



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 87 OF 2019

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

IN THE MATTER ARTICLE 48 OF THE CONSTITUTION

AND

IN THE MATTER OF THE KENYA REVENUE AUTHORITY ACT

AND

IN THE MATTER OF THE EAST AFRICA COMMUNITY CUSTOMS MANAGEMENT ACT 2004

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT

AND

IN THE MATTER OF THE STANDARDS ACT.

AND

IN THE MATTER OF THE LAW REFORM ACT SECTIONS 8 AND 9

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE SENIOR PRINCIPAL MAGISTRATE, NAIROBI.....RESPONDENT

EX-PARTE

KENYA REVENUE AUTHORITY

DIRECTOR OF CRIMINAL INVESTIGATION.....1ST INTERESTED PARTY

KENYA BUREAU OF STANDARDS.....2ND INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD INTERESTED PARTY

CHARLES OGEKA ONGWAE.....	4 TH INTERESTED PARTY
ERIC CHESIRE KIPTOO.....	5 TH INTERESTED PARTY
PETER NYANJUI NDUNG'U.....	6 TH INTERESTED PARTY
MARTIN MUSWANYA NYAKIAMO.....	7 TH INTERESTED PARTY
POLE MWANGENYI.....	8 TH INTERESTED PARTY
ERICK KARIUKI KIRIMI.....	9 TH INTERESTED PARTY
BENSON ODUOR NGESA.....	10 TH INTERESTED PARTY
KARIM LOFTI SENHADJI.....	11 TH INTERESTED PARTY
MALIKA KIRAMA.....	12 TH INTERESTED PARTY
YOUNES ADDOU.....	13 TH INTERESTED PARTY
OCP (K) LIMITED.....	14 TH INTERESTED PARTY

RULING

The Introduction

1. This matter has its genesis in a ruling dated 13th March 2019 and subsequent orders issued on 13th March 2019 by Hon. K. Cheruiyot, the Senior Principal Magistrate, who is the Respondent herein. The said orders were issued in **Nairobi Chief Magistrate's Criminal Case No. 1151 of 2018- Republic vs Eric Chesire and 9 Others**, and the Respondent directed as follows therein:

- a) The Chief Manager of Customs, Kenya Revenue Authority(KRA) of Kilindini Port to facilitate access to the warehouse by removing the seals thereon and that Mr. Benard Nguyo to supervise alongside Mr. Nicholas Kinoti, the Regional Manager, KRA, Coast;
- b) Police assistance be provided by the Officer in Charge of the Police Operation in that jurisdiction;
- c) Mr. Bernard Nguyo to supervise alongside Mr. Nicholas Kinoti, the Regional Manager, KRA, Coast;
- d) The sampling be done on 26th and testing on 27th March, 2019 at 10.00am;
- e) Mr. Nguyo be discharged and orders modified accordingly; and
- f) The matter is mentioned on 4th April, 2019.

2. On 27th March 2019, the Kenya Revenue Authority, which is the *ex parte* Applicant herein, filed the instant application by way of a Chamber Summons of the same date seeking the following orders:

- a) **That leave be granted to the *ex-parte* Applicant to apply for an order of Certiorari directed to the Respondent to remove into this Court and quash the decision in the order dated 13th March, 2019.**
- b) **That leave be granted to the *ex-parte* Applicant to apply for an order of Prohibition directed to the Respondent to remove into this Court and be prevented from making further orders directing the *ex parte* Applicant or any of its officers from removing the seals placed at the warehouse at Bollore without involving all the relevant government agencies;**
- c) **That the grant of leave to apply for the above orders do operate as stay of the decision and orders of the Respondent of 13th March 2019 until the hearing and determination of the substantive Notice of Motion for judicial review.**
- d) **Any other orders as the Court may deem fit to grant.**
- e) **The cost of the application be provided for.**

3. The matter came for *ex parte* hearing on 27th March 2019, when this Court (Mativo J.), directed the *ex parte* Applicant to serve the other parties for an *inter partes* hearing that was held on 3rd April 2019. The *ex parte* Applicant had originally sued the Respondent, and had

joined the Director of Criminal Investigations, Kenya Bureau of Standards and the Director of Public Prosecutions as the 1st, 2nd and 3rd Interested Parties respectively. An *inter partes* hearing was held on 3rd April 2019, when this Court, after perusal of the court file for **Nairobi Chief Magistrate's Criminal Case No. 1151 of 2018- Republic vs Eric Chesire and 9 Others** directed that the accused persons therein, who are the beneficiaries of the orders sought to be quashed, be joined as the 4th to 14th Interested Parties herein and be served with the said application and a notice for the further hearing. The application was subsequently held on 15th April 2019 by way of oral submissions. The counsel for the *ex parte* Applicant were Mr. Ochieng, Ms Amadi and Mr. Nyaga, while Mr. Munene represented the Respondent. The 1st and 3rd Interested Party was represented by Mr. Muteti and Mr. Akula; Mr. Oonge appeared for the 4th, 6th, 7th and 9th Interested Parties; and Mr. Gichamba for the 5th Interested Party. Hon. Paul Muite SC made submissions for the 10th Interested Party.

The *ex parte* Applicant's Case

4. The Application is founded upon facts contained in a Statutory Statement dated 27th March 2019, as verified in an affidavit sworn on the same date by Nelly Ngovi Kasiso, an employee of the *ex parte* Applicant working in its Investigation and Enforcement Department. The *ex parte* Applicant contends that the orders made by the Respondent in **Nairobi Chief Magistrate's Criminal Case No. 1151 of 2018- Republic vs Eric Chesire and 9 Others** are directed to the officers of the *ex parte* Applicant and places obligation upon them to remove seals to allow access to the fertilizer and also take part in the supervision of the sampling and retesting of the fertilizer which is held at Bollore Transport and Logistics Warehouse. However, that neither the *ex parte* Applicant nor its officers named therein were party to the criminal proceedings, nor were they involved in the proceedings therein leading to the issuance of the said orders. Further, that the subject fertilizer is held at Bollore Warehouse outside the jurisdiction of the Chief Manager of Customs, KRA Kilindini Port.

5. The *ex parte* Applicant further contends that the impugned orders are substantive and have far reaching consequences, in as far as the fertilizer consignment is in the control of the multi-agency taskforce which took part in the investigation leading to the charges against the accused persons in **Nairobi Chief Magistrate's Criminal Case No. 1151 of 2018- Republic vs Eric Chesire and 9 Others**, and the investigations are still ongoing. Further, that, the subject fertilizer are goods under customs control as provide under Section 16 of the East African Community Customs Management Act, 2004, and are subject to joint verification by several government agencies including the Director of Criminal Investigations, the Anti-Counterfeit Agency, Port Health, Kenya Plants Health Inspectorate and National Environment Management Authority, which bodies have to be involved before any goods under customs control are interfered with, and which critical roles which are distinct and are all meant to ensure the goods allowed into the country meet the approved standards and are not harmful to public health and safety. The *ex parte* Applicant stated that the lead agency in the multi-agency lead process is the Director of Criminal Investigations that had undertook the initial sampling and recommended prosecution culminating to the said criminal case.

6. According to the *ex parte* Applicant, the goods in question are sealed to ensure integrity of the consignment and safeguard them for the above named agencies and as exhibits intended for production in Court. That as such, it is holding the consignment following investigation and findings by the 1st Interested Party who undertook tests and found the same to contain mercury, leading to the prosecution of the officers of the 2nd Interested Party for failing in their mandate thereon. The *ex parte* Applicant therefore states that the Respondent ought to have involved it, the Interested Parties and the state agencies of the Multi-Agency Taskforce in the proceedings therein. The *ex parte* Applicant further states that breaking the seals at the Bollore warehouse in the absence of the Multi-Agency Taskforce and especially the 1st Interested Party may interfere with the integrity of the evidence, and affect any subsequent criminal cases the 1st Interested Party may intend to pursue on relation to the consignment.

7. The *ex parte* Applicant contends that the impugned orders directed towards the officers of the *ex parte* Applicant were made without involving them, and is therefore tainted with procedural impropriety for not affording all the relevant agencies a chance to be heard contrary to the rules of natural justice. Further, the Respondent in issuing the impugned orders failed to take into account that the consignment was held at the behest of other government agencies who were not party to the proceedings. Subsequently, it was incumbent upon the Respondent to direct that all relevant agencies involved in the verification of goods being entered into the country be present in the proceedings to allow for their positions to be considered before granting the said orders.

8. It was also contended that the Respondent did not appreciate that the seals were placed upon the consignment so as to preserve the integrity of the consignment for the benefit of the 1st Interested Party, who through its investigation had established that the consignment was tainted and unsuitable for release into the market for public use. Furthermore, that the Respondent did not hear the 1st Interested Party before making the impugned orders. It is their contention that the Respondent erred in assuming that the 1st Interested Party on whose behest the consignment were being held had finalized their investigation. They also argued that the Respondent failed to consider that unsealing the warehouse without the involvement of all relevant bodies will present a health hazard to the Kenyan population. The *ex parte* Applicant thus urged that the Respondent's impugned ruling and orders were unreasonable and irrational for the foregoing reasons.

9. The *ex parte* Applicant also faulted the impugned orders for being vague and irrational to the extent that they do not state who was carrying out the re-sampling and retesting and only asked Mr. Nguyo who is the acting Managing Director of the 2nd Interested Party (Kenya Bureau of Standards) alongside Mr. Nicholas Kinoti who is an officer of the *ex parte* Applicant, to supervise the process. In addition, that its officers, as named in the impugned orders, lack the technical capacity to undertake the directives of the Respondent, and as such it is not in a position to comply with the same. According to the *ex parte* Applicant, the Respondent ought to have identified the body to undertake the sampling and testing, and issued directions regarding resealing taking into account the distinct roles of all the government agencies that formed part of the multi-agency taskforce.

10. Lastly, it is the *ex parte* Applicant's case that the seals in question cannot be broken in the absence of certain critical agencies including the Director of Criminal Investigations, the Anti Counterfeit Agency, Port Health, Kenya Plants Health Inspectorate and National Environment Management Authority. The *ex parte* Applicant also contends that the goods are under the purview of 1st Interested Party who detained them for purposes of investigation and further are exhibits in the continuing prosecutions. Hence, breaking the seals would prejudice the case and amount to interference with the evidence.

11. Mr. Ochieng reiterated these arguments during his submissions, and cited the decision in **Republic vs Chief Magistrate Milimani Law Courts & 5 Others ex parte Google Kenya Limited (2018) e KLR** where the Court granted judicial review orders where the applicable statutory procedure was not followed. He also relied on Articles 22 and 23 of the Constitution on the authority of the Court to uphold the Bill of Rights, and for the position that judicial review that judicial review is now a constitutional remedy and leave is no longer necessary. The decision in **Republic vs Kenyatta University ex parte Ochieng Orwa Domnick & 7 Others (2018) e KLR** was cited for this position.

The Respondent's Case

12. The Respondent did not file any response to the application, and Mr. Munene in his submissions stated that he would leave it to the Court to make the appropriate decision on the issue of leave and stay.

The Interested Parties' Cases

13. The 1st and 3rd Interested Parties supported the application for leave and stay, and Mr. Muteti submitted that under Article 23 of the Constitution the requirement for leave is no longer necessary where a matter touches on the infringement of rights, and Courts should not shut the door on a litigant seeking redress and protection of Bill of Rights. That the Applicant, having not been heard, should therefore be granted the opportunity to move the Court and be granted a fair hearing.

14. Dr. Nyaundi for the 4th Interested Party addressed the Court on points of law raised by the application, and relied on the replying affidavit filed by the 10th Interested Party. His position was that the application is brought under Order 53 of the Civil Procedure Rules which require leave to be granted before judicial review proceedings are commenced. Further, that the Applicant's case is frivolous and brought in bad faith, as it has not disclosed that the issues raised herein are pending in the Court of Appeal, after similar orders were made in applications for revision and appeal and denied by the High Court.

15. Benson Oduor Ngesa, the 10th Interested Party, filed a replying Affidavit dated 10th April 2019, opposing the instant application. He avers that he is the 7th accused person in Nairobi Criminal Case no. 1151 of 2018, and that the *ex parte* Applicant is economical with the truth. He gave a chronological account of the events and orders given by the trial court for resampling and retesting, which orders he claimed have all been defied by the 2nd Interested Party working in cohorts with the *ex parte* Applicant. He in this respect s averred that:

- a) On 15th January 2019, the trial court ruled that in the absence of the samples and the fact that there was no previous communication on mercury, fresh samples should be collected from the same consignment in the warehouse, and retested.
- b) On 15th January 2019, the Principal Magistrate issued an order in the trial Court for fresh samples to be collected from the warehouse in Mombasa and tested by the 2nd Interested Party in the presence of all interested parties and an independent laboratory.
- c) That the 2nd Interested Party and 3rd Interested Party declined to obey the trial Court's order, despite the 10th Interested Party, his advocates on record and duly appointed independent laboratory expert travelling to Mombasa for the resampling exercise in compliance with the orders of 15th January 2019, which exercise never took place.
- d) On 4th February 2019, the trial Court issued another order for sample collection on 11th February, 2019 in Mombasa, and for testing on 12th February 2019 in the 2nd Interested Party's laboratory in Nairobi.
- e) That the 3rd Interested Party applied for stay of the orders of 4th February 2019 in the High Court. That on the said 4th February 2019, new dates were agreed on by consent, being, 14th February 2019 for resampling and 15th February 2019 for retesting, while a hearing date of the stay application was set for 11th February 2019 in the High Court.
- f) On 13th February 2019, the High Court dismissed the application for stay in relation to re-testing and issued an Order to the 2nd Interested Party and 3rd Interested Party for samples to be taken in Mombasa on 15th February 2019 and retesting in Nairobi on 15th February 2019 as earlier consented, in the presence of all interested parties and an independent laboratory. That the court order was served to all parties.
- g) That together with his advocates and an independent team from USA, the deponent travelled to Mombasa on 14th February 2019, the 2nd Interested Party and 3rd Interested Party defied the court order and failed to appear.
- h) On 15th February 2019 during a mention before the trial Court, the 3rd Interested Party said that the court order was not clear and needed modification. The trial court modified the orders and ordered that new dates for resampling be 20th February 2019 and 21st February 2019. The court order was issued and served accordingly.
- i) On 20th February 2019 the deponent, his lawyers and independent laboratory travelled to Mombasa, but that the 2nd Interested Party and 3rd Interested Party once again did not show up.
- j) That the 3rd Interested Party instead proceeded to the Court of Appeal in an attempt to obtain a stay order which was not granted.
- k) That the application which is presently before this Court is seeking the same orders as the revision application for Stay of the resampling and retesting.

16. The 10th Interested Party further averred that his advocates asked the Court to summon the Ag. Managing Director of the 2nd Interested Party for contempt of court. That, the prosecution brought a letter from the 2nd Interested Party dated 22nd February 2019 suggesting that the fertilizer has been in warehouse for a long time and its condition may have changed. It is also averred that the deponent's advocate informed the Court that during the visit to Mombasa, he went to the office of Mr. Nicholas Kinoti, the *ex parte* Applicant's Regional Manager Coast, and issued him with the order, and that Mr. Kinoti informed him that he is ready to organize for breaking of the seals as soon as the 2nd Interested Party's team were ready. That this is the basis upon which Mr. Nicholas Kinoti's name was also included in the Court order. That therefore, the *ex parte* Applicant has been aware of the requirements and have never raised any issue.

17. It was deponed by the 10th Interested Party that the trial court on 6th March 2019 made a ruling that the 2nd Interested Party's Managing Director be summoned to appear in court personally on 12th March 2019 to show cause why he should not be punished for disobeying the court order. It is averred that the said Ag. Managing Director appeared on the 13th March 2019, and upon hearing the Ag. Managing Director, the trial Court issued further orders that resampling and retesting of the fertilizer has to proceed, and ordered that the exercise be carried out on the 26th and 27th March 2019 respectively, which is precisely the exercise the *ex parte* Applicant is out to stop.

18. In addition, that on 26th March 2019, the High Court dismissed the prosecution's application for revision of orders in which the 3rd Interested Party had sought stay orders, and that the chronology that has been given demonstrates the 1st to 3rd Interested Parties continuous defiance of Court orders by seeking stay orders, the common denominator being avoiding and/or stopping the resampling and testing of the subject fertilizer. That, in view of this, the *ex parte* Applicant and the 1st to 3rd Interested Parties are not entitled to the discretionary orders being sought. The 10th Interested Party annexed copies of the various orders.

19. The deponent stated that he was arrested on 22nd June 2018 and charged with attempted murder for releasing fertilizer with excessive mercury, adding that the remaining fertilizer bags have been in go downs locked/sealed since June 2018. That, the Court order directed at the *ex parte* Applicant is intended for them to break the seals so that the 2nd Interested Party may take samples for testing, under the Court's supervision to facilitate the criminal proceedings. Hence the orders of 13th March 2019 were not made against the *ex parte* Applicant arbitrarily. The deponent disagreed with the assertion that implementing the orders of 13th March 2019 will compromise the integrity or security of the subject fertilizer, for the reasons the order require the seals to be removed for the 2nd Interested Party to collect samples after which the godown will be locked by the *ex parte* Applicant and the seals replaced by new ones. Thus, the integrity of the consignment is ensured even after resampling and retesting by the 2nd Interested Party.

20. According to the deponent, the *ex parte* Applicant (through Mr. Abdi Malik) and Mr Nicholas Kinoti (the *ex parte* Applicant's Coast region head) have been accordingly served with the court orders but are yet to comply with the same. Further, that the 1st Interested Party has similarly been served with the sampling and retesting orders and are expected, as the lead of the multi-agency team, to coordinate with the others in the same manner they did in collecting samples and locking/sealing go-downs. That the *ex parte* Applicant has therefore not set out the procedural impropriety occasioned by the impugned orders.

21. He also averred that since the matter before the trial court is of a criminal nature, a party need not be a party to the said proceedings before orders are granted against them, particularly if the orders are aimed at advancing the accused person's rights under Article 50 of the Constitution. According to the deponent, it is the interested parties that are using the *ex parte* Applicant to frustrate the orders of the trial Court. He reiterated that all the relevant interested parties are aware of the purpose of the orders for resampling and retesting and cannot feign ignorance, and that the instant application is a continuation of the *ex parte* Applicant's tactics to delay and frustrate the court orders granted in his favour.

22. Hon. Paul Muite SC in his submissions on behalf of the 10th Interested Party reiterated the foregoing arguments, and submitted that the impugned orders were made in the context of Article 50 of the Constitution on the right of his client to a fair hearing. Further, that a distinction has to be made between an application for judicial review orders made under Article 47 of the Constitution and Order 53 of the Civil Procedure Rules. Reliance was placed on the decision in **Republic vs Kenyatta University ex parte Ochieng Orwa Domnick & 7 Others (supra)** on the requirement for leave, and on the threshold to be met for the grant of leave.

The Determination

23. The preliminary issue that this Court needs to address is the one raised by the Applicant as to whether leave is necessary with the new Constitutional provisions. This issue was addressed by Mativo J. which position I am in agreement with, in **Republic vs Kenyatta University ex parte Ochieng Orwa Domnick & 7 Others (supra)** as follows:

“28. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. First, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the Court is now constitutionally guaranteed. This makes the requirement for leave in cases citing violation of the Bill of Rights unnecessary. Third, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3)(f). Fourth, section 7 of the Fair Administrative Action provides that "any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to- a court in accordance with [section 8](#); or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7 (2) of the act provides for grounds for applying for Judicial Review.

29. Court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a constitutional supervision of public authorities involving a challenge to the legal validity of the decision.[\[12\]](#) Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power

and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed “theory of a holistic interpretation of the Constitution.

30. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the Courts to control the exercise of public power are now regulated by the Constitution.

31. It is therefore my conclusion that in cases citing violation of the Bill of Rights or violation of the Constitution, leave of the Court is not a prerequisite before instituting the proceedings nor is it necessary to invoke the provisions of Order 53 of the Civil Procedure Code, 2010 or sections 8 and 9 of the Law Reform Act.^[13]No matter how noble and worthy of admiration Court procures are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail.”

24. The instant application was brought as a judicial review application under the provisions of Order 53 of the Civil Procedure Rules, and not by way of a constitutional petition which are the proceedings where leave is not necessary for the grant of judicial review orders. The applicable law on leave to commence judicial review proceedings is therefore *Order 53 Rule 1*, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. On whether leave once granted should operate as a stay, Order 53 Rule 1(4) of the Civil Procedure Rules further provides as follows:

“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.”

25. The reason for the leave was 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** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

26. Various criteria come to play in the granting of leave to commence judicial review proceedings, including the capacity and interests of the applicant, the nature of the applicant’s claim, the merit or otherwise of the applicant’s claim and the propriety of judicial review proceedings to resolve the claim. In the present application, this Court will have to consider two relevant factors that have been raised by the Interested Parties. These are firstly, that a court of competent jurisdiction has already declined to grant orders with respect to the impugned orders of 13th March 2019 in previous revision proceedings, and that an appeal from this decision is pending before the Court of Appeal. Secondly, that the trial Court, having been the Court that granted the impugned orders **Nairobi Chief Magistrate’s Criminal Case No. 1151 of 2018- Republic vs Eric Chesire and 9 Others** might be the appropriate fora powers to address the Applicant’s concerns and claims.

27. To the extent that there have been previous decisions seeking to revise the impugned orders granted on 13th March 2019, commencing judicial review proceedings herein as regards the impugned orders may be a collateral attack on orders made by a court of competent jurisdiction and in abuse of the process of Court. The *ex parte* Applicant in this respect ought to have moved the High Court that granted the revision orders and/or the Court of Appeal that is presently seized of the issue of revision of the said orders, and not this Court.

28. In addition, the present judicial review proceedings will also result in this Court usurping the role of the trial Court which is the Respondent herein, and which has the appropriate powers under the Constitution and Magistrate’s Courts’ Act to hear and determine the *ex parte* Applicant’s claims as regards not having been given the opportunity to be heard. Section 8 of the Magistrates Courts Act in this respect provides as follows on claims relating to violation of human rights:

1) “ Subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of the Constitution.

(3) Nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.

(4)The Chief Justice shall make Rules for the better exercise of jurisdiction of the magistrate's courts under this section.”

29. The *ex parte* Applicant is in essence in its application seeking leave to be heard on merits by the Respondent, and it is evident from the above provisions that the Respondent is clothed with the necessary powers to do so. The *ex parte* Applicant's application in this Court is therefore premature, to the extent that it has not moved the Respondent to be heard, and the Respondent has not made any adverse ruling as regards the concerns it has raised.

30. In the premises, I find that the Applicant's Chamber Summons dated 27th March 2019 is not merited, and is hereby struck out with no order as to costs.

31. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF MAY 2019

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 22ND DAY OF MAY 2019

J. MATIVO

JUDGE