



Necheza v Director of Public Prosecutions; Shah (Interested Party) (Judicial Review Application E013 of 2022) [2024] KEHC 493 (KLR) (23 January 2024) (Ruling)

Neutral citation: [2024] KEHC 493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E013 OF 2022**

OA SEWE, J

JANUARY 23, 2024

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF KWALE CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. E092 OF 2022

BETWEEN

LEONARD SHIMAKA NECHEZA APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

AND

RATILAL GHELA SHAH INTERESTED PARTY

RULING

1 The Chamber Summons dated 14th April 2022 was filed by the applicant, Leonard Shimaka Necheza, pursuant to Sections 8 and 9 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya, and Order 53 Rules 1(1), 2 and 4 of the *Civil Procedure Rules*. The applicant thereby prayed for orders that:

(a) Spent



- (b) The Court be pleased to grant the applicant the requisite leave to apply for:
- (i) An order of *Certiorari* to remove into this Court and quash the decision to charge the applicant in Kwale Chief Magistrate’s Criminal Case No. E092 of 2022: Darius Mwiti Kirimi & Shimaka Necheza Leonard.
 - (ii) An order of prohibition to prohibit the respondent from prosecuting, trying or taking further proceedings whatsoever in Kwale Chief Magistrate’s Criminal Case No. E092 of 2022: Darius Mwiti Kirimi & Shimaka Necheza Leonard.
- (c) Grant of leave do operate as a stay of any acts by the respondent to charge, continue prosecution, trial or taking further proceedings whatsoever in Kwale Chief Magistrate’s Criminal Case No. E092 of 2022: Darius Mwiti Kirimi & Shimaka Necheza Leonard.
- (d) The costs of the application be provided for.
2. The application was premised on the grounds set out in the Statutory Statement filed therewith together with the applicant’s Verifying Affidavit sworn on 14th April 2022. Accordingly, the brief facts are that the applicant is an advocate of the High Court of Kenya, practicing as such in the name and style of Marende Necheza & Company Advocates; and that in that capacity he received instructions from a client by the name Darius Mwiti Kirimi to file a suit over a parcel of land known as Kwale/Diani Complex/25. The applicant further averred that he proceeded and filed the suit under a Certificate of Urgency *vide* Mombasa ELC No. 237 of 2016: *Darius Mwiti Kirimi v Maltra Limited*.
 3. Later, on the 12th April 2022, the applicant was arrested by police officers from Kwale and arraigned before Kwale Chief Magistrate’s Court alongside his client, Darius Mwiti Kirimi, to face several charges about which he knew nothing. He pointed out that some of the charges were in connection with events that occurred as far back as 1999 when he was a third year student at Amukura High School. He therefore averred that the intended prosecution is malicious, biased and not in public interest. He therefore alleged failure on the part of the respondent to adhere to the Prosecution Guidelines and the best international prosecution practice, and accordingly prayed for leave to challenge the respondent’s decision to prosecute him.
 4. The applicant also relied on the pleadings and correspondence filed in Mombasa ELC No. 237 of 2016, a copy of the Charge Sheet filed in Kwale CMCR Case No. E092 of 2022 and a copy of the search in respect of Maltra Limited from the Business Registration Service dated 15th May 2018, which he annexed to his Verifying Affidavit. On the basis thereof, he prayed that his application for leave be granted.
 5. In response to the application, the respondent relied on the Replying Affidavit sworn by S/Sgt Japheth Ng’etich, filed herein on 5th July 2022. The respondent gave a detailed account of the subject matter and its genesis. For instance, at paragraph 7 of the Replying Affidavit, the respondent averred that on the 25th January 2017, the Land Registrar, Kwale, transferred the property known as Parcel No. Kwale/Diani Complex/25, (the suit property) to Darius Mwiti Kirimi, after which the entire physical land file at Kwale disappeared. The respondent also conceded that the transfer was shrouded in controversy, hence the filing of Mombasa ELC No. 177 of 2017: [*Ratilal Ghela Shah v Darius Mwiti Kirimi & Land Registrar, Kwale*](#).
 6. The respondent also pointed out that, in Mombasa ELC No. 237 of 2016 mentioned by the applicant, the court ultimately found in favour of the Maltra Limited and the title held in the name of the applicant’s client, Darius Mwiti Kirimi, was cancelled. A copy of the judgment in Mombasa ELC No. 177 of 2017 was annexed to the respondent’s Replying Affidavit as Annexure “JK-7”, among other



documents to demonstrate that the applicant relied on forged documents in Mombasa ELC No. 237 of 2016. Accordingly, at paragraphs 23, 24 and 25, the respondent averred that the forged documents, in particular, the sale agreement that Darius Mwitiri Kirimi relied on was subjected to forensic analysis found to have been forged; and therefore there was sufficient grounds for having both the applicant and Darius Mwitiri Kirimi prosecuted for the offences of conspiracy to defraud contrary to Section 317 of the Penal Code, Chapter 63 of the Laws of Kenya.

7. Thus, the respondent asserted that the findings as evidenced by the documents placed before the Court go to show that it best served the public interest if the respondent is allowed to carry out its mandate by prosecuting the Kwale criminal case to its logical conclusion. The respondent further averred that the investigations were professionally conducted by the Director of Criminal Investigations (DCI); and therefore the applicant cannot claim immunity from prosecution.
8. Although the parties were given an opportunity to file written submissions, they ultimately opted to rely on the documents filed, namely the application, the Statement of Facts, the Affidavits and the documents annexed thereto. I have given careful consideration to the said documents in the light of the nature of the instant application. At this juncture, the Court need not engage in a detailed consideration of the merits of each parties' case, granted that, under Order 53 Rule 1 of the Civil Procedure Rules, the Court has the discretion to grant such an application *ex parte*. 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..."
9. In some instances, as recognized by Order 53 Rule 1(4) above, courts have insisted on hearing the parties before granting leave; and the rationale for this was well explicated in Mombasa HCMCA No. 384 of 1996: Republic v County Council of Kwale & another, Ex Parte Kondo and 57 others thus:

"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...Leave may only be granted therefore if on the material available before the court 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”.

10. A perusal of the Statement of Facts reveals that the applicant was arrested on 12th April 2022 and arraigned before Kwale Chief Magistrate's Court but the plea was deferred to 19th April 2022. He accordingly used that window of opportunity to file the instant suit on 14th April 2022. It is plain then that the applicant 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. The applicant's contention is that, as an advocate, he was merely discharging his duty to his client; and therefore his prosecution is inimical to the public interest. In the premises, I am satisfied that the applicant has demonstrated that he has an arguable case; a case that is fit for further investigation by the Court, and is consequently entitled to leave.
11. As to whether an order of stay of proceedings before Kwale 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...”
12. Thus, having granted the applicant 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.
13. In the result, the applicant's Chamber Summons dated 14th April 2022 is hereby allowed and orders made as hereunder:
 - (a) That leave be and is hereby granted to the applicant to apply for the following judicial review orders:
 - (i) An order of Certiorari to remove into this Court for quashing the decision of the respondent to charge and prosecute the applicant in Kwale Chief Magistrate's Criminal Case Number E092 of 2022: *Republic v Darius Mwiti Kirimi and Shimaka Necheza Leonard*.
 - (ii) An order of prohibition to prohibit the respondent from prosecuting the applicant in Kwale Chief Magistrate's Criminal Case Number E092 of 2022: *Republic v Darius Mwiti Kirimi and Shimaka Necheza Leonard*.
 - (b) The substantive application be filed within 14 days from the date hereof.
 - (c) That the leave thus granted does operate as stay of any prosecution against the applicant or taking further proceedings whatsoever in Kwale Chief Magistrate's Criminal Case Number E092 of 2022: *Republic v Darius Mwiti Kirimi and Shimaka Necheza Leonard*.
 - (d) The costs of the application be costs in the substantive cause.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF
JANUARY 2024**

OLGA SEWE

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JUDGE

