



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW APPLICATION NO.148 OF 2015

IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

**IN THE MATTER OF THE WILDLIFE (CONSERVATION AND MANAGEMENT) ACT CAP
376 LAWS OF KENYA**

AND

**IN THE MATTER OF PROCEEDINGS BEFORE THE CHIEF MAGISTRATE'S COURT AT
MAKINDU CRIMINAL CASE NO**

1299 OF 2013

REPUBLIC APPLICANT

VERSUS

THE CHIEF MAGISTRATE MAKINDU 1ST RESPONDENT

THE DIRECTOR, PUBLIC PROSECUTION 2ND RESPONDENT

AND

THE KENYA WILDLIFE SERVICE INTERESTED PARTY

AND

BERNARD MASAU MAILU1ST EXPARTE APPLICANT

JOSHUA KIOKO PETER 2ND EXPARTE APPLICANT

RULING

The Application

The 1st Applicant is the brother of the 2nd Applicant, and the two Applicants were granted leave to commence judicial review proceedings in Machakos High Court Miscellaneous Case No 132 of 2015. They subsequently filed their substantive application for judicial review orders in the suit herein on 8th July 2015 by way of a Notice of Motion dated 7th July 2015. On the same date they also filed yet another Notice of Motion also dated 7th July 2015 seeking the following orders:

1. An order do issue to restrain the Chief Magistrate, Makindu from dealing or making any orders in **Criminal Case No. 1299 of 2013 – Republic vs Bernard Musau Mailu & Another**.
2. An order do issue to quash the warrants of arrest issued by the Chief Magistrate, Makindu on 2nd July 2015.

This second application is the subject of this ruling. The grounds for the said application are that the Chief Magistrate issued warrants of arrest on 2nd July, 2015 even after the Applicant had already filed judicial review proceedings pursuant to this Court's leave issued on 23rd June 2015, and after he had been served with the said orders by the Applicants on 1st July 2015. Further, that if the Chief Magistrate is allowed to continue hearing and making orders in **Criminal Case No. 1299 of 2013 – Republic vs Bernard Musau Mailu & Another**, the instant proceedings would be rendered nugatory.

The Applicants' application was supported by an affidavit sworn on 7th July 2015 by the 1st Applicant. He explained therein that the Applicants are the accused persons in **Criminal Case No. 1299 of 2013 – Republic vs Bernard Musau Mailu & Another**, and that if the warrants are executed during the pendency of their application herein, the trial court is likely to jail them as a result of their having challenged the proceedings in the criminal case.

The Response

The 1st Respondent's Litigation Counsel, Odhiambo A. Leah, filed Grounds of Opposition to the application dated 24th September 2015. It was averred therein that the prayers sought ought to be dismissed as the 1st Respondent had requisite jurisdiction to determine the matter at hand, and the Applicants has not demonstrated any case as to why an order of certiorari should be issued against it . Further, that the matter is not within the purview of judicial review, neither does it meet the basics tenets of a judicial review application which should deal with procedure of decision making and not the merit or substance.

The 2nd Respondent opposed the Application by way of a replying affidavit sworn by its Prosecution Counsel, Shijenje Johnson, on 6th August 2015. He stated therein that the orders granted on 23rd June 2015 to the Applicants were for leave to institute judicial review proceedings for orders of prohibition and certiorari within 21 days. Further, that the said orders did not stay the proceedings against the Applicants before the Makindu Law Courts in Criminal Case No. 1299 of 2013.

However, that on or about 2nd July 2015, the Applicants knowing very well that they had no order of stay, failed to attend their case before the Makindu Law Courts in Criminal Case No. 1299 of 2013 on unfounded allegations that they feared they would be jailed. In addition, that the substantive Notice of Motion herein was only filed on 8th July 2015, subsequent to the Applicants absconding court and the warrants of arrest being issued. The 2nd Respondent stated that the trial court therefore had no other option other than to issue warrant of arrest as against the Applicants as it did.

It was further averred by the 2nd Respondent that this Court cannot rightfully issue an order quashing the warrants of arrest and/or restraining the Chief Magistrate Makindu from making any further orders in Criminal Case No. 1299 of 2013 as the said proceedings are yet to conclude, and that it is upon the Applicants to present themselves before the Makindu Law Courts in Criminal Case No. 1299 of 2013 for the lifting of the arrest warrants and further orders.

The Issues and Determination

The Applicants' counsel was directed to file submissions on the application and failed to do so within the timelines set by the Court. The Respondents submitted that as a result, they were also not able to file their submissions in reply, and relied on the pleadings filed. The Court thereupon ruled that it would proceed to give a ruling on the application without the benefit of the parties' submissions.

I have considered the pleadings of the Applicants and Respondents. The issue that requires to be determined is whether this Court should grant the interim orders of stay and lifting of the warrant of arrests sought by the Applicants. The applicable law in this respect is Order 53 Rule 1(4) of the Civil Procedure Rules which 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.”

The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion must be exercised judiciously. It has been noted in this regard by the 2nd Respondent that the Applicants never sought stay at the leave stage, but it is my view that this oversight does not preclude them for seeking for stay after leave has been granted.

The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of the proceedings have been laid down in various decisions. Firstly, in **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005** it was held that if the decision sought to be quashed has been fully implemented leave ought not to operate as a stay, as there is nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted.

Secondly, it was held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. Similarly, **Maraga J.** (as he then was) was of the following view in this regard in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006:**

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the *ex parte* applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

In the present application it is contended by the Respondents that the Applicants ought to seek the lifting of the arrest warrants in **Criminal Case No. 1299 of 2013 at Makindu Chief Magistrate’s Court** and that the said court has jurisdiction to entertain the Applicants’ allegations. However, it has not been alleged or stated that the said criminal Court has made any decision on the subject matter of the application herein. In addition, the fact that the proceedings in the criminal Court are ongoing does not bar this Court from staying the same pending the hearing of the substantive motion herein.

In the premises, the Applicants’ Notice of Motion dated 7th July 2015 is allowed for the foregoing reasons, and it is accordingly ordered as follows:

1. The proceedings in **Makindu Chief Magistrate’s Court Criminal Case No. 1299 of 2013 – Republic vs Bernard Musau Mailu & Another** be and are hereby stayed pending the hearing and determination of the substantive application filed herein.

2. The warrants of arrest issued by the Chief Magistrate, Makindu on 2nd July 2015 as against the Applicants in **Makindu Chief Magistrate's Court Criminal Case No. 1299 of 2013 – Republic vs Bernard Musau Mailu & Another** be and are hereby lifted pending the hearing and determination of the substantive application filed herein.
3. The costs of the Applicants Notice of Motion dated 7th July 2015 shall be in the cause.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 1st DAY OF FEBRUARY 2016

P. NYAMWEYA

JUDGE