



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 33 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
CERTIORARI**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 47, 49 AND 50**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 53 RULES 1 OF THE CIVIL PROCEDURE RULES**

**REPUBLIC .....APPLICANT**

**VERSUS**

**CHIEF MAGISTRATES COMMERCIAL COURTS.....1<sup>ST</sup> RESPONDENT**

**NEW DAWN SELF HELP GROUP .....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**NAIROBI CITY COUNTY.....EX PARTE APPLICANT**

**JUDGMENT**

1. Before this court for determination are two notices of motion by the ex parte applicant. There is the substantive notice of motion dated 10<sup>th</sup> February 2017 brought under the provisions of Articles 47, 49 and 50 of the Constitution, Order 53 Rule 1 of the Civil Procedure Rules, and Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya.

2. The notice of motion is brought pursuant to the leave of court granted on 1<sup>st</sup> February 2017 seeking Judicial Review order of Certiorari to remove to the High Court and quash the warrants of arrest issued on 30<sup>th</sup> January 2017 by the 1<sup>st</sup> respondent Chief Magistrate Commercial Courts, against the applicant's chief officers namely Chrispine O. Calep, Albert Koech, Stephen Njuguna

Waweru, Harry Mwahari and Judah Abekah. It also prays for costs and any other relief that the court may deem just and expedient to grant.

3. The grounds upon which the motion is predicated are on the face of the motion, the statutory statement and the verifying affidavit of Dr Robert Ayisi Acting County Secretary.

4. Principally, the *ex parte* applicant claims that on 30<sup>th</sup> January 2017 the Chief Magistrate's Court at Nairobi issued a warrant of arrest against the applicant's Chief Officers for alleged contempt of court yet they had not been served with the application for contempt of court hence the decision to issue a warrant of arrest against them was irrational. That when the advocate for the applicant applied on 30<sup>th</sup> January 2017 for suspension of the warrants of arrest, the court declined to grant the orders hence the applicants had to seek refuge before this Honourable court.

5. The advocate for the applicant, Miss Otieno did submit to that effect while urging the court to grant the orders sought, of quashing the warrants of arrest issued on 30<sup>th</sup> January 2012.

6. In the motion dated 20<sup>th</sup> February 2012, the applicant seeks leave of court to amend the substantive motion to enjoin the Honourable Attorney General as a party to these proceedings because he is a necessary party and that they inadvertently omitted him hence it is in the interest of justice that he be enjoined to represent the Chief Magistrates Court.

7. The 1<sup>st</sup> respondent did not file any response to the substantive motion nor the one dated 20<sup>th</sup> February 2017 but argued orally on points of law.

8. The 2<sup>nd</sup> respondent filed a replying affidavit sworn by Perpetua Ponjiwa a member of New Dawn Self Help Group, the 2<sup>nd</sup> respondent contending principally, that it is misjoined to the proceedings as no remedy is sought against the 2<sup>nd</sup> respondent and asserting that the applicants were served with the application for contempt of court prior to the application being canvassed as shown by the order of 8<sup>th</sup> August 2016 wherein the applicants received the order on 9<sup>th</sup> August 2016 which order restrained them from interfering with the 2<sup>nd</sup> respondent's peaceful possession and occupation of Tumaini Parking along Moi Avenue for purposes of a trade fair pending the hearing and determination of the application, which application was set for inter parties hearing on 21<sup>st</sup> September 2016.

9. The 2<sup>nd</sup> respondent also annexed the notice of motion dated 13<sup>th</sup> January 2012 which sought for committal to jail of the *ex parte* applicant's named chief officers for contempt of court order dated 8<sup>th</sup> August 2016 referred to above. It was argued by Mr Kinyanjui advocate that the orders sought in the two motions are not available because the court below exercised its jurisdiction and discretion properly. Moreso, that the warrants of arrest were not before the court for quashing and that the omission to enjoin the Honourable Attorney General to these proceedings was fatal *ab initio* to the substantive motion.

10. The 1<sup>st</sup> respondent through Miss Ngelechei counsel opposed both motions while maintaining that the Attorney General cannot be a primary party but a legal representative as duty calls him to do so for the Chief Magistrate's Court hence he should have been simply served with pleadings on the substantive motion. Miss Ngelechei argued that there was nothing to show that the Chief Magistrate overreached in his decision or acted without jurisdiction or illegally hence the motion for certiorari should be dismissed.

#### **DETERMINATION.**

11. I have carefully considered the foregoing and the issues for determination are whether the motion for amendment is merited; whether the substantive motion is merited; whether the Attorney General ought to have been enjoined to these proceedings; and whether the 2<sup>nd</sup> respondent is improperly enjoined to these

proceeding.

12. On the motion for amendment, I am in agreement with Miss Ngelechei for the 1<sup>st</sup> respondent and add that the Attorney General has a constitutional and statutory duty to represent the National Government in all civil proceedings and any other proceedings except in criminal proceedings. It follows therefore that the idea of joinder or non joinder of the Attorney General to these proceedings is immaterial as his non joinder is not fatal or at all. (See Article 156 of the Constitution and the provisions of Section 5 of the Office of Attorney General Act. Parties may opt to enjoin the Honourable Attorney General to proceedings as the Principal Legal Advisor to the Government where the National Government entity or organ is a primary party to proceedings or they may simply serve the entity which will then seek legal advice and representation from the Honourable Attorney General.

13. Accordingly, I overrule the objection that the Attorney General ought to have been enjoined to these proceedings from the onset. I also decline to grant the application for amendment of the motion to enjoin the Attorney General as a necessary party to these judicial review proceedings and dismiss it.

14. On the question of the merits of the substantive notice of motion, it is clear that the motion seeks to bring into this court for purposes of quashing and to quash the warrants of arrest issued on 30<sup>th</sup> January 2017 against the applicant's named Chief Officers by the Chief Magistrate. The **supporting 'affidavit'** to the motion which is dated 10th February 2017 is not even signed by the deponent Dr Robert Ayisi. That notwithstanding, the provisions of Order 53 of the Civil Procedure Rules are clear that in the substantive motion, the applicant only needs to rely on the statutory statement and verifying affidavit of the applicant accompanying the chamber summons for leave. As the verifying affidavit of the same deponent Dr Robert Ayisi is duly signed and commissioned by a Commissioner of Oaths, I see no material defect save that the supporting affidavit is no affidavit at all since it is unsigned and the same is hereby struck out with no consequences or effect to the substance of the substantive motion.

15. However, Order 53 Rule 7(1) of the Civil Procedure Rules, it is clear that:

***(1) In case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record unless, before the hearing of the motion, he has lodged a copy thereof verified by an affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the High Court"***

16. In the instant case, what is apparent is that neither the warrants of arrest which are sought to be quashed nor the proceedings for 30<sup>th</sup> January 2017 wherein the said warrants of arrest were allegedly issued against the Chief Officers of the applicant City County Government are attached to the verifying affidavit for purposes of Order 53 Rule 7(1) of the Civil Procedure Rule and for purposes of being quashed by this court.

17. In other words, there is nothing in the form of an order or warrant of arrest which is impugned. This court in the exercise of Judicial Review jurisdiction cannot act out of nothing. That which is being quashed to be brought or removed into this court for quashing must be available to the court to be considered for quashing.

18. As there is nothing before me to be quashed, I would bring nothing for purposes of quashing and therefore I quash nothing.

19. For the above reasons, I have no hesitation in finding that these proceedings were hastily filed without giving serious thought into their competency. I proceed to dismiss the motion dated 10th February 2017 for want of merit and for being incompetent.

20. On the question raised by the 2<sup>nd</sup> respondent that it is not a necessary party to these proceedings as no orders are sought against it, and therefore whether it was properly joined to these proceedings, I find

and hold that the 2<sup>nd</sup> respondent, from the annexures on record is an interested party to these proceedings because it was the complainant /plaintiff in the Chief Magistrate's Court wherein the contempt proceedings were commenced against the exparte applicant's named Chief Officers.

21. Whether the 2<sup>nd</sup> respondents were named as respondents without any reliefs being sought against them is a mere technicality which can be cured under Article 159(2) (d) of the Constitution. This is so because Order 53 Rule 3 of the Civil Procedure Rules is clear that the notice of motion for the substantive orders **shall be served on all persons directly affected** and where they concern proceedings before a court then they shall be served on the presiding officer of the court and all the parties to the proceedings.

22. In this case, the proceedings wherein the warrant of arrest were allegedly issued were before the Chief Magistrates court at Milimani Commercial court in CMCC 4833/2016 between the 2<sup>nd</sup> respondent herein and the exparte applicant herein hence the 2<sup>nd</sup> respondent is directly affected by any order that may be issued by this court and therefore there is no misjoinder and the fact that the 2<sup>nd</sup> respondent was named as respondent and not interested party is not fatal to these proceedings. The objection by the 2<sup>nd</sup> respondent is accordingly dismissed.

23. In the end, I find that the two motions dated 10<sup>th</sup> February 2017 and 20<sup>th</sup> February 2017 are without any merit. They are dismissed. Costs are in the discretion of the court. I note that it is the incompetence of the two applications as well as the weak objections by the 2<sup>nd</sup> respondent and the lack of vigilance on the part of the exparte applicant's counsel that has given rise to the incompetent proceedings in that they failed to annex the warrants of arrest and or proceedings which their clients sought to quash. Counsel ought to have advised their clients on what is appropriate especially where there is no claim of want of jurisdiction on the part of the trial court.

24. In the premises, I order that there shall be no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 11<sup>th</sup> day of May, 2017.

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Miss Otieno for the exparte applicants

Miss Ngelechei for 1<sup>st</sup> and 3<sup>rd</sup> respondents

Mr Kinyanjui for the 2<sup>nd</sup> respondent