Republic v Kithure Kindiki, Cabinet Secretary Interior & Coordination of National Government & another; Katiba Institute (Exparte); Office of Data Protection Commissioner & 3 others (Interested Parties) (Judicial Review Application E194 of 2023) [2024] KEHC 1649 (KLR) (Judicial Review) (23 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1649 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E194 OF 2023

JM CHIGITI, J

FEBRUARY 23, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

KITHURE KINDIKI, CABINET SECRETARY INTERIOR & COORDINATION OF NATIONAL GOVERNMENT ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

KATIBA INSTITUTE ..... EXPARTE

AND

OFFICE OF DATA PROTECTION COMMISSIONER ..... INTERESTED PARTY

ARTICLE 19: GLOBAL CAMPAIGN FOR FREE EXPRESSION .... INTERESTED PARTY

NUBIAN RIGHTS FORUM ..... INTERESTED PARTY

KENYA HUMANS RIGHTS COMMISSION ..... INTERESTED PARTY

RULING

1. The Application before this Court is the 1st Respondent's Notice of Motion application dated 14th December, 2023 seeking the following orders:

1. Spent

2. That this Honorable Court be pleased to set aside the orders of the court issued on 4th December, 2023 particularly Order No. 3 thereof.

3. That this Honorable Court proceeds to issue any other or further orders and directions in the interest of justice.

4. That the costs of this application be provided for.

2. The Application is brought under Section 11 of the *Fair Administrative Action Act*; Section 3A and 1A of the *Civil Procedure Act*; and Order 53, Rule 4 of the Civil Procedure Rules, 2010.It is supported by the Affidavit of Amb. (Prof) Julius Bitok sworn on even date.

Arguments in Support of the Application.

3. The 1st Respondent's case is that the orders of 4th December, 2023 were issued on grounds of material non-disclosure on the part of the Ex parte Applicant as it failed to disclose to the Court that a Data Protection Impact Assessment had been conducted and a report submitted.

4. The Respondent also argues that a similar case being Constitutional Petition No. E196 of 2023, Dr. Fredrick Onyango Ogola & 9 others vs. Cabinet Secretary, Ministry of Information and Communication Technologies & 2 Others has been filed before the Constitutional and Human Rights Division on the same subject matter and similar facts.

5. The 1st Respondent's case is that the Assessment was conducted and a report submitted before the date of piloting of the project which was 1st November, 2023.

6. The 2nd Respondent filed a Replying Affidavit sworn by Hon. Shadrack J. Mose on 26th January, 2024. In the affidavit, Hon. Mose depones that the orders issued by this Court have a far-reaching effect in that the 1st Respondent is unable to process new applications for ID cards which add up to at least 10,000 applications a day as well as applications or replacement adding up to around 5,000 applications in a day.

7. It is also the 2nd Respondent's case that the order is directly against public interest, as thousands of young Kenyans are turning 18 daily and without an ID card they cannot access services on the e-Citizen Platform which include applying for driving licenses, applying for passports, and registering businesses. This it is urged in effect affects the allocation of KRA Pin Numbers, application for registration of marriages, and opening of bank accounts, among others.

8. The 1st Interested Party also filed a Replying Affidavit in support of the application sworn by Rose Mosero, HSC, FIP on 29th January, 2024. In the affidavit, the deponent avers that the 1st Interested Party received from the 1st Respondent Data Protection Impact Assessment reports dated 12th June, 2023 and 18th January, 2024 relating to Maisha Namba and Card Project.

9. M/s Mosero further depones that upon an audit being conducted, the Reports were found to have met statutory requirements under the Act and regulations - as seen in the letter dated 22nd January,2024. The deponent also avers that as the Data Protection Impact Assessment is an ongoing one, it is recommended that the 1st Respondent continues updating and reviewing their data protection practices, and update the relevant Assessments accordingly.

Arguments against the Application

10. The 2nd Interested Party in its Replying Affidavit sworn by Mugambi Kiai on 13th February, 2023 argues that the 2nd Respondent has failed to prove that the facts raised were known to the Ex-parte Applicant as at 4th December, 2023.It is also deponed that the Ex-parte Applicant had requested for information from the 1st Respondent about the Maisha Numba project but the same was never given.

11. The 2nd Interested Party's case is that the 1st Respondent has failed to demonstrate that the Data Protection Impact Assessment Report dated 8th June, 2023 was published for effective public participation by stakeholders in accordance with Articles 10 & 35 of *the Constitution*.

12. The deponent also argues that the 2nd Interested Party was not aware of the Petition before the Constitutional and Human Rights Division, and neither was it a party. It is also the 2nd Interested Party's argument that the Petition is based on a different legal action brought under Article 22 of *the Constitution* with different parties.

13. On their part, the Ex-parte Applicant in response to the Application, filed an affidavit sworn by Chris Kerkering on 1st February, 2024 in response to the 1st Respondent's Application. In the affidavit, the deponent urges that Katiba Institute was not aware of the proceedings before the Constitutional and Human Rights Division, neither was it aware of the nature of the pleadings and documents filed in the said proceedings.

14. The Ex-parte Applicant's case is that the circumstances leading to filling of the Judicial Review application was the government's past demonstrated history of failing to comply with prior orders regarding the rollout of a national digital identification system, which had prompted previous High Court litigation and a previous judicial review. It is also its case that when the State Department for Immigration and Citizen Services, Ministry of Interior and National Administration announced that it was finalizing the rollout of the Maisha Namba, the Ex-parte Applicant was concerned that it would roll out the project without conducting a Data Protection Impact Assessment and therefore the deponent sent an access to information request to the Principal Secretary, Mr. Bitok through and email and hand delivery on 26th September, 2023.

15. The Principal Secretary is said to have despite his duty under Article 35 failed to respond. The Ex-parte Applicant's argument is that according to section 9(6) of the *Access to Information Act* failure to respond constitutes denial of its request.

Parties Submissions

16. The Application was canvassed by way of written submissions. The 1st Respondent/Applicant in its submissions dated 29th January, 2024 argues that this Court has jurisdiction to set aside an order of stay issued ex-parte as was held by the Court in the case of Republic V Capital Markets Authority Ex-parte Joseph Mumo Kivai & Another [2012] eKLR. The 1st Respondent further argues that by the time the court's conditional order issued on 4th December, 2023 staying implementation of the Maisha Namba Project was issue the Data Protection Impact Assessment report had been produced and filed before Court on 12th September, 2023.

17. It is submitted that the Application before this Court meets the public interest threshold as defined under the Black's Law Dictionary 10th Edition at Page 1425. The 1st Respondent's submission is that having the orders remain in place infringes the entire Chapter Three and Four of *the Constitution* with respect to the rights of each and every citizen. The 1st Respondent further submits that public interest is a primary consideration when granting or considering stay as was held by the Court in Republic v

Permanent Secretary Ministry of Local Government & 4 Others Ex-Parte Immaculate Transporters Ltd & 17 Others [2008] eKLR.

18. The 2nd Respondent in its submissions urges that this Court has unfettered, unlimited, and unrestricted jurisdiction to set aside an order as is provided under Section 3A of the *Civil Procedure Act*. The Respondent also submits that when issuing stay orders Court ought to strike a balance between the rights of an individual and public interest see the case of R (H). vs Ashworth Special Hospital Authority and Re Bivac International SA (Bureau Veritas) (2005) 2 EA 42.

19. The 1st Interested Party in its submissions dated 12th February, 2024 submits that it is sued in these proceedings pursuant to its mandate under the Data Protection Act and that section 5 of the Data Protection Act,2019, it is the office mandated to give effect to the right to privacy as enshrined under Article 31 (c) and (d) of *the Constitution* of Kenya 2010.

20. The Office of the 1st Interested Party it is submitted is required to make provision specifically for the regulation of the processing of personal data and further provide for the rights of data subjects and obligations of data controllers and processors.

21. The 1st Interested Party it is submitted once consulted pursuant to the provisions of Section 31(3) of the Data Protection Act is required to receive and review the data protection impact assessment and the same is done through assessing whether the DPIA complies with the set-out guidelines for carrying out an impact assessment as provided for under section 31(6) of the DPA 2019. Section 19 of the Data Protection (Civil Registration) Regulations 2020 is also referred to on the method of conducting a data protection impact assessment.

22. The Ex-parte Applicant also submits that it stated fully and fairly, all material facts within its knowledge. The Court of Appeal case of Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Others [1998] eKLR, is referred to on the principles for determining the fact and consequences of non-disclosure.

23. Further that on 25th October, 2023 the Respondents without conducting public participation unconstitutionally amended the Registration of Persons (Amendment) Regulations, 2023 and Birth and Deaths (Amendment) Regulations, 2023 to sustain the Maisha Namba decision and roll out electronic identity cards. The Respondents it is submitted also introduced a unique personal identification number. According to the Ex-parte Applicant they have created a regulatory confusion incompatible with Article 10 and the rule against vagueness by introducing Regulations contradictory to the existing Registration of Persons (National Integrated Identity Management System) Rules, 2020 without revoking these Regulations.

24. The Ex-parte Applicant's submission is that it was not aware of the Data Protection Impact Assessment Report and had followed the proper legal channels for accessing information. There has been no deception on the part of the Ex-parte Applicant.

25. The 2nd Interested Party also filed written submission dated 13th February, 2024. In the submissions, it is urged that stay orders as issued are not final and only seek to have the main application heard on merit and not render final orders nugatory as was held by the Court in Taib vs Minister for Local Government and Others, Msa Misc. Appl. No.158 of 2006.

26. It is also the 2nd Interested Party's submission that there are other grounds for Judicial Review beyond the data protection Impact Assessment such as lack of Public Participation and irregular amendment of the Births and Deaths Act.

Analysis and Determination

27. The Court has considered the arguments adduced by all the parties, their respective pleadings, written submissions, and evidence produce before this court. The issues that form for determination are:

    i. Whether the 1st Respondent's application dated 14th December, 2023 is merited?

    ii. Whether the Judicial Review suit before this Court is sub judice?

    iii. Who shall bear the costs?

28. Whether the court has powers to vary, set aside, or discharge an order of stay is to be found under 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.

29. The Court in the case of Republic vs Vice Chancellor Moi University & 3 others Ex Parte Benjamin J. Gikenyi Magare [2018] eKLR held as follows;

> " The wording of this sub-rule clearly indicates that the court has jurisdiction to review, vary, set aside or discharge stay and that the powers of court are discretionary. Referring to the review, varying or setting aside ex-parte orders by the court the matter was discussed in Civil Appeal No.77/2003 in Court of Appeal Judicial Commission of Inquiry to the Goldenberg Affair & Others vs. Job Kilach. The Court of Appeal referring to the case of Ex-parte Harbage and the words of MAY L. J. quoted a passage on page 14 thus:-
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> > "The next point to make is that although appeal does lie to this court against an ex-parte order made by a judge of High Court.....nevertheless in his judgment in that case Sir Donalds on MR [1983] 3 All E.R. 589 at page 593 said:
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> > > "I have said ex-parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the Applicant is under duty to make full disclosure of all relevant information in his possession whether or not it assists his application this is no basis for making a definite order and every judge knows this. He expects at a later stage to be given opportunity to review his provisional order in the light of evidence and argument adduced by the other side and in so doing he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order. This being the case it is difficult if not impossible to think of circumstances in which it would be proper to appeal to this court against an ex parte order without just giving the High Court judge an opportunity of reviewing it in light of argument from the defendant and reaching a decision."

30. Similarly, the Court in Republic vs Kenya Sugar Board & Attorney General on behalf of Minister for Agriculture Ex-parte Mat International Limited [2004] eKLR held as follows;

> " Considering the submissions of counsel on both sides it is my view that under provision of *Law Reform Act*, Cap.26 Section 8 and nine (9) and under the Order 53 rule 1(4) the High

Court has jurisdiction to review, vary, discharge or set aside orders of stay granted under sub-rule (4) and an aggrieved party has the option of returning to the judge who issued the orders or to file an appeal to Court of Appeal."

31. The principles upon which orders such as the ones that were issued by this court on 4th December 2023 may be set aside were set out in the case of Republic vs Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR where the Court stated thus;

> "I will not attempt to re-invent the wheel regarding the issue of setting aside stay orders issued when leave has been granted to operate as stay. I say so because a host of judicial decisions have now settled the position that setting such stay orders would only be merited if: -(a) There is non-disclosure of material facts (b) Concealment of material documents (c) Misrepresentation".

32. The 1st Respondent/Applicant herein has raised the ground of non-disclosure of material facts which include that at the time of applying for the stay orders the Ex-parte Applicant did not disclose to the Court that there was a Constitutional Petition - before the Constitutional and Human Rights Division - that raised the same issues as the ones raised before this Court. The Ex-parte Applicant is said to have also failed to disclose that the 1st Respondent herein had submitted to the 1st Interested Party a Data Protection Assessment Report before launching the Maisha Namba project.

33. In its defence, the Ex-parte Applicant argues that at the time of filing the application it was not aware that there existed a Constitutional Petition before the Constitutional and Human Rights Division as it was not a party to the same. The Ex-parte Applicant also argues that it was not aware that the Data Protection Assessment Report had been submitted as the 1st Respondent failed to respond to its request for further information on the Maisha Namba project. The Ex-parte Applicant further argues that as it was not a party to the proceedings before the Constitutional Court it did not have access to the documents filed in the proceedings and therefore it was not aware that the report had been produced by the 1st Respondent.

34. It is the Ex-parte Applicants' case that it made a request for information under The *Access to information Act*. Section 9(6) of The *Access to information Act* stipulates that where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected.

35. Section14 (1)(a) provides that Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information a decision refusing to grant access to the information applied for.

36. Section14 (2) provides that an application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.

37. The Ex-parte Applicant's case is that the circumstances leading to filling of the Judicial Review application was the government's past demonstrated history of failing to comply with prior orders regarding the rollout of a national digital identification system, which had prompted previous High Court litigation and a previous judicial review.

38. The Ex-parte Applicant who comes through as a vigilant litigant has left the court in limbo in the face of such a critical call for information. The court has not been informed whether or not the Ex-parte Applicant applied to the Commission requesting a review of any of the following decisions within

thirty (30) days as envisioned under Section 9(6) of The *Access to information Act*. The court has not been informed by the Ex-parte Applicant what the outcome of the review was, if any.

39. From the foregoing, this court draws an inference that the Ex-parte Applicant had access to the report which it concealed or failed to disclose to the court.

40. On another front, the Ex-parte Applicant filed an affidavit sworn by Chris Kerkering on 1st February, 2024 in response to the 1st Respondent's application wherein he urges that Katiba Institute was not aware of the existence of the proceedings before the Constitutional and Human Rights Division or the nature of the pleadings and documents filed in the said proceedings.

41. The Ex-parte Applicant's case is that the circumstances leading to filling of the Judicial Review application was the government's past demonstrated history of failing to comply with prior orders regarding the rollout of a national digital identification system, which had prompted previous High Court litigation and a previous judicial review.

42. From the foregoing, it is clear to the court that the Ex-parte Applicant is a vigilant litigant as a result of which it is no doubt that the Ex-parte Applicant has demonstrated that it is has substantial knowledge and awareness of what is going on in the High Court constitution in the human rights and the judicial review divisions.

43. The Ex-parte Applicant has on its own volition demonstrated to the satisfaction of this court that it is aware of the current and past litigation touching on the rollout of a national digital identification system.

44. It is not the duty of the court to conduct an inquiry to find out whether or not other suits are pending. A vigilant litigant has a duty satisfy themselves that there are no other pending suits in other courts before moving the court for stay orders. This call is particularly more important in situations in cases like the matter before me, where the Ex-parte Applicant is expressing knowledge of repeated litigation around the cause of action before Constitutional and Human Rights Division, and the Judicial Review Division of the High Court. There is a high probability, that the Ex-parte Applicant knew of the existence of the Constitutional and Human Rights Division at the time of filing the instant Judicial Review application.

45. With the foregoing admissions on the part of the Ex-parte Applicant this court is satisfied on a balance of probabilities that the Ex-parte Applicant was aware, and/or knew of the existence of the high court petition that is pending - which it failed to disclose to the court when it secured the stay orders from this court.

46. The Court has had an opportunity to examine the Pleadings filed before the Constitutional and Human Rights Division, and it notes that the issues raised therein arise from the same subject matter as the one before this Court. The Constitutional Suit was filed on 19th September, 2023 way before the Ex-parte Applicant came before this Court on 30th November, 2023.

47. The Supreme Court in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [2020] eKLR) had the following to say on the doctrine of sub judice:

> " The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This

means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

48. The issues at hand are issues of great public interest that ought not be held ransom by a process of sub judice. Stay orders cannot be issued nor serve any useful purpose where the administrative action complained of has been fully implemented.

49. In the case of Munir Sheikh Ahmed v Capital Markets Authority [2018] eKLR Lady Justice P. Nyamweya held as follows:

> " The second factor that comes to play in the exercise of discretion whether or not to grant a stay in judicial review proceedings is that of the public interest. The public interest as an overriding factor when determining whether or not to grant stay orders was explained by Majanja J. in R vs Capital Markets Authority Ex-parte Joseph Mumo Kivai & Another (supra), where the learned judge held that judicial review proceedings are public law proceedings for vindication of private rights, and for this reason public interest is a relevant consideration in the granting of stay orders.

50. In the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR the court stated:

> " Conservatory Orders" bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues on the "prospects of irreparable harm occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the Constitutional values and the proportionate magnitudes, and priority levels attributable to."

51. This Court has the discretion to set aside the stay orders of pursuant to section 3A of the *Civil Procedure Act* which gives the Court the power to issue orders as may be necessary to meet the ends of justice.

52. In the case of Wachira Karani vs Bildad Wachira [2016] eKLR the court stated that:

> " The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit. The inherent power, as observed by the Supreme Court of India in Raj Bahadur Ras Raja vs Seth Hiralal "has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." Lord Cairns in Roger Vs Comptoir D' Escompts De Paris stated as follows: -
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> > One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any

intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case." [Emphasis Added]

53. I am further guided by the decision of the Court of Appeal in M. Mwenesi vs Shirley Luchhurst & Another Civil Application No.170 of 2000 where the court held;

> " A court of justice has no jurisdiction to do injustice and where injustice on a party to a judicial proceeding is apparent a court of law is under a duty to exercise its inherent power to prevent injustice." [Emphasis Added]

54. This court is further guided by the case of Patel vs E.A. Cargo Handling Services Ltd [1974] E.A. 75 where the court stated that:

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules." [Emphasis Added]

Disposition:

55. The upshot of the foregoing is that the stay order issue on is hereby set aside.

Order:

1. The 1st Respondent's application dated 14th December,2023 is hereby allowed.
2. The matter shall be transferred immediately to the Constitutional Human Rights Division for hearing and determination together with E196 of 2023.
3. This being a public interest matter I make no orders as to costs.

It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

J. CHIGITI (SC)

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR