



Mwendwa v Director of Public Prosecutions & another; Issah (Interested Party) (Miscellaneous Civil Application E003 of 2024) [2024] KEHC 2179 (KLR) (5 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
MISCELLANEOUS CIVIL APPLICATION E003 OF 2024**

RK LIMO, J

MARCH 5, 2024

BETWEEN

JOHN MWENDWA APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

AND

BENARD ISSAH INTERESTED PARTY

RULING

1. The application before the court is dated 14th February 2024 brought pursuant to provisions of Order 53 Rule 1(1), 2 3 and 4 of the *Civil Procedure Rules*, Sections 8 and 9 of the *Law Reform Act*, Sections 7,9 and 11 of the *Fair Administrative Actions Act* and all other enabling provisions of the Law. The Applicant is seeking the following orders;
 - i. Spent
 - ii. That pending the hearing of the Chamber Summons, there be a temporary interim interdict restraining plea taking by the ex-parte applicant in Kitui Magistrates Court Crim. No. E 110 of 2024 *Rep v John Mwendwa & Sylvester Muinda* or taking any further proceedings in respect of the applicant herein.
 - iii. That pending the hearing of the application for leave and filing of and determination of the substantive motion and pursuant to section 11(1) (i) of the *Fair Administrative Action, Act*, that there be interlocutory interdict orders restraining the 1st, 3rd and 4th Respondents from arraigning and charging the Ex-parte Applicant with charges related to the Interested Party of stealing and malicious damage to property for the same is invalid, null, void and against the



protection of advocate-client privileges and protection of an advocate as an officer of the court in assisting in delivery of justice to his clients.

- iv. That leave sought be granted to apply for orders of Prohibition pursuant to section 11(1) (b) and (d) of the [Fair Administrative Action Act](#) to prohibit and bar the Respondents against arraigning the Ex-parte applicant in court and/or taking of plea in court for charges of stealing and malicious damage to property as the same is against public policy and protection of advocates-clients confidentiality and privileges and against protection of advocates in performance of their duties and the charges are driven by malice and the same posse an existential threat to the legal protection.
- v. That leave be granted to apply for orders of Certiorari pursuant to Section 11(2) of the [Fair Administrative Action Act](#) to call forth and remove the High Court the administrative (investigative) actions, powers and decisions by the 1st Respondent for preferring of charges of stealing against the 1st Applicant.
- vi. That leave be granted to apply for orders of Mandamus pursuant to Section 11 (1) (f) and 11 (2) of the [Fair Administrative Action Act](#) to compel the Respondents to supply the applicant with copies of witness statements, investigative diary, photos, decisions of the ODPP to prefer charges, CCTV footage and any other documents or evidence in relation to the Criminal Case.
- vii. That leave be granted to apply for declaration pursuant to section 12 of the [Fair Administrative Action Act](#) that the decision to prefer charges and arraign to charge the ex-parte applicant who was acting on behalf of his client who is privileged under advocate-client confidentiality irrational in the circumstances was materially against the law, public policy, abuse of power and malicious hence was illegal, an error of law, invalid, null and void.
- viii. That leave be granted to apply for declaration that the decision to prefer charges and arraign the ex-parte applicant, an officer of the court was materially meant to embarrass him due to undue influence by the Interested Party to the 1st, 3rd and 4th Respondents and was all aimed at pleasing the interested party and an abuse of office by the 1st, 3rd and 4th Respondents.
- ix. That leave be granted to apply for a declaration pursuant to section 12 (b) of the [Fair Administrative Action Act](#) that the decision to charge the ex-parte applicant was negatively influenced to prejudice the ex-parte applicant legal protection as an advocate and officer of the court and intimidate him to fear performing his duties as an advocate and deny him from making a living from his profession and career.
- x. That leave be granted to apply for a declaration pursuant to section 12 (b) of the [Fair Administrative Action Act](#) that the ex-parte applicant had the fundamental right to protection of the law, including the rights to institute proceedings to challenge any action that vitiates that right among others.
- xi. That leave be granted to apply for a declaration pursuant to section 11 (1) (h) of the [Fair Administrative Action Act](#) that the whole investigation, arrest and arraignment before court was an abuse of the court process to settle scores and should be quashed.
- xii. That leave be granted to apply for a declaration pursuant to section 11 (2) (b) of the [Fair Administrative Action Act](#) that the tracking of the ex-parte applicant's phone record and movement was infringement of his protected constitutional right to privacy.



- xiii. That leave be granted to seek orders for independent investigations on bribery and undue influence against the officers of the 1st, 3rd and 4th respondents who are based in Kitui and who are involved in the entire saga
 - xiv. That the leave so obtained do operate as stay and any proceedings of Kitui Chief Magistrates' Court Criminal Case No. E110 of 2024; *Rep v John Mwendwa and Silvester Muinda* pursuant to section 11 (1) (i) of the *Fair Administrative Action Act*.
 - xv. That the respondents and interested party be ordered to pay costs of the application pursuant to section 11 (1) (j) of the *Fair Administrative Action Act*.
2. The Chamber summons is supported by grounds set out on the statutory statement of facts and the supporting affidavit of John Mwendwa. The grounds upon which the reliefs sought are summarized as follows;
- a. That this court has supervisory jurisdiction over bodies, commissions, persons, authorities, tribunals, subordinate courts and agencies among others who exercise the powers which may affect rights and privileges and/or interests of other persons. This jurisdiction is derived from Articles 165 (3) (a), 165 (6) and (7) of the *Constitution of Kenya*.
 - b. That the court has jurisdiction as per article 165 (3), (a), (b) and (d) to determine any issues relating to violation of any rights and freedoms and fundamental rights relating to any persons complaining about the same and also the right to interpret the *Constitution*
 - c. Pursuant to Article 258 (1) of the *Constitution*, every person has a right to institute court proceedings, claiming that this Constitution has been contravened or is threatened with contravention.
 - d. That Article 20 (4) call the court while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.
 - e. That Article 23 gives the High Court Jurisdiction to hear and determine redress, denial, violations, infringements, threat to a right or fundamental freedom in the Bill of Rights and grant reliefs among them Judicial review orders.
 - f. That the constitution in Article 25 lists rights and fundamental freedoms that shall not be limited and right to a fair trial is among them while Article 28 protects the right to human dignity.
 - g. That Article 31 provides that every person has the right to privacy which includes the right not to have the privacy of their communications infringed.
 - h. That Article 27 (1) places all persons equal before the law. The Respondents seem to have only considered the allegations of the Interested party complainant and disregarded everything the ex-parte applicant told and provided them with.
 - i. That the provisions of Article 47 of the *Fair Administrative Action Act* were violated in totality. There was not a single of the said requirement followed.
 - j. That under this article, the court has powers and duty to review unfair administrative actions and promote efficient administration.



- k. That Article 50 (2) (b) gives every accused person a right to be informed of the charge with sufficient detail to answer it. In this case, the sufficient detail is all what the prosecution has before he answers. The answer is the plea. It is a constitutional and not procedural right.
 - l. That the same is repeated in 2 (j) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. Advance does not necessarily mean before the hearing, it can mean in advance before taking a plea.
 - m. That Article 157 (11) requires the ODPP while exercising his power to have regard to public interest and interests of administration to justice and the need to prevent and avoid abuse of the legal process. This is clear case of abuse of the legal process to settle grudges. It is a tenancy dispute and the criminal allegations brought are aimed to settle scores. Serious evidential questions were ignored by the DPP and this shows undue compromise. The DPP has a duty to consider the evidence and documents provided to him by the suspects. He is not in office to serve the complainants but should serve justice to all. He is not in the office to use his position to enrich himself.
 - n. That there is clear abuse of power coupled with irrationality and undue influence on the part of the 1st respondent in collusion with the interested party to charge an advocate to intimidate him from discharging his duties to his clients and make a living out of it. He contends that the charge denies the co-accused persons right to representation when the person who is supposed to fight for them is charged along them. Who is supposed to fight for them is charged alongside them.
3. Mr. Kimuli submits that the applicant's reputation as an advocate is under attack and that the entire profession is under attack because of perceived danger that criminal charges may be preferred for work undertaken by the advocates in their profession discharge of their duty as advocates. He contends that there was haste to charge the applicant contending that the respondents should await the outcome of substantive motion.

Response by the 1st and 2nd respondents

4. The 1st and 2nd Respondents opposed the application vide the Replying Affidavit of Prosecution Counsel Pauline Mwaniki sworn on 20th February 2024. Counsel avers that the applicant's averments are devoid of merit and that the ODPP has the mandate under Article 157 (6) (a) to institute and undertake proceedings against any person before any court and that the DPP does not require consent to do so. Counsel avers that a complaint was received at Kitui Police Station vide OB No 52/19/12/2023 and a Police File Cr. No. 400/58/2024 was opened by the 2nd Respondent and witness statements were recorded. That the 1st Respondent perused the police file and was satisfied that the evidence was sufficient and decided to charge the applicant in Kitui Chief Magistrate Criminal Case No. E110 of 2024 with the offence of Malicious Damage to Property contrary to Section 339 (1) of the [Penal Code](#). Counsel avers that the decision as arrived at independently.
5. It is averred that the applicant has not demonstrated that he acted under the instructions of his client or was sanctioned by a court order to undertake forceful eviction. It is also averred that the applicant's actions are not protected by privilege of Advocates as provided under Sections 134 and 137 of the [Evidence Act](#).
6. With regards to what has transpired so far, it is averred that the applicant presented himself at Kitui Police Station on 30th January 2024, he was granted cash bail of Kshs 10,000/- That he attended court on 31st January 2024 but plea was differed to pave way for delivery of a court ruling. That the ruling



was delivered and the trial court directed that plea takes place on 6th March 2024 before the duty court. Counsel avers that the applicant has been supplied with the charge sheet and witness statements and that CCTV footage forwarded for forensic analysis.

7. The respondents have stated that they are now ready to supply the applicant with the same evidence. He submits that there is no evidence of extraneous factors that might have influenced the respondents specifically by the allegation that they have been influenced by the interested party. It is also averred that the applicant has failed to establish a *prima facie* case for issuance of orders of stay.

Response by the Interested Party

8. The Interested Party opposed this application vide a Replying Affidavit sworn by Benard Issah on 26th February 2024. He avers that he is a tenant of John Kimanzi Mutinda in respect to a shop No. 6 situated on his property on Plot No. 4096/63 where he operates a fast food hotel. He avers that on 19th December 2023, the applicant in the company of others entered his shop and destroyed his tools. That he reported the matter at Kitui Police Station the same day and he denies allegations of influencing the police in the events leading to the applicant's apprehension by the police.
9. Mr. Musyoki submits that the material placed before court is insufficient for stay of proceeding in the criminal court. He submits that the process to charge the applicant is complete and there is nothing to be stayed adding that this court can only protect rights of individuals and not image or reputation.

Analysis and Determination

10. The applicant herein has already been granted leave to apply for prerogative orders of Certiorari and prohibition to challenge the decision reached by the respondents to prefer Criminal Charge against him in court. The only issue contested here and which is the issue for determination is whether the leave granted should operate as stay of any proceedings in Kitui Chief Magistrate's Court Criminal Case No. E110 of 2024.
11. The Provisions of Order 53(4) [Civil Procedure Rules](#) provide as follows;

“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”. (Emphasis added)
12. The above cited rule also provides that where circumstances so require, the question of whether leave so granted should operate as stay can be canvassed inter parties be determined separately from the main prayer of leave. That is what guided this court to issue the directions issued on 28th February 2024.
13. The question of an order of leave granted operating as a stay is question to be determined on the discretion of the court. A court does exercise its discretion judiciously guided by the law and the evidence placed before it.
14. The applicant's main thrust in this application, which no doubt was presented quite animatedly and with passion by a number of advocates led by learned counsel Mr. Maurice Kimuli, is that he is being dragged to court for lawful acts which he duly carried out following instructions from his client and that the action taken by the respondent is therefore an affront to him as an advocate and the advocacy work in general. He therefore asks this court to intervene by staying the prosecution or plea taking to be precise pending the determination of the intended substantive motion.



15. The intervention in his view will protect his image, reputation and the profession at large from the media whom he says are likely to portray him in bad light as “an accused person” and thereby injure his image and reputation as an Advocate.
16. The above contention has been contested in equal measure by both Mr. Ochieng learned Counsel from ODPP and Mr. Kinyua Musyoki Learned Counsel for the interested party or the complainant in the criminal case pending at the trial court. Both counsels have raised fundamental issues of law and fact which I will shortly address in this ruling.
17. It is undisputed fact that the applicant herein is an advocate and an officer of this court. It is also not contested that he was instructed by his client going by a letter dated 11th December 2023 exhibited in this application addressed to D.M. Mutinda & Co. Advocates. What is contested is whether the actions done by the applicant in carrying out his instructions were lawful as he alleges or unlawful or in breach of the law as alleged by the respondents and the Interested party.
18. It is given that an advocate as any other law abiding should always operate within the law and cannot be immune to prosecution when he breaches or violates the law. The Respondents herein and the interested party allege that the applicant herein is suspected or connected to commission of an offence to wit malicious damage to property contrary to Section 339 (i) of the *Penal Code*. That offence is known in law and is well defined and whether or not the allegations are true/factual as alleged by the Interested party and the respondents or false/untrue as alleged by the applicant is really something that has not been brought within the scope and the mandate of this court.
19. The allegations that the decision to charge the applicant was done in haste or that it was irrational will be addressed in the main motion to be filed because the applicant has already been granted leave to file substantive Judicial Review proceedings. So whether or not there was haste in charging him is a matter to be considered later.
20. The applicant has sought interim orders to stay plea from being taken. This court was keen to ask the applicant to really lay basis why is should exercise my discretion in his favour and what I understood the applicant to be pointing out is that he is basically seeking protection to protect his image and reputation. However, this is a court of law which can only intervene by staying criminal proceedings where constitutional rights of the accused person are either infringed or threatened. To be and specific in this consent any infringements or threats of infringements of the fundamental rights well articulately under Articles 25, 26, 27,48, 49 and 50 of the *Constitution of Kenya* calls for intervention and where sufficient evidence is laid out a court should intervene.
21. This court could have gone ahead to list and examine the rights listed above the cited provisions but for the interest of time I will skip the same. Suffice to find and state that the applicant has not alleged or cited that any of his constitutional right under the constitution have either been breached by the decision to charge him or is threatened by taking of plea at the trial court.
22. It is worth to note that under Article 27 (1) of the *Constitution* every person is equal before the law and enjoys equal protection and benefit of the same. The equality envisaged here covers both the applicant and the interested party in equal measure. None of them can be discriminated on account of status, profession or any other discriminatory consideration, in the eyes of the law the two protagonists are equal notwithstanding the undeniable fact that one is an advocate of this court and by virtue of that he is an officer of this court. This court is mandated and indeed obligated to treat both of them fairly and equally. In the case of *Sauti Communications Limited v Communications authority of Kenya* [2020]



eKLR, Justice Nyamweya examined circumstances under which a stay of proceedings can be granted. It observed;

“The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decisions and in various decisions by Kenyan Courts.”

23. According to the Judge in the above case, an important consideration is whether the decision sought to be stayed has been fully implemented. This aspect was considered in *Jared Benson Kangwana v Attorney General* HCCCS No. 446 of 1995, *Taib Ali Taib v Minister for Local Government & Others* HC Misc. No. 158 of 2006, *Republic v Cabinet Secretary for Transport and Infrastructure & 4 others, Ex parte Kenya Country Bus Owners Association & 8 others* [2014] eKLR and *James Opiyo Wandayi v Kenya National Assembly and 2 others* (*supra*) where Judges held that where the decision sought to be stayed is complete, the Court cannot stay the same unless it is a continuing process in which the case, the Court considers the completeness or continuing nature of the implementation violates the rights of the accused.

24. In determining whether or not leave should act as a stay, this Court is further guided by the sentiments of Odunga J (as he then was) in *Beatrice Kwamboka v Leader of Majority Party of the Nairobi County Assembly* [2016] eKLR where the Learned Judge observed as follows:

“Apart from the foregoing the Court must also look at the likely effect of granting the stay to the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not and lean towards a determination which is unlikely to lead to an undesirable outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the Court, so far as possible to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court in exercising discretion, should therefore always opt for the lower rather than the higher risk of injustice.”

25. Finally, Maraga J. (as he then was) in *Taib A. Jaib v Minister of Local Government & 3 others* (2006) eKLR also made the following observations which I find relevant;

“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. It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administrative decision-making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister. A stay is only appropriate to restrain a public body from acting. It is however, not appropriate to compel a public body to act.”

This court finds that the process of charging the applicant is complete as what is only remaining is plea taking.

26. This court further notes that the applicant’s complaints herein perse do not mainly touch on his rights under article 49 and 50 of the *constitution*. He has not demonstrated with any iota of specificity that his right under the above articles or indeed any of his constitutional rights are likely to be infringed unless stay is granted.



27. The duty of the 2nd respondent is to investigate any complaint registered and upon satisfying itself that a crime has been committed, it forwards the investigation file to ODPP who then in the exercise of its mandate under article 157 (10) can decide whether or not to prefer charges. The question of the rationality, legality and propriety of the Respondents decision or action to charge is an issue that will be canvassed and determined in the main motion.
28. At this stage of the proceedings, it is now well settled that whenever a petitioner or an applicant sufficiently demonstrates that there is a hinderance or threats of infringements of rights, fundamental freedoms by the investigative or prosecutorial agencies there is basis for a court to intervene and stop the process through a stay of proceedings. Such intervention should however be in clearest of cases as decided in the case of *Reuben Mwangi v ODPP & 2 others, UAP & another (interested party)* (2021) eKLR where the court held that a party seeking intervention should demonstrate that his prosecution is not made in public interest or in the interest of administration of justice but an abuse by either the police or DPP to abuse legal process in order to achieve a collateral/extraneous purpose. This court has considered the application for stay of plea taking and the oral submissions made. I find that the basis for the intervention by this court is wanting. This court is not persuaded that the rights of the accused as an accused person are likely to be infringed in any way if the plea is taken by the trial court.
29. The applicant and the respondent have touched on evidence to be relied on by the prosecution and in particular the CCTV Clips reported to be going round in the mainstream media and other social media outlets. This court takes the view that the evidence to be presented at the trial, whether electronic, oral or whatever form is an issue within the scope and jurisdiction of the trial court. It would be premature for this court to go into the same at this stage because it is both undesirable and irregular.
30. There is also another important issue of law raised which is tied to the supervisory jurisdiction of this court under article 165 (6) of the *constitution*. This court has supervisory jurisdiction over the cited provision to exercise supervisory jurisdiction of a subordinate courts or tribunals exercising quasi-judicial authority but the same is only done when an aggrieved party moves the court to do so. In this matter the applicant has not asked this court to call for the lower court file to satisfy itself on the legality, regularity of the proceedings or for any other issue related to fair trial and protection of his rights. In any event those issues will be canvassed at the substantive stage later.
31. The right to access justice under article 48 of the *constitution* applies to both the applicants and the complainant (the interested party herein). The applicant as observed has not stated that the taking of the plea will hinder any of his rights. As a matter of fact, the respondent and the interested party have demonstrated that the right to access justice swings the pendulum of justice in their favour and the applicant has not contested that fact.

In the premises this court finds no merit in the applicant's prayer that leave granted to him should operate as a stay. The question of costs will be addressed in the main motion.

DELIVERED, DATED AND SIGNED AT KITUI THIS 5TH DAY OF MARCH, 2024.

HON. JUSTICE R.K. LIMO

JUDGE

