REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

HCJRA . NO. 2 OF 2016

IN THE MATTER OF REPUBLIC

EX PARTE PURITY GATHONIMACHERU ….....……APPELLANT

-VERSUS—

THE CHIEF MAGISTRATE NANYUKI LAW COURTS…… RESPONDENT

RULING

1. **GATHONIMACHERU**, the applicant, has come before court by chamber summons dated 12th February, 2016. It is brought under the provisions of Order 53 Rule 1 (1) (2) (3) and (4) of the Civil Procedure Rules. By that application the applicant seeks leave to apply for an order of certiorari to remove to this court for the purpose of quashing the proceedings and the order made on 12th August 2015 before Nanyuki Chief Magistrate's court criminal case No. 200 of 2015. That such leave on being grant do operate as stay.

BACK GROUND

2. The applicant in criminal case No. 200 of 2015 is facing two counts of offences which offences are **Contrary to the Provisions of Veterinary Surgeons And Veterinary Para –Professionals, Cap 366.** In the **first count** the applicant was charged with the offence Practicing as a veterinary Surgeon and selling veterinary medicines while not registered by the Kenya Veterinary Board Contrary to Section 13(1) as read with Section 15(7) of Cap 366. On the **second count the** applicant was charged with the offence of unlawfully operating an agrovet without approval and Licensing Contrary to Section 38 (m) of Cap 366. The applicant pleaded not guilty to the two counts.

3. Before the trial commenced the applicant raised a preliminary objection to the proceeding of the trial based on the provisions of Section 40 of CAP 366. That Section restricts the institution of proceedings brought under Cap 366. That Section provide:

> *1. A prosecution for an offence under this Act shall not be instituted without the sanction of the Director of Public prosecutions.*
>
> *2. Without prejudice to the provisions of subsection (1), the Director of Public Prosecutions, may give consent to inspectors or other officers designated by the Board under this Act.*

4. The applicant argued before the trial court by way of preliminary objection that any prosecution under Cap 366, which the applicant was charged under, had to have the sanction of the Director of Public Prosecution (DPP). Indeed that is what Section 40 above provides. But the applicant went further to submit, in support of the preliminary objection, that her prosecution under the provisions of Cap 366 did not have the consent of the DPP. That the provisions of Section 40 of Cap 366 required that such consent of DPP be shown to the trial court, which in the case was not done.

5. The prosecution before the trial court submitted that the DPP's consent did not necessarily have to be in writing.

6. The Learned trial Magistrate in his considered Ruling on the preliminary objection, delivered on 12th August, 2015, ruled that there was no requirement under Section 40 Cap 366 which required the DPP's consent to be in writing. Further that Section 23 of Office of the Director of Public Prosecutions Act, Act No. 2 of 2013, and Article 157 (9) of the Constitution gave DPP power to commence and prosecute Criminal Proceedings without the direction of any person.

7. The Learned trial Magistrate concluded in his Ruling by stating: -

> "*My finding is that the sanction contemplated in Section 40(1) of the Veterinary Surgeon and Veterinary Para Professionals Act only applies where the prosecution is being undertaken by inspectors appointed under the Act. This is given effect under Section 40(2) which provides that the DPP may give consent to inspectors or those officers designated by the board under the Act without the sanction/ authority of the DPP. He must prove that he has obtained the necessary consent before instituting prosecution. But where the DPP institutes the criminal Prosecution, it would be superfluous to still require the same DPP to prove that he has authority Sanction to institute prosecution. "*

8. The Learned trial Magistrate accepted the prosecution's argument that the officer of DPP at Nanyuki acted on delegated powers of the office of DPP Act. That the office of DPP Nanyuki endorsed the charge sheet and thereby gave consent to the prosecution of the applicant.

9. **SUBMISSIONS ON THE APPLICATION FOR LEAVE TO SEEK JUDICIAL REVIEW ORDER.**

10. The applicant's Learned counsel MR. Mwangi Kariuki in support of the application in a nutshell submitted that the criminal proceedings before the Magistrate's court amounted to the abuse of the court process because the applicant was charged with an offence Contrary to Cap 366 without the requisite consent required under Section 40 of the Act.

11. Learned Principal Prosecuting Counsel Mr.Tanui at the office of DPP in opposition submitted that the applicant failed to show to this court that the proceedings before the Magistrate's court were unlawful. That it would be where such unlawfulness is shown that this court would grant leave to file for judicial review orders. He submitted that this is because judicial review orders are directed against a process, and not against merit.

12. The submissions of the said counsel was that if the applicant was dissatisfied with the Ruling of the trial court she ought to have preferred an appeal.

13. In response to that submission Learned counsel Mr. Kariuki submitted that the applicant was questioning the jurisdiction of the Magistrate to hear the criminal case against her.

ANALYSIS AND DETERMINATION

14. I have considered the parties submissions. What the applicant seeks is leave to apply for judicial review. I am guided, in my consideration of the application, by the decision in **REPUBLIC – VERSUS- COUNTY COUNCIL OF KWALE and ANOTHER EX-PARTE KONDO AND**

57 OTHERS MOMBASA HC. MSC. APP NO. 384 OF 1996 which case was referred to in the case **LADY JUSTICE JOYCE N. KHAMINWA – V-JUDICIAL SERVICE COMMISSION AND ANOTHER [2014]eKLR**thus:

> "*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 the 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 of granting the relief claimed by the applicant the test being whether there is an case fit for further investigation at a full interpartes 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".*

15. As stated by Justice G V Odunga in the case of Lady Justice Joyce N Khaminwa (Supra) the court in considering leave to file for judicial review orders isinvolved in an exercise which ensures frivolous or vexatious applications which on a prima facie basis seem to be an abuse of court process do not obtain leave. The said Learned Judge stated in that case: -

> *"However, leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case. Leave stage is therefore a filter whose purpose is to weed out hopeless cases at the earliest possible time…"*

16. The applicant objectedbefore thetrial court to her continued prosecutionunder the provisions of Section 366 because as she alleged the office of DPP had not given consent to the prosecution. Having raised that objection the trial court Ruled, as stated before. Having soRuled what then was the applicant's remedy? I am inclined to agree with the submissions of the Learned Counsel for the DPP, before me, that the applicant ought to have appealed against that trial court's Ruling. There is in other word an alternative remedy available to the applicant.

17. The Learned authors Beatson, Mathews, ad Elliott in the book Administrative Law on availability of alternative remedy had this to say.

> "*It is generally accepted that, at least in principle, judicial review is a remedy of last resort, to be invoked only when other avenues, such as rights of appeal… have been explored; if not then permission may be denied."*

18. The said authors referred to the case **REPUBLIC – VS INLAND REVENUE COMMISSIONERS, EX PARTE PRESTON [1985]** where LordScarman stated that:-

> "*a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is … not an appeal. Where Parliament has provided by statute appeal procedures… it will only be very rarely that the courts will allow the … process of judicial review to be used to attack an appealable decisions."*

19. The issue raised regarding the alleged lack of DPP's consent not only is it appealable but to grant leave as sought by the applicant will deny the DPP the opportunity to provide the facts relating to how the prosecution was initiated. it is in my view far more expedient for the issue of the lack of

consent or otherwise to be canvassed first at the trial and if need be to be the subject of the appeal if any

20. It is because of the above finding that I conclude that the applicant's application is without merit. As a result the chamber summons dated 10th February, 2016 is dismissed with cost to the respondent.

Dated and Delivered at Nanyuki this 7th APRIL, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Njue

For state ……

For Appellant …….

Appellant ……

COURT

Ruling delivered in open court

MARY KASANGO

JUDGE