



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

JUDICIAL REVIEW APPLICATION NO. 6 OF 2018

IN THE MATTER OF THE NATIONAL POLICE SERVICE IN ARREST AND PROSECUTION OF THE ACCUSED PERSON

IN THE MATTER OF CRIMINAL CASES NO. 1022 OF 2018 CHIEF MAGISTRATES COURT AT MALINDI

REPUBLIC.....APPLICANT

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

AND

THE CHIEF MAGISTRATES COURT AT MALINDI...1ST INTERSETED PARTY

JAMAL HAFIDHI.....2ND INTERESTED PARTY

SALIM OMAR MOHAMED.....EX-PARTE APPLICANT

Coram: Hon. Justice R. Nyakundi

Katsoleh for the Ex-parte Applicant

Ms. Sombo for the 1st Respondent

Mr. Mouko for the 1st Interested party

Onchangu Kemunto Advocates for the 2nd Interested party

Attorney General

JUDGEMENT

Background

The ex-parte applicant **Salim Omar Mohamed** was on 10.10.2018 indicted with the offence of forcible entry contrary to Section 90 of the Penal Code and the second count of threatening a breach of peace contrary to Section 95 as read with Subsection 1(b) of the Penal Code.

The particulars of the charges are that on the 1.10.2018 at Ganda village in Malindi Sub-county within Kilifi, the applicant jointly with others not before court unlawfully entered and took possession of Plot No. 11021 of originally 102 of **Jamal Hafidi Mohamed** while armed with bows, arrows and pangas chased, the said **Jamal Hafidi Mohamed** while threatening to harm him.

The application

On 26.6.2019, the ex-parte applicant filed a notice of motion pursuant to Section 889 of the Law Reform Act, Order 53 Rules 1, and 2 of the Civil Procedure Rules applied for Judicial Review supported by an affidavit dated 25.10.2018.

The applicant sought the following orders:

a. That an order of prohibition be granted against Chief Magistrate's Court at Malindi Case No. 1022 of 2018 from further proceeding with Hearing of the said criminal case and also to prevent and or forbid the respondents and the 2nd interested party from arresting and prosecuting the ex-parte applicant.

b. An order of certiorari be issued to quash the entire proceedings of Chief Magistrate's Court at Malindi Case No. 1022 of 2018.

The applicant outlined in his affidavit the details to support the reliefs under Judicial Review as:

1. That the respondents and the 2nd interested party have

(a). The respondent and the 2nd interested party have colluded and unlawfully charged and obtained warrant of arrest against the ex-parte applicant after he complained that he paid cash bail of Kshs.7,500/= to an officer at Malindi Police Station but he was never issued with official receipt.

(b). The ex-parte applicant was released on a free bond as indicated in his statement he recorded with an officer at Malindi Police Station after he paid Kshs.7,500/= for cash bail.

(c). The charges herein are maliciously filed to conceal and/or unlawful amend the complaint made by the ex-parte applicant in regard to the issue of official receipt of the cash bail he paid to an officer at Malindi Police Station.

(d). The officer whom the complaint is made against him has been listed as one of the 2nd interested party's witness in the Criminal Case No. 1022 of 2018.

(e). That on or about 10th October, 2018 four persons visited the ex-parte applicant home and introduced themselves as police officers and the owner of the land the ex-parte applicant has been living with his family.

(f). The ex-parte applicant was requested to accompany the said officers to Malindi Police Station and upon arrival he was informed that he was among the squatters who had invaded the interested party's land and his statement was taken.

(g). The ex-parte applicant on 22nd October, 2018 received another phone call and he was informed to appear in Malindi Law Court since his file had been taken to court.

(h). The ex-parte applicant on 23rd October, 2018 was informed by his brother that a cousin who is a police officer has informed him that a charge sheet had been taken to court in his absence and warrant of arrest issued against him.

(i). It is in the spirit of justice and fairness that the Honourable Court do issue the orders sought pending hearing and determination of the main motion.

The 2nd interested party filed an affidavit in opposition for grant of judicial review orders to the applicant in his affidavit dated 3.6.2019.

According, to the 2nd interested party, he deponed that on 8.10.2018 he lodged a formal complaint at Malindi Police Station in respect of the ex-parte applicant who had invaded his suit land.

That the matter was under active investigations by **PC Lagat** who subsequently submitted and charged the ex-parte applicant with two counts under the penal code of forcible detainer contrary to Section 90 and threatening a breach of the peace.

That the arguments with regard to payment of Kshs.7,500/= without being issued with an official receipt is a non-issue and does not constitute part of his complaint given and recorded in OB NO. 64/8/10/18.

That unless the honourable court declines the judicial review orders, he will suffer injustice without being given an opportunity to be heard in **Criminal Case No. 1022 of 2018 at Malindi Chief Magistrates Court.**

Besides the affidavits evidence, both counsels filed written submissions on the legal perspectives for and against judicial review application. In the succeeding analysis I would be capturing the input in the final determination.

Analysis and determination

As to the extent of judicial review jurisdiction, the legal framework and guiding principles are as illustrated in the following precedents. In the case of **Rita Biwott v Council of Legal Education Misc. Application No. 1122 of 1994** and the court stated as follows:

“Judicial review power is not like that of an appellate authority to override the decision of the council for legal education. The question to be considered is whether the council of legal education has acted on the principles of natural justice and fairness in

this particular matter, on the facts before it and in the circumstances prevailing at the material time”

In essence when approaching the court for grant of judicial review order the court exercises review jurisdiction and not that of Appeal. **De Smith’s Judicial Review 6th Edition at paragraph 5 page 225 – 6** further established the principles on the legal position underpinning judicial review. He explained that an administrative decision is flawed if it is illegal. A decision is illegal if it:

- a. Contravenes or exceeds the terms of the power which authorises the making of the decision.*
- b. Pursues an objective other than that for which the power to make the decision was conferred.*
- c. Is not authorized by any power.*
- d. Contravenes or fails to implement public policy.*

This being an application for judicial review against a decision by the Director of Public Prosecution to charge the ex-parte applicant with a criminal offence, the question would be whether as a matter of public policy and the constitutional mandate the decision was taken in contraventions of that power under Article 157 (6) (10) and (11) of the Constitution.

In affirming the jurisdiction of judicial review, the Supreme Court in India in **Partap Singh v State of Punjab AIR 1264 SC 72** held thus:

“The basic principle is that the court would not interfere with or probe into the merits of the exercise of discretion by an authority as it is not a forum to hear appeals from the decisions of the authority. They would not go into the question whether the opinion formed by the concerned authority is right or wrong. The court does not substitute its own views for that of the concerned authority.”

On this question **Desmith** in his book on Judicial Review reiterated that:

“The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision maker. The instrument will normally be enunciated policy and sometimes a prerogative or other common law power. The courts, when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the four corners of their powers or duties. They are also acting as guardians of parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of parliament’s enactments.”

It is therefore settled that Judicial Review in principle is more concerned with the decision making process than the merits of the decision, however it does not mean in principle as espoused the tenor of the decision is completely ignored.

In an earlier case on this subject, in **Commissioner of Lands v Kunste Hotel Ltd Civil Appeal No. 234 of 1995 the Court of Appeal** stated that:

“Judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process, its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.”

In applying the above principles to the facts of this case, counsel submitted and argued that the manner in which the investigating officer **PC Langat** conducted himself was improper and irregular to unlawfully charge the ex-parte applicant.

Further, counsel submitted that there exist improper motive on the part of the investigating officer who caused the ex-parte applicant to be arrested and in granting him bail of Kshs.7,500/= refused to receipt for the money. In further developing the argument counsel contended that the mission by the investigating officer not to issue the receipt for Kshs.7,500/= prompted him to charge the ex-parte applicant with fictitious offences.

Counsel indicated that the bone of contention between the ex-parte applicant and the 2nd interested party was in respect of an agreement for him to vacate the disputed property. That by virtue of the parties having reached an agreement on the conflict, it was clear that the indictment and prosecution of the ex-parte applicant was on account of malice and ill will on the part of the respondents.

The 2nd interested party on his part pointed out that the content contemplated by the ex-parte applicant is a misrepresentation of facts contrary the criminal allegations pending in court concerning the charges. The 2nd interested party highlighted that the complaint to the police station was specific in regard to the criminal acts under Section 90 and 95 of the Penal Code. The court was urged to disregard the line of arguments by the ex-parte applicant.

The real question in this application is in respect of the complaint made by the 2nd interested party and the commencement of investigations by **PC Langat**. Whether the decision to investigate and prosecute the ex-parte applicant contravenes the constitution and statute requiring exercise of discretion to grant or decline judicial review remedy.

In accordance with Article 243 and 244 of the constitution, the national police service is charged with the responsibility of maintaining law and order. The power to arrest and charge a person suspected to have committed a crime is provided for in part (III), Section 89 and Section

134 of the Criminal Procedure Code. The nature of the jurisdiction conferred upon the Director of Public Prosecution is provided for under Article 157 (6), (10) and (11) of the Constitution to institute, undertake, take over, continue or terminate, discontinue any criminal proceedings against any person before any court other than a court martial. In doing so, under sub section (10) the Director of Public Prosecution shall not be under the direction or control of any person or authority.

The constitution went on to state in Article 157 (11) that:

“in exercising the powers confirmed by this Article, the Director of Public Prosecution shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.”

On the basis of the foregoing did the investigating officer and the Director of Public Prosecution act fairly in reaching a decision to charge and prosecute the ex-parte applicant.

As regards to the issue of procedural fairness, the court in **Byrne v Kine Motograph Renters Society Ltd {1958} 2ALL ER 599** held that:

“What, then, are the requirements of natural justice in a case of this kind? First, the person accused should know the nature of the accusation made, secondly, that he should be given an opportunity to state his case and thirdly, of course, that the tribunal should act in good faith.”

It is also trite that any statutory process or act done ultravires the provisions of the constitution and statute law is void ab initio. In my view it would be expected of the ex-parte applicant to demonstrate that the investigating officer and subsequent decision by the director of public prosecution took into account irrelevant material, or ignored a material factor in the impugned decision making process.

(See the principles in **Associate Provincial Picture House Ltd v Wednesbury Corporation {1948} 1KB 223**). The court cannot usurp the role of the National Police Service or the Director of Public Prosecution unless it is shown that as the decision process stands they acted in bad faith, with malice, ill will, caprice or to a great extent the whole matter of it was not done for the public and the interest of justice.

Bearing in mind the nature of competing interest arising out of constitutional organs in their quest to champion the public interest, the court being a creature of the same constitution had this to say in **Muge Cherogony v Chief of General Staff of the Armed Forces of Kenya Misc Civil Application No. 40 of 2001** thus:

“Where the Law lays down a particular procedure for the doing of an act, such procedure may be construed to be directional or mandatory. If it is directional, then it is meant to be a guideline and or departure therefrom is not necessary fatal to the validity of the decision making process. However, if it is mandatory, then any departure renders the ultimate decision null and void.”

I pause here for a moment and in the circumstances ask the question whether the respondents in pursuit to investigate and prosecute the ex-parte applicant amidst the many considerations that go into the making of the decision as vested by the constitution did so act to bring to the ambit of judicial review jurisdiction at the decision jurisdiction to call for the remedy of prohibition and certiorari.

A writ of prohibition being sought by the ex-parte applicant is one which seeks to prohibit or stop the already initiated criminal proceedings before the Magistrate court. The ultimate question is whether the Magistrate court has jurisdiction over the proceedings initiated by the Director of Public Prosecutions? Beyond the issues being agitated for by the ex-parte applicant, the right to a fair trial under Article 50 of the Constitution is insulated with determinative rights which the trial court is empowered to give effect to ensure his fundamental rights are not threatened or violated.

Examining the constitution as a whole and the principles of Law governing the writ of prohibition, in the various precedent setting cases starting with **Wednesbury (supra)** and the well known case of **Anisimic Ltd v Foreign Compensation {1969} 1 ALL ER 1969 1 AC 147** prohibition will issue only in cases of extreme necessity. In considering the threshold issue, the judicial review court has the duty to define whether the aggrieved ex-parte applicant has no remedy in the tribunal body or for that matter the Magistrate court.

In their capacity as chairman, or persons or in the capacity of judicial or quasi officers of the lower court, any acts done in a judicial capacity are amenable to on appeal.

However, that is not all, in the nature of an administrative or executive decision, supervisory powers of review becomes the avenue to restrain any act done ultravires.

As such the order of certiorari as a remedy is not available to the exparte applicant. This as demonstrated in the cases of **Elizabeth Wainaina and others v Board of Governors Pangani Girls School Misc. Civil Case No. 818 of 1992, R v Judicial Commission of Inquiry into Goldenberg Affair and others ex-parte George Saitoti {2006} eKLR, R v The Staff Disciplinary Committee of Maseno University and others ex-parte Prof. Okello Misc. Application No. 227 of 2003.**

By unanimous decisions at different circumstances, it is plain that the writ of certiorari, is not a remedy to be disguised as an appeal, but it does follow through where the impugned acts in existence prima facie demonstrate an error of Law, on the face of the record, irregularity, procedural and substantive unfairness and absence or excess of jurisdiction by the inferior body, person or authority.

The importance of these remedies should not be underestimated as the prerogative orders of prohibition and certiorari sought by the ex-parte applicant must meet the prima facie test as a prerequisite for grant of such remedies.

Whether there is a breach of the rules of natural justice, I hasten to add that the respondents have a duty to satisfy the issues of fact and law in arriving at its determination to investigate and prosecute the ex-parte applicant. The legal issue which the court must address is whether the public authority or person denied the ex-parte applicant his fundamental rights under Article 49 and 50 of the Constitution.

Infact, my reasoning is that there is a legitimate expectation from the public that any person or body exercising jurisdiction of a nature of a police officer or public prosecutor is to be bound by the national values and the principles of governance under Article 10 of the Constitution. To buttress the position, based on our adversarial system of justice, the burden bearer in cases of this nature is the applicant to demonstrate existence of a prima facie case of infringement against the respondents. In this regard, once the ex-parte applicant tenders prima facie evidence against the respondents, the onus shifts to the respondent to show that the decision so challenged was founded within the ambit of Article 10 of the Constitution.

Its expedient at this stage to fortify the legal position by the decision of the privy council in **Francis Paponette and others v The Attorney General of Trinidad and Tobago {2011} 3 WLR 219**. In this case, the court made the following observations:

“If the authority does not place material before the court to justify its frustration of expectation, it runs the risk that the court will conclude that there is no sufficient public interest and in that in consequence its conduct is so unfair as to amount to an abuse of power.”

The Board agrees with the observation of **Lords L. J. in R (Nadarajah) v Secretary of State for the Home Department {2005} EWCA CIV 1363 AL 68**:

“The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as proportionate measure in the circumstances. It is for the authority to prove its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified.”

(See **Keroche Industries Ltd v Kenya Revenue Authority & Others MISC. APPLICATION NO 1285 OF 2007**).

Applying this principles for all intents and purposes its expected of the ex-parte applicant to call before court material to establish a prima facie case that would call upon the respondents to answer.

Indeed, the court has had occasion to examine the ex-parte applicant evidence stipulating the decision making process by the respondents. The facts and context of the indictment as it emerges from the replying affidavit of the interested party and submissions there was no denial of procedural fairness capable of subjecting the decision to judicial review remedy. The evidence discloses that the investigations was triggered by a complaint booked at Malindi Police Station. There is no doubt that upon investigations, a recommendation to charge the ex-parte applicant was made to the Director of Public Prosecution. Its on this the applicant submitted that there is a clear case for the prerogative orders to issue against the decision making process of the respondents.

As noted by the persuasive case of **Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd 2 NZLR 641** the court addressed itself on the criteria to guide in exercise of discretion to grant judicial review remedy as follows:

“The authorises, amply demonstrates that unfairness can be a ground for judicial review, but it does not follow that anything that can be disclosed as unfair will suffice. What is required is unfairness of eh kind illustrated by the cases or of a similar nature based on a proper application of the same principles in each case the particular facts must be examined including the nature of the unfairness relied upon and whether it is such as to justify the intervention of the court.”

It follows that the victim of the offence should not in the ordinary way be denied an opportunity to have his or her day in court to present the evidence for the criminal complaint to be adjudicated on the merits under Article 50 of the Constitution because of a procedural default, unless the ex-parte applicant demonstrates that the impropriety in the decision making process has occasioned prejudice or was an abuse of the process.

It is only procedural and in the interest of justice to do so. The primary consideration of a judicial review judge as a matter of practicability and governance, was well advanced by Learned author **Clive Lewis in judicial remedies in Public Law 1992** under the subheading:

“Impact on Administration observed that “The courts now recognize that the impact on the administration is relevant in the exercise of their remedial jurisdiction quashing decisions may impose heavy administrative burdens on the administration, divert resources towards re-opening decisions, and to lead to increased and unbudgeted expenditure. Earlier cases took the robust line that the law had to be observed, and the decision invalidated. Whatever the administrative inconvenience based. The courts nowadays recognize that such an approach is not always appropriate and not be in the wider public interest. The effect on the administrative process is relevant to the courts remedial discretion and may prove decisive. This is particularly the case when the challenge is procedural rather than substantive, or if the courts can be certain that the administrator would not reach a different decision even if the original decision were quashed. Judges may differ in the importance they attach to the disruption that questioning a decision will cause.”

From the affidavit evidence and submissions by counsel, it emerges that the ex-parte applicant set of circumstances do not involve any of the grounds on judicial review under Section 7 of the Fair Administration Action Act 2015 which outlines the permissible scenarios calling for interference by the High Court and grant of writs of certiorari, mandamus or prohibition.

Further as observed above by the Learned author **Clive Lewis**, it is for the court to determine whether the body has acted intra-vires or ultra-

vires with respect to the applicant rights. These elements have been recognised in the precedent sectioning case of Council of Civil Service Unions v Minister for the Civil Service {1985} AC 374 where **Lord Diplock** remarked:

“One can conveniently classify under the three heads, the grounds on which administrative action is subject to control by judicial review the first ground I would call illegality, the second irrationality and the third procedural impropriety, that is not to say that further development on a case by case basis may not in course of time added further grounds.”

Further, **Lord Diplock** indicated the concepts

“By illegality, as a ground for judicial review, meant that the decision maker must understated correctly the law that regulates his decision making power and give effect to it. Whether he had or not is par excellence of justifiable question to be decided. In the event of a dispute, by those persons, the Judges by whom the judicial power of the state is exercisable. By irrationality- I mean what can now be succinctly referred to as Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls under this category is a question that Judges by their training and experience should be well equipped to answer. Thirdly, procedural impropriety, failure to observe fairness towards the person who will be affected by the decision. Proportionality – this means that in any administrative decision and action, the end and means relationship must be rational unreasonableness. This means that either the facts do not warrant the conclusion reached by the authority or the decision is partial and unequal in its operation.”

It will be seen that the factual basis of the applicant’s claim was disputed by the respondent and 2nd interested party and if correct it would mean that the applicant’s has not satisfied the grounds to have the decision reviewable.

I appreciate the force of Learned counsel arguments regarding the question of whether the 1st and 2nd respondent initiated criminal proceedings in breach of the constitutional provisions on fairness and the grounds as elucidated in the **Council of Civil Service Unions case (supra)**.

The grounds posited by the ex-parte applicant do not demonstrate the abuse of the process by the respondents in investigating and commencing a prosecution before Malindi Court for purposes of giving effect to the complaint made to the police by the 2nd interested party.

It is of critical importance that under Article 157 (10) (11) of the Constitution the decision by the Director of Public Prosecution to initiate, and or continue criminal proceedings against the ex-parte applicant is not prohibited or quashed unless sufficient consideration is given to Section 7 of the Fair Administrative Action Act.

In sum the decisive set of facts and evidence of the ex-parte applicant lacks in error on the record, the jurisdictional issue or lack of it by the inferior body, person or authority to invoke prerogative remedies of judicial review.

Subsequently the decision of the respondents cannot be faulted. The notice of motion should be dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF FEBRUARY 2020

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R NYAKUNDI

JUDGE

In the presence of:

1. Mr. Obaga h/b for Katsoleh for the the ex-parte applicant
2. Mr. Nyoro h/b for Ms. Sombo for the 1st respondent
3. Ex-parte applicant