



Republic v Director of Public Prosecution & 2 others; Sitati & 2 others (Interested Parties); Ranju Limited (Exparte Applicant) (Judicial Review E001 of 2023) [2024] KEHC 12269 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
JUDICIAL REVIEW E001 OF 2023
LW GITARI, J
OCTOBER 4, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATION 2ND RESPONDENT

RESIDENT MAGISTRATE’S COURT AT CHUKA 3RD RESPONDENT

AND

SOLOMON SITATI INTERESTED PARTY

ZACHARIA SHARIFF INTERESTED PARTY

ROBERT NJOROGE INTERESTED PARTY

AND

RANJU LIMITED EXPARTE APPLICANT

JUDGMENT

Introduction

1. This is a Judicial Review Application filed by the Ex-parte applicant seeking orders that this court issues an order to quash the decision by the 1st Respondent withdrawing criminal charges against the 2nd and 3rd Interested Parties herein. The ex-applicant also seeks orders that the 1st respondent be compelled to involve him by taking their views and await completion of investigations by the 2nd respondents.



The application is filed pursuant to leave granted to the applicant to file Judicial Review proceedings dated 5/6/2023.

Brief facts.

2. The brief facts are that the applicant lodged a complaint with the 2nd respondent and upon investigations, the 1st, 2nd and 3rd Interested Parties were charged with two counts of stealing and handling stolen property in Chuka Criminal Case No. E352/2022. The 2nd Interested Party in a letter addressed to the headquarter office of the 1st respondent sought to have the charges against himself and the 3rd Interested Party withdrawn. The 1st respondent in a letter dated 23/12/2022 directed that the charges against 2nd and 3rd Interested Parties be withdrawn. In making that decision, the 1st respondent did not seek the views of the ex-parte applicant who had complained against the Interested Parties. The ex-parte applicant contends that the decision by the DPP was bad as the 1st respondent denied the applicant who is a victim and complainant a reasonable opportunity to state their case and did not comply with the procedure prescribed in the law, hence the improprieties.
3. The ex parte applicants further states that the decision taken had ulterior motive calculated to prejudice the legal rights of the applicant. Further, that the DPP has been reasonably suspected of bias and the decision was as a result of biased and subjective considerations of the facts rendering the decision bad in law.
3. The 1st respondent opposed the application and filed a replying affidavit sworn by Ahmed Shaban sworn on 18/09/2023.
4. It is deponed that the 1st, 2nd and 3rd Interested Parties were charged with stealing contrary to Section 268 as read with Section 275 of the Penal Code and an alternative charge of handling stolen property contrary to Section 322(1) (2) of the Penal Code. That subsequently the 2nd and 3rd interested parties wrote to the 1st respondent requesting that the decision to charge them be reviewed. The respondent considered the request and responded vide a letter dated 23/12/2023 and noted that there was insufficient evidence against the 2nd and 3rd interested parties to support the said letter charges. The said letter highlighted gaps which needed to be corrected and the charges were then withdrawn. The letter was copied to the applicant and he has not presented to the 1st respondent concise evidence that can support and sustain criminal charges against the interested parties.
5. The respondent further depones that the ex parte applicant did follow the right channel before making the impugned decision. That the decision was made within the powers donated to the 1st respondent under Article 157 (b) (c) of *the Constitution* which power is exercised without the direction or influence of any entity.
6. The 2nd respondent filed grounds of opposition and contends that the Notice of Motion is totally defective, misconceived and mischievous or otherwise an abuse of court process and therefore unsustainable as the applicant seeks to interfere with the Respondent's performance of their statutory mandate to investigate and prosecute the offence that the application does not disclose a reasonable cause of action against the respondents for the reasons that under Article 157 (10) of *the Constitution* the Director of Public Prosecutions shall exercise state powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed without the direction or influence of any other entity.



7. That the Director of Public Prosecution has powers to take over and continue any criminal proceedings that have been undertaken by another person or authority with the permission of the person or authority.
8. He contends that the decision to withdraw the charges against the 2nd and 3rd Interested Parties was not only done for a good reason but the said reasons were well communicated to all parties affected including the applicant and the allegation by the applicant that they were not informed of the decision is therefore totally false and misleading.
9. The 2nd and 3rd respondents through the litigation Counsel E. Kendi filed grounds of opposition and contends that the application is fatally defective, misconceived and mischievous or is otherwise an abuse of court process and therefore unsustainable. That the issues raised are untenable in law as the applicant seeks to interfere with the respondents' performance of their statutory mandate to investigate and prosecute an offence.
10. It is the contention by the respondents that the application herein does not disclose a reasonable cause of action by dint of Article 157 (10) of *the Constitution* which gives the 1st respondent the powers of prosecution and to exercise those powers independently without the consent of any person or authority for the commencement of Criminal Proceedings and in the exercise of those powers or functions shall not be under the direction or control of any person or authority.
11. The respondents contend that the application does not meet the threshold for the grant of the Judicial Review orders sought and should be dismissed.
13. The second Interested Party filed grounds of opposition and contends that the ex-parte applicant's Judicial Review Application having been commenced outside the statutory period stipulated under Section 9(3) of the *Law Reform Act* as read with Order 53 rule 2 of the Civil Procedure Rules is not properly before the court. The Orders 2, 3 & 4 of Ex-parte Applicant's Notice of Motion is defective and bad in law since no leave was granted by this court to apply for the same having regard to the scope of leave granted to ex-parte Applicant in the order made herein on 15/6/2023 . That the application is hopelessly defective and bad in law having been commenced by a party (Rainju Limited) who lacks locus standi under the *Victim Protection Act* to commence and continue the purported application on the basis of being a victim considering the express provisions of Section 2 of the *Victim Protection Act* which states –

“Victim” means any natural person who suffers injury loss or damage as a consequence of an offence.”

That the court lacks jurisdiction to hear the application as filed.
14. The application was canvassed by way of written submissions.

Submissions by the 1st Respondent:

15. The 1st respondent submits that the issue for determination is whether the impugned decision was made in conformity with the prescribed law and procedure. He submits that under Article 157 (6) of *the Constitution*, the 1st respondent has prosecutorial powers and may institute and undertake Criminal Proceedings against any person in respect of any offence alleged to have been committed.
16. Thus the 1st respondent has powers to discontinue at any stage before Judgment is delivered any Criminal Proceedings instituted or taken –over by the 1st respondent. The 1st respondent contends that it properly exercised its constitutional mandate by considering whether or not there was sufficient



evidence to sustain the criminal charges against 2nd and 3rd Interested Parties. He relies on Republic – v- Inspector General of Police & 3 Others Ex parte Lilian Wangari & 5 Others (2017) eKLR

17. The respondent contends that he acted within his powers to terminate the case against 2nd & 3rd Interested Parties as there was no evidence linking them to the theft of the subject property or handling of the said property. That the ex-parte applicant was served with the letter and wrote a reply. That the letter gave detailed reasons that informed its decision thus providing the applicant with sufficient information. That it is not true that the applicant was not informed of the decision. That the applicant has misinterpreted the law by stating that the 1st respondent can only undertake its mandate in withdrawing a criminal charge once the victim has given his concurrence. He relies on Republic –v- Director of Public Prosecution and Another, Exparte Ense Ltd; David Gikaria (Interested Party) (2021) eKLR where it was held that:

“The applicant points to the fact that it was not consulted before that decision was made. While it would be prudent for the DPP to hear an alleged victim’s representations before withdrawing a case, there is no requirement that the consent of the alleged victim be sought before such withdrawal.”

18. That 1st respondent’s mandate ought to be exercised without the control or direction of any person or authority as provided under Article 157 (1) of *the Constitution* of Kenya. He relies on the Republic-v- Chief Magistrate, Milimani Criminal Division & 4 Others Ex parte John Wachira Wambugu & Another (2018) eKLR where it was stated:

“A clear reading of the architecture of Article 157 of *the Constitution* leaves no doubt that DPP is required to not only act independently, but remain fiercely so.”

19. On the issue whether the orders sought herein are tenable in law, the 1st respondent submits that, he relies on Article 157 (6) of *the Constitution* and submits that, it is imperative for the court to not only consider whether or not there are sufficient grounds to grant orders sought, but to also weight the implication the orders will have on the course of criminal proceedings if at all granted. That discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. The 1st respondent has urged the court to rule that it had good reason for making the decisions which was informed by apparent evidentiary gaps that are yet to be addressed. That the 1st respondent was not convinced that there was enough evidence to secure a conviction against the 2nd and 3rd Interested Parties. He relies on Republic –v- Chief Magistrate Milimani Criminal Division & 4 Others Ex- parte John Wachira & another (supra) and Republic-v- Inspector General of Police & 3 Others Ex parte Lilian Wangari & 5 Others (2017) eKLR

20. He prays that the application be dismissed.

2nd and 3rd Respondent’s submissions

21. She has urged the court to consider whether the decision was arrived at in a manner envisaged by the law. She submits that the order of ‘Certiorari’ only issue if the decision being challenged was made without or in excess of jurisdiction or where the rules of natural justice were adhered to. That the applicant was given an opportunity to be heard on the application to withdraw the charges and on their motion dated 6/3/2023 seeking to set aside and stay the said withdrawal. That the applicant has not presented any evidence to show that the 1st respondent in making the decision he was biased. She further submits that Judicial Review Proceedings deal with procedure and process of decision making and not with the merits or substance of the case. That the application is not proper as the applicant is challenging the



decision of the 1st respondent. She submits that the application does not satisfy the requisite threshold to warrant this court to exercise discretion in his favour. She prays that the application be dismissed.

Analysis and Determination:

22. I have considered the application, the statement of facts and the submissions. The issues which arise for determination are:-
1. Whether the application is time barred having been commenced outside the statutory period stipulated under Section 9 (3) of the *Law Reform Act* as read with Order 53 Rule -2- of the Civil Procedure Rules, (Cap 21 Laws of Kenya.)
 2. Whether the application is hopelessly defective and bad in law for having been commenced by a Party, (Ranju Limited) that lacks Locus Standi under the *Victim Protection Act*.
 3. Whether the impugned decision by the 1st respondent was made in conformity with the prescribe law and procedure.
 4. Whether Judicial Review remedies of certiorari and Mandamus are available to the applicant.

1. Whether the application is time barred:

23. The counsel for the 2nd Interested Party contends that the judicial Review application is time barred as the decision in the letter dated 23/12/2023 is time barred having been commenced in contravention of Section 9(3) of the *Law Reform Act* as read with Order 53 rule 2 of the Civil Procedure Rules Section 9(3) of the *Law Reform Act* (Cap 26 Laws of Kenya provides:-

“In case of an application for an order of Certiorari to remove any Judgment, Order, decree, conviction or other proceedings or the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that Judgment, order, decree conviction or other proceedings or such shorter period as may be prescribed under any written Law, and where that Judgment, Order, decree, conviction or other proceedings & is subject to an appeal and a time is limited by law for bringing the appeal the court or Judge may adjourn the application for leave until the appeal is determined or time for an appeal has expired.”

24. Thus the Act gives a limitation period of six months to seek leave to file Judicial Review Proceedings. Order 53 Rule 2 Civil Procedure Rules provides that leave shall not be granted to apply for an order of certiorari unless the application for leave is made not later than six months after the date of proceedings. Order 53 rule 2 Civil Procedure Rules provides:-

“53(2). Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

25. The application for leave is dated 14/6/2023. The impugned decision by the 1st respondent not to charge the Interested Parties is dated 23rd December 2022. The application for leave to file the



proceedings was clearly filed out of time. Judicial Review Proceedings are supposed to be heard and determined within the shortest time possible hence the stringent timelines provided for institution such proceedings. This is meant to ensure the validity of decisions sought to be reviewed are not kept in suspense indefinitely or for in-ordinately long time. As such Judicial Review remedies being exceptional in nature should not be made available to those who take too long to seek redress. In Republic –v- The Minister for Lands & Settlement & Others, Mombasa H.CM CA No.1091/2006 the court stated that legal business can no longer be handled in a sloppy and careless manner and some clients must realize that at their cost the consequences of such careless and leisurely approach must fall on their shoulders. In Raila Odinga & 6 Others –v- Nairobi City Council Nairobi H.CCC No. 89/93. It was stated that Order 53 contains rules made pursuant to Section 9(1) of the Law Reform Act and an application for Judicial Review should be made promptly and in any event within a period of six months from the date when the ground for the application arose. The application was filed outside time and since there is no provision for this court to extend time, no orders can be issued under the said application.

2. Whether the Application is defective and bad in Law:

26. This Judicial Review Application is filed by Ranju Limited who lacks locus standi as Section 2 of *Victim Protection Act* defines Victim; “to mean – any natural person who suffers injury, loss or damage as a consequence of an offence.”
27. A limited liability company is a legal person who is precluded from the definition of natural person. This court therefore lacks the requisite jurisdiction to take cognizance of, hear and determine the Ex Parte Applicants Notice of Motion application as filed.

3. Whether the decision by the 1st respondent was made in conformity with the law and Procedure

28. The applicant had the duty to prove that the order was made in excess of jurisdiction and in violation of the rules of natural justice. Article 157(10) of *the Constitution* provides that-

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

29. Further under Article 157(6) of *the Constitution* provides as follows:-

“157(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

- (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- (c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the



Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”

30. The Article gives the 1st respondent the powers among others to discontinue any criminal proceedings at any stage before Judgment is entered.
31. The background of the matter is that the Interested Parties were charged with stealing contrary to Section 268 as read with Section 275 of the Penal Code and an alternative charge Handling Stolen Property contrary to Section 322 (1) (2) of the Penal Code. The 2nd Interested Party wrote to the 1st Respondent requesting him to review the decision to charge him. The 1st respondent called for the Investigations filed and upon perusing it was satisfied that the evidence was not enough to sustain a charge against the 2nd and 3rd Interested Parties. The 1st respondent in its letter dated 23/12/2022 highlighted the evidential gaps and decided to terminate the charges. The letter was served on the applicant and they responded. The Ex-parte applicant was given all the information and he wrote a response. There was no requirement for the 1st respondent to consult the applicant before making the decision to withdraw the trial. In Republic- v- Director of Public Prosecutions & Another Ex- Parte Ense Ltd, David Gikaria, (the Interested Party) the court stated:-

“The Applicant points to the fact that it was consulted before that decision was made. While it would be prudent for the DPP to hear an alleged victim’s representation before withdrawing a case, there is no requirement that the consent of the alleged victim be sought before such a withdrawal. Mativa J, said it best in the Ex parte John Wacira Wambugu Case:-

64. The Ex parte applicant states that he was not consulted prior to the decision to terminate the criminal case being made. There is no requirement under the law that the DPP consults a complainant before deciding to prosecute or withdrawal a trial. More significant is the fact that an official who has discretionary powers must, naturally exercise them within the limits of the constitution and the authorizing statute, read in the light of the Bill of Rights. Rights here will include the rights of the Ex-parte applicant and the accused persons. The DPP is required to balance the two and make the right decision. No material has been presented before me to show that the DPP failed to exercise his functions or abused his discretion in making the decision. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated, conducted r terminated. No such illegality or irregularity has been established.

32. The 1st respondent exchanged communication with the ex-parte applicant but he was aggrieved with the decision. The 1st respondent is given powers under Article 157 to work independently. The ex-parte applicant cannot be seen to be directing the 1st respondent as to what to do. Article 157(10) of the Constitution gives the 1st respondent power to make decisions without the consent of any person or authority. I find that the 1st respondent acted within his mandate and there was no violation of the rules of natural justice.

4. Whether the remedies of Certiorari and Mandamus are available:

33. The Ex-parte applicant had a duty to show how the 1st respondent acted illegally. It is not enough to state that the 1st respondent acted illegally, he needed to lay a basis for alleging that Judicial Review



orders are serious in nature. In Republic –v- Director of Immigration Services & 2 Others Ex-Parte Olamilekan Gbenga Fasuyi & 2 Others (2018) eKLR it was held-

"It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of judicial review orders do apply. Judicial Review is about the decision-making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a Judge of the High Court of a decision: or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction- reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of law. Judicial Review is more concerned with the manner in which a decision is made than the merits of the ultimate decision. As long as the process followed by the decision-maker are proper and the decision is within the confines of the Law, a court will not interfere."

34. I am well guided by the decision. I find that the ex-parte applicant has not satisfied the requisite threshold to warrant this court to issue the orders sought.

Conclusion:

35. I find that the application is not properly before this court and it also lacks merits.

I dismiss it.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 4TH DAY OF OCTOBER 2024.

L.W. GITARI

JUDGE

4/10/2024

Wambui Nyaga for Applicant

No appearance for Respondent & Mr. Justus Omollo for 2nd & 3rd Interested Parties.

Judgment has been read out in open court.

L.W. GITARI

JUDGE

4/10/2024

