Ongoto v Independent Policing Oversight Authority & another; Obiero & another (Interested Parties) (Judicial Review Application E001 of 2024) [2025] KEHC 2535 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2535 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

JUDICIAL REVIEW APPLICATION E001 OF 2024

FR OLEL, J

MARCH 13, 2025

N THE MATTER OF AN APPLICATION BY SAMUEL BARONGO ONGOTO FOR ORDERS OF PROHIBITION, MANDAMUS, AND CERTIORARI AGAINST THE INDEPENDENT POLICING OVERSIGHT AUTHORITY

AND

IN THE MATTER OF ARTICLES 23(3), 47(1) AND 47(2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 4(1),7(1),(A) &(B), 7(2) AND 9OF THE FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015.

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 3,4,11 OF THE LEADERSHIP AND INTEGRITY ACT, NO 19 OF 2012.

AND

IN THE MATTER OF THE INDEPENDENT POLICING OVERSIGHT AUTHORITY

BETWEEN

SAMUEL BARONGO ONGOTO .... EXPARTE APPLICANT

AND

INDEPENDENT POLICING OVERSIGHT AUTHORITY ...... 1ST RESPONDENT

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION . 2ND RESPONDENT

AND

CONSTABLE OBIERO .... INTERESTED PARTY

SERGENT TZUMA .... INTERESTED PARTY

JUDGMENT

A. Introduction

1. This suit was initiated by way of chamber summons dated 30.09.2024 wherein the Ex parte Applicant sought leave to file the substantive judicial review application seeking orders of certiorari, prohibition, and mandamus to stop the respondents from Instituting criminal proceedings against him over the alleged loss of a firearm and also seeking to direct them to conduct proper investigations in relation to the said firearm.

2. By an order of this court dated 02.10.2024, leave was granted to the Ex parte Applicant allowing him to file the substantive notice of motion, and leave so granted would operate as a stay of the Respondent's decision to charge the Ex parte Applicant pending determination of this suit.

3. The Ex parte Applicant subsequently filed their Notice of Motion Application dated 08.10.2024 seeking the following orders;

    a. That an order of prohibition against the Respondent prohibiting them from prosecuting and/or charging the applicant over Exhibit or gun that he did not handle but just signed a forwarding memo to the DCIO Headquarters.

    b. That an order of mandamus directing the Respondent to conduct proper investigations and determine the movement of the Exhibits.

    c. That an order of certiorari against the Respondents to compel them to charge any person who may have participated in the loss of the Exhibit and an order to compel the respondent not to charge the alleged loss of the Exhibit.

    d. That costs of the application be provided for.

4. The Application was supported by the grounds stated on the face of the said Application, the verifying Affidavit of the Applicant dated 08.10.2024 and the statutory statement of facts dated 30.09.2024. It was the Applicants contention that he was a police officer who worked diligently until he retired in July 2019, while serving as DCIO, Marsabit central police station.

5. Recently he had been contacted by officer's from the 1st respondent, who requested him to come to Marsabit chief Magistrate court to answer to charges of loss of an exhibit that had been forwarded to the DCI Headquarters for forensic examination. The said exhibit, which was a firearm, had been forwarded by Constable Obiero and picked by Sergeant Tzuma as confirmed by the OB, firearm movement register, forwarding memo and collecting memo signed by sergeant Tzuma.

6. The Ex parte Applicant further averred that, the said Exhibit was never returned to him and it was therefore preposterous for the 1st respondent to hold him liable for its loss. The respondent's action was biased, unfair and prejudicial as he was being punished over an allegation that he had no control over. The Ex parte Applicant also faulted the respondent's action as the determination to charge him in court, had been made without giving him a fair hearing as prescribed under Article 50(1) of *the constitution* of Kenya 2010.

7. The Ex parte Applicant therefore prayed that the writ orders sought be issued to quash the decision to charge him based on framed up charges, the 1st respondent be compelled to conduct proper

investigations, and a prohibitory order do issue to prohibit the respondents from prosecuting him over the loss of the said firearm.

8. The Ex parte Applicant therefore prayed that the court finds merit in the said Application and proceed to allow the same with costs.

B. The Response

9. The 1st Respondent opposed this Application, through their Replying Affidavit dated 29.10.2024, sworn by one Cyrus Thuo, an investigating officer working at IPOA.

10. He averred that under Section 6(a), 7 and 25 of the *Independent Policing Oversight Authority Act*, Cap 86, laws of Kenya the 1st respondent had statutory power to investigate complaints related to disciplinary or criminal offences committed by any member of the service, whether on its own motion and/or upon receipt of a complaint from the public. Further while executing their mandate, they had the power to summon and compel attendance of witnesses to shade light into the investigations undertaken and finally recommend an appropriate relief.

11. On 13th January 2018, there were public demonstrations within Marsabit town and a shooting incident occurred, where unfortunately three young men were shot and fatally wounded. The Ex parte Applicant, by then was serving as the DCIO Marsabit central police station, and he immediately commenced investigations into the killings, seizing the firearm with serial Number 24187644, allegedly used in the said fatal shooting.

12. The 1st respondent too, acting under its mandate also conducted and independent inquiry into the said killings and submitted its findings to the 2nd respondent, who registered Marsabit Magistrate's court Inquest No 1 of 2022. On 17.10.2023, during the hearing of the said inquest, the ballistic expert was to testify, but it was discovered that the relevant firearm, serial Number 24187644 could not be traced and consequently the honorable court did direct the 1st respondent to conduct an inquiry as to its whereabouts.

13. They subsequently initiated investigation's, recorded statements from several witnesses, including the Ex parte Applicant and established that the firearm in question was handed over to him after forensic investigations and he deliberately failed to record and acknowledge receipt of the said firearm despite being fully aware that it was an exhibit under investigations. The Ex parte Applicant had further acted in a negligent, unlawful and clandestine manner, by releasing the said firearm to one Guyo Dagane Dibu, a National police reservist, who claimed to have surrender the said firearm to an unknown officer, based on instructions from the government limiting their roles as National Police Reservist's and asking them to surrender the issued firearm to the county commissioner office.

14. Having established that the Ex parte Applicant had failed to document the release of the Exhibit firearm, resulting to its subsequent loss and inability to have it traced, he had to bear responsibility for the said loss and according, they recommended that he be charged with the loss of an Exhibit firearm through neglect, contrary to section 92 of the *National police service Act* No 11A of 2011. They had forwarded this recommendation to the 2nd respondent, who independently reviewed the said file and approved their recommendation.

15. It was therefore evident that the issues raised by the Ex parte Applicant, were matters of evidence, for which he would be given an opportunity to challenge and/or would form the basis of his defence during trial. To that extent the application as filed was not merited and they prayed that the same be dismissed with costs.

16. The 2nd Respondent and both Interested parties despite service did not file any response to this Application and did not take part in these proceedings.

C. Submissions

i. he Ex parte Applicants submissions.

17. The ex-parte Applicant filed their submissions dated 18.11.2024, wherein they gave a detailed background of the facts herein and pointed out that in order to succeed in an application for judicial review, the applicant had to show that the decision complained of was tainted with illegality irrationality and procedural impropriety. They had proved this by showing that the 1st respondent had initiated court proceedings without conducting proper investigations and had infringed on the Ex parte Applicant's right's to his detriment.

18. The Ex parte Applicant had diligently worked as a police officer and honorably retired as a senior officer in 2019. No issue had ever been raised at his retirement for not having handed back all government material under his possession and was duly cleared. It was therefore a surprise that years later as he was enjoying his sunset years, he was being called upon to explain the whereabouts of an Exhibit which was clearly not in his possession

19. The Ex parte Applicant faulted the 1st respondent for failing to conduct diligent investigations before opting to charge him. To that extent, their action had been made in bad faith and contrary to provisions of Article 47 of *the constitution* of Kenya . Reliance was placed in the case of Zachariah Wagunza & Another Vrs Office of the Registrar, Academic, Kenyatta University & 2 others (2013) eKLR, Pastoli Vrs Kabale district local Government council & others (2008) 2EA 300 & Kenya National Examination council Vr Republic Ex parte Geoffrey Gathenji Njoroge & 9 others (1997) eKLR.

20. The Ex parte Applicant prayed that the orders sought be granted and they be awarded the costs of these proceedings.

ii. The Respondent's submissions

21. The Respondents filed their submissions dated 17.12.2024 and noted that the Exparte Applicant was challenging the exercise of statutory powers by the 1st respondent to investigate him over the loss of an Exhibit -firearm and the issues which arose from the pleadings filed were, whether the 1st respondent exceeded its jurisdiction in investigating and recommending prosecution of the Applicant and whether the ex parte Applicant has established any grounds for the court to issue the writ orders sought.

22. The 1st respondent's counsel submitted that under Section 6(a), 7 and 25 of the Independent Policing Oversight Authority (IPOA) Act, the 1st respondent had the statutory power to investigate complaints related to disciplinary or criminal offences committed by any member of the service, summon any prospective witnesses, take all necessary steps to secure evidence relevant to the investigations, and making recommendations as the circumstances deem fit.

23. The 1st respondent based on its statutory mandate, had conducted investigations into a tragic shooting incident, which occurred on 13th January 2018 during demonstration's held within Marsabit town, as a result of which firearm serial No 24187644 was confiscated and taken for ballistic analysis before being returned to the safe custody of the Ex parte Applicant.

24. Later during the hearing of Marsabit Inquest No 1 of 2022, it was discovered that this crucial evidence was missing and upon investigations it was established that the Ex parte Applicant was culpable for

the loss of the said firearm. Proper recommendations were therefore made to charge him with loss of a firearm through negligence, contrary to Section 92 of the *National Police service Act*, No 11A of 2011.

25. It was further submitted that it was clear beyond peradventure that, they had the statutory powers to conduct investigation and make relevant recommendation for prosecution to the relevant authorities, order compensation and/or internal disciplinary action where they deem it so fit. The investigations conducted herein were done well within the statutory mandate proffered on the 1st respondent and the Ex parte Applicant had not shown that they had exceeded and/or overstepped their mandate.

26. Further, the decision to charge the Ex parte Applicant had been made after thorough investigations and adherence to procedural fairness. His application was therefore unmerited and had to fail. Reliance was placed on Attorney General, National Police service commission & National police service Vrs Independent Policing oversight Authority & Charles Kiptarus Chesire (2015) KECA 734 (KLR), Republic Vrs Permanent secretary/secretary to the cabinet and Head of the Public service office of the President & 2 others. Exparte Stanley Kamanga Nganga(2004) eklr

27. The 1st respondent also noted that the orders sought for prohibition did not lie as the decision to charge the Ex parte Applicant for the offence of loss of the firearm had already been made and effected. Reliance was placed in the case of Geoffrey Gathenji Njoroge & 9 others (Supra), where the court had held that, “Prohibition cannot quash a decision which has already been made, it can only prevent the making of a contemplated decision”.

28. The Orders sought for Mandamus to direct them to conduct proper investigations, too did not lie and they had acted as mandated under Section 6(1),(a) of the IPOA Act, (Cap 86) laws of Kenya, gathered all evidence and in the process had also been fair to the Ex parte Applicant by seeking his side of the story before arriving at it decision’s. The 2nd respondent had also independently verified the evidence collected and come to the same conclusion.

29. Therefore the adequacy or otherwise of the said investigations could not be subject of orders of mandamus as any issue which the Ex parte Applicant had raised could be adequately addressed during the trial, where he would get the opportunity to question the witnesses and also testify in defence to exonerate himself, if need be.

30. Finally the 1st respondent also submitted that the orders of certiorari to compel the respondents to charge any person, who might have participated in the loss of the exhibit and to restrain them from charging him, too could not lie as it had not been shown that, they had exceeded their mandate, failed to comply with rules of natural justice, made an error on the face of the record and/or shown that the decision arrived at was unreasonable. Reliance was placed on Peter Bogonko Vrs National Environmental Management Authority (2006) eKLR.

31. The 1st respondent therefore urged this court to dismiss the said Application with costs.

D. DETERMINATION

32. I have considered the Notice of Motion Application on record, the response filed, submissions on record and find that the issues for determination are;

    a. Whether the ex-parte applicant is entitled to the writ orders sought.

    b. Who should bear the costs of this Application?

33. Traditionally, judicial review was not concerned with the merits of the decision but rather the propriety of the process and procedure in arriving at the said decision. *The Constitution* of Kenya 2010 entrenched the importance of fair administrative action under Article 47 (1) of *the Constitution* of

Kenya 2010, which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

34. Article 47 (3) of *the constitution*, further mandated parliament to enact legislation to give effect to the rights espoused under, Article 47 (1) of *the constitution*. Consequently in 2015, Parliament enacted the *Fair Administrative Action Act*, 2015 ("the Act), which completely shifted the judicial review process from the rigid and limited tradition previously propagated, of only examining the propriety of the process and procedure in arriving at the decision and extended court's jurisdiction to proceed further to examine the merits of the said administrative actions.

35. The Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR noted as follows:

> " Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the *Fair Administrative Action Act* provides proportionality as a ground for statutory judicial review…..The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision."

36. In the case of Republic v Public Procurement Administrative Review Board; Ex Parte Madison General Insurance Kenya Ltd; Accounting Officer (KEBS) & another (Interested Parties) 2022 KEHC the court stated as follows;

> A person aggrieved by the decision of the Board has recourse before this court by dint of section 175 of the Act. The emphasis I would wish to lay here is that the recourse is one under the judicial review jurisdiction of this court and not an appellate one. The court, thus, would be exercising its supervisory powers over the board through sniffing for any whiff of illegality, irrationality or procedural impropriety. In Council of Civil Service Unions v Minister for the Civil Service (1985) A.C. 374,410 Lord Diplock stated as follows:
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> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation

[1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all

37. Initially, Supreme Court in SGS Kenya Limited v Energy Regulatory Commission & 2 others SC Petition No 2 of 2019 [2020] eKLR had a different view and held as follows:

> " [40] The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic 'Administrative Law', is clear enough, and it is unnecessary to belabour the point.' We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner."

38. Recently however, the Supreme Court has clarified the conflicting approach to Judicial review. In a Judgment dated 16th June 2023 in Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR), the Supreme Court has set the scope of Judicial and the circumstances under which the scope may be expanded to include inquiry into the merits of administrative action.

39. In the said case Dande & 3 others, the Supreme Court while disagreeing with the reasoning of the Court of Appeal and in complete shift from its previous decision in SGS Kenya Limited case held inter alia that:

> " With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under *the Constitution* if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined

based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the Jirongo and Praxedes Saisi cases speaks succinctly to this issue. That is also why, the question below is pertinent to the present appeal."

40. Based on the above decision of the Supreme Court, the current position can be summarized as follows:

a. The entrenchment of judicial review under *the Constitution* of Kenya, 2010 has 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*.

b. When a party approaches a court under the provisions of *the Constitution*, then the court ought to carry out a merit review of the case. However, if a party files suit under the provisions of order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision per se.

(i)Whether the ex-parte applicant is entitled to the writ orders sought.

41. The Exparte Applicant first sought for orders of prohibition. As noted by the 1st respondent, the court cannot issue an order in vain and/or prohibit a decision that has already been made. It can only prevent the making of the contemplated decision. See the decision of Geoffrey Gathenji Njoroge & 9 others (Supra).

42. The facts herein establish that the 1st respondent has already completed their investigations, forwarded their recommendations to the 2nd respondent who approved of the same by virtue of the powers conferred under Section 5 of the ODPP Act, Cap 68 as read with Article 157 of *the constitution* of Kenya. The said prayer is thus overtaken by events.

43. The Ex parte Applicant also prayed for the court to issue orders of mandamus to compel the 1st respondent to conduct proper investigations. The requirements for an order of mandamus to issue were explained by Mativo J (As he was then) in Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another [2018] eKLR as follows:

> " Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in Apotex Inc. vs. Canada (Attorney General), and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration).
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> The eight factors that must be present for the writ to issue are:-
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> (i) There must be a public legal duty to act;
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> (ii) The duty must be owed to the Applicants;
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> (iii) There must be a clear right to the performance of that duty, meaning that:
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> a. The Applicants have satisfied all conditions precedent; and
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> b. There must have been:
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> i. A prior demand for performance;
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> ii. A reasonable time to comply with the demand, unless there was outright refusal; and

iii. An express refusal, or an implied refusal through unreasonable delay;

iv. No other adequate remedy is available to the Applicants;

v. The Order sought must be of some practical value or effect;

vi. There is no equitable bar to the relief sought;

vii. On a balance of convenience, mandamus should lie

44. It has not been proved that the 1st respondent has failed to perform their obligation as mandated under the IPOA Act and in particular, the court would be overstretching its mandate to "direct the 1st respondent on how to conduct its investigation". The Ex parte Applicants prayer to that extent fails as the 1st interested party has proved that pursuant to the Inquest Magistrate directions, they had acted within their mandate and in the process sought the Ex parte Applicant's response before arriving at their decision. The administrative action taken is therefore lawful and made without violating the pertinent provision of Article 47 of *the constitution*.

45. Finally, the Ex parte applicant moved the court under Order 53 rule 3(1) and 4(1) of the civil procedure rules & section 1A, 1B, and 3A of the *civil procedure Act*, Cap 21 laws of Kenya. Based on the supreme court finding as espoused in the Dande case (Supra), the orders sought can only be looked at from the limited lens of the process and manner in which the action complained of was reached, but not the merits of the decision per.

46. The law as espoused by the supreme court, is binding to this court, and automatically knocks out the Ex parte applicant's case as they seek to have the court determine the merits of the respondent's decision.

E. Disposition

47. The upshot considering the totally of all the facts herein, I do find that the Ex parte applicant has failed to prove on balance of probability that the respondents acted in an ultra vires manner and/or that he is entitled to the orders sought.

48. This notice of motion dated 8th October 2024 therefore fails and is dismissed with no orders as to costs.

49. It is so ordered

DATED, DELIVERED AND SIGNED AT MARSABIT THIS 13th DAY OF MARCH, 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 13Th Day Of March, 2025.

In the presence of: -

Mr. Nyabari Petitioner

Mr. Mogeni For Respondents

Mr. Jarso Court Assistant