



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC. E032 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

MINAL ROHTKUMAR SHAH.....1ST APPLICANT

JILAN SUDHIR SHAH.....2ND APPLICANT

YASH COMMODITIES (KENYA) LIMITED.....3RD APPLICANT

VERSUS

THE OFFICE OF THE DIRECTOR OF PUBLIC

PROSECUTIONS.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF CRIMINAL ...

INVESTIGATIONS.....3RD RESPONDENT

CHIEF MAGISTRATE'S COURT,

KIBERA LAW COURTS.....4TH RESPONDENT

AND

ZACHARIA NDIU NGOCHI.....1ST INTERESTED PARTY

LILIAN KIRITO.....2ND INTERESTED PARTY

RULING

1. The 1st and 2nd Applicants herein are directors of the 3rd Applicant, and they are aggrieved by the decision to charge the 1st Applicant before the Kibera Law Courts in **Chief Magistrate Criminal Case No. 700 of 2020 - Republic vs. Minal Rohtkumar Shah** with the offence of obtaining goods by false pretences contrary to section 313 of the Penal Code. Further, that the Respondents now intend to similarly arrest and institute criminal prosecutions against the 2nd Applicant. The Applicants have therefore filed an application by way of a Chamber Summons dated 4th September 2020, seeking the following orders:

1. **THAT** this Court be pleased to certify the application as urgent and admit the same for hearing ex parte in the first instance.

2. **THAT** the Applicants be granted leave to apply for a judicial review order of Certiorari to remove to this Court for the purposes of quashing the decision by the Respondents to arrest, charge and institute criminal prosecution against the 1st

Applicant in Kibera Chief Magistrates Criminal Case No. 700 of 2020 - Republic vs. Minal Rohtkumar Shah or any other criminal proceedings in relation to the supply of cargo by the Interested Parties.

3. **THAT** leave be granted to the Applicants to apply for an order of prohibition directed to the Respondents from either jointly or severally commencing, sustaining or proceeding with Kibera Chief Magistrates Criminal Case No. 700 of 2020 - Republic vs. Minal Rohtkumar Shah or any other criminal proceedings against the Applicants herein with respect to any dealing relating to the supply of cargo by the Interested Parties.

4. **THAT** the leave so granted do operate as a stay of any decision of the Respondents either jointly or severally to arrest or charge and or proceed with any criminal proceedings against the Applicants herein in the subordinate Court or any other Court pending the hearing and determination of this matter.

5. **THAT** costs of this Application be provided for.

2. The said application is supported by a statutory statement dated 4th September 2020, and a verifying affidavit sworn on the same date by the 2nd Applicant. The main ground for the application is that the basis of the complaint and prosecution in the criminal proceedings in **Kibera Chief Magistrates Criminal Case No. 700 of 2020** is of a civil and commercial nature, and that the 3rd Applicant had filed a civil suit against the 1st Interested Party, one of the complainants, in **Milimani CMCC E 4750 of 2020 - Yash Commodities K. Limited vs Zacharia Ngochi**, to demand for the outstanding amount of Kshs. 1,821,400/= for goods supplied but not paid for. The Applicants annexed copies of the pleadings in the said suit, and other documents evidencing the relationship of seller and buyer between them and the 1st Interested Party.

The Determination

1. I am satisfied that the Applicants have demonstrated that this matter is urgent, and that the same ought to be heard on a priority basis in light of their impending criminal prosecution.

2. On the orders sought by the 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 cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was 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. In the present application, the Applicants have provided evidence of their business dealings with the 1st Interested Party and the civil suit they have commenced against him as a result.

4. To this extent I find that the Applicants have met the threshold of an arguable case, and are therefore entitled to the leave sought to commence judicial review proceedings against the Respondents.

5. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

6. It has in this regard been held that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation. See in this regard the decisions in **Taib A. Taib vs. The Minister for Local Government & Others, Mombasa HCMISCA. No. 158 of 2006; Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995; Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others, (2014) e KLR; and James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR.**

7. In the present application, the Applicants aver that the hearing of the criminal case instituted against them is set to commence in October 2020, and the criminal prosecution therefore is not yet implemented, but is also of a continuous nature and amenable to stay.

The Orders

8. In light of the foregoing observations and findings, the Applicants' Chamber Summons dated 4th September 2020 is merited to the extent of the following orders:

I. The Applicants' Chamber Summons application dated 4th September 2020 be and is hereby certified as urgent, and that

the same is hereby admitted for hearing *ex parte* at the first instance.

II. The Applicants are granted leave to apply for a judicial review order of Certiorari to remove to this Court for the purposes of quashing the decision by the Respondents to arrest, charge and institute criminal prosecution against the 1st Applicant in Kibera Chief Magistrates Criminal Case No. 700 of 2020 - Republic vs. Minal Rohtkumar Shah or any other criminal proceedings in relation to the supply of cargo by the Interested Parties.

III. The Applicants are granted leave to apply for an order of prohibition directed to the Respondents from either jointly or severally commencing, sustaining or proceeding with Kibera Chief Magistrates Criminal Case No. 700 of 2020 - Republic vs. Minal Rohtkumar Shah or any other criminal proceedings against the Applicants herein with respect to any dealing relating to the supply of cargo by the Interested Parties.

IV. The leave so granted shall operate as a stay of the criminal proceedings in Kibera Chief Magistrates Criminal Case No. 700 of 2020 - Republic vs. Minal Rohtkumar Shah or any other criminal proceedings brought against the Applicants in relation to the supply of cargo by the Interested Parties, pending the hearing and determination of the Applicants' substantive application or until further orders by this Court.

V. The costs of the Chamber Summons dated 4th September 2020 shall be in the cause.

VI. The Applicants shall file and serve the Respondents with the substantive Notice of Motion application, and shall also serve the Respondents with the Chamber Summons dated 4th September 2020 and its supporting documents, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.

VII. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

VIII. This matter shall be mentioned on 12th October 2020 for further directions.

IX. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the Applicants' substantive application the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

X. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

XI. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the description of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

XII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XIII. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XIV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 12th October 2020

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the Applicants by electronic mail by close of business on Monday, 7th September 2020.

XVI. Parties shall be at liberty to apply.

9. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF SEPTEMBER 2020

P. NYAMWEYA

JUDGE