



**Republic v Office of the Director of Public Prosecutions & another;
Wamalwa & another (Exparte Applicants) (Judicial Review
E005 of 2024) [2024] KEHC 12199 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
JUDICIAL REVIEW E005 OF 2024
S MBUNGI, J
OCTOBER 4, 2024**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

-AND-

**IN THE MATTER OF ARTICLES 20, 21, 22, 23, 27, 28, 47, 48 AND 50
OF THE CONSTITUTION OF KENYA, 2010 AS READ WITH THE
PROVISIONS OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

BETWEEN

REPUBLIC APPLICANT

AND

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
KAKAMEGA CHIEF MAGISTRATES' COURT 2ND RESPONDENT**

AND

**EUGENE WANDERA WAMALWA EXPARTE APPLICANT
WESLEY NG'ANG'A ASUBWA EXPARTE APPLICANT**

RULING

1. The applicant filed this ex-parte application dated 5th September 2024 together with the chamber summons also dated the 5th September 2024.
2. The chamber summons dated 05.09.2024 sought the court's leave to have the ex-parte application admitted and heard during vacation.

3. The chamber summons was placed before Lady Justice A. Bett on 10.09.2024, the Hon. Judge declined to admit the ex-parte application to be heard during vacation for no urgency was demonstrated.
4. The court ordered the matter be mentioned on 25.09.2024 for further orders / directions. But on the said date, this court was not sitting. The judge was away on official duties.
5. The matter was then placed before this court on 01.10.2024.
6. Ms. Lumallas appeared for the applicant. Ms. Osoro appeared for the respondent.
7. Ms. Lumallas requested the court to issue conservatory orders as prayed and also grant leave to the applicants to file substantive motion, and the leave to operate as a STAY of the proceedings before the lower court MCAC NO. E001 of 2024, Republic Vs Arnold Kimiya Mamadi And Others, for the applicants stand to lose their jobs if the prosecution proceeds.
8. Ms. Osoro for the respondent told the court that she was the one who was prosecuting the criminal matter in the lower court, and that she was not served with the ex-parte application. She sought for a few minutes to look at the file so that she could be able to respond. The court agreed with concurrence of Ms. Lumallas though she intimated the court that the matter was meant to be heard ex-parte in the first instance.
9. When the court resumed, Ms. Osoro told the court she was served a day before the matter came up before the court on 01.10.2024 and thus she needed time to respond. She asked for 14 days, saying that plea was taken on 13.06.2024 and the matter in the lower court was fixed for hearing on 7th, 8th, and 9th October 2024. This application should have been filed in good time.
10. Ms. Lumallas in response said she came into the matter after the plea had been taken, that is why she filed the application late. She filed the application after she found there was no any evidence linking the 2 applicants to the charges facing them in the lower court.
11. She further told the court that there was no prejudice to be caused to the respondents if the prayers sought are granted.
12. I have considered the submissions by the counsels. I have also looked at the court record.
13. What came before Lady Justice A. Bett on 10.09.2024 was an application dated 05.09.2024 which sought the ex-parte to be heard during the vacation but not the ex-parte application itself.
14. The judge ordered the ex-parte application be considered on 25.09.2024. On this date the court was not sitting and the ex-parte application as set for consideration on 01.10.2024.
15. Judge Bett did not order for the ex-parte application to be served. Therefore Ms. Lumallas served the ex-parte application out of her own volition.
16. This was un-procedural for an ex-parte application remains an ex-parte application unless the court orders for its service and it ought to be considered ex-parte. Therefore, the respondent/counsel was not obliged to respond to ex-parte application on the 01.10.2024 as the court had not ordered for its service. Nevertheless, I have taken note of what Ms. Osoro told the court.
17. Having rendered myself as herein above, I proceed and consider the application as an ex-parte application.
18. After considering the ex-parte application, I am satisfied that the applicants have raised substantial issues touching on their fundamental rights vis-à-vis the constitutional mandate of the respondents. Issues which can be wholesomely canvassed if the applicants are allowed to prosecute the issues.

19. Therefore, I order as follows: -

- i. the Ex-Parte Applicants, Eugene Wandera Wamalwa And Wesley Ng'ang'a Asubwa be granted leave to apply for an order of certiorari to move into this Court for purposes of being quashed, a decision of the Respondent to charge them as evidenced in the Charge Sheet dated 13th June; 2024 in Kakamega Chief Magistrates Court Mcac No. E001 Of 2024; Republic Vs Arnold Kimiya Mamadi And Others, And The Criminal Proceedings Therein.
- ii. The Ex-Parte Applicant be granted leave to apply for an order of prohibition to prevent the Respondents from continuing, maintaining and sustaining any such charges and/or criminal proceedings or any such proceedings against Eugene Wandera Wamalwa And Wesley Ng'ang'a Asubwa as per the Charge Sheet dated 13th June; 2024 in Kakamega Chief Magistrates Court Mcac No. E001 Of 2024 Republic Vs Arnold Kimiya Mamadi And Others.
- iii. That the grant of leave herein does operate as a stay to stop the implementation of the decision and any such further proceedings against the ex parte Applicants, Eugene Wandera Wamalwa And Wesley Ng'ang'a Asubwa, as per the Charge Sheet dated 13th June; 2024 in Kakamega Chief Magistrates Court Mcac No. E001 Of 2024; Republic Vs Arnold Kimiya Mamadi And Others.
- iv. That given the urgency of the matter, the applicants to file the substantive motion forthwith even if it is today and serve the respondents.
- v. The respondents to file a response within 14 days upon service of the substantive motion by the applicants.
- vi. The applicants to file a rejoinder within 7 days upon being served with the response by the respondents.
- vii. The4 matter be mentioned on 14.11.2024 to confirm compliance and take directions on how to dispose off the matter.

20. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED IN KAKAMEGA THIS DAY 4TH OCTOBER 2024

S.N. MBUNGI

JUDGE

In the presence of :

Ms. Lumallas - for the applicants

Ms. Osoro- for the respondents.

Court Assistant – Elizabeth Angong'a