



**Republic v Director of Public Prosecutions & 2 others; Chief Magistrate’s
Court, Mombasa (Interested Party) (Judicial Review Application
E023 of 2024) [2025] KEHC 2517 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2517 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E023 OF 2024
OA SEWE, J
MARCH 7, 2025
IN THE MATTER OF AN APPLICATION FOR
ORDERS OF PROHIBITION AND CERTIORARI
AND
IN THE MATTER OF MOMBASA MAGISTRATE’S CRIMINAL CASE NO. E1006 OF 2024
AND
IN THE MATTER OF AN APPLICATION BY FRANCIS NDERITU MICHURI
BETWEEN
REPUBLIC APPLICANT
AND
THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
DIRECTORATE OF CRIMINAL INVESTIGATIONS, LIKONI 2ND
RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT
AND
THE CHIEF MAGISTRATE’S COURT, MOMBASA INTERESTED PARTY

RULING

1 Before the Court for determination is the Chamber Summons dated 25th July 2024. It was filed by the applicant, Francis Nderitu Michuri pursuant to Order 53 Rules 1(1), (2) and 4 of the [Civil Procedure Rules](#) for orders that:



- (a) Spent;
 - (b) The applicant be granted leave to apply for an Order of Prohibition directed at the Chief Magistrate's Court at Mombasa in Chief Magistrate's Criminal Case No. E1006 of 2024 to prohibit further proceedings in the said case and to forbid the respondents and the 2nd interested party from further arresting and prosecuting the applicant pending the hearing and determination of the substantive motion.
 - (c) That the grant of leave do operate as stay of further proceedings in Mombasa Chief Magistrate's Criminal Case No. E1006 of 2024 pending the hearing and determination of the substantive motion.
 - (d) That the applicant be granted leave to apply for an order of Certiorari to quash the entire proceedings in Mombasa Chief Magistrate's Criminal Case No. E1006 of 2024.
 - (e) That the applicant be granted leave to apply for an order of Mandamus to compel the Directorate of Criminal Investigations, Likoni to release to the applicant his mobile phone, Make Oppo Reno 8.
2. The application was supported by the Statutory Statement dated 25th July 2024 and the Verifying Affidavit filed therewith, sworn by the applicant. He contended that the respondents and the 2nd interested party had colluded and unlawfully arrested the applicant and charged him with the offence of obtaining 340 bags of dry amounting to Kshs. 2,380,000/= by false pretences, contrary to Section 313 of the *Penal Code*. The applicant denied having ever engaged in any business dealings with the 2nd interested party but conceded that the 2nd interested party has been conducting business with his son for a long time. He therefore averred that, if his son is indebted to the 2nd interested party then the person to go for is his son and not him.
 3. Accordingly, the applicant averred that the 2nd interested party caused his arrest and prosecution with the sole intention of intimidating him to shoulder the burden of his son; which in any case is a civil dispute in nature. He therefore deposed that, unless the Court intervenes, the respondents are intent on abusing their powers in pursuing a prosecution that is entirely unwarranted. He added that, in the course of investigations, the 2nd respondent took away his mobile phone for forensic analysis, yet his son has not disputed the amount claimed by the 2nd interested party.
 4. On behalf of the 2nd respondent and 3rd respondents, a Replying Affidavit was filed herein sworn on 7th August 2024 by PC Colleta Mutuku. She averred that she was one of the investigating officers in Mombasa Chief Magistrate's Criminal Case No. E1006 of 2024; and that the case emanated from a complaint filed at Likoni Police Station vide O.B. No. 29 of 23rd September 2023 by the interested party, Simon Muteti Kiratia. She further deposed that according to the interested party, the applicant had, through his mobile phone No. 0722965154 requested to be supplied with 340 bags of dried maize; and that upon supplying the maize as per the applicants' instruction, he declined to pay for goods and denied any knowledge of the transaction or the interested party.
 5. The 2nd and 3rd respondents further averred that upon investigations being conducted it was established that an offence had been committed by the applicant. He was, consequently, arrested and charged with the offence of obtaining goods by false pretences, contrary to Section 313 of the *Penal Code*. The 2nd and 3rd respondents further deposed that, upon forensic analysis being done on the applicant's mobile phone, relevant evidence found and retrieved for use in the criminal case. They added that they had no objection to the release of the applicant's phone but he would have to obtain a court order to that effect. Annexed to the affidavit of the 2nd and 3rd respondents was a copy of the Exhibit Memo Form in respect of the subject mobile phone and its sim card.



6. Counsel for the 1st respondent had indicated on 8th October 2024 that she would rely on the Replying Affidavit filed on behalf of the 2nd and 3rd respondents. The 2nd interested party, Simon Muteti Kiratia, relied on his Replying Affidavit sworn on 17th September 2024. He averred that he entered into a business transaction with both the applicant and his son, one Ericsson Mbugua; and that he supplied them with dry cereals during the period 2020 to 2023. He further conceded that he received part payment for the supplies in the sum of Kshs. 250,000/= as well as Kshs. 800,000/= towards transport charges.
7. Accordingly, the 2nd interested party was categorical that no payment whatsoever was made by the applicant in respect of the purchase price of the bags of dried maize supplied to him in 2023 to the tune of Kshs. 2,380,000/=:, which formed the basis of the criminal case. He further deposed that upon the applicant's refusal to pay, it became clear to him that this was a case of obtaining goods by false pretences; and that this was the reason he caused the matter to be reported to Likoni Police Station. The 2nd interested party added that his complaint to Likoni Police Station was made in good faith. He therefore and prayed for the dismissal of the application with costs.
8. With the leave of the Court, the applicant filed a Supplementary Affidavit, sworn by him on 20th August 2024. He reiterated his stance that he never had any business dealings with the 2nd interested party and that he informed the police accordingly and disclosed that the interested party used to deal with his son, Ericsson Mbugua Gathoni. He added that his son had substantially paid off the debt owed to the 2nd interested party and was available to record his statement to the police. He therefore posited that this is purely a case of breach of contract between his son and the complainant in respect of which he was wrongfully charged.
9. The application was canvassed by way of written submissions, pursuant to the directions given herein on 13th August 2024. The submissions filed by the applicant are dated 22nd August 2024. His counsel proposed the following issues for determination:
 - (a) Whether the applicant has established the legal threshold for grant of leave to institute judicial review proceedings;
 - (b) And if so, whether the leave so granted should operate as stay of the impugned proceedings.
10. On the basis of the fact deposed to in his two affidavits, the applicant urged the Court to find that he had no business dealings with the 2nd interested party; and that the decision to have him arraigned and prosecuted was made by the respondents for the sole intention of harassing and intimidating him as a businessman of repute in Kilifi Town. The applicant relied on *Republic v Kenya Revenue Authority commissioner, Ex Parte Keycorp Reals Advisory Limited* [2019] eKLR and *Nuguna v Ministry of Agriculture* [2001] eKLR for the proposition that, at the leave stage, the merit of the applicant's case should not be considered in-depth.
11. On the need for stay, the applicant relied on the case of *Taib A. Taib v The Ministry for Local Government & others, Mombasa HCMISC. Civil Application No. 158 of 2006* and urged the Court to exercise its discretion in his favour by granting stay of the impugned proceedings.
12. On their part, the respondents relied on their written submissions dated 13th September 2024. They proposed a single issue for determination, namely, whether the application herein meets the threshold for grant of leave to apply for the judicial review orders sought. They made submissions on the decision to charge and why warranted as well as the mandate of the 2nd respondent. The respondents further urged the Court to bear in mind that thorough investigations were conducted by the 2nd respondent before a decision was taken to charge the applicant. They relied on *Republic v County Government of Embu, Ex Parte Peterson Kamau Muto t/a Embu Medical and Dental Clinic & 6 others* [2022]



eKLR and Republic v County Council of Kwale & another, Ex Parte Kondo & 57 others, Mombasa HCMCA No. 384 of 1996.

13. On the mandate of the 2nd respondent, counsel submitted that the office of the 2nd respondent is as independent as is the office of the 1st respondent; and therefore the charges were preferred in accordance with the mandate of the 2nd respondent as provided for in Article 245 of *the Constitution* and Sections 24, 28 and 35 of the *National Police Service Act*. The respondents further posited that courts ought to be slow in granting orders such as the ones prayed for by the applicant. They relied on *Republic v Commissioner of Police and another, Ex Parte Michael Monari & another* [2012] eKLR and Republic v Director of Public Prosecutions & another, Ex Parte Chamanlal Vrajlal Kamani & 2 others and urged for the dismissal of the application.

14. I have given careful consideration to the application, the averments set out in the applicant's Supporting Affidavit as well as the written submissions filed in respect thereof. The application has been brought pursuant to Order 53 Rule 1 of the *Civil Procedure Rules*, which is explicit that the Court has the discretion to either grant such an application ex parte or hear the parties on the prima facie merits thereof. The aforementioned provision states:

- (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
- (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
- (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
- (4) The grant of leave under this rule 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:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave.

Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

15. Hence, in Mombasa HCMCA No. 384 of 1996: *Republic v County Council of Kwale & Another, Ex Parte Kondo and 57 others* the court held:

“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 the



administrative action while proceedings for Judicial Review of it were actually pending even though misconceived...”

16. There is no dispute that the applicant was arrested on 12th June 2024 and charged with obtaining by false pretenses in respect of a debt allegedly owed to the 2nd interested party. He therefore contended that the decision to prosecute is unreasonable in that it was not made in good faith, but was intended to harass him into paying a debt that he did not personally incur.

17. It is plain then that the applicant has complied with the requirements of Order 53 Rules 1 and 2 of the Civil Procedure Rules in so far as the application was brought within the 6 months’ period stipulated in Rule 2 of Order 53. In contending that the respondents exercised their mandate for collateral reasons, the applicant has shown that he has an arguable case; a case that is fit for further investigation by the Court, and is consequently entitled to leave. Although the Court was addressed at length as to the circumstances in which the alleged debt was incurred, as well as the mandate of the respondents, at this stage the merit of the parties’ cases need not be considered in detail. In *Republic v County Council of Kwale & another* (supra) for instance, the Court held:

“Leave may only be granted 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. Granting of leave to file for judicial review is an exercise of the court’s discretion but as always it has to be exercise judiciously.”

18. For the foregoing reason, it would be premature to make an order for the release of the applicant’s mobile phone as proposed. That is an aspect that can be handled before the trial court upon hearing the parties on the nature and stage of investigations. Indeed, the 2nd respondent indicated that he had no objection to the release of the item.

19. As to whether an order of stay of proceedings before the Mombasa Chief Magistrate’s Court ought to issue pending the hearing and determination of the substantive application, the position articulated in *Taib A. Taib v The Minister for Local Government & Others Mombasa* HCMISCA. No. 158 of 2006 was that:

“... 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 and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken...”

20. Thus, having found that the applicant is entitled to leave to file his substantive application, it is only fair and just that the impugned decision and the proceedings ensuing therefrom be stayed, as otherwise the substantive application will be rendered otiose.

21. In the result, the applicant’s Chamber Summons dated 25th July 2024 is hereby allowed and orders made as hereunder:

(a) That leave be and is hereby granted to the applicant, Francis Nderitu Michuri, to apply for an Order of Prohibition directed at the Chief Magistrate’s Court at Mombasa in Chief Magistrate’s Criminal Case No. E1006 of 2024 to prohibit further proceedings in the said case and to forbid the respondents and the 2nd interested party from further arresting and prosecuting the applicant pending the hearing and determination of the substantive motion.



- (b) That leave be and is hereby granted to the applicant to apply for an order of Certiorari to quash the proceedings in Mombasa Chief Magistrate's Criminal Case No. E1006 of 2024.
- (c) The substantive judicial review application be filed within 14 days from the date hereof.
- (d) That the leave, thus granted herein above, does operate as stay of further proceedings in Mombasa Chief Magistrate's Criminal Case No. E1006 of 2024 pending the hearing and determination of the substantive motion.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF MARCH 2025.

OLGA SEWE

JUDGE

