Swara Acacia Lodge v Office of the Data Protection Commisioner & another (Application E072 of 2024) [2025] KEHC 7 (KLR) (Judicial Review) (9 January 2025) (Judgment)

Neutral citation: [2025] KEHC 7 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E072 OF 2024

J NGAAH, J

JANUARY 9, 2025

BETWEEN

SWARA ACACIA LODGE ..... APPLICANT

AND

OFFICE OF THE DATA PROTECTION COMMISIONER ..... 1ST RESPONDENT

TERENCE ADRIANO ..... 2ND RESPONDENT

JUDGMENT

1. The applicant's application is a motion dated 15 April 2024 expressed to be brought under order 53 rule 3(1) and Rule 4 of the Civil Procedure Rules. The applicant seeks the following orders:

> " 1. That this Honourable Court be pleased to grant the following Judicial review orders;
>
> a) An order for Certiorari to bring into the High Court for the purposes of being quashed the determination of the Office of the Data Protection Commissioner dated 5/04/2024 in ODPC Complaint No. 2533 of 2023 in regard to the alleged violation of the 2nd Respondent's right of erasure.
>
> b) An order of Prohibition restraining the Respondents from enforcing, implementing and or executing the determination of the Commission dated 5/03/2024.
>
> 2. Such further and other reliefs that this Honourable Court may deem just and expedient to grant.

3. Costs of this application be provided for."

2. The application is based on a statutory statement dated 4 April 2024 and an affidavit verifying the facts relied upon sworn on even date by Mr. Sanjay Narain. Mr. Narain has sworn that he is a director of the applicant company.

3. According to Mr. Narain, a complaint dated 7 December 2023 was filed at the Office of the Data Protection Commissioner by the 2nd respondent alleging that the applicant used his images for commercial purposes on its social media pages without his consent. The applicant was notified by the 1st respondent of the said complaint vide a letter dated 8 January 2024. The applicant filed a response to the notification of complaint letter vide a letter 18 January 2024 and further, pulled down all the 2nd respondent's images from the applicant's facebook page.

4. The 1st respondent conducted its investigations and upon considering both the complaint and the response to the complaint, proceeded to render its determination on 5 March 2024. According to the determination, the 1st respondent found the applicant to have discharged the burden of proof in establishing that the complainant indeed consented to having his photos taken and published on the applicant's facebook page.

5. Nonetheless, the Commission proceeded to hold that the complainant withdrew his consent when he requested the same to be pulled down from the applicant's Facebook page. Further still, the Commission found that images of the complainant were taken down except for one image which formed the basis of the commission's finding that the applicant violated the 2nd respondent's right of erasure and ordered the applicant to compensate the 2nd respondent Kshs. 250,000/=.

6. It is the applicant's case that it pulled down all images of the 2nd respondent on receiving the notification of complaint because it takes seriously all claims in relation to data protection since it is a registered data controller with the Office of the Data Protection Commissioner. The applicant contends that although the 1st respondent alleged that there was one image that had not been deleted, it did not provide the image or even the details of the said image. Accordingly, it was malicious on the part of the 1st respondent to have held that the applicant violated the applicant's rights.

7. The 1st respondent filed a replying affidavit sworn by Mr. Oscar Onyango Otieno who has introduced himself as the 1st respondent's Deputy Data Commissioner (Complaints, Investigations & Enforcement).

8. Mr. Otieno does not dispute the facts leading to the 1st respondent's impugned decision. However, he has denied the applicant's allegation that it has deleted the 2nd respondent's images on the applicant's facebook page. According to him, the 2nd respondent's images were still on the applicant's facebook page, at the time material to this suit.

9. Mr. Otieno has also sworn that contrary to the applicant's allegations,it was not until the 1st respondent notified the applicant of the 2nd respondent's complaint on 8 January 2024, that the applicant acted and pulled down the 2nd respondent's images. Even then, as at the time of writing the 1st respondent's decision, the applicant had not pulled down all of the 2nd respondent's images. As a matter of fact, one of the respondent's images was still published on the applicant's facebook page, as at 5 March 2024 when the 1st respondent rendered its determination.

10. It is also urged that the applicant did not prove that it had any overriding legitimate interest to continue having the 2nd respondent's image on its facebook page since he objected to the publication of his image and withdrew his consent. As much as the applicant discharged the burden of proof in establishing that

the 2nd respondent indeed consented to having his photos taken and published on its facebook page, the 2nd respondent later withdrew his consent when he requested the applicant to pull down his images.

11. In conclusion, Mr Otieno has defended the 1st respondent's decision as being lawful, reasonable and procedurally fair. It is also urged that the decision was made expeditiously and efficiently.

12. The 2nd respondent also opposed the application and filed a replying affidavit to that end. He has sworn that he was the applicant's employee, engaged as a receptionist. Sometimes in 2021, the applicant informed some of its employees that there would be a marketing campaign for itself and that there would be photos taken of some employees, including the 2nd respondent. The applicant participated in the campaign and some of his photos were used in the marketing campaign.

13. The 2nd respondent parted ways with the applicant having been subjected to an indefinite suspension without pay. The 2nd respondent was subsequently hired by an establishment of trade as applicant, called Ulwazi Place Hotel.

14. Because the 2nd respondent's pictures were still on the applicant's facebook page, a number of what the 2nd respondent has described as his "return clients" asked him on multiple occasions if he still worked for the applicant since they had wanted to support the 2nd respondent by visiting or holidaying at the establishment at which the 2nd respondent was currently working. It is for this reason that the 2nd respondent asked the applicant to pull down his pictures from the applicant's social media platforms.

15. The applicant failed, neglected or refused to remove the 2nd respondent's pictures which were on the applicant's social media platforms and thereby denying the 2nd respondent the right to erasure under the Data Protection Act, cap.411C. This prompted the 2nd respondent to lodge a complaint with the Office of the Data Protection Commissioner. In her determination rendered on 5 March 2024, the Data Protection Commissioner ordered the applicant to pay punitive damages of Kshs, 250,000/=. Although the applicant pulled down the 2nd respondent's pictures it failed to pay the damages it was ordered to pay. Accordingly, it is the 2nd respondent's case that the application is in bad faith.

16. Before considering the parties' respective submissions, I have to deal with a preliminary issue which may as well determine the fate of the applicant's application. This issue is whether the applicant were could approach this Honourable Court by way of judicial review. This is an issue that calls for the court's determination in limine because section 64 of the Data Protection Act is clear that any person aggrieved by the decision of the Data Protection Commissioner may appeal the decision. This section reads as follows:

> 64. Right of appeal
>
> A person against whom any administrative action is taken by the Data Commissioner, including in enforcement and penalty notices, may appeal to the High Court.

17. As I have held in previous applications where this question has arisen, there shouldn't be any doubt that the 1st respondent's impugned decision is an administrative action within the context of section 64 of the Data Protection Act.

18. It follows that the respondent's decision of 5 March 2024 being of the character described in section 64 was a decision subject to an appeal and not to judicial review proceedings. I say so because where the statute expressly provides for an appeal to this Honourable Court as a means of challenging a decision of a public body authority, person or tribunal, it is not open to an applicant, in those circumstances, to invoke the judicial review jurisdiction of the court.

19. This question has been discussed by David Foulkes in his book Foulkes Administrative Law, 7th Edition. Citing the case of Customs and Excise Commissioners versus J.H. Corbitt (Numismatists) Ltd (1981) AC 22, (1980) 2 2ALL ER 72, the learned author noted as follows:

> "It is to be noted that an appeal lies from, whether to an appellate tribunal or to a court of law, only when and to the extent that statute so provides, and the powers of the appeal body to review, reconsider etc. the decision of the tribunal likewise depend on the statute.
>
> To be contrasted with appeal is judicial review. The decision of tribunals, as bodies exercising judicial functions, have always been subject to review by the courts (that is, to judicial review) by means of the order of certiorari. This enables the court to quash a decision on certain grounds. Whereas appeal lies only when and to the extent that statute provides, the court's common law power of judicial review exists unless it is take away or limited by statute. Thus where no appeal to the court is provided by statute the only possible challenge in the courts is by way of judicial review..." (at p.150-151). (Emphasis added).

20. And no doubt this was the principle applied by Lord Wright in General Medical Council versus Spackman (1943) AC627, at 640 where he stated as follows:

> "I have observed that Parliament has not provided for any appeal from the decisions of the council. The only control of the court to which the council is subject (apart from proceedings by way of mandamus) is the power which the court may exercise by way of certiorari. Certiorari is not an appellate power."

21. Thus, judicial review only sets in if parliament has not, by statute, provided for an appeal. By its very nature, judicial review comes into play where there is no other alternative form of remedy that is as convenient, beneficial and effective. This principle was well articulated by Lord Widgery CJ in R versus Peterkin, ex Soni (1972) Imm AR 253 where the learned judge noted as follows:

> "The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere". (Emphasis added).

22. It has also been held in R versus Entry Clearance Officer, Bombay ex p Amin (1983) 818 at 829 (B-C) per Lord Fraser that judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and it is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.

23. The same point was emphasised in Chief Constable of North Wales Police versus Evans (supra) where Lord Brightman said at page 1173F and 1174G that:

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

Lord Hailsham stated in the same case that:

> " The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court." At page 1161A.

24. The Court of Appeal has held in the Speaker of the National Assembly v. Karume, Civil Application No. NAI 92 OF 1992 that 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.

25. These authorities remind us that there is a clear distinction between appeal and judicial review and one cannot be substituted for the other, particularly where the statute has expressly stated that one form of procedure rather than the other ought to be adopted in addressing any particular grievance. It follows that to the extent that the applicant purportedly instituted judicial review proceedings instead of an appeal, its application is misconceived and an abuse of the process of the court. And for the for the foregoing reason, it is hereby struck out with costs. It is so ordered.

SIGNED, DATED AND UPLOADED ON THE CTS ON 9 JANUARY 2025

NGAAH JAIRUS

JUDGE