



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC CIVIL APPLICATION CASE NO. 2 OF 2016 (JR)

**IN THE MATTER OF: APPLICATION BY PHERAN OMWANDO KENANI FOR JUDICIAL
REVIEW IN THE NATURE OF CERTIORARI & PROHIBITION**

AND

IN THE MATTER OF: LAW OF CONTRACT ACT, CHAPTER 23, LAWS OF KENYA

AND

IN THE MATTER OF: LR NO. KISII MUNICIPALITY/BLOCK 1/499

AND

IN THE MATTER OF: BREACH OF CONTRACT

AND

IN THE MATTER OF: OBTAINING MONEY BY FALSE PRETENCE

AND

IN THE MATTER OF: KISII CMCR NO. 1845 OF 2016

AND

**IN THE MATTER OF: ARTICLES 2 (2), 10 (2), 19, 20 (2), 21 (1), 27 (1), 40 (2), 48, 50 (1), 165 &
258 OF THE CONSTITUTION, 2010**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT CRIMINAL INVESTIGATIONS OFFICER, KISII

THE DIRECTOR OF CRIMINAL INVESTIGATIONS

THE INSPECTOR GENERAL

THE DIRECTOR OF PUBLIC PROSECUTIONS

THE CHIEF MAGISTRATE'S COURT, KISII LAW COURTS....RESPONDENTS

AND

JOSEPH NYAOCHI AMINGA.....INTERESTED PARTY

RULING

1. On 6th July 2016, the ex-parte applicant herein filed an ex-parte chamber summons application under **Order 53 Rules 1 and 2 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act Cap, 26 Laws of Kenya**. In the said application, the ex-parte applicant sought, inter alia, leave to apply for an order of Judicial Review in the nature of certiorari to quash the charge sheet and proceedings in Kisii C.M. Criminal Case No. 1845 of 2016.

2. The ex-parte applicant also applied that leave to apply for Judicial Review, if granted, do operate as an order of stay, staying the proceedings in the said Kisii CMCCR. Case No. 1845 of 2016 between the Republic and the applicant.

3. On 6th July 2016, this court, (differently constituted) granted leave to the ex-parte applicant to apply for orders of Judicial Review ex-parte but deferred the prayer that the leave granted do operate as a stay of proceedings in the Criminal proceedings before the lower court to be heard inter partes.

4. When the said application dated 1st July 2016 came up for hearing before me on 31st August, 2016, the respondents and their counsel did not attend court despite having been aware of the said hearing date whereupon the ex-parte applicant's counsel successfully applied for the orders that the leave granted on 6th July 2016 do operate as a stay of the proceedings in the Criminal Case pending before the lower court being (Kisii CMCR Case No. 1845 of 2016).

5. Subsequently, the ex-parte applicant filed a substantive application for Judicial Review through a Notice of Motion application dated 8th July 2016 which motion was equally not opposed by the respondents and on 24th October 2016, the respondents did not attend court whereupon Mr. Ochwangi for the ex-parte applicant applied for orders of Prohibition and Certiorari which prayer was allowed. It is the said court's orders of 24th October 2016 that have precipitated the application dated 21st November 2016 that is now the subject of this ruling.

6. In the said application dated 21st November 2016, filed under Order 51 (15) and section 3 and 3A of the Civil Procedure Act, the applicant seeks the following orders:

1. Spent

2. That pending the hearing and determination of this application there be a temporal stay of execution of the decision of the Hon. W. A. Okwany dated 24/10/2016 prohibiting the 1st, 2nd, 3rd, 4th and 5th respondents from further preferring and/or maintaining the Criminal charges vide KISII CMCR NO. 1845 OF 2016 between REPUBLIC VS PHERAN KENANI OMWANDO.

3. That pending the hearing and determination of the application to set aside the order of judicial review in the nature of prohibition issued ex-parte there be a stay of execution until determination of the application.

4. That the draft application to set aside herewith be deemed to have been filed within time and duly served.

7. The application is premised on the grounds that even though the applicants and their counsel were duly

served and were aware of the hearing date for the Judicial Review being 24th October 2016, the applicant's counsel was then engaged in another court for the hearing of other matters only to get to this court after the impugned orders had already been granted. The applicant contends they will be greatly prejudiced in the performance of their duties unless the orders sought are granted. They also contend that by extension, the entire public will also be prejudiced by the prohibition orders which will prevent them from performing their duties.

8. The application was also supported by the affidavit of Maureen Mbelete, the Prosecution Counsel appointed by the office of the Director of Public Prosecutions sworn on 21st November 2016. She expounds on the grounds in support of the application already stated on the body of the application and reiterates that the prohibition order issued to the respondents in the Judicial Review application will cause a miscarriage of justice to the victim in the criminal proceedings before the lower court as the orders will restrain the respondents from discharging their constitutionally mandated functions. She reiterates that the impugned orders leave a lacuna on the already instituted criminal proceedings before the lower court

9. M/s Oguttu Mboya advocates for the ex-parte applicant herein filed a statement of grounds of opposition to the application dated 21st November 2016 in which he listed the following grounds:

1. The Honourable Court herein has jurisdiction to supervise and cross-check the actions of Quasi Judicial Bodies, like the Respondents herein, to ensure that such bodies act within the parameters of the law.

2. The Respondents herein are Government Officer and/or Departments.

3. Nevertheless, the Respondents are Duty bound and/or enjoined to heed and/or honour and/or comply with the terms of the law.

4. The Honourable Court ought to Protect and vindicate the Applicant's fundamental rights.

5. Quasi Judicial bodies like the Respondents are obliged to heed and/or abide by the Provisions of the Constitution, 2010 and the relevant statutes.

6. The actions and/or omissions of the Respondents constitute a breach of both law and the Constitution, 2010.

7. In any event, the failure by and/or at the instance of the Respondents is a travesty to Justice.

10. When the application came up for hearing before me on 8th February 2017, Miss Mbelete for the applicant/4th respondent urged the court to invoke its powers to set aside the impugned orders of 24th October 2016.

11. On his part, Mr. Oguttu for the ex-parte applicant submitted that the judicial review proceedings filed under **Section 8 and 9 of the Law Reform Act** are not amenable to variation, review, or rescission pursuant to the provisions of the **Civil Procedure Act and Rules**. He added that even though such proceedings are filed pursuant to **Order 53 of the civil Procedure Rules**, the said **Order 53** is only donated to Judicial Review proceedings pursuant to **Section 8 of the Law Reform Act** which stipulates that once the court issues an order for Judicial Review, the court becomes *functus officio* and cannot revisit such an order. The ex-parte applicant relied on the case of **Biren Amritlal Shah & Another vs the Republic [2013] eKLR** in which the Court of Appeal held that the High Court became *functus officio* upon issuing orders for Judicial Review.

12. Mr. Oguttu also took issue with the conduct of the 4th respondent and by extension, the rest of the respondents in failing to attend court or file any replying affidavit to the ex-parte applicant's application for Judicial Review despite the court granting them a lot of leverage and time to do so on previous

occasions.

13. Upon considering the application dated 21st November 2016, the ex-parte applicant's grounds of opposition filed herein and the parties respective submissions, I find that the issues that arise and that require my determination are:

a) Whether this court has jurisdiction to entertain the application and;

b) Whether the applicant has made out a case to warrant the granting of the orders sought.

14. On the first issue, **Order 8 (5) of the Law Reform Act** stipulates as follows:

“Orders of mandamus, prohibition and certiorari substituted for writs

(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.”

15. The instant application seeks a stay of execution of orders of Judicial Review made on 24th October 2016, pending the hearing and determination of an application to set aside the orders of Judicial Review.

16. I note that the applicant has not filed any application to set aside the impugned orders of 24th October 2016. I am in agreement with the submissions of Mr. Oguttu counsel for the ex-parte applicant that the **Law Reform Act, Cap 26 Laws of Kenya**, under which Judicial Review proceedings are instituted, does not clothe this court with the powers/jurisdiction to entertain applications for stay of execution.

17. I align myself with the decision of the **Court of Appeal in the case of Biren Amritlal Shah (supra)** when it held:

“It is therefore quite clear that appeals in respect of orders made under judicial review lie with the Court of Appeal. Therefore, in answering the question whether the High Court had jurisdiction to entertain a review application, we agree with the learned judge of the High Court that, in exercising its special jurisdiction under the Law reform act, the High Court had no jurisdiction to review its previous order.”

18. The holding in the **Biren case (supra)** is applicable to this case even though the orders sought are for stay of execution in the sense that one can similarly say that in exercising its jurisdiction under the **Law Reform Act**, the High Court has no jurisdiction to order for stay of execution of its own orders.

19. Turning to the second issue of whether the instant application is merited assuming that this court had jurisdiction to entertain it, I find that the answer to the above question is to the negative for the following reasons:

20. Firstly, the applicant concedes that he was duly served with the application dated 8th July 2016 that gave rise to the impugned ruling of 24th October, 2016. The applicant was therefore all along aware of the existence of the judicial review proceedings pending before the court. However, for reasons that the applicant has not ventured to explain, he did not file any response to the said application upto and including 24th October 2014 when the matter came up for hearing which means that the applicant's counsel would not have been in a position to oppose the application dated 8th July 2016 even if she had been in court at the time the case was called up before the orders of judicial review sought were granted. All that the applicant's counsel says that she was engaged in another court at the time that the judicial review proceedings were conducted. I find the explanation given by the applicant's counsel to be wanting and unconvincing because the applicant's said counsel has not disclosed, as a sign of good faith, which cases she was handling before the other court. Similarly, the applicant's counsel has not explained why she did not engage the services another counsel to hold her brief to explain her said engagement in another court or better still, why she did not inform her counterpart, Mr. Ochwangi, of her predicament

considering that the matter was placed aside by the court till 11.45 a.m. when it then proceeded ex-parte. To my mind, failure to reply /oppose the application despite service can only be interpreted to mean that the respondents conceded to the said application.

21. Secondly, the applicant has not filed any application to set aside the court's orders of 24th October 2016 and therefore even assuming that this court could apply the provisions of the Civil Procedure Act relating to stay of execution, such a stay would then be granted in vacuum pending an event or action that has not been actualised. The Civil Procedure Rules does not envisage a scenario in which stay of execution orders are granted pending the filing of an application to set aside orders.

22. In sum therefore, having found that this court lacks jurisdiction to entertain the application dated 21st November 2016, and further, having found that the said application is not merited, the order that commends itself to me is the order to dismiss the said application with costs to the ex-parte applicant.

23. It is so ordered.

Dated, signed and delivered in open court this 5th day of April, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Nyamweya for the Applicant
- N/A for the Respondent
- Omwoyo: Court Clerk