



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 156 OF 2017

IN THE MATTER OF: AN APPLICATION BY CHARLES MWITI MUGAMBI FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND PROHIBITION..

AND

IN THE MATTER OF ARTICLE 10,47,50,73 AND 157 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF SECTIONS 6(a) &(b), 16(1),(2)&(3), 29, (1),(2) &(3) 30(1) & (2) AND 34 (1) (a),(b) &(c) OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION ACT, 2013

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS.....2ND RESPONDENT

THE NATIONAL POLICE SERVICE.....3RD RESPONDENT

THE CHIEF MAGISTRATE’S COURT, NAIROBI.....4TH RESPONDENT

EX-PARTE

CHARLES MWITI MUGAMBI

RULING RECALLING JUDGMENT

1. As I was perusing this file for purposes of writing a judgment due for delivery on 6th March 2018, and after the parties had all filed and exchanged written submissions, I noticed that one key party who ought to have been enjoined to these proceedings or who the court ought to have directed that the motion be served upon, was not served or included as a party to these proceedings. The party in question is the complainant in the impugned criminal proceedings. This is a very important party to these proceedings because it was upon his complaint lodged with the police that investigations were carried out and a decision reached by the Director of Public Prosecution to charge the ex parte applicant with the relevant offences, which charges the ex parte applicant is resisting.

2. These are not civil proceedings where the defendant would be expected to enjoin a third party. The law under Order 53 of the Civil Procedure Rules clearly stipulate that persons who would be directly affected by the decision of the court in judicial review proceedings should be served with the application.

3. This is in recognition of the fact that the court is likely to make adverse orders against a person who is not a party to proceedings

therefore it is important that before such a situation occurs, such person must be made a party and accorded an opportunity to be heard.

4. The proceedings which are sought to be quashed were initiated at the behest of the complainant, who, regrettably, the applicant did not enjoin to these proceedings as an interested party as required by law. The court also did not order that such complainant be served with the application.

5. Due to that critical omission, and this court having discovered such an omission before writing and or rendering the decision on the substantive motion, it is unable to write and deliver a judgment that is devoid of such a crucial party being accorded an opportunity to be heard in this matter. The right to be heard is a constitutional imperative espoused in Article 50 (1) of the Constitution which should never be denied to a person who deserves to be heard and who is known to the party applying. To do otherwise would be violating the principles of natural justice especially where the court would make orders which are adverse to the person who initiated the complaint subject of the impugned criminal charges.

6. For the above reasons, I hereby on my own motion recall the judgment which was to be delivered on 6th March 2018 in this matter and direct the exparte applicant to serve all pleadings, affidavits and submissions so far filed by the applicant and the respondents, upon the complainant in Milimani CM criminal case No. 451 of 2017 **Mr Eric Mwenda Kanyuuru** within the next 7 days of todate, upon which the said **Eric Mwenda Kanyuuru** will have 10 days from the date of service to file and serve his replying affidavit.

7. The applicants shall have 7 days of service to file a further affidavit if need be together with brief further submissions and serve upon the interested party **Mr Eric Mwenda Kanyuuru** who will have 7 days of service to file and serve written submissions. The matter shall be mentioned on 20th April 2018 for further directions by the presiding judge.

8. Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 6th day of March, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mr Ombwayo h/b for Mr Eric Mutua for the applicant

Miss Ochieng h/b for Mr Makori for the 1st Respondent

CA: Kombo