



Republic v Director of Criminal Investigations & another; Mwangi (Interested Party); Mwangi (Exparte Applicant) (Judicial Review Application E151 of 2022) [2023] KEHC 19677 (KLR) (Judicial Review) (7 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E151 OF 2022**

JM CHIGITI, J

JULY 7, 2023

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

THE INSPECTOR GENERAL OF NATIONAL POLICE

SERVICE 2ND RESPONDENT

AND

ISAAC MWANGI INTERESTED PARTY

AND

LYDIA NYAMBURA MWANGI EXPARTE APPLICANT

JUDGMENT

1. The Applicant moved this court through a Notice of Motion Application dated 14th October, 2022 – under Article 23(3)(f) of the [Constitution](#) of Kenya; Section 7 & 8 of the [Fair Administrative Action Act](#) No. 4 of 2015; and Order 53 Rule 3 of the [Civil Procedure Rules](#), 2010 – seeking for the following orders:
 1. That this application be and is hereby certified as urgent;
 2. That this Honourable Court be pleased to grant an order of *Certiorari* to bring into this Honourable Court and quash the decision of the Inspector General of National Police Service and the Director of Criminal Investigations officers from summoning, intimidating, harassing



and threatening to arrest the *Ex Parte* Applicant at her home, place of work and/ or anywhere within the Republic of Kenya including her agents and representatives on matters touching on the conduct of Thika CMCC No. 820 of 2013 Isaac Mwangi v Molyn Credit Limited & others, and ELC Civil Appeal No. 21 of 2017 *Isaac Mwangi & another v Molyn Credit Limited and others*;

3. That this Honourable Court be pleased to grant an order of Prohibition prohibiting the Respondents herein from intimidating, harassing and threatening to arrest the *Ex Parte* Applicant at her home, place of work and/ or anywhere within the Republic of Kenya including her agents and representatives on matters touching on the conduct of Thika CMCC No. 820 of 2013 Isaac Mwangi v Molyn Credit Limited & others, and ELC Civil Appeal No. 21 of 2017 *Isaac Mwangi & Another v Molyn Credit Limited & others*;
 4. That this Honourable Court be pleased to issue a Declaration that the Respondents' decision to keep issuing summons and/ or sending police officers to harass and intimidate and/ or threaten to arrest the *Ex Parte* Applicant causing fear and mayhem at her home, place of work and/ or anywhere within the Republic of Kenya in the exercise of conducting investigations on matters touching on Thika CMCC No. 820 of 2013 Isaac Mwangi v Molyn Credit Limited & others & ELC Civil Appeal No. 21 of 2017 *Isaac Mwangi another v Molyn Credit Limited & others* is unlawful, ultra vires, unconstitutional, conducted in bad faith and procedures used by the Respondents are bias against the *Ex Parte* Applicant;
 5. That pending the hearing and determination of this application inter parties, this Honourable Court be pleased to stay the decision of the Respondents by themselves, agents, servants, representatives, employees, assignees and/ or any other person acting under the Respondents' authority either jointly or severally of summoning, harassing, intimidating and/ or threatening to arrest the *Ex Parte* Applicant at her home, place of work and/or anywhere within the Republic of Kenya including her agents and representatives on matters touching on the conduct of Thika CMCC No. 820 of 2013 Isaac Mwangi v Molyn Credit Limited & others & ELC Civil Appeal No. 21 of 2017 *Isaac Mwangi & another v Molyn Credit Limited and others*; and
 6. That the costs of this application be provided for.
2. The Notice of Motion Application was accompanied by a Statutory Statement dated 14th October, 2022 and a Verifying Affidavit dated 13th October, 2022 deponed by Lydia Nyambura Anyangu. The Application was based on the grounds of ultra vires, unlawfulness, irrationality, and illegality on the part of the Respondents. To advance their case, the *ex-parte* Applicant filed their written submissions dated 28th March, 2023.
 3. In response, to the Notice of Motion Application, the Respondents filed their Replying Affidavit dated 7th April, 2023 deponed by PC Kipkoech Talam No. 70778; and also a written submission dated 4th April, 2023 was filed to support the Respondents' case.
 4. In further opposition to the Notice of Motion Application, the Interested Party filed his Replying Affidavit dated 21st October, 2022 and a Supplementary Affidavit dated 21st February, 2023. Additionally, the Interested Party filed his written submissions dated 31st March, 2023 to butress his opposition to the Notice of Motion Application.
 5. I have carefully considered the Application, Responses thereto, annexures, and the parties' submissions. I find the following issue arises for determination, on preliminary stage: Whether the Substantive Notice of Motion Application is properly before this court without first seeking leave.



6. It is a requirement of the law, under Order 53 Rule 1 of the Civil Procedure Rules 2010, that an Applicant must seek leave to institute judicial review proceedings. The section stipulates that,

“Order 53 – Applications For Judicial Review

1. Applications for *mandamus*, prohibition and *certiorari* to be made only with leave [Order 53, rule 1.]

(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.”

7. Leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; 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; 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. This reason for leave was discussed in the case of Republic v County Council of Kwale & another Ex Parte Kondo & 57 others, Mombasa HCMCA No. 384 of 1996.

8. The Learned Judge further held that 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 parties 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 exercised judiciously.

9. Turning back to the instant case, this court observes that the Applicant did not seek leave (by way of a chamber summon, or otherwise); before instituting the substantive Application through the filed Notice of Motion Application.

10. Notably, parties – in their pleadings -have not raised/addressed the issue of seeking leave to institute substantive judicial review proceedings, before commencing substantive judicial review application.

11. The court of Appeal has had an opportunity to deal with the issue, as to whether leave is necessary before substantive application is made, in judicial review proceedings.

12. In Aluochier v Independent Electoral and Boundaries Commission & 17 others (Civil Appeal E176 of 2022) [2022] KECA 952 (KLR) (29 July 2022) (Judgment) Neutral citation: [2022] KECA 952 (KLR) the Court of Appeal (faced with a similar issue of leave, as in the instant case) observed that,

“25. In view of the foregoing, we reach the inescapable conclusion that Order 53 Rule 1 applies in mandatory terms. It is the procedure therein prescribed that the appellant ought to have complied with before approaching the High Court without first seeking leave, as though his Motion were an appeal to the High Court. (Emphasis Ours)

26. The above-mentioned procedural defects rendered the application before the Court fatally defective...

27. A question then arises as to whether the appellant’s Motion as characterized by the foregoing procedural defects would find cure in Article 159(2) (d) of the Constitution, which mandates courts and tribunals to administer justice without undue regard to technicalities of procedure. It would not. We agree



with the learned Judge that Article 159(2) (d) of the Constitution could not come as a saving grace to the applicant. That Article cannot be used to circumvent mandatory rules of procedure laid down in statute law.

28. In this regard, the Supreme Court decision in Raila Odinga v the Independent Electoral and Boundaries Commission and 3 others [2013] eKLR is instructive.

In its decision, the Supreme Court had this to say:

“Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.”

29. We do not tire to remind litigants that mandatory rules of procedure, as is Order 53 Rule 1 of the Civil Procedure Rules, are not merely a cosmetic add-on to substantive law. They cannot be likened to a pack of cherries from which one’s choice to pick is as good as the choice not to. Indeed, the observance of such rules is mandatory, and for good reason. As Kiage JA. observed in this Court’s decision in Nicholas Kiptoo Arap Korir Salat v the Independent Electoral and Boundaries Commission & 6 others [2013] eKLR:

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

30. We have said enough of this matter, which to some might appear trivial, though fundamental in the determination of the issue as to whether the appellant’s Motion for review of the 1st Respondent’s decision stood the competency test weighed against mandatory rules of procedure. Having carefully considered the appeal before us, the judgment of the High Court and the respective positions of the parties considered against the Constitution, the statute and judicial precedents relevant to the issue, we reach the inescapable conclusion



that the appellant’s appeal must fail. It is hereby dismissed with costs to the respondents.”

13. From the foregoing, it is clear that in Judicial Review proceedings, obtaining leave of court is mandatory before filing the substantive application. This court is bound by the decision of the court of Appeal.

Order:

1. The Notice of Motion Application dated 14th October, 2022 is defective for want of leave, and the same is struck out with cost.
2. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2023

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J. CHIGITI (SC)

JUDGE

