IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 312 OF 2017

BETWEEN

JUSTUS ONGERA.....APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION...2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (L. A. Achode, J) dated 20th July, 2017

in

JR Misc. Appl. No. 20 of 2017)

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JUDGMENT OF THE COURT

1. The appeal before us arises from the refusal by the High Court **(Achode, J.)** to grant leave to the appellant to seek Judicial Review **(JR)** orders of *certiorari* and *prohibition* under ***Order 53 Rule 1*** and ***2*** of the Civil Procedure Rules **(CPR).** It is common ground that the grant of leave is an exercise in judicial discretion. The only issue for determination, therefore, is whether the learned Judge acted judiciously in the exercise of such discretion.

2. The facts behind the application for Judicial Review may be briefly stated.

The appellant is the Director of the ICT department in the Office of the Auditor General **(OAG).** In the year 2013, the Kenya National Audit Office, in line with their 2013-2014 Procurement Plan, decided to procure an **Audit Vault Software (AVS),** an analytical tool for management of auditing process, particularly useful in auditing transactions online on the IFMIS platform used by the Government. The appellant was tasked with the responsibility of carrying out due diligence on the suppliers of the system and he, together with the Manager of IT Audit, Annette Mwangi, confirmed that as at June 2013, only one company, OSI Kenya Ltd **(OSI)**, was known to supply the system in Kenya and the African region, and had supplied the system to Kenya Airways and Safaricom Limited. Indeed, ORACLE, the manufacturers

of the AVS, had in a letter dated 18th June, 2013 confirmed that their certified Audit analytical tools specialist partner in Kenya was OSI (a subsidiary of **OSI Slovenia**) who had already supplied and integrated the system to other Kenyan customers. The government financial system, IFMIS, was also ORACLE based and the AVS would fit in seamlessly.

3. The appellant conveyed the information to the Auditor General and the Tender Committee subsequently met and approved the purchase of the software through direct sourcing which decision was approved by the Executive Committee. The applicant was neither a member of the Tender Committee nor the Executive Committee, and did not have a decision-making role in the transaction or the power to influence the decisions of those independent Committees. He states that the direct procurement was communicated to the Public Procurement Oversight Authority **(PPOA)** in accordance with the Public Procurement and Disposal Act **(PPDA).**

4. Four years later, in 2017, allegations were made from the Treasury which received an anonymous letter, that the OAG had irregularly purchased an AVS for Sh. 100 million against the available budget of Sh. 18 million. The matter was reported to the Ethics and Anti Corruption Commission **(EACC)** for investigation and according to them, OSI was not the only agent of ORACLE in Kenya and so, in their view, the purchase of the software should not have been single sourced. In December 2016, the EACC issued a report recommending to the Director of Public Prosecutions **(DPP)** that various persons, among them the Auditor General, **Edward Ouko**, and the Deputy Auditor General, one, **Stephen Ndungu Kinuthia**, be charged with several offences including: abuse of office; engaging in a project without planning; wilful failure to comply with procurement law, dealing with suspect property, and acquisition of proceeds of crime. It also recommended that the Appellant together with Annette Mwangi be charged with the offence of knowingly deceiving a principal contrary to ***Section 41(2)*** as read with ***Section 48(1)*** of the Anti-Corruption and Economic Crimes Act **(ACECA)** .

5. Upon receipt and perusal of the report, the DPP rejected the evidence and recommendation relating to the Auditor General and declined to charge him with any offence. But the recommendation to charge the Deputy Auditor General and other persons with several offences was upheld. The DPP also directed that the appellant and Annette Mwangi be charged with the offence of deceiving a principal.

6. The appellant saw no reason for such recommendation which in his view had no basis, was discriminatory, an abuse of court process, and borne out of extraneous considerations and ulterior motives. It was irrational and failed to take into consideration relevant factors while placing undue weight on irrelevant considerations. That was so particularly when ORACLE itself, at the request of the Auditor General, had written on 10th February, 2017 confirming that OSI were the only company who had local presence in Kenya and had implemented the AVS at Kenya Airways and Safaricom. In the appellant's view, if such information was considered by EACC and DPP, they would not have upheld the recommendation to prefer the charge against him. The recommendation was also baseless and malicious because none of the members of the Tender Committee, the Executive Committee or the Auditor General had disowned the information which they were at liberty, nay a duty, to verify before approval of purchase. The Public Procurement Oversight Authority would also have questioned the information after the recommendation of direct procurement was communicated to it but they did not. For those reasons, the appellant sought review of the DPP's decision and when it was not forthcoming, he filed the JR invoking the **Law Reform Act**, several Articles of the **Constitution** and the **Fair Administrative Actions Act** (No. 4 of 2015).

7. Ordinarily, an application for leave ought to be heard *ex parte* under ***Rule 53(1)(2)*** of the CPR. But the trial court is at liberty to require that service be effected and the hearing be conducted *inter partes* under the proviso to ***sub-rule (1).*** That is what **Ong'undi, J.** did when the matter first came up in court on 14th February, 2017, and service was effected on the DPP and EACC. Pending the filing of the responses and the hearing of the application *inter partes*, Achode, J. who next handled the matter granted a temporary order staying the decision to arrest and charge the applicant, which orders were extended periodically until the application was disposed of.

8. In their responses, the two institutions insisted that the proposed charge was valid and was backed up

by evidence. The evidence in their possession showed that OSI was not the only company which could supply the AVS as there were 14 other companies accredited by ORACLE to provide the same service. They referred to information supplied by ORACLE in a letter dated 8th July, 2015 confirming that position and contended that the letter relied on by the appellant from the same company dated 8th February, 2017 stating otherwise, was not genuine. It followed therefore that the appellant supplied false and deceptive information to the OAG, the Tender Committee and the Executive Committee all of whom relied on the information. There was thus no *prima facie* case shown to warrant the grant of leave. In their view, the EACC cannot be restrained from discharging its constitutional mandate of investigating crime or the DPP from enforcing the criminal law.

9. Upon hearing the respective counsel for the parties and considering the law placed before her, the learned Judge dismissed the application on the grounds, *inter alia,* that the fact that the DPP exonerated the Auditor General but charged the appellant was not discriminatory; that the office of the DPP was independent and the courts can only interfere with prosecutorial decisions made in the clearest of cases; that the DPP did not make an irrational, unreasonable or unfair decision to prosecute the appellant; that the DPP did not abrogate any provisions of the Constitution or any written law in making his decision; that the DPP did not breach any rules of natural justice or act in excess of jurisdiction; that the decision on sufficiency or insufficiency of evidence to prosecute lay with the trial court and not EACC; that no order of prohibition can lie against EACC as it had no prosecutorial powers; that the issuance of the orders sought would undermine the constitutional mandate of EACC and the DPP; and that the application did not fall within the parameters of judicial review. It was accordingly dismissed.

10. In a memorandum of appeal containing 23 grounds, the appellant basically complains that such findings amounted to a predetermination of his substantive application which he was yet to file; the powers of the two institutions were amenable to the supervisory jurisdiction of the superior courts and therefore the court abdicated its powers; there were triable issues raised in the application and the decision was a wrong and injudicious exercise of discretion; there was a miscarriage of justice in failing to give an opportunity to the appellant to urge his case before facing any criminal proceedings; the Court unduly shifted its supervisory role, constitutional responsibility, and issues relating to the Fair Administrative Actions Act to the subordinate court.

11. Before us in written submissions which were briefly highlighted, learned counsel for the applicant **Mr. Stanley Manduku** instructed by the firm of M/s Kerandi Manduku & Company Advocates contended that by deductive reasoning, Achode, J. had granted the application for leave at an interlocutory stage and she had no right to somersault and undo the order. That is because prayer 4 of the application sought an order of stay consequent upon grant of leave sought in prayer 1 and 2. The learned Judge granted prayer 4 at the commencement of the hearing and therefore, in counsel's view, that was tantamount to granting leave, since both prayers go together. The proceedings carried on after the grant of the order were thus a nullity. In effect, according to counsel, if the grant of leave operates as a stay, a grant of stay should operate as grant of leave.

12. Counsel next moved to the scope of JR which he submitted had expanded since the promulgation of the Constitution in 2010 and the enactment of the Fair Administrative Actions Act in 2015. Submissions had been made on the basis of the new developments but, according to counsel, the trial court ignored them. The net effect of the submissions was to show that there was a *prima facie* case deserving of closer look and it was wrong therefore to examine the application in detail and make conclusive findings as the learned trial judge did.

13. In response, Learned State Counsel **Mr. F. S. Ashimosi,** instructed by the DPP, orally submitted that the appellant had not demonstrated that the trial judge misdirected herself in law in the exercise of her discretion. On the contrary, he noted, the learned Judge spent time laying down the principles applicable in an application for review before analyzing the evidential material placed before her. In counsel's view, all that the appellant brought before the learned judge was evidence that ought to be taken before and considered by the criminal trial court and it was rightly rejected. He submitted that there was no *prima facie* case of threat to breach the law or the Constitution, and as far as he could see, the appellant's application went beyond seeking leave.

14. Finally, learned counsel for EACC M**s. R. C. Murugi** emphasized the written submissions submitting that there was no assertion by the appellant that the learned judge considered the wrong principles. She submitted, that the contention that the interim stay order granted at the commencement of the hearing operated as leave was misconceived. Firstly, it was only interim and lasted until the application was heard and determined, and secondly, leave can only be granted on the basis of a *prima facie* case having been established but none had been at that stage. As for the contention by the appellant that there was new evidence which had not been considered by the investigators and which may have altered their decision, counsel submitted that such evidence was for the criminal trial court to analyze and consider during the trial.

15. We have considered the appeal fully. As earlier observed the only issue to consider is whether the trial court exercised its discretion in a judicious manner, for if it did, then an appellate court would have no basis to interfere. The Court can only interfere if the appellant demonstrates that the court misdirected itself in some matter and as a result has arrived at a wrong decision, or it is manifest that the judge was clearly wrong as a result of which an injustice occurred. In the case of ***United India Insurance Co. Ltd & 2 Others vs East African Underwriters (Kenya) Ltd [1985] eKLR***, Madan, JA, (as he then was) stated:-

> ***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account of, or fifthly, that his decision, albeit a discretionary one, is plainly wrong".***

See also ***Mbogo & Anor vs Shah [1968] EA 93.***

16. We have re-examined the record in line with those principles and have noted that the learned trial judge initially had a clear appreciation of the law governing the grant of leave. She appreciated that the threshold for grant of leave was a low one where an applicant need only show that his interests have been affected or threatened by the actions of a public body. She appreciated that the guiding principle is to determine whether there was an arguable case on the material before the court without going into the matter in depth. However, in a surprising turn, she delved into a 23-page analysis of the facts and the law and made conclusive findings. It is no wonder therefore that the appellant submits that the substantive JR application was determined before it was filed.

17. On the outset, we must dismiss at once, the contention by Mr. Manduku that the grant of an order for interim stay operated as grant of leave. He ascribed the submission to didactic reasoning but in truth it was disingenuous. The provision that the grant of leave operates as stay is an express provision under ***Order 53 Rule 1*** of the ***CPR***. There is no express provision in reverse order and for good reason; different considerations of law apply to both limbs and have to be considered. Indeed, under the proviso to the rule, the court is at liberty to separate the two limbs and hear them separately. The interim order issued by the trial court at the commencement of the proceedings on 14th February, 2017 had nothing to do with a stay that operates consequent upon grant of leave. It had everything to do with the normal inherent power of the court to preserve the subject matter of litigation pending the merit determination of it. That ground of appeal has no merit and is rejected.

18. Adverting to the principles for consideration of an application for leave to seek judicial review orders, we predicate our discourse by observing the fast evolving nature of JR in our country from the common law basics of checking public authorities and other decision makers on the basis of the three **'I's--** ***"illegality, irrationality and impropriety of procedure".*** The evolution has been noted in several decisions made after the promulgation of the Constitution, for example, the case of ***Ernst & Young LLP vs Capital Markets Authority & Another [2017] eKLR*** where **Mativo, J.** carried out extensive comparative analysis before opining that:

> ***"Judicial review is available as relief to a claim of violation of the rights and freedoms guaranteed in the constitution. The constitution has expressly granted the High Court***

jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is no longer whether the function was public or private or by a statutory body, but whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50. The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution."

19. **Odunga, J.** too in the case of ***Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited [2015] eKLR*** stated thus:

"Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. Our courts need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front. Our courts must develop judicial review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution".

20. The Supreme Court underscored the evolving nature of JR in the case of ***Communication Commission of Kenya vs Royal Media Services & 5 Others Petition No. 14 of 2014*** *consolidated with* ***Petition Nos. 14A, 14B and 14C of 2014.*** At paragraph 355 of its judgment, the Court expressed itself as follows:

"However, ...we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law."

The Court further stated:

"The power of judicial review in Kenya is found in the Constitution, as opposed to the principle of the possibility of judicial review of legislation established in Marbury vs Madison 5 U.S. 137 (1803). "

21. More recently, **(**20th July, 2017), this Court in the case of ***Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR*** stated as follows:-

"***In our considered view presently, judicial review in Kenya has Constitutional underpinning in Articles 22 and 23 as read with Article 47 of the Constitution and as operationalized through the provisions of the Fair Administrative Action Act. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the Civil Procedure Act and Rules is a procedure for applying for remedies under the common law and the Law Reform Act. These common law remedies are now part of the constitutional remedies that the High Court can grant under Article 23 (3) (c) and (f) of the Constitution. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law Order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both. In the instant case, we have examined the original application filed before the High Court. Whereas the application is stated to be grounded on Order 53 of the Civil Procedure Rules, on the face thereof, Articles 10, 38 (2), 47, 88 and 227 of the Constitution are cited. In our view, this correctly reflects the fusion of constitutional and common law judicial review in Kenya as one system for judicial review".***

22. The appellant in this matter invoked the provisions of ***Order 53*** but also relied on several Constitutional provisions. It was incumbent on the trial court to appreciate the gravity of the application before it which focused on fair administrative action and trial rights but, in our view, a narrow view was

taken. The view seems to be that the investigative powers of EACC and the prosecution powers of the DPP are underpinned in the Constitution and statutory law. The courts must therefore be slow to interfere with their mandate. There is wisdom, of course, in taking that view since in a functioning democratic country, the criminal justice system must be set free to function without unnecessary fetters. In particular, it is common knowledge, and therefore we take judicial notice of it, that in this country, corruption is the bane of society. It abounds in high places as it does everywhere else. The long term solution would be a radical change in societal values but equally effective, in our view, is to unleash the criminal justice system at all levels without discrimination fear of favour and bring to book the perpetrators of the crime. This will be possible if the law enforcement agencies operate in a climate of independence and encouragement from other agencies of public and private service, including the Judiciary.

23. The efforts to assist law enforcement agencies, however, does not take away the vigilance which the people of Kenya have given the courts through the Constitution, to preserve and defend it. That is particularly so with regard to the expansive provisions on the bill of rights and fundamental freedoms. The primacy of fair administrative action and fair trial rights is underscored by two entire Articles of the Constitution dedicated to them (**Articles 47** and **50**), and an Act of Parliament, the ***Fair Administrative Action Act,*** to give effect to ***Article 47***.

24. We are aware that the grant of leave is not automatic. The purpose of it, as stated in numerous court decisions, is to exclude frivolous and vexatious applications or applications which *prima facie* appear to be in abuse of the process of the Court or those applications which are statute barred. **Waki, J** (as he then was), in ***Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others; Mombasa HCMCA No. 384 of 1996*** put it as follows:

> ***"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 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.."***

25. The test applied, as correctly surmised by the trial court, is:

> "***..if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting the relief sought by the applicant."***

See ***Halsbury's Laws of England, 4th Edition, Volume 1 (1) at pg 276;*** and also the case of ***Tom Mbaluto vs Jessie Lesiit, Hannah Okwengu, Jackton Ojwang, Festus Azangalala & Luka Kimaru [2012] eKLR.***

26. The approach suggested by the court in applying the test in ***Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)*** was as follows:

> ***"There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him…. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."***

27. We respectfully subscribe to that approach. As noted earlier, the learned judge went deep into the merits of the case, and made final conclusions on a matter that had not been substantively filed and heard. Perhaps the same result may have been reached by the court hearing the substantive Judicial Review application itself, but it was presumptive of the court in considering leave to make a final determination of the issues. In its analysis, the court did not refer to the Constitutional provisions cited before it or the Fair Administrative Actions Act. We do not know what conclusion on arguability of the application the court would have reached if it considered those provisions. There is thus a proper basis for interfering with the discretion of the court. Without going into an analysis of our own lest we prejudice the hearing before the court which will eventually hear the judicial review application, we find merit in the submission that there was an arguable case on whether the fair administrative action and fair trial rights of the applicant were threatened with breach.

28. For the reasons aforegoing, we allow this appeal and set aside the ruling of Achode, J. made on 20th July, 2017. We substitute therefor an order granting the appellant's application for leave in terms of prayers (i), (ii), and (iii) of the 'Chamber Summons' dated 14th February, 2017. The substantive motion for Judicial Review shall be filed in the High Court within 21 days of this judgment and disposed of expeditiously. The appellant shall have the costs of this appeal but the costs before the High Court shall abide the outcome of the Judicial Review application.

We so order.

Dated and delivered at Nairobi this 25th day of May, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR