



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E046 OF 2021

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE
JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

TECHNOSERVICE LIMITED.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT AT MILIMANI.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

EX PARTE APPLICANTS:

1. NOKIA CORPORATION

2. ROSCHIER ATTORNEYS LIMITED

3. RAJEEV SURI

4. AAPO SAARIKIVI

RULING

The Application

1. The *ex parte* Applicants herein have filed an application by way of a Chamber Summons dated 30th March 2021, seeking the following orders:

1. This Application be certified urgent and service thereof be dispensed with in the first instance and it be heard ex parte for purposes of prayers 2 and 3 below.

2. Leave be granted to the Applicants to apply for the following judicial review orders:

a) An order of Certiorari directed at the 2nd Respondent to bring to this Court for purposes of being quashed the decision made by the 2nd Respondent on 8th December 2020 in Nairobi Chief Magistrate Court Miscellaneous Application No. 4465 of 2019- TechnoService Limited vs. Nokia Corporation and 6 others granting leave to the 1st Respondent to commence a private prosecution action against the Applicants.

b) An order of Certiorari directed at the 2nd Respondent to bring to this Court for purposes of being quashed the

decision made by the 2nd Respondent in **Milimani Criminal Case No. E171 of 2021 - TechnoService Limited vs. Nokia Corporation and 3 others** on 20th January 2021 to accept a charge sheet brought by the 1st Respondent to commence a private prosecution action against the Applicants.

c) **An order of prohibition directed at the 1st Respondent and at the 4th Respondent prohibiting each of them from proceeding with the conduct and prosecution of Milimani Criminal Case No. E171 of 2021 TechnoService Limited vs. Nokia Corporation and 3 others as against the Applicants.**

3) **The grant of leave do operate as stay of the decision to grant leave to the 1st Respondent to commence a private prosecution action against the Applicant and the prosecution of the Applicants in Milimani Criminal Case No. E171 of 2021 TechnoService Limited vs Nokia Corporation and 3 others.**

4) **The Court to issue such further and other incidental, consequential or alternative orders that it may deem just and expedient to grant.**

5) **The costs of this Application to be provided for.**

2. The grounds for the application are stated in the *ex parte* Applicants' statutory statement dated 30th March 2021, and a verifying affidavit sworn on the same date by the Aapo Saarikivi, the 4th *ex parte* Applicant.

3. In summary, the main grounds for the application are that the decision made in **Nairobi Chief Magistrate Court Miscellaneous Application No. 4465 of 2019- TechnoService Limited vs. Nokia Corporation and 6 others** to grant leave to commence a private prosecution action against the 1st Applicant, together with the 2nd, 3rd and 4th Applicants, is erroneous as it is in relation to alleged false assertions made in documents in the arbitration proceedings between the 1st Applicant and 1st Respondent, and which records were based on the information in the 1st Respondent's file at the Kenyan Companies Registry. Furthermore, that the criminal offences alleged to have been committed by the 1st Applicant of criminal offences were in relation to matters that occurred before private arbitration proceedings in Helsinki, Finland, whereas Kenyan criminal court's jurisdiction is limited only to offences that occurred within the territory of Kenya.

4. The *ex parte* Applicants also aver that the application for leave was motivated by malice or some ulterior considerations, and was devoid of good faith to the extent that the 1st Respondent had abandoned the arbitration it initiated and brought various other civil claims pending before the commercial division of the High Court, as well as the courts of Finland, in relation to the matters in dispute between it and the Applicants.

5. Lastly, the *ex parte* Applicants averred that the impugned decision to grant leave to commence private prosecution against them has resulted in charges being presented against them in **Milimani Criminal Case No. E171 of 2021 - TechnoService Limited vs. Nokia Corporation**, wherein they are required to take plea on 7th April 2021. In addition, that their application for revision of the directions made in the said criminal case to take plea was dismissed by the High Court (Ogembo J.) on 18th March 2021. They also disclosed that they had filed an appeal against the decision made in **Nairobi Chief Magistrate Court Miscellaneous Application No. 4465 of 2019- TechnoService Limited vs. Nokia Corporation and 6 others** in High Court Criminal Appeal No. E055 of 2020, together with an application seeking stay pending the hearing and determination of the appeal, which are yet to be heard by the criminal division of the High Court.

6. The *ex parte* Applicants in this respect annexed copies of the leave application filed in **Milimani Magistrates Criminal Court Miscellaneous Application No. 4465 of 2019**, and the ruling delivered and orders extracted therein, of the pleadings and orders made in the arbitration proceedings and in High Court Case No. 093 of 2020 between the 1st Respondent and 1st Applicant, of the orders accepting the charges against the *ex parte* Applicants in **Milimani Criminal Case No. E171 of 2021 - TechnoService Limited vs. Nokia Corporation & 3 others**, and of revision ruling delivered by the High Court in **HCCR Misc App No. E052 of 2021**.

The Determination

1. I have considered the *ex parte* Applicants' application and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicants have demonstrated that this matter is urgent. This is mainly for the reason that the private prosecution against the *ex parte* Applicants is imminent.

2. On the orders sought by the *ex parte* Applicants for leave to commence judicial review proceedings, the applicable law 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 main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

3. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make a cursory perusal of the evidence before it, and make a decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was in this respect explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

4. In the present application, the *ex parte* Applicants have provided evidence of the ruling and orders made by the 2nd Respondent in **Nairobi Chief Magistrate Court Miscellaneous Application No. 4465 of 2019- TechnoService Limited vs. Nokia Corporation and 6 others** granting leave for private prosecution to be commenced against them, and of the previous arbitration proceedings and civil suits with the 1st Respondent. They have also brought evidence of the charges brought against them in the private prosecution, and have averred as to

the grounds and reasons why they consider the decision to grant leave to commence private prosecution to have been erroneous.

7. However, it is evident that there are multiple court cases on the subject matter of the *ex parte* Applicants' application, and, there is an obvious risk that there may be conflicting orders given by the courts seized of the different matters. In particular, leave is being sought to being judicial proceedings with respect to the orders and proceedings in **Milimani Criminal Case No. E171 of 2021 - TechnoService Limited vs. Nokia Corporation & 3 others**, which will result in a collateral attack on the revision orders made by Ogembo J., and by a court of concurrent jurisdiction in a similar application in **HCCR Misc App No. E052 of 2021**.

8. In addition, there is a pending appeal filed by the *ex parte* Applicants against the decision in **Nairobi Chief Magistrate Court Miscellaneous Application No. 4465 of 2019- TechnoService Limited vs. Nokia Corporation and 6 others**, which is an available alternative remedy. It needs to be emphasised at this point that the availability of an adequate alternative remedy is a material consideration in the exercise of the Court's discretion to grant leave, for the reasons that judicial review is a remedy of last resort, and Courts require other avenues of redress to be first utilised in relation to the actions or decisions of a public body.

9. The exhaustion of alternative remedies is a constitutional and legal imperative under Article 159 (2)(c) of the Constitution and section 9(2) and (3) of the Fair Administrative Action Act, and as exemplified by emerging jurisprudence on the subject. Article 159(2)(c) of the Constitution in this regard obliges this Court to observe the principle of alternative dispute resolution. Specifically, with respect to the exercise of the judicial review jurisdiction of this Court, sections 9(2) (3) and (4) of the Fair Administrative Action Act state as follows:

“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

10. The Court of Appeal first embodied the doctrine of exhaustion in **Speaker of National Assembly vs Karume (1992) KLR 21**, and further clarified the doctrine under the current constitutional dispensation in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR** as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

11. In conclusion, the current application is in abuse of process of Court, and the *ex parte* Applicants should pursue the pending appeal for the appropriate relief.

The Disposition

12. I therefore find that the *ex parte* Applicants have not met the threshold of an arguable case for the foregoing reasons, and are therefore not entitled to leave to commence judicial review proceedings against the Respondents. The question of whether the said leave can operate as a stay is therefore also moot.

13. The *ex parte* Applicants' Chamber Summons application dated 30th March 2021 is accordingly dismissed with no order as to costs.

14. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF APRIL 2021

P. NYAMWEYA

JUDGE