Republic v Attorney General & another; Shahdadpuri (Exparte) (Application E133 of 2023) [2024] KEHC 9135 (KLR) (Judicial Review) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9135 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E133 OF 2023

J NGAAH, J

JULY 19, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

ATTORNEY GENERAL .... 1ST RESPONDENT

REGISTRAR OF COMPANIES .... 2ND RESPONDENT

AND

GHASHYAM CHOITRAM SHAHDADPURI .... EXPARTE

JUDGMENT

1. The application before court is a motion dated 11 September 2023 in which the applicant seeks the following orders:

“1. An Order For A Writ Of Certiorari directed to the 1st and 2nd respondents quashing the findings and decision of the 2nd Respondent made on the 31st of August 2023 expunging the entries of the Companies register as regards the directorship and shareholding structure of Global Apparels Kenya Limited (EPZ) lodged in 2016 and reverting the said directorship and shareholding structure to the position it was before the entries lodged in 2016.

2. An Order For Mandamus directed to the 1st and 2nd respondents compelling the 2nd Respondent to reinstate the entries of directorship and shareholding structure of Global Apparels Kenya Limited (EPZ) in the Companies Register

to the position it was before prior to the decision to expunge the said entries made on the 31st of August 2023.

2. The application is brought under Sections 8 and 9 of the *Law Reform Act*, cap. 26, section 3A of the *Civil Procedure Act*, cap. 21 and Order 53 Rule 3 of the Civil Procedure Rules. It is supported by a statutory statement dated 8 September 2023 and an affidavit verifying the facts relied upon sworn on even date by Ghashyam Choithram Shahdadpuri.

3. Without going to the merits of the case my attention has been drawn to what the applicant has captioned as "the grounds upon which the reliefs are sought." They have been set out in the statutory statement as follows;

> " 1. That the Applicant herein is a director with Global Apparels Kenya Limited (EPZ) holding a 50% shareholding thereto of the Ordinary and Preference shares.
>
> 2. That the Applicant lawfully obtained his shareholding status pursuant to a transfer of shares that was effected on the 6th of September 2017 from Narain Choithram Shahdadpuri (Now deceased) and was appointed a director to the company on even date. 3. THAT the Applicant herein followed due process in his acquisition of shares and appointment as director.
>
> 4. That the 2nd respondent has since unilaterally expunged the entries lodged with the said office reflecting the transfer of shares to the applicant and his appointment as director.
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> 5. That the 2nd respondent has further directed that pursuant to having the said entries expunged from the records, the directorship and shareholding structure of Global Apparels Kenya Limited shall revert to the position it was before prior to 2016.
>
> 6. That the actions of the 2nd respondent has served to Un-procedurally and unlawfully oust the applicant as a director of the company and take away his bonafide acquired shares to his great detriment and loss.
>
> 7. That the applicant was never given a chance to be heard on the intended actions of the 2nd respondent despite the fact the said decision directly affected him as a shareholder and director of the company.
>
> 8. <u>That there are court cases pending on the same subject matter with interim injunctive orders for maintenance of status quo as regards shares of the company and other directions by this Honourable court which the 2nd respondent is privy to</u>.
>
> 9. That the actions of the 2nd respondent contravenes the law and is un procedural hence warranting the orders sought.
>
> 10. That the actions by the 2nd Respondent is not only in bad faith but also in total disregard of the Interim Orders of this Honourable Court and the other attendant court directions thereto." (Emphasis added).

4. Strictly speaking, these are not grounds for judicial review. The grounds for judicial review are as set out in Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374,410 where Lord Diplock explained them as follows:

> " 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 recognised 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.

5. So, the grounds for which judicial review reliefs are sought have not been left to speculation; they are acknowledged and recognised in law. It follows that without these grounds, an application for judicial review would be fatally defective. Needless to say, the point of entry for a judicial review court to intervene and check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to judicial review is the grounds upon which the application is made.

6. And Order 53 Rule 1(2) of the Civil Procedure Rules states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

   (2) 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. (Emphasis added).

   Further, Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

7. Turning back to what the applicant has described as grounds, paragraph 8 of those grounds 8 states in clear terms that "there are court cases pending on the same subject matter with interim injunctive orders for maintenance of status quo as regards shares of the company and other directions by this Honourable court which the 2nd respondent is privy to".

8. In the affidavit sworn by Shahdadpuri the court cases to which reference has been made have been identified as Milimani HCC MM No. E 789 of 2021 (Nairobi) and HCC No. 12 of 2022 (Mombasa). Besides the civil cases there is also a criminal case, to wit, Milimani Criminal Case No. E537 of 2021. Apparently the charges before court relate to transfer of shares in the same company that is the subject of the proceedings in this case.

9. Judicial Review would not be available where an alternative remedy exists. It was so held in Rep – vs – Inland Review Commissioner, ex-parte Boston (1985) AC 835 where the court noted that;

   > " A remedy by way of judicial review is not to be made available where an alternative remedy exists...judicial review is a collateral challenge".

   And in Rep. – vs- Peterkin ex Soni (1972) 1mm AR 253 Lord Widgery held;

   > " The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow the jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere".

10. My assessment of the applicant's application is that he not only appreciates that there exists alternative jurisdiction elsewhere to address his grievances but also that he has either invoked that jurisdiction or he is disposed to invoke it. Most importantly, it has not been demonstrated that the remedies provided in the alternative jurisdiction are inadequate or they are not as convenient or effective as those that the applicant seeks in this application.

11. Further, considering that, by the applicant's own admission, other courts are seized of jurisdiction over issues that are directly or substantially in issue in this suit, and this suit having been filed later in time, the suit is bad on the ground of sub judice under Section 6 of the *Civil Procedure Act* which is to the effect that no court is to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or parties under whom they claim.

    For the going reasons I hold the applicant's application to be misconceived and, in any event, incompetent. It is hereby struck out with costs.

SIGNED, DATED AND DELIVERED ON 19 JULY, 2024.

NGAAH JAIRUS

JUDGE