Republic v Inspector General of Police; Mwende & another (Exparte Applicants); Ngatia (Interested Party) (Judicial Review Application E200 of 2024) [2025] KEHC 1792 (KLR) (Judicial Review) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1792 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E200 OF 2024

JM CHIGITI, J

FEBRUARY 13, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE INSPECTOR GENERAL OF POLICE ..... RESPONDENT

AND

MARION MWENDE ..... EXPARTE APPLICANT

MOSES MUKIIBI ..... EXPARTE APPLICANT

AND

REMY NGATIA ..... INTERESTED PARTY

JUDGMENT

1. The application that is before me for determination is the one dated 14th September, 2024 wherein the Applicants are seeking the following orders:

    1. That a Judicial Review Order of Mandamus do issue to compel the Respondent to release the Ex-parte Applicants' detained personal effects shown in the inventories dated 18th August 2024 and confiscated by the Respondent's officers from the Ex-parte Applicants.

    2. That an Order of prohibition do issue prohibiting the Respondent from harassing, intimidating rearresting and detaining the Ex-parte Applicants whatsoever on the basis of the purported investigations.

3. That costs of this Application be provided for.

2. The Application is supported by a statement of facts and verifying affidavit of Moses Mukiibi sworn on 11th September, 2024.

3. The Applicants are Directors of Dreifty Retail Limited doing genuine business of fashion and marketing.

4. It is their case that on 17th May 2024, they received letters on their WhatsApp messenger puportedly from an officer identified Bernard Gikandi as CPL from Directorate of Criminal Investigations (DCI) Headquarters summoning them to appear at the DCI Headquarters on 22nd May 2024 at 09:00 Hrs.

5. The Applicants posit that they honoured the summons and on the day of summoning they were directed to provide details of their banking transactions, bank accounts, evidence of source and usage of funds, KRA details and statements regarding the nature of their work.

6. It is also the Applicants case that they had received threats from the Interested Party in the instant suit, one Remy Ngatia who "warned me that he was coming for me and demanded that I leave the Country otherwise he would end my life".

7. They argue that they reported the said threat to Kilimani Police Station under OB NO. 31103/06/2024 on 3rd June 2024, but no investigations or arrests have been made despite the Interested Party residence being known.

8. The Applicants filed a formal complaint with the Director of Public Prosecutions (ODPP) regarding the failure by the Respondent's officers to investigate and arrest the Interested Party on 6th September 2024.

9. It is also their case that the Respondent through its officers has persistently harassed and intimidated them by tracking and intercepting their phone calls threatening to re-arrest them.

10. They were forced to flee to Uganda due to the threats from the Respondent and Interested Party.

11. On 16th August 2024 while on their way back into Kenya from Uganda, they were detained at the Namanga border and their personal effects including a personal journal, I phones, passports, identity cards, cameras, bank cards, driving licences, and a vehicle registration number KDM 369K inter alia.

12. The Applicants contend that they were then taken to the DCI headquarters and later released on 19th August, 2024 on police bail of Kenya shllings fifty thousand (50,000/=) each but they were not charged.

13. They were asked to report back at the DCI headquarters on 3rd September, 2024 which they did and they were asked to produce the same information as they had in the previous weeks after they received their letters summoning them.

14. The Applicants argue that this is abuse of power by the Respondent in violation of *the Constitution*.

15. It is their case that the police conduct is in bad faith, capricious, unfair and oppressive contrary to the principles of natural justice with disregard of the rule of law and being done at the behest of the Interested Party.

16. It is their submission that Judicial Review proceedings is not concerned with the merits of the case which is being investigated into as that entirely falls in the discretion of the police once investigations are over, to decide whether there is sufficient evidence gathered to mount a prosecution by the Director of Public Prosecution.

17. They argue that Article 47 of *the Constitution* of Kenya, 2010 and subsequent enactment of the *Fair Administrative Action Act* No 4 of 2015 have sought to allow the courts to consider certain aspects of merit when considering an application for judicial review.

18. The Court of Appeal in the case of Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] KECA 729 (KLR) attempted to reconcile this expanded context as follows:

> " 54. The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of article 47 of Constitution as read with the *Fair Administrative Action Act* of 2015. The Act establishes statutory judicial review with jurisdictional error in section 2(a) as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision making process in articles 47 and 10(2)(c) of *the Constitution*. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the *Fair Administrative Action Act* and *the Constitution*. As correctly stated by the High Court in Martin Nyaga Wambora v Speaker of the Senate [2014] eKLR it is clear that they - articles 47 and 50(1) - have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases".

19. In Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170, the Court of Appeal held:

> " It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...".

20. The Applicants invoke Article 29 of *the Constitution* of Kenya which provides: -

> " Every person has the right to freedom and security of the person, which includes the right not to be-
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> a. deprived of freedom arbitrarily or without just cause;
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> b. detained without trial except under a state of emergency in which case the detention is subject to Article 58;
>
> c. subjected to any form of violence from either public or private sources;
>
> d. subjected to torture in any manner, whether physical or psychological
>
> e. subjected to corporal punishment in a cruel, inhuman or degrading manner.

21. The Applicants submit that investigation of a crime is not a violation of their rights, however, the Respondent must ensure that they carry out their investigations within the framework of the law and if they engage in harassing and intimidating them, the Court has a mandate to intervene.

22. According to the Applicants, the investigations have not been completed since May 2024 thus the same cannot be genuine and is a strategy to harass and intimidate them with an intention to get something from them.

23. They place reliance on the case of Titus Mathenge Nguyo v Republic & another [2022] eKLR where it was held that:

> " The Investigating officer is ordered to take photographs of Motor Vehicle Registration No. KCL 634A Toyota Vitz and have them processed for production in evidence during the trial hearing. Motor Vehicle Registration No. KCL 634A Toyota Vitz is hereby ordered to be released to the Applicant subject to the conditions that the Applicant shall deposit the original log book in court pending the trial and determination of the case, and the subject motor vehicle shall be produced in court during trial of the case before the magistrate's court."

The Interested Party's case;

24. In opposition to the Applicants' Application, the Interested Party filed a Replying Affidavit by Remy Ngatia sworn on 7th October, 2024.

25. The Interested Party contends that he he is a stranger to existence of any company referred to as Dreifty retail Limited in which the Applicants are Directors and thus has no knowledge of the nature of business of the said company.

26. It is his case that he is oblivious and bemused to the alleged letters to the Applicants by the DCI investigating the applicants them for any crimes and or summoning them.

27. He posits that he has never threatened any of the applicants in any manner whatsoever and is utter shock about the instateneous and false utterances and or allegations levelled against him.

28. He argues he has no scores to settle with any of the Applicants in the instant suit and any allegations of his involvement with the police as alleged by the Applicants is hearsay and unsubstantiated.

29. It is his case that the alleged harrassment and/or arrest by the police is outside his ambit of knowledge and he urges this court to dismiss the application before this honourable court as it lacks merit.

Analysis and determination

30. The issue for determination is whether or not the applicant is entitled to the orders sought.

31. The application is unopposed to the extent that the Respondent did not file any response or submissions.

32. The Respondent is a statutory office whoo are under a duty to protect promote and fulfil the rule of Law under Article 3 and 2o of the Constituion.

33. The Respondent is expected to at all times act in a fair manner whenever he is disscharging and or executing their mandate or duties toward promoting the rule of law.

34. No doubt whenever the Respondent's officers confiscicate property that belongs to a suspect while discharging its duties, they have a duty to ensure that they handle the property professionally within Article 40 of the constititution.

35. If in the assesment of the Respondent, the confiscicated property is not needed for the investigations, then the same should be returned to the suspect immidiately. This becomes even more critical when it comes to personal identification documents like passports and communication gadgets like telephone to say the least.

36. The respondent did not justify to the court why they decided to keep the Applicant's property for such a long time. There are mechanism and procedural mechanisms at the Respondent's disposal through which the Respondent's officeers can and should adopt to return the Applicants property whether conditionally or otherwise.

37. The Respondent has not demonstrated how and when he intends to release the Applicants property if at all. In any event the detention of personal items by the respondents or his officers indefinitely does not accord with the fair administrative action dictates and I so find.

38. Detaining personal travel documents like a passport indefinately offends the right and the freedom of movement of the Applicant as guaranteed under *the Constitution*.

39. Limiting the rights of a suspect must be done within the threshold that has been set out under Article 24 of *the Constitution* and the Respondent has not furnished the courts with any evidence to demonstrate that indeed he complied with Article 24 of *the Constitution*. This court is left with no option than to find that the respondent has acted illegally in the manner that justifies the intervention of this court.

40. An indefinite retention of a suspect's propertysince the month of May 2024 without any indication of as to when the same will be released is an unreasonable conduct on the part of the Respondent to say the least.

41. This court takes judicial notice of the fact that mobile telephones are an important communication tool. A person whose mobile telephone has been retained indefinately is left crippled socially and economically to say the least.

42. The Interested Party filed a replying affidavit in response to the application. In this case theRespondent who is a principle party has not filed any responses. It is this courts finding that an interested party is not a principle party and they have no capacity to determine in which direction the issues should be determined exclusively.

43. In Mohamed Fugicha v Methodist Church in Kenya (Through its registered trustees) & 3 others [2020] eKLR the cause pitted the Methodist Church in Kenya against the Teachers Service Commission, the County Director of Education, Isiolo County, the District Education Officer, Isiolo Sub- County, and an Interested Party, Mohamed Fugicha – a parent with three students enrolled at St. Paul's Kiwanjani Day Mixed Secondary School.

44. The Court in the above case addressing the cross petition held that the status of the 1st Respondent in the High Court petition cannot be overlooked. The 1st respondent was admitted to the suit as an 'Interested Party'. The question then arises as to whether an 'interested party' has the capacity to institute a 'cross petition.

45. The Court then went ahead to state as follows;

> "(51) The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of *the Constitution*. It is on this basis that he cross-petitioned at paragraph 34 of his replying affidavit, for the Muslim students to be allowed to wear the hijab, in accordance with Articles 27 (5) and 32 of *the Constitution*.
>
> (53) What should we make of a cross-petition fashioned as such" Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in Francis Karioki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):
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> > "Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.
> >
> > Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court" [emphasis supplied].
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> (54) In like terms we thus observed in Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012 (paragraph 24):
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> > "A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

46. The Interested Party has no identifiable stake in the suit. In any event the Applicants did not seek any reliefs against the Interested Party as a result of which this court has no findings to make against the Interested Party.

47. In Pastoli v Kabale District Local Government Council & Others, [2008] 2 EA 300, the court held:

> " In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

48. It is the court's finding that the Applicants have made out a case for the grant of the order of mandamus compelling the Respondent to release their personal items as detailed in the inventory dated 18th August 2024 and I so hold.

49. The Applicants have also sought an order of prohibition. It is this court's finding that the illegal indefinate detention of the applicant's property without any justification must be prohibited and I so find.

50. The Applicants have also sought orders for costs. It is the court's finding that the Applicants have made out a case for costs which I do hereby issue.

Orders:

1. A Judicial Review Order of Mandamus is hereby issued compelling the Respondent to release the Ex-parte Applicants' detained personal effects shown in the inventory dated 18th August 2024 and confiscated by the Respondent's officers from the Ex-parte Applicants.

2. An Order of prohibition is hereby issued prohibiting the Respondent from harassing, intimidating rearresting and detaining the Ex-parte Applicants whatsoever on the basis of the investigations that led to the confiscication.

3. Costs of this Application to the Applicants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

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J. M. CHIGITI (SC)

JUDGE