Mucheru & 2 others v Katiba Institute & 2 others (Civil Application E373 of 2021) [2022] KECA 386 (KLR) (4 March 2022) (Ruling)

Neutral citation: [2022] KECA 386 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E373 OF 2021

AK MURGOR, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

MARCH 4, 2022

BETWEEN

JOE MUCHERU .... 1ST APPLICANT

FRED MATIANGI .... 2ND APPLICANT

ATTORNEY GENERAL .... 3RD APPLICANT

AND

KATIBA INSTITUTE .... 1ST RESPONDENT

IMMACULATE KASAIT .... 2ND RESPONDENT

YASH PAL GHAI .... 3RD RESPONDENT

(Being an application for stay of execution from the Judgment and Orders of the High Court of Kenya at Nairobi (Jairus Ngaah, J.) delivered on 14th October 2021 in Judicial Review Application No. E1138 of 2020)

RULING

1. By the Statute Law (Miscellaneous Amendments) Act, 2018 the *Registration of Persons Act* (Cap. 107) ("the principal Act") was amended to establish the National Integrated Identity Management System. The Amendment Act came into force on the 18th day of January, 2019 (the date of commencement), whereupon section 9A of the principal Act came into force with immediate effect.

2. Section 9A of the principal Act provides:

   " 9A. Establishment of the National Management Integrated Identity System Management System.

1. There is established a National Management Integrated Identity System Management System.

2. The functions of the system are -

a. to create, manage, maintain and operate a national population register as a single source of personal information of all Kenyan citizens and registered foreigners resident in Kenya;

b. to assign a unique national identification number to every person registered in the register;

c. to harmonise, incorporate and collate into the register, information from other databases in Government agencies relating to registration of persons;

d. to support the printing and distribution for collection all national identification cards, refugee cards, foreigner certificates, birth and death certificates, driving licenses, work permits, passport and foreign travel documentation, student identification cards issued under the Births and Death Registration Act, Basic Education Act, *Registration of Persons Act*, Refugees Act, Traffic Act and the *Kenya Citizenship and Immigration Act* and all other forms of government issued identification documentation as may be specified by gazette notice by the Cabinet Secretary;

e. to prescribe, in consultation with the various relevant issuing authorities, a format of identification document to capture the various forms of information contained in the identification documents in paragraph (d) for purposes of issuance of a single document where applicable;

f. to verify and authenticate information relating to the registration and identification of persons;

g. to collate information obtained under this Act and reproduce it as may be required, from time to time;

h. to ensure the preservation, protection and security of any information or data collected, obtained, maintained or stored in the register;

i. to correct errors in registration details, if so required by a person or on its own initiative to ensure that the information is accurate, complete, up to date and not misleading; and

j. to perform such other duties which are necessary or expedient for the discharge of functions under this Act.

3. The Principal Secretary shall be responsible for the administration, coordination and management of the system."

3. Following the amendment aforesaid, the 1st and 2nd applicants embarked on a nationwide exercise to collect personal and biometric data in March 2019.

4. The amendment aforesaid and the implementation of section 9A of the principal Act were challenged in Nairobi High Court (Constitutional and Human Rights Division) Petition Nos. 56, 58 and 59 of

2019 filed separately by the Nubian Rights Commission, the Kenya Human Rights Commission and the Kenya National Commission on Human Rights respectively.

5. In their petitions, the three petitioners sought various declarations, including: a declaration that the impugned amendments were unconstitutional in that they infringed on the right to privacy, personal dignity, socio-economic rights, the right to public participation and the right to equality and non-discrimination; that the impugned amendments were enacted unprocedurally and without public participation contrary to Articles 10(2) (a) and 118(1) (b) as read together with Article 259 of *the Constitution*; that the amendments were inconsistent with the Bill of Rights; that the amendments were unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom contrary to Article 24(1) of *the Constitution*; that the State had failed to provide a statutory framework for the protection of the right to privacy and data protection; and that the State had failed to protect the Rights and Welfare of the Children of the Nubian Community.

6. In addition to the declarations aforesaid, the petitioners sought orders, including: an order prohibiting the 1st and 2nd applicant from installing and operationalising the National Integrated Information Management System (NIIMS) in any manner whatsoever until policy, legal and institutional frameworks compliant with *the Constitution* are put in place; and that the costs of the respective petitions be provided for. On its part, the Kenya National Commission on Human Rights in Petition No. 59 of 2019 prayed that there be no order as to costs in view of the public nature of its petition.

7. In summary, the three petitions were made on the grounds inter alia that the impugned amendments were passed in violation of *the Constitution* and in bad faith; that the amendments posed serious and immediate threat to certain fundamental rights and freedoms protected under the Bill of Rights; that the amendments offended the right to privacy; that the impugned amendments and implementation of the National Integrated Information Management System were in breach of the right to public participation; that the impugned Statute Law (Miscellaneous Amendments) Bill was not tabled for debate in the Senate before enactment; that the impugned amendments were intrusive, ambiguous and susceptible to abuse; and that the amendments in issue should have been legislated in an omnibus Act in place of a miscellaneous amendment Act.

8. In their reply, the applicants opposed the three petitions as consolidated and prayed that they be dismissed. On his part, the 1st applicant contended that the NIIMS kits were inspected for any data mining software to completely eliminate the possibility of external access, data mining or even data manipulation by any unauthorized entity; and that the registration was voluntary.

9. The 2nd applicant contended that Kenya has a robust series of statutes and policy on data protection, information security, modalities of access to information and protection of privacy of the integrity of government records and information; that the impugned amendments were subjected to meaningful and qualitative public participation in line with Article 118(1)(b) of *the Constitution* and had met the threshold thereunder; and that the Petitioners had not demonstrated what feature of NIIMS would make registration of alleged marginalized communities more difficult.

10. In addition to the foregoing, the 3rd applicant contended that the Petitions did not disclose any threat of violation of *the Constitution*; that the Petitions were premised on conjecture and misconceptions that negate the substance and object of NIIMS; and that the formulation and enactment of the impugned amendments were made within the confines of a proper and justified legislative process. He contended further that the registration of persons is a process regulated by the *Births and Deaths Registration Act* and the *Registration of Persons Act*; and that the NIIMS process was primarily anchored on the said legislation. In his view, to have the State accord the Nubians preferential treatment over and above other Kenyan citizens was contrary to the provisions of Article 27 of *the Constitution*.

11. Learned counsel for the petitioners, the 1st and 2nd applicants, and the Hon. Attorney-General, made written and oral submissions in support of their respective cases, whose import we need not evaluate here.

12. The three petitions, which were consolidated, were heard together by a three-Judge bench (P. Nyamweya, Mumbi Ngugi and W. Korir, JJ.), whose judgment was delivered on 30th January 2020. In their judgment, the court made the following orders:

> "i. A declaration that the collection of DNA and GPS co-ordinates for purposes of identification is intrusive and unnecessary, and to the extent that it is not authorised and specifically anchored in empowering legislation, it is unconstitutional and a violation of Article 31 of *the Constitution*.
>
> ii. Consequently, in so far as section 5(1)(g) and 5(1)(ha) of the *Registration of Persons Act* requires the collection of GPS coordinates and DNA, the said subsections are in conflict with Article 31 of *the Constitution* and are to that extent unconstitutional, null and void.
>
> iii. The Respondents are at liberty to proceed with the implementation of the National Integrated Identity Management System (NIIMS) and to process and utilize the data collected in NIIMS, only on condition that an appropriate and comprehensive regulatory framework on the implementation of NIIMS that is compliant with the applicable constitutional requirements identified in this judgment is first enacted.
>
> iv. Each party shall bear its own costs of the Consolidated Petitions."

13. Shortly before delivery of the court's judgment on the three petitions consolidated as aforesaid, Parliament enacted the *Data Protection Act, 2019* which came into force on 25th November 2019 whereupon the 2nd applicant announced the rollout of the identity card commonly referred to as Huduma card.

14. Soon after the enactment of the 2019 Act, the 1st and 3rd respondents herein filed a Notice of Motion dated 24th November 2020 in the High Court of Kenya at Nairobi Judicial Review Application No. E1138 of 2020 – Katiba Institute and Yash Pal Ghai v Joe Mucheru CS ICT Ministry and 2 Others – seeking:

> "a. Prohibition restraining the respondents, their servants and agents from executing the decision of 18th November 2020 to roll out Huduma cards before and without a data protection impact assessment per section 31 of the *Data Protection Act, 2019*.
>
> b. Certiorari to bring to this court and to quash the decision of 18th November 2020 to roll out Huduma cards for being ultra vires section 31 of the *Data Protection Act, 2019*.
>
> c. Mandamus compelling the respondents to conduct a data protection impact assessment per section 31 of the Data Protection Act, 2019 before rolling out the Huduma cards."

15. Upon hearing the application, the High Court (Jairus Ngaah, J.) delivered his judgment on 14th October 2021 in the following terms:

> " 1. The order of certiorari is hereby issued to bring onto this honourable court and quash the Respondents' decision of 18th November 2020 to roll out Huduma Cards for being ultra vires section 31 of the *Data Protection Act, 2019*.
>
> 2. The order of mandamus is hereby issued compelling the Respondents to conduct a data protection impact assessment in accordance with section 31 of the *Data Protection Act, 2019* before processing of data and rolling out the Huduma Cards."

16. Aggrieved by the judgment and orders of the High Court (Jairus Ngaah, J.) delivered on 14th October 2021, the applicants filed the Notice of Motion dated 27th October 2021 under Rule 5(2) (b) seeking stay of execution of the said judgment and orders pending hearing and determination of their application and the intended appeal. The application was made on 5 grounds set out on the face of the Motion, two of which are substantive, namely:

    a. that the applicants' intended appeal will be rendered nugatory if the orders of the superior court are not stayed as the data in issue has already been collected and processed;

    b. that the data so far being processed was qualified by the judgment of the High Court in Petition Nos. 56, 58 and 59 as it was from those who willingly submitted the same; and

    c. the orders of the superior court, if not stayed, will occasion irreversible substantial loss to the public.

17. The applicants' Motion is supported by the affidavits of Dr. Eng. Karanja Kibicho (a Principal Secretary of the 2nd applicant) and of Lucy Mulili (the Secretary Administration for the State Department of ICT and Innovation in the 1st applicant's Ministry) both sworn on 27th October 2021. Notably, Ms. Mulili's supporting affidavit restates the grounds of the intended appeal as set out in the annexed draft Memorandum of Appeal dated 18th October 2021.

18. On his part (in paras 7 and 8 of his affidavit), Dr. Eng. Kibicho explains the historical background for the establishment of the impugned NIIMS and draws the Court's attention to the High Court of Kenya at Nairobi Petition Nos. 284 and 353 of 2019 (Consolidated) in which the court issued declaratory order on 29th October 2020 nullifying several pieces of legislation, including the Statute Law (Miscellaneous Amendment) Act, 2018, and subsequent to which the 3rd applicant and the Speaker of the National Assembly appealed to this Court in Nairobi Civil Appeal No. E084 of 2021 – The Speaker of the National Assembly and Another v the Senate of the Republic of Kenya – which was then pending judgment, but whose outcome has not been disclosed to us. It is noteworthy, though, that this Court granted an order staying execution of the orders of the superior court, and suspending the invalidity of the nullified Statute Law (Miscellaneous Amendment) Act, 2018 pending judgment then scheduled for delivery on 5th November 2021.

19. According to Dr. Eng. Kibicho (para 11 of his affidavit) –

> " … a total of 10,471,566 Huduma cards have been processed/printed and distributed to all eight hundred and seventy National Registration Bureau Offices countrywide for collection

by the citizens/aliens and, as at 14th October 2021, the date of delivery of judgment, 8,734,356 cards had already been collected by the respective owners."

20. In paras 13 and 14 of his affidavit, Dr. Eng. Kibicho states that –

> "The number of citizens and aliens registered locally after the rolling out of the registration exercise for Huduma Number before closure of the first phase was 37,724,521 while Kenya Diaspora Citizens stood at 96,571, giving a cumulative total of 37,821,092 ... That the processing/printing of the cards for the balance of the citizens/aliens (already registered and data captured, being a continuous activity is ongoing."

21. Also annexed to the applicants' Motion is their draft Memorandum of Appeal in which they contend that the learned Judge erred in law and in fact –

> "a. by giving orders whose effect was to render nugatory subsisting orders of the Court of Appeal in Nairobi Civil Appeal No E084 of 2021; The Speaker of the National Assembly and Another vs The Senate of the Republic of Kenya and Others.
>
> b. by giving retrogressive application to statutory provisions incapable of retrogressive application.
>
> c. by failing to appreciate that the High Court in the Petitions Nos 56, 58 and 59 of 2019 had specifically allowed the Respondent's therein to proceed with the implementation of NIIMS and to process and utilize the data collected in NIIMS on specific conditions.
>
> d. by completely ignoring the uncontroverted evidence that NIIMS was rolled out sometime in March 2019 and that mass collection of personal data under NIIMS had already being completed by the time the *Data Protection Act, 2019* come into effect in November 2019.
>
> e. by holding that the Data Protection Act was by the sole reason that it was to give effect to Article 31(c) and (d) of *the Constitution* intended to apply retrogressively.
>
> f. by premising his holding on the basis of prudence of having in place the Data Protection Act before amendments to the *Registration of Persons Act* which permitted collection of data.
>
> g. by failing to appreciate that the application before him was one of Judicial Review and that the Respondents could not be liable for the actions of the Legislature.
>
> h. by finding that they was no other scale upon which to weigh the actions of the State to collect and process personal data except that provided by the Data Protection Act thereby subjecting the provisions of Article 31 to statutory provisions.
>
> i. by conflating general duties under Article 31 of *the Constitution* and specific duties imposed by specific provisions of the Data Protection Act.

j. by on the one hand holding that the Data Protection Act did not impose any new obligation or duty on the State and on the other hand that the State could not collect and process data without prior legal framework.

k. by failing to appreciate that it is the totality of the Data Protection Act that is intended to give effect to some of the provisions of Article 31 of *the Constitution* and elevated the provisions of section 31 of the Act above other provisions of the Data Protection Act."

22. In addition to the two affidavits filed in support of the applicant's Motion,the Attorney-General filed written submissions dated 1st November 2021. We also hasten to observe that the 2nd respondent (Immaculate Kassait, the Data Commissioner) also filed written submissions dated 8th November 2021 in support of the Motion.

23. The respondents opposed the applicants' Motion. In reply thereto, Lempaa Suyianka (litigation counsel for the 1st respondent) filed his affidavit sworn on 1st February 2022 in which he contends, among other things, that an order of certiorari cannot be stayed as a matter of law; that as regards the second order of mandamus, the application has been overtaken by events and become moot by reason of subsequent developments; that, in compliance with the impugned order of mandamus, the applicants submitted to the Office of Data Commissioner a document titled "Data Protection Impact Assessment for the NIIMS; that the applicants submitted this report to the High Court on 12th January 2022; that the Commissioner is yet to take representations or approve the Data Protection Impact Assessment Report; that the Court's intervention by way of a stay order at this stage would be unwise and disruptive; and that the stay order itself would render the intended appeal needless.

24. In addition to his affidavit in reply, counsel for the 1st respondent filed written submissions dated 28th November 2021. He urged us to dismiss the applicants' Motion.

25. Having considered the Applicant's Notice of Motion dated 27th October 2021, the 2 affidavits in support thereof, the 1st respondent's replying affidavit, the written and oral submissions of the 3rd applicant and those of the learned counsel for the 1st and 3rd respondents, we form the view that the Applicants' Motion stands or falls on two main grounds:

a. whether the appeal is arguable, which is to say, it is not frivolous; and

b. whether the appeal, if successful, would be rendered nugatory if stay was not granted.

26. The principles that apply in applications under Rule 5(2) (b) of the Court of Appeal Rules for stay of execution or of further proceedings pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings arising from the impugned judgment, decree or order were not stayed. These principles have been enunciated in various judicial pronouncements of this Court, including those cited by the parties.

27. On the first limb of this twin principle, this Court held in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC [2020] eKLR* that, for stayorders to issue in similar cases, the Applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.

28. On our reading of the grounds on which the Applicant's Motion is founded, the draft Memorandum of Appeal, the affidavit in support thereof, and from the respective written and oral submissions of the learned counsel for the parties, we are persuaded that the applicants have an arguable appeal. Indeed, it is by no means frivolous. Whether the appeal will succeed or not is not for us to judge. That is a matter for determination at the hearing of the appeal. Neither is it material whether the appeal is preferred on only one or more grounds.

29. With regard to the adequacy of the grounds of appeal to warrant a grant of the stay orders sought, this Court in *Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others [2014] eKLR* observed that an applicantneed not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed. That brings us to the second limb of the twin principle

   – whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted.

30. The term "nugatory" was defined in *Reliance Bank Ltd V Norlake Investments Ltd (2002) 1 EA* p.227 at p.232 thus: "it does not only mean worthless, futile or invalid. It also means trifling." The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.

31. In his replying affidavit sworn on 1st February 2022, Lempaa Suyianka (litigation counsel for the 1st respondent) contends that an order of certiorari, such as was issued by the trial court, cannot, as a matter of law, be stayed.

32. In his judgment delivered on 14th October 2021, the learned Judge issued the impugned order of certiorari to bring onto the court and quash the respondents' decision of 18th November 2020 "... to roll out Huduma Cards for being ultra vires section 31 of the *Data Protection Act, 2019*".The applicants fault the learned Judge for issuing this order and request for stay pending appeal. The respondents, for good reason, disagree. We agree with litigation counsel for the 1st respondent that such an order is incapable of being stayed as the effect would be to undo what the superior court has done; to reverse a decision that could only be reversed on the intended appeal.

33. We take to mind the decision in *Karia Mbae v The Land Adjudication Officer, Chuka, High Court Misc. Application No. 257 of 1987 (Unreported)* where the learned Judges (Mbito and Mango, JJ.) held that–

   > " In our view, therefore, it would appear that this court has no jurisdiction to stay, recall, review or set aside or quash an order of certiorari once it has been made ..."

34. The futility of an application for stay of orders of certiorari was also considered in *Republic v Municipal Council of Mombasa & 2 Others, Ex Parte – Adopt – A – Light Ltd. Civil Application No. Nai. 15 of 2007* (unreported) where this Court, referring to an application for stay of an order of certiorari nullifying both the resolution of Mombasa Municipal Council to award a contract and the contract itself, observed:

   > " The Court has no jurisdiction under Rule 5(2) (b) to stay the nullification of the resolution and the contract. It can only stay the execution of the decree or orders of the superior court. The order of certiorari granted by the superior court is not capable of execution as the superior court did not order any party to do anything or refrain from doing anything or to pay any sum (of money) other than costs.

Furthermore, the order of certiorari granted by the superior court quashing the resolutions of the Council and the Agreement is final and conclusive and took effect immediately. If the application is allowed the effect would to reverse the decision of the superior court and legalize the resolution and the contract already nullified until the determination of the appeal. This Court has no jurisdiction at this stage to undo what the superior court has done. It can only reverse the order of certiorari upon the hearing of the appeal".

35. As regards the second order of mandamus, it is noteworthy that the application has been overtaken by events and become moot by reason of subsequent developments. Annexed to the replying affidavit of learned counsel for the 1st respondent as "LS-1" is a letter Ref: AG/JRP/OP/107/20 dated 12th January 2022 addressed to the Deputy Registrar of the trial court in which the 3rd applicant states:

> " Pursuant to the judgment delivered on 14th October 2021 by Hon. Justice Jairus Ngaah, the respondents have complied with the court order, in particular, the order of mandamus compelling the respondents to conduct a Data Protection Impact Assessment in accordance with section 31 of the *Data Protection Act, 2019* before processing of data and rolling out the Huduma Cards … We hereby attach and forward the Data Protection Impact Assessment for the National Integrated Identity Management System."

36. Even though the applicants sought to have paragraphs 6 and 7 of the 1st respondent's replying affidavit relating to steps already taken by the applicants in compliance with the impugned order of mandamus expunged, the applicants did not deny that those steps had been taken and a data protection impact assessment report submitted to the court. We also find that the applicants' further request that the entire replying affidavit be expunged or disregarded for want of prior leave to file and serve the same so late in the day to be unmerited in light of Article 159(2) (d) of *the Constitution*, which mandates the Court to administer justice "without undue regard to procedural technicalities".

37. Furthermore, according to the respondents, the applicants have substantially complied with the impugned order of mandamus, which is further confirmed by the 2nd applicant in paragraphs 8, 9, 11, 13 and 14 of Dr. Eng. Kibicho's supporting affidavit (see paragraphs 18, 19 and 20 above). The extent to which the applicants have rolled out the registration exercise and the issuance of the Huduma card is to both citizens and alien residents is evident from Dr. Kibicho's statement in paragraphs 13 and 14 of his affidavit where he states that those registered before closure of the first phase was 37,724,521 while Kenya Diaspora Citizens stood at 96,571; that the cumulative total of those registered numbers 37,821,092; and that the processing/printing of the cards for the balance of the citizens/aliens (already registered and data captured), is ongoing.

38. The applicants' submission to the trial court on 12th January 2022 of the Data Protection Impact Assessment for the NIIMS, paved way for the subsequent rollout of the registration exercise and issuance of the Huduma Cards in such numbers as are disclosed by the 3rd applicant. What then is there to stay? We agree with the respondents, and are persuaded, that the circumstances of the case before us do not call for stay of the order of mandamus as sought. To grant such orders would be in vain, as no orders of the kind sought can arrest the doing or undo of what has already been done.

39. In view of the foregoing, we are of the considered view that the applicants have done, and continue to do, that which the trial court mandated – to undertake a data protection impact assessment before processing of data and rolling out the Huduma Cards. Indeed, the applicants' Motion comes too late in the day in light of their compliance with the impugned order of mandamus. In effect, the stay order sought would be worthless and inconsequential, and the same does not avail to the applicants.

40. Having considered the applicants' Notice of Motion dated 27th October 2021, the affidavits in support thereof, the 1st respondent's replying affidavit, the respective written and oral submissions of the 3rd applicant and for the 1st and 2nd respondents, we find that the applicants have failed to satisfy the two conjunctive limbs of the requirements in an application for stay of execution of the judgment and orders of the High Court Judicial Review Application No. E1138 of 2020 pending the intended appeal.

Accordingly –

a. the applicant's Notice of Motion dated 27th October 2021 is hereby dismissed; and

b. this being a matter of public interest, there shall be no orders as to costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022

A. K. MURGOR

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR