



**Magon & another v Office of the Director of Public Prosecutions & 2 others
(Judicial Review 1 of 2023) [2024] KEELC 6498 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6498 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
JUDICIAL REVIEW 1 OF 2023
OA ANGOTE, J
OCTOBER 3, 2024
IN THE MATTER OF ARTICLES 22, 23, 25, 27, 47, 50,157
AND 165 OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF SECTION 4 AND 5 OF THE OFFICE
OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT
AND
IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT
AND
IN THE MATTER OF THE PENAL CODE, CAP 63 LAWS OF KENYA
AND
IN THE MATTER OF ELC CASE NO. 1532 IN THE ENVIRONMENT AND LAND COURT

BETWEEN

ASHISH MAGON 1ST APPLICANT

TRIKUTI INVESTMENT LIMITED 2ND APPLICANT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT



RULING

1. The Applicants herein have filed a Chamber Summons application dated 11th November 2022 under Order 53 Rule 1 of the Civil Procedure Rules, Sections, 8, 9, 10 & 11 of the Fair Administrative Actions Act, Section 8 and 9 of the *Law Reform Act* and Articles 22, 23 & 47 of *the Constitution* of Kenya 2010. They have sought for the following orders:
 - a. That leave be and is hereby granted to the applicants to apply to this Honourable Court for orders of certiorari to deliver up to the court and quash the directions and recommendations of the 2nd and 3rd Respondents dated 29th July 2020 and 22nd January 2021.
 - b. That leave be and is hereby granted to the applicant to this Honourable Court for orders of certiorari to deliver up to the court and quash the directions and recommendations of the 1st Respondent dated 2nd April 2020, 14th May 2020, and 21st May 2020 and 25th March 2020 which are all based on earlier recommendations dated 24th January 2020 made by the 2nd and 3rd Respondents to the DPP.
 - c. That the leave granted to the Applicants do operate as stay of any anticipated criminal proceedings with respect to or relating to the dispute of ownership for land parcel No. 1/1330 and 1/1331 being sub-division of LR 1/199 situated along Nyangumi Road in Upperhill Nairobi County pending the hearing and determination of these proceedings.
 - d. That leave be granted to the applicants to apply for an order of prohibition to prohibit the respondents or any persons acting on their behalf or authorized by them from arresting, purporting to arrest, instituting criminal charges, charging and/or prosecuting the Applicants pending the hearing and determination of Milimani ELC Case No. 1532 of 2013 Trikuti Investments Limited v Alasow Hassan Moamud & 4 others.
 - e. That the leave granted to the Applicants do operate as stay of any anticipated criminal proceedings with respect or relating to the dispute of ownership for Land Parcel No. 1/1330 and 1/1331 being sub-division of LR 1/199 situated along Nyangumi Road in Upperhill Nairobi County pending the hearing and determination of these proceedings.
 - f. That the costs of this application be provided for.
 - g. That this Honourable Court do grant any other or further relief that it may deem fit to grant.
2. The application is supported by the Verifying Affidavit and Statutory Statement sworn by Ashish Magon, the Director of the 2nd Applicant. Mr. Ashish Magon deponed that the 2nd Applicant was incorporated on 10th March 1997 for purposes of holding and managing the property known as Land Reference Number 1/199 and that over the years, the suit property has been leased to third parties and charged to financial institutions.
3. The 2nd Applicant's Director deponed that he enjoyed quiet possession of the suit property until August 2012, when unidentified persons claiming to own the property and purporting to sub-divide the said property visited the suit property with an Indenture for land known as Land Reference Number 1/99 and an unregistered surrender for LR No. 1/199, documents that were being used for purposes of sub-division of the land.
4. According to the 2nd Applicant's Director, he thereafter reported and lodged a complaint at Muthangari and Kilimani Police Stations in October 2012 and requested that investigations be



- conducted over the allegation, and attached the 2nd Applicant's Indenture dated 1997 and the Indenture dated 2002 for that purpose.
5. Mr. Magon asserts that the said sub-division was effected and the parcel of land sub-divided into LR No. 1/1330 and LR No. 1/1331 which was subsequently transferred by Salat Saman Aolow to Wang Wang Centre Limited.
 6. According to the Applicants, more than a year later, there was no report or conclusion on the matter prompting the Applicants to engage counsel to file a suit to have the issue of ownership resolved and that this prompted the 2nd Applicant through its Directors to file a civil suit before the Environment and Land Court to have the dispute of ownership of the suit property resolved.
 7. According to the Applicants, in October 2013, they requested the 3rd Defendant to re-investigate the matter, but no attempts to investigate the matter were ever carried out and that at that time, the alleged new owner of the land, Wang Wang Centre Limited, kicked out the 2nd Applicant's tenants from the suit property, and barred the Applicants from entering the suit property.
 8. He stated that in 2020, Wang Wang Centre Limited requested for an investigation to be done; that the 3rd Respondent thereupon carried out investigations and recently made a recommendation to the 1st and 2nd Respondents directing them to charge and prosecute the Applicants with forgery of documents to title to land and obtaining money by false pretense.
 9. Mr. Magon deponed that at the time of making this recommendation, the 3rd Respondent did not have the original title to the suit property for them to make any recommendations and that the 3rd Respondent relied on the title documents that had been used to sub-divide the 2nd Applicant's property by Salat Saman Olow.
 10. He contended that the two titles are as a result of the sub-division of LR No. 1/199 being LR No. 1/1330 and LR No. 1/1331 which were procured from an Indenture of land known as LR No. 1/99, and a surrender of LR No. 1/199 which clearly shows the discrepancy between the two documents.
 11. The 1st Applicant asserts that the 3rd Respondent's action and recommendations to arrest the Applicants is geared at intimidating the Applicants from appearing before the land court to adduce evidence with regard to the ownership of the suit property and that the Applicants have a right to be heard and therefore any action to prosecute them or any other directors of the 2nd Applicant should be estopped until the Environment and Land Court gives its determination as to the ownership of the suit property.
 12. Counsel for the Applicants filed submissions and a list of authorities which I have considered.

Analysis and Determination

13. This court has considered the Chamber Summons and submissions filed by the Applicant. The following issues are for this court's consideration:
 - a. Whether this court should grant the applicant leave to file for judicial review orders
 - b. Whether leave should operate as stay.
14. This application has been filed pursuant to the provisions of Section 9(2) and (3) of the [Law Reform Act](#) which provides as follows:
 - “(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or



certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

- (3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

15. This application was also filed pursuant to Order 53 Rule (1) and (2) of the Civil Procedure Rules which provides as follows:

“Applications for mandamus, prohibition and certiorari to be made only with leave[Order 53, rule 1]

- (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.
- (2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —
 - (a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and
 - (b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.”

16. Order 53 Rule 2 prescribes that an application for leave for an order of certiorari against any Judgment, order, decree or other proceeding for the purpose of its being quashed should be made within six months after the date of the proceeding.

17. This application has also been made under *the Constitution* of Kenya and the Fair Administrative Actions Act. Section 9 of the Fair Administrative Actions Act provides as well:

“Procedure for judicial review

- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
- (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.



- (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).
 - (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
 - (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.”
18. The Supreme court in *Dande & 3 Others vs Inspector General, National Police Service & 5* [2023] KESC 40 (KLR) noted that the entrenchment of judicial review under *the Constitution* of Kenya, 2010 elevated it to a substantive and justiciable right under *the Constitution*. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*.
 19. The Supreme Court noted that this has resulted in a dual approach to judicial review, which approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings.
 20. The Applicants have relied on the provisions of the *Law Reform Act* and Order 53 of the Civil Procedure Rules, as well as *the Constitution* and the Fair Administrative Actions Act. Their approach to seek leave indicates that they have adopted the common law approach set out in Order 53 of the Civil Procedure Rules and the *Law Reform Act*.
 21. The Applicants have also not anchored this application in *the Constitution*. Were this the case, the Applicants would not have needed to seek leave. This was the position that was taken in *National Social Security Fund vs Sokomania Ltd & Another* [2021] eKLR as follows:

“Judicial review as a relief is provided for in among others; Article 23 (3) of *the Constitution* of Kenya 2010, section 8 of the *Law Reform Act* Chapter 26 Laws of Kenya, section 13(7) of the *Environment and Land Court Act* 2011, section 7 of the *Fair Administrative Action Act* 2015 and the Common law. In my view, no leave is required to seek judicial review as a relief under Article 23(3) of *the Constitution* where proceedings are instituted to enforce the Bill of Rights under Article 22 of *the Constitution* or where proceedings have been brought under section 7 of the *Fair Administrative Action Act*, 2015 for the review of an administrative action. Such leave is also not required under the *Environment and Land Court Act* 2011 before such relief is sought.

Leave is however still required in my view where an applicant for judicial review moves the court under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules. Following the promulgation of *the Constitution* of Kenya, 2010 and *Fair Administrative Action Act*, 2015, applicants for judicial review orders have a choice. They can anchor their judicial review applications under *the Constitution* of Kenya 2010 and/or the *Fair Administrative Action Act*, 2015 in which case they will not need leave of the court or go for the same relief under the *Law Reform Act* Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules like in the present case and be bound to seek leave of the court.”



22. The reasons for an application for leave were set out in in *Republic vs County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996* as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially.”

23. It is trite that this court ought not to delve into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an Applicants’ case is sufficiently meritorious to justify the grant of leave. The court in *Njuguna vs Minister for Agriculture* [2000] 1 E.A 184, held that:

“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 might be granted on the hearing of the substantive application.”

24. *Mativo J. in Republic vs Kenya Revenue Authority Commissioner Ex Parte Keycorp Reals Advisory Limited* [2019] eKLR cited with approval the decision in *Meixner & another vs A.G* [2005] KLR 189, where the court laid out the following conditions of what an Applicant must show at the leave stage:

- “(i) Sufficient interest in the matter otherwise known as locus standi.
- (ii) He/she is affected in some way by the decision being challenged.
- (iii) He/she has an arguable case and that the case has a reasonable chance of success.
- (iv) The application must be concerned with a public law matter that is the action must be based on some rule of public law.
- (v) The decision complained of must have been taken by public body, that is a body established by statute or otherwise exercising a public function.”

25. The Applicants in this case have sought for orders of certiorari to deliver up before this court and to quash the directions and recommendations of the 2nd and 3rd Respondents dated 29th July 2020 and 22nd January 2021, as well as the directions and recommendations of the 1st Respondent dated 2nd April 2020, 14th May 2020, 21st May 2020 and 25th March 2020.

26. Noting that this application was filed on 11th November 2022, it is clear that the decisions which the Applicants seek to quash were made more than one year before the Applicants approached the court.



This is beyond the statutory six months window stipulated in the *Law Reform Act* and in the *Civil Procedure Act*. From the provisions of law as read together with the settled precedent, judicial review applications must be filed within six months from the date of the impugned decision.

27. The limitation period of six (6) months is however applicable only in certain instances. In the case of *Republic vs Kenya National Highways Authority & 2 Others Ex-parte Amica Business Solutions Limited* [2016] eKLR, the Court of Appeal held as follows:

“In our considered view, Order 53 Rule (2) was meant to cover both judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties. This could not in our considered view have been meant to cover letters which were sent to specific persons in response to theirs which were not even copied to other ostensibly interested parties, like in the case here.

We are persuaded in this respect by the High Court decision in *The Goldenberg Affair Ex-parte Hon. Mwalulu and Others*, HCMA No. 1279 of 2004 [2004] eKLR, and *Republic vs. The Commissioner of Lands Ex-parte Lake Flowers Limited Nairobi*, H.C. Misc. Application No. 1235 of 1998 where the courts held that the six (6) months limitation period set out in order 53 Rules 2 and 7 only applied to specific formal orders mentioned in Order 53 Rules 2 and 7 and to nothing else, certainly not to contents of one private letter in response to another.

We are also persuaded by the Tanzania Court of Appeal decision in *Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals and Others*, Dar-es-Salaam Civil Appeal No. 31 of 1999 [1995 – 1998] 1 EA 199 in which case the court held that the phrase “or other proceedings” has to be construed ejusdem generis with ‘judgment, order or decree, and conviction’ as having reference to judicial or quasi-judicial proceedings as distinct from the acts and omissions for which certiorari may be applied for. We hold the view therefore that the six month’s limitation would not apply to “decisions” made by administrative bodies which fall outside the purview of the definition “decision, judgment, order, decree or other proceedings” as contemplated under Order 53 Rule 2 of the *Civil Procedure Act*.”

28. The six (6) months’ limitation period set out in Order 53 Rules 2 and 7 of the Civil Procedure Rules is only applicable to specific formal orders mentioned in Order 53 Rules 2 and 7 and to nothing else, and certainly not to contents of one private letter in response to another.
29. The recommendations that are the subject matter herein were made by way of letters shared between the Respondents, to which the Applicants were not parties to. These were not formal orders of which the Applicants had notice of, and they are therefore exempted from the six-month limit set out under Order 53 Rule 2 of the *Civil Procedure Act*.
30. The Applicants have also sought for leave to file an application for orders of prohibition to prohibit the respondents or any persons acting on their behalf or authorized by them from arresting, purporting to arrest, instituting criminal charges, charging and/or prosecuting the Applicants pending the hearing and determination of Milimani HC ELC Case No. 1532 of 2013 *Trikuti Investments Limited v Alasow Hassan Moamud & 4 others*.
31. This court is satisfied that the Applicants are challenging the decision to prosecute them made by the ODP, the 1st Respondent, which is a public body established by statute. It is also apparent that the Applicants have the requisite locus standi to challenge the 1st Respondent’s decision and will be



- adversely affected by the said decision. On this basis, this court finds that the Chamber Summons application is partially merited.
32. Lastly, the Applicants have sought that the leave granted to them do operate as stay of any anticipated criminal proceedings with respect or relating to the dispute of ownership.
33. Under Order 53 Rule 1(4) of the Civil Procedure Rules, the grant of leave to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.
34. Such orders of stay stop the proceedings challenged by an application for judicial review, and are for the purpose of preserving the status quo pending determination of the judicial review proceedings. (Republic vs Nairobi City County Assembly Service Board Ex parte Applicant Pauline Sarah Akuku [2022] eKLR).
35. In Republic vs National Transport & Safety Authority & 10 Others [2014] eKLR, the Court expressed itself as follows:
- “In judicial review, the threshold for obtaining leave to commence is low and obtaining leave is not in itself evidence of a strong case for issuance of stay orders. In order to obtain leave to commence judicial review proceedings, an applicant only needs to show that he has an arguable case. The standard for the grant of an order of stay is however a high one. In a situation where an Applicant seeks to stop the implementation of a law, he must demonstrate that the implementation of the law will cause irreparable harm. Otherwise, the Court will be reluctant to suspend the operation of a law.”
36. In determining whether or not leave should act as a stay, the Court is guided by the sentiments of Odunga J. in Beatrice Kwamboka vs Leader of Majority Party of the Nairobi County Assembly [2016] eKLR where the learned Judge put it thus:
- “Apart from the foregoing the Court must also look at the likely effect of granting the stay to the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the Court, so far as possible to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court in exercising discretion, should therefore always opt for the lower rather than the higher risk of injustice.”
37. The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision-making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. A stay is only appropriate to restrain a public body from acting.
38. In this case, the effect of leave operating as stay would result in the stay of criminal proceedings. At the time when this application was filed in 2022, the criminal proceedings were anticipated and had yet been commenced. In the two years in which this application has been pending before this court, the Applicants have given no indication as to whether these criminal proceedings were ever instituted. They would undoubtedly have brought them to this court’s attention if that was the case.



39. In an article titled ‘Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules’, the author, Randy S. Eckers, argues that a determination to either stay or allow the continuation of parallel proceedings depend on existence of certain requirements. He observes: -

“The Courts only block parallel proceedings in special circumstances. A defendant may move for a stay to block parallel proceedings, which will be granted only if the defendant can prove either that the government is acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there is a due process violation....Even if a defendant meets one of these requirements, a stay is not guaranteed. The Court takes many other factors into account in deciding whether a stay is appropriate in a specific situation. These factors include the commonality of the transaction or issues, the timing of the motion, judicial efficiency, the public interest, and whether or not the movant is intentionally creating an impediment.” Absent special circumstances, both cases will probably proceed.”

40. In the case of Commissioner of Police & the Director of Criminal Investigation Department & another vs Kenya Commercial Bank Ltd & 4 Others [2013] eKLR, it was articulated that a court should only interfere with the Inspector General and the DPPs functions where there has been a serious abuse of power. It stated:

“...in terms of Article 157(11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution.”

41. In the circumstances of this case, the Applicants have not established to the required standard that there has been abuse of process in the anticipated criminal proceedings. They have also not established how such proceedings would prejudice the matter before this court. In any case, the law does not bar criminal process to continue side by side with civil proceedings. Each of the processes are intended to achieve justice for all the parties.

42. This court does not therefore find it fit for leave to operate as stay against the anticipated criminal proceedings against the Applicants.

43. In conclusion, the court hereby issues the following orders:

- a. Leave is hereby granted to the Applicants to apply to this Honourable Court for orders of certiorari to deliver up to the court and quash the directions and recommendations of the 2nd and 3rd Respondents dated 29th July 2020 and 22nd January 2021.
- b. Leave is hereby granted to the applicants to apply to this Honourable Court for orders of certiorari to deliver up to the court and quash the directions and recommendations of the 1st Respondent dated 2nd April 2020, 14th May 2020, and 21st May 2020 and 25th March 2020.
- c. Leave is hereby granted to the Applicants to apply for an order of prohibition to prohibit the respondents or any persons acting on their behalf or authorized by them from arresting,



purporting to arrest, instituting criminal charges, charging and/or prosecuting the Applicants pending the hearing and determination of Milimani HC ELC Case No. 1532 of 2013 Trikuti Investments Limited v Alasow Hassan Moamud & 4 others.

- d. Leave shall not operate as stay.
- e. The Notice of Motion to be filed within 21 days.
- f. Costs of this application to be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF OCTOBER, 2024.

O. A. Angote

Judge

In the presence of;

Ms Mwangi for Applicant

Mr. Allan Kamau for Attorney General

Court Assistant - Tracy

