACHARIA.....**  
**APPLICANT**

**Versus**

**SENIOR RESIDENT MAGISTRATE**

**KARATINA &**  
**ANOTHER.....RESPONDENT**

**RULING**

The ex parte applicant Francis Gichuki Macharia filed the Chamber Summons dated 12<sup>th</sup> June 2008 in which he seeks orders of Judicial Review against the Senior Resident Magistrate Karatina, Hon. L. Mbugua while the Interested Party is named as Charles Muthoga Macharia. He seeks that leave be granted to the Applicant to apply for orders of certiorari to remove into this court for purposes of being quashed the judgment written and delivered by the Hon. L. Mbugua (Mrs) Senior Resident Magistrate, Karatina on the 29<sup>th</sup> May 2008 at Karatina in CRC. 701/04 without jurisdiction and without conducting a trial contrary to Section 77 of the Constitution and that the said leave do operate as stay of the said judgment given by Hon. L. Mbugua in CRC 701/04 and all consequential orders.

The Chamber Summons is premised on a statutory statement and a verifying affidavit sworn by the Applicant on 10<sup>th</sup> June 2008. When Counsel appeared before this court on 12<sup>th</sup> June 2008, the court directed that the Chamber Summons be served on the Respondent and Interested Party for hearing inter partes and the Respondent Lucy Ngima Mbugwa filed a replying affidavit dated 18<sup>th</sup> July 2008. Mr. Kinga had come on record for the Interested Party but has so far not filed any reply nor did Mr. Kinga attend the hearing of the Chamber Summons which he was aware of. The grounds upon which the Application is brought are at paragraph D of the statement and they are thus; the judgment delivered on 29<sup>th</sup> May 2008 was given without jurisdiction; the same is a nullity and illegal and it is contrary to Section 77 of the Constitution, that the judgment was not preceded by a trial; that the judgment was written without the consent of the Applicant, that it is extraneous, unreasonable and contrary to the rules of natural justice; is arbitrary and an abuse of judicial discretion. In addition Mr. Ngoge submitted that the magistrate violated the mandatory provisions of S. 200(3) of the Criminal Procedure Code when she wrote the judgment and breached the rules of natural justice by failing to give the Applicant a hearing.

A replying affidavit was sworn by Lucy Mbugwa the Senior Resident Magistrate Karatina, explaining what she did in the CRC SRM 701/045 and the fact that the case was pending for judgment as from 16<sup>th</sup> February 2007 and upto 15<sup>th</sup> April 2008 when she handled the file, it had not been clear why the

Applicant (accused therein) was not coming to court but on perusal of the file found that the Applicant had obtained a stay in Misc 939/05 against the Senior Resident Magistrate's proceedings. That she is empowered by S. 200 Criminal Procedure Code to take over the matter, write the judgment and deliver sentence and that the Applicant should present himself to the court for that purpose. Mrs. Owino, Counsel for the Respondent had no objection to both leave and stay being granted.

I have considered the application, the affidavits filed both in support and in opposition to the Chamber Summons, submissions by Counsel and I do agree with Counsel for the Applicant that at this stage all that the Applicant needs to do is to demonstrate that he has an arguable case without necessarily examining the matter in depth. (See NJUGUNA V MINISTER FOR AGRICULTURE (2000) 1 EA 184).

In Judicial Review, the Applicant who moves the court for leave ex parte has a duty of candour, to make a full and frank disclosure of all material facts to his case. Failure to do that disentitles him to the exercise of the court's discretion to grant leave or stay. In Michael Fordham's Book Judicial Review Handbook 3<sup>rd</sup> Edition, the writer says the following of the duty to disclose (pg 352.21.5 "CLAIMANT'S DUTY OF CANDOUR

A claimant for permission is under an important duty to make full and frank disclosure to the court of all material facts and matters. It is especially important to draw the attention to matters which are adverse to the claim in particular

- (1) any statutory restriction on the availability of Judicial Review;
- (2) Any alternative remedy;
- (3) any delay, lack of promptness and so need for the extension of time;

In facing up to adverse points, the claimant will have an early opportunity to explain why those points are not fatal and only the case should be permitted to proceed. The duty of full and frank disclosure harks back to the time when permission for Judicial Review was ex parte. That has changed."

In Kenya the last sentence is not true because the position has not changed. In Judicial Review applications for leave are still made ex parte but the court may direct that the same be heard inter partes as the court did in the instant case.

In KNFC V ECONETT WIRELESS KENYA LTD. HMISC 1621/05, the court adopted the decision in R V METROPOLITAN POLICE FORCE DISCIPLINARY TRIBUNAL ex parte LAWRENCE (1999) HC ADM P 555, where the High Court in England said;

"It is essential that parties who seek leave to move for Judicial Review should appreciate that they have a duty to make full disclosure of all potentially material facts to the court"

I note that nowhere in the Applicants Chamber Summons is there mention of HMisc 939/05 Francis Hezekiah Gichuki v SNR RM Karatina & Ali & Charles Muthoga Macharia, Interested Party, filed by the Applicant seeking to stay the proceedings in the same case in the Senior Principal Magistrate's Court 701/04. In HMisc 939/05 Justice Emukule granted leave to commence Judicial Review proceedings but it is not clear what has happened to the case. The Respondent has explained that the judgment in CRC 701/04 has been pending since 16/2/07 because of a stay order given in the High Court. Why did the applicant not bring this case to the attention of the court? Is he concealing anything about that case? And why has the Applicant never presented himself to the Senior Resident Magistrate's court for delivery of judgment? All these facts needed to be brought to the attention of this court but the Applicant has decided to withhold them. The only inference the court can draw is that they are adverse to his case and the court is unlikely to grant the orders sought if the true facts are known.

Secondly, it is upon the Applicant to disclose to the court any other alternative remedies that are available

to him for the court to determine whether or not Judicial Review is the most efficacious remedy in the circumstances.

In the case of R V BIRMINGHAM CITY COUNCIL ex parte FERRERO LTD (1993) 1 ALL ER 530 the court held that

“where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure it was only exceptionally that Judicial Review would be granted. In determining whether an exception should be made and Judicial Review granted it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory provisions was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

In R V HORSHAM DISTRICT COMMISSION ex parte WENMAH (1995) 1 WLR 680 (QRD) the court said –

“It is of course trite law that when parliament has provided an alternative remedy, it is only in an exceptional case that Judicial Review should be granted.

P 710 thirdly, it is common place that in proceedings like these, all material matters must be placed before the judge who is being invited to grant leave ex parte. How could it be right not to draw the court’s attention to the alternative statutory remedy or to explain why this was thought to be inadequate?”

Back home, in SPEAKER OF NATIONAL ASSEMBLY V NJENGA KARUME (1990-94) EA 546 the Court of Appeal said,

“where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should be strictly followed. Order 53 cannot oust clear constitutional and statutory provisions.”

The Applicant is challenging the reading of a judgment by the magistrate which he alleges contravenes, Section 200 (3) of the Criminal Procedure Code. In Criminal Law, there is provisions for revision under Section 362 to 364 of the Criminal Procedure Code. S.362 provides:

“362 The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

363.....

364 (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may -

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by Sections 354, 357 and 358 and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order;

(2) No order under this Section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.

(3) .....

(4) .....

(5) .....

Under the above provision, the Applicant needed only point out the anomaly complained to the High Court and without wasting time and incurring costs coming to this court for Judicial Review orders, the High Court would have intervened. Why would the Applicant opt to take such a long winded procedure when the law has provided for a quick manner in which to dispose of such matters? One can only conclude that it is meant to delay and derail the criminal case that has been pending in the Karatina Senior Resident Magistrate's court since 2004 (CRC 701/04). In my view this application is a total abuse of the court process which this court can not stand by and condone. Besides there is procedure for appeal under Section 347 of Criminal Procedure Code. In seeking leave to commence Judicial Review proceedings it is the duty of the Applicant to disclose to the court the remedies available to him and why the other alternative remedies are not suitable so that he can opt to come by way of Judicial Review.

That is what the courts have said in the above cited authorities. The Applicant having failed to disclose the existence of alternative remedies and also failing to disclose material facts, is not entitled to the orders sought.

For the above stated reasons this court will not exercise its discretion in favour of the applicant and thereby dismiss the Chamber Summons with costs.

Dated and delivered this 28<sup>th</sup> day of July 2008.

**R.P.V. WENDOH**

**JUDGE**

Read in the presence of

Mr. Ngoge for Applicant

Mrs Owino for Respondent

Mr. Njoroge for Interested Party