



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW NO. 332 OF 2016
IN THE MATER OF AN APPLICATION BY HEMA VIRENDRA
KASHYAP FOR ORDERS OF PROHIBITION
AND
IN THE MATTER OF THE FIRST CLASS MAGISTRATE’S COURT
AT CITY HALL NAIROBI IN CASE NO. 109 OF 2015
AND
IN THE MATER OF ARTICLE 48 & 50 OF THE CONSTITUTION OF KENYA
REPUBLIC.....APPLICANT
VERSUS
NAIROBI CITY COUNTY.....1ST RESPONDENT
THE FIRST CLASS MAGISTRATE
COURT AT CITY HALL NAIROBI.....2ND RESPONDENT
AND
HEMA VIRENDRA KASHYAP.....EX-PARTE APPLICANT

JUDGMENT

1. On 10th August 2016, this court granted to the exparte applicant herein Hema Virendra Kashyap allegedly (wrongly referred to in the charge sheet in criminal case No. 109/2015 filed before the Magistrate’s Court at City Hall Nairobi as Hema Patel Kashyap), leave to apply for Judicial Review orders of prohibition to prohibit the Nairobi City County from prosecuting her and or taking any further steps in criminal case No, 109/2015.

2. The Court also directed that the substantive motion be filed and served within 21 days from the date of leave, and the leave as granted was to operate as stay of any further proceedings in criminal case

No. 109/2015 at the City Magistrate's court until the substantive motion if filed is heard and determined.

3. On 25th August 2016 the ex parte applicant filed and served upon the respondents the substantive notice of motion in terms of the leave granted and as shown by the affidavit of service of Daniel Waweru Mwangi sworn on 8th September 2016 respectively.

4. On 19th September 2016 the respondents filed notice of appointment of advocates through Morara Onsongo & Co-advocates. When the matter came up for mention on 4th October 2016, the respondents counsel Miss Sitienei holding brief for Mr Morara sought indulgence to file their replying affidavit but even after being granted 15 days and this matter coming up on 8th November 2016 for hearing inter partes, there was no replying affidavit filed.

5. The application proceeded to hearing with Mrs Macharia submitting on behalf of the applicant, replying on the grounds, the statutory statement and the verifying affidavit and annexures filed together with the chamber summons dated 28th July 2016.

6. According to the ex parte applicant, and which averments and depositions have not been controverted, she is wrongly charged before the city Magistrates Court vide criminal case No.109/2015 with advertising contrary to Section 30(1) with reference to Section 3 of the Physical Planning Act Cap 286 Laws of Kenya and punishable under Section 30(2) of the same Act. That although she is alleged to have erected an advertisement (sky sign) at the Taj Mall on LR 209/139, she had no idea what that is and that although she took a plea in court, the case has never proceeded to hearing.

7. That she is neither an employee, Director, shareholder, owner nor even a tenant of Taj Mall and therefore she does not understand why she was hauled into court and charged with an offence. She considers the criminal proceedings against her malicious hence the respondents should be prohibited from continuing with these criminal charges against the ex parte applicant.

8. The only issue for determination in this matter is whether on the material supplied before court, an order of prohibition as sought in these judicial Review proceedings is available to the ex parte applicant.

9. The scope of Judicial Review remedies was the subject of the Court of Appeal decision in the often cited case of **Kenya National Examinations Council Vs Republic Ex parte Geoffrey Gathenji Njoroge & Others CA 266 of 1996 [1977] e KLR** where the Court of Appeal held, *inter alia*:

“.....prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the Rule of Natural Justice the High Court would be obliged to prohibit if from acting contrary to the Rules of Natural Justice. However, where a decision has been made, whether in excess of or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not lie, however, to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....”

10. From the above decision, it is clear that an order of prohibition in Judicial Review proceedings can only be made to prevent the making of a contemplated decision.

11. In other words, prohibition ought not to be made or issued in the nature of a declaration but is directed at a contemplated action. It therefore follows that unless the ex parte applicant shows that the

respondents contemplated an action in the circumstances under which orders of Judicial Review may issue, the court will not readily issue an order of prohibition.

12. In the instant case, the criminal charges subject of these proceedings vide criminal 109/2015 have already been initiated, whether rightly or wrongly, and there is no prayer for the order of certiorari to quash the decision to charge or to prosecute the exparte applicant with the criminal offence of erecting a sky sign.

13. In Judicial Review proceedings, the High Court does not examine the merits of the decisions to charge the exparte applicant, and neither does the court seek to interrogate whether or not the exparte applicant is innocent because she is wrongly charged with the criminal offence.

14. The court is concerned with the decision making process, and not to act as an appellate court over the inferior court or tribunal. The court will not question whether or not there was sufficient evidence to prove that the exparte applicant is the person who erected a sky sign subject to the charge sheet presented before the second respondent Magistrate's court. (See **Municipal Council of Mombasa Vs Republic & Umoja consultants Ltd CA No. 185/2001**.)

15. In **Republic vs Kenya Revenue Authority Exparte Yaya Towers Ltd [2008] e KLR**. The court held:

“The remedy of Judicial Review is concerned with reviewing not the merits of the decision of which the application for Judicial Review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given a fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the Judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power see Halsbury's Law of England 4th Edition VOL (1) (1) paragraph 60”

16. Thus the purpose of Judicial Review is to ensure that an individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court.

17. In this case, the exparte applicant complains that she is not aware of the charge of erecting a sky sign without lawful authority and or why she was charged yet she has no relation or association with Taj Mall. Further, that the respondent acted ultra vires, unreasonably and in bad faith in charging her.

18. Indeed, there is the question of whether the exparte applicant was wrongly referred to in the charge sheet and therefore whether she is the one charged before the court, or whether she erected any sky sign for purposes of advertisement, without lawful authority.

19. However, to determine whether or not the exparte applicant is the one wrongly referred to in the charge sheet and or whether she erected any sky sign without lawful authority, requires evidence to be adduced orally and in documentary form and the burden of proof of those facts as disclosed in the charge sheet lies on the 1st respondent to discharge, beyond reasonable doubt.

20. Nonetheless, it is not the jurisdiction of this court to exercise criminal jurisdiction to determine whether or not there is evidence to prove the charge framed against the exparte applicant. That jurisdiction is barred by Sections 8 and 9 of the Law Reform, Act Cap 26 Laws of Kenya.

21. This not being a trial court, it lacks jurisdiction to resolve those conflicting issues of fact. And to proceed to prohibit the criminal charges pending before the City Magistrate, there must be an order declaring that the decision to charge the exparte applicant was made arbitrarily, without jurisdiction or was an abuse of power.

22. The applicant has not sought any declarations or orders of certiorari. The applicant has not sought to challenge the process through which the decision to charge her was made. It therefore follows that only the trial court has the power to hear evidence or objections to the charges and make a finding on the merits of the charge or decision to charge the exparte applicant with the offences contained in the charge sheet.

23. In **Republic Vs Judicial Service Commission Exparte Pareno [2004] 1 KLR 203-209**, the court was categorical and I agree that:

“Judicial Review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against the other and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles....”

24. Although this court is alive to the fact that Judicial Review remedies are now anchored in the Constitution at Article 47 and the provisions of the Fair Administrative Action Act, 2015, the court has not been shown how and what specific the provisions of the Constitution and of the Fair Administrative Action Act have been breached in charging the exparte applicant.

25. The fact that the exparte applicant’s case has not proceeded to hearing since March 2015 as submitted by her counsel is not in itself a ground for prohibition to issue for reasons that the applicant can object to any adjournments by the prosecution and if there is any impropriety in the manner the trial is being conducted, then the exparte applicant can invoke the provisions of Article 165(6) of the Constitution and Article 165(7) thereof to ask the High Court to call for the record of the subordinate court and for purposes of making any order or give any direction it considers appropriate to ensure the fair administration of justice. That has not been done.

26. In addition, although it was averred that the charges preferred against the exparte applicant are malafides and malicious and without jurisdiction, this court was not shown any particulars of malice on the part of the respondents and neither was there any submission touching on the jurisdiction of the 1st respondent in charging the applicant or of the 2nd respondent in conducting the criminal trial. In other words, the applicant did not unveil any material evidence before the court upon which the court can find that she is truly entitled to the grant of Judicial Review orders of prohibition. She did not even rely on any ground of abuse of power by the 1st respondent in charging her. She has not claimed that she was discriminated upon or that other people were being shielded to nail her or that there is no proper foundation for the charge or that the charge against her is frivolous, vexatious and oppressive or abuse of court process. She neither demonstrated that her constitutional right to accessing justice has been violated in any way by her continued prosecution.

27. The exparte applicant did not even demonstrate to this court that she was being denied her right to a fair trial for she did not adduce any evidence showing that she had asked the prosecution to avail to her all the prosecution witnesses’ statements to enable her prepare for the trial and that the request was turned down or not responded to. The applicant has failed to discharge the burden of proof.

28. In the end, I am unable to find any merits in this Judicial Review application for Orders of prohibition. I proceed and dismiss the Judicial Review application dated 25th August 2016, with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 9th day of November, 2016.

R.E. ABURILI

JUDGE

In the presence of

Mr Mungai for the applicant

Miss Sitienei for the Respondents

CA: Adline