



Republic v Kenya Revenue Authority & 2 others; County Government of Nairobi (NCC) & 4 others (Exparte) (Judicial Review Miscellaneous Application E163 of 2021) [2023] KEHC 861 (KLR) (Judicial Review) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E163 OF 2021
AK NDUNG'U, J
FEBRUARY 16, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

KENYA REVENUE AUTHORITY 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

NATIONAL POLICE SERVICE 3RD RESPONDENT

AND

COUNTY GOVERNMENT OF NAIROBI (NCC) EXPARTE

ANN KANANU MWENDA (DEPUTY GOVERNOR AND ACTING GOVERNOR, NCC) EXPARTE

ALLAN ESABWA IGAMBI (FINANCE COUNTY EXECUTIVE COMMITTEE MEMBER, NCC) EXPARTE

DAVID KIMBURI WAMBUGU (DEPUTY DIRECTOR DEBT MANAGEMENT, NCC) EXPARTE

MARTHA KARUNGARI WAMBUGU (HEAD OF COUNTY TREASURY, NCC) EXPARTE

RULING

1. The application before this court is the chamber summons dated 29th October. The applicants seek orders:



- a. Spent
 - b. That the honourable court be pleased and do hereby grant leave to the *ex-parte* applicants to apply for judicial review order of *certiorari* to remove into this honourable court and quash notice dated October 27, 2021 issued by the respondent to the applicants on behalf of the *ex-parte* applicant.
 - c. That the honourable court be pleased and do hereby grant leave to the *ex-parte* applicants to apply for a judicial review order of prohibition to remove into this honourable court and prohibit the respondent from issuing any other or further notice(s) to the applicants on behalf of the *ex-parte* applicant.
 - d. That the leave to commence judicial review proceedings do operate as a stay order against the respondents stopping any further proceedings pending the hearing and determination of the judicial review proceedings.
 - e. That the honourable court be pleased to grant the applicants anticipatory bail pending arrest or charge on such terms the court may deem fit to impose.
 - f. That the honourable court be pleased to give further orders and directions as it may deem fit and just to grant.
 - g. That the costs of this application be provided for.
2. The application is premised on twenty- six grounds listed on the face thereof, a statutory statement and a verifying affidavit, the gist of which is that the applicants were summoned to appear before the Directorate of Criminal Investigations unit in the Kenya Revenue Authority on the October 28, 2021. The applicants state that they are apprehensive of a looming arrest by the respondents which is a threat to their liberty. It is urged that the intended arrest is an abuse of the criminal process as it is intended to embarrass the applicants in a matter that is in active negotiations between the parties. The respondents are accused of exercising the powers to institute criminal proceedings arbitrarily, capriciously and in bad faith.
 3. The applicants maintain that the orders sought will ensure the enforcement of their right to fair trial as well as a fair administrative action as guaranteed in the [Constitution](#) and other laws of Kenya. The motive of the respondents is questioned and it is averred that the respondents intend to forcefully compel the applicants to submit to them and as such, the institution of the criminal process is meant to achieve a collateral purpose other than the legally recognised aim and the action is thus unconstitutional. It is urged that it is not the purpose of a criminal investigation or proceedings to aid government agencies in execution of their mandate.
 4. It is the applicant's case that there is no evidence that the respondents can purport to have a good case against the applicants in which case the impugned process is malicious and an abuse of the court process.
 5. The application is opposed. For the 1st respondent, their response is contained in the affidavit of Dominic Kengara whose position is as follows; that the 1st respondent and the 1st applicant signed a debt settlement agreement on the September 19, 2019 to settle outstanding tax arrears of Kshs 4,490,214,629. Between October and December 2019, Kshs 3,000,000,000 was settled through recoveries. The 1st applicant was to apply for a waiver of penalties and interest while the 1st respondent was to undertake a reconciliation of the 1st applicant's accounts to establish the entire extent of liability. This exercise was never concluded as the 1st applicant failed to provide some of the relevant records.



6. Dominic sets out the engagements that went on between the two parties which included various payments made by the 1st applicant. There is, however, default on the part of the 1st applicant and the impugned summons were geared towards obtaining an explanation from the 2nd to the 5th applicants, the 1st applicant not being a natural person. It is urged that taxes are payable as and when they become due and that it is a criminal offence to abrogate, neglect to pay taxes or attempt to defer one's statutory obligations under the law.
7. Further, that the actions of the applicants show a deliberate attempt to default in payment of taxes as they had recognised the outstanding tax liability as a pending bill, budgeted for the same and even sought approval to draw the funds from the ex chequer (controller of budget) but still failed to remit the same to the commissioner. It is the 1st respondent's case that the amounts in question were held by the 1st applicant in trust enroute to it both as an employer and a withholding tax agent of the 1st respondent whose responsibility is to remit all deducted amounts to the 1st respondent. It is the actions of the applicants even after numerous concessions that necessitated the issuance of the summons to discuss the way forward on the outstanding tax liability.
8. The 1st respondent maintains that if at all it wished to arrest and or prosecute the respondents, it would be for violation of tax laws and not for the reasons offered in the application. The summons issued is defended as lawful and that at all material times, the 1st respondent acted fairly and within the rules of natural justice and fair administrative action and the *Constitution*. The 1st respondent concludes by stating that the doors are still open for the applicants to cooperate with them towards amicable settlement of the outstanding taxes.
9. There was no response filed on behalf of the 2nd and 3rd respondents.
10. Pursuant to directions of court issued on the November 2, 2021, this matter was to be disposed of by way of written submissions and in compliance thereof, I note that the applicants and the 1st respondents have through their respective counsel on record filed written submissions accompanied by a list and copies of authorities relied upon.

Analysis And Determination

11. I have had occasion to consider the application, the grounds relied upon as seen in the statutory statement and verifying affidavit. I have had due regard to the replying affidavit on record as well as the submissions by the parties. The issue for determination is whether the applicants have established the legal threshold for the grant of leave to institute judicial review proceedings and, if in the affirmative, whether such leave do operate as stay of any proceedings against the applicants by the respondents.
12. The applicable law on leave to commence judicial review proceedings is order 53 rule 1 of the *Civil Procedure Rules*, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was explained by Waki J (as he then was), in *Republic v County Council of Kwale & another ex parte Kondo & 57 others*, Mombasa HCMCA No 384 of 1996 as follows:

“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 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 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”.

13. It is also trite that in an application for leave, the court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. In *Uwe Meixner & another v Attorney General* [2005] eKLR, it was held that the leave of court is a prerequisite to making a substantive application for judicial review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case. Thus, the first step in the judicial review procedure involves the mandatory "leave stage." At this stage an application for leave to bring judicial review proceedings must first be made. The leave stage as held by Waki J is used to identify and filter out, at an early stage, claims which may be trivial or without merit.
14. In HCJR Case No E087 of 2021, *AAR Insurance v Public Procurement Administrative Review Board, Secretary IEBC and Zamara Risk and Insurance brokers Limited Interested Parties* (unreported), Ngaah J aptly summed up the rationale for the requirement for leave where he stated;

“I must reiterate that that judicial review remedies are discretionary and it is partly for this reason that a judicial review court has been clothed with the discretion to interrogate, at a preliminary level, the intended application for prerogative orders. It is at that stage that, in exercise of its discretion, the review court will weigh between ‘the legitimate requirement of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals. (emphasis added)’ If upon examination of the material before it, the court is persuaded that a case has been made out that on further interrogation the legitimate rights and interests of the individual or group of individuals may have been abrogated, it will intervene and exercise its discretion in favour of grant of leave to institute a substantive motion for judicial review reliefs. It follows that the application for leave is not a mere procedural technicality that can be dispensed with at the whims of either the court or an applicant. It is a material stage in the application of judicial review orders at which the discretion of this honourable court is called into question and which, for this very reason, cannot be taken away without an express provision of the law in that regard.”
15. So, what is the factual background on which this present application is anchored? Without delving deeply into the merits of the applicants' case, a cursory look at the facts disclosed in the application reveals a long history of a tax dispute between the 1st applicant and the 1st respondent. At some point, the tax indebtedness was agreed on in writing and a commitment to settle put in place as between the parties and indeed the 1st applicant made some payments towards liquidating the due and owing taxes. There followed, however, a long history of default which default prompted the issuance of the impugned summons.



16. The 1st respondent has explained that the summons dated October 27, 2021 (and I note there were other earlier summons of a similar nature) were to seek clarification in regard to the default in payment and the 2nd to 5th applicants were summoned as representatives of the 1st applicant, the city county government of Nairobi, which body is not a natural person.
17. Without answering the summons and /or making an appearance before the 1st respondents enforcement unit, the applicants have approached this court to halt the summons and the proceedings that would arise therefrom.
18. The scope of judicial review is well settled in law. The court's role in such matters was explained in [*Judicial Review Handbook*](#) by Michael Fordham (third edition) p249- 256 as hereunder:
- “Every public body has its own role and has matters which it is to be trusted to decide for itself. The courts are careful to avoid usurping that role and interfering whenever it might disagree as regards those matters.”
19. A party desirous of approaching the court ought to appreciate the parameters of judicial review as opposed to an appeal. Judicial review is a special supervisory jurisdiction which is different from both ordinary (adversarial) litigation between private parties and an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the court through proceedings brought nominally by the Republic. See [*R v Traffic Commissioner for North Western Traffic Area ex parte Brake*](#) [1996] COD 248.
20. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See [*Reid v Secretary of State for Scotland*](#) [1999] 2 AC 512.
21. The rationale for this position was that to do that would amount to the court sitting on appeal on the decision made by the respondent. This position was appreciated in [*Municipal Council of Mombasa v Republic & Umoja Consultants Ltd*](#) civil appeal No 185 of 2001 where it was held that:
- “Judicial review is concerned with the decision making process, not with the merits of the decision itself: the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such



as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”

22. It was similarly held in *Republic v The Retirement Benefits Appeals Tribunal ex parte Augustine Juma & 8 others* [2013] eKLR, that:

“...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision...I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or ‘wrongness’ or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a ‘wrong’ decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others*, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...”

23. Similarly, in *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury’s Laws of England* 4th Edition Vol (1)(1) para 60.

24. This position was adopted in *Republic v Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited* where Majanja J quoting with approval the decision of Githua J in *Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited* Nairobi HC Misc JR No 157 of 2012 [2012] eKLR as follows;

“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting



its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.” (emphasis added).

25. The question whether a judicial review court is the proper forum to deal with the issue whether or not taxes are due and if so how much has been the subject of judicial decisions in this jurisdiction. As was held by the Court of Appeal in *Pili Management Consultants Ltd v Commissioner of Income Tax, Kenya Revenue Authority* civil appeal No 154 of 2007:

“As the trial judge rightly pointed out, the jurisdiction of a court in judicial review is concerned primarily with the decision making process not with the merits of the decision. For the Judge to be able to conclude that no tax was due from Pili for the year 2004, the judge would have to determine first whether the money in Pili’s account at the bank was or was not liable to tax. No material was placed before the judge on that point... it was not the role of the superior court nor of this court to determine the correctness or otherwise of the tax which Pili was liable or whether Pili was liable to pay any tax at all for the year 2004.”

26. I have deliberately over emphasized the scope of judicial review with a view to putting the current application for leave in perspective. In our present case, no decision has been made by the respondents. What is impugned is the issuance of a summons against the applicants, a statutorily provided power to the 1st respondent in enforcement of tax collection. Within this background, the application before court becomes speculative in nature. There is as yet no illegality, irrationality or procedural impropriety demonstrated against the respondents. No rights have been shown to have been abrogated. No adverse action by way of criminal charges or otherwise has been taken against the applicants. The court can only intervene when there is a process that has been abused, a process that borders on illegality, irrationality or procedural impropriety. The invite to this court to exercise its supervisory powers over the respondents in judicial review is thus premature.
27. As the natural persons running the 1st applicant, the applicants are legally bound to explain to the 1st respondent the tax default on the part of the 1st applicant. It is only when the respondents would engage in a process that does not meet the legal muster that the applicants should seek refuge in this court under its judicial review powers.
28. Suffice it to note that in issue is tax indebtedness by a public body, indebtedness that relates to among other taxes, remittance of PAYE. The managers of such a public entity owe a duty to the body mandated to collect taxes to explain such default and my view is that the impugned summons, which summons have statutory backing, were geared towards achieving that goal. I do not lose sight of the fact that the 1st respondent in its response affirms that the doors are still open for the applicants to cooperate with the respondent to amicably settle the outstanding taxes that are due and owing.
29. From the foregoing, I reach the inevitable conclusion that the applicants have failed to achieve the legal threshold for grant of the leave sought. The application thus lacks merit and is dismissed. Since this litigation is generally between public bodies, I direct that each party bears its own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY 2023

A. K. NDUNG’U



JUDGE

