



REPUBLIC OF KENYA



KENYA LAW
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**Maganga v Director of Public Prosecutions & another (Judicial Review
E001 of 2024) [2024] KEHC 6928 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 6928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
JUDICIAL REVIEW E001 OF 2024**

GMA DULU, J

APRIL 25, 2024

**IN THE MATTER OF: AN APPLICATION BY GADIEL MAGANGA FOR
LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

-AND-

**IN THE MATTER OF: THE DECISION OF THE DIRECTOR OF PUBLIC PROSECUTIONS
TO CHARGE AND PROSECUTE IN RESPECT TO ALLEGATION OF MISAPPROPRIATION
OF PUBLIC FUNDS AT TAITA TAVETA COUNTY ASSEMBLY REGARDING TRAVEL
CLEARANCE TO ZANZIBAR INQUIRY FILE NO. EACC/MSA/FI/INQ/13/2022**

-AND-

IN THE MATTER OF: ARTICLE 157 (11) OF THE CONSTITUTION OF KENYA, 2010

-AND-

IN THE MATTER OF: ANTI-CORRUPTION & ECONOMIC CRIMES ACT NO. 3 OF 2003

-AND-

**IN THE MATTER OF: THE PUBLIC FINANCE MANAGEMENT
ACT NO. 18 OF 2012 AND REGULATION THEREON**

-AND-

IN THE MATTER OF: THE COUNTY ASSEMBLY SERVICES ACT NO. 24 OF 2017

-AND-

IN THE MATTER OF: COUNTY GOVERNMENT ACT NO. 17 OF 2012

-AND-

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW UNDER
SECTIONS 7(1)(2)(3) OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO.
4 OF 2015 AND ORDER 53 RULES 1, 2 AND 3 OF THE CIVIL PROCEDURE
RULES, SECTION 1A, 1B, 3A OF THE CIVIL PROCEDURE ACT, 2020**



BETWEEN

GADIEL MAGANGA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

RULING

1. On 7th March 2024 the *ex-parte* applicant filed a Chamber Summons dated 6th March 2024, seeking the following orders:-
 1. (Spent)
 2. The *ex-parte* applicant Gadiel Maganga, be granted leave to apply for:-
 - a. An order of *certiorari* to issue to remove to this court and quash the decision of the 1st respondent to institute and/or commence criminal prosecution or proceedings against the applicant following an investigation by the 2nd respondent namely an inquiry into the allegations of corruption and misappropriation of public funds at Taita Taveta County Assembly regarding travel clearance to Zanzibar vide inquiry file No EACC/MSA/FI/INQ/23/2023 pending hearing and determination of this Judicial Review.
 - b. An order of prohibition do issue directed to the 2nd respondent barring the 2nd respondent from arresting, incarceration, instituting and/or undertaking or otherwise prosecute him on matters relating to the inquiry into an allegation of corruption & misappropriation of public funds at Taita Taveta County Assembly regarding travel clearance to Zanzibar vide inquiry file No EACC/MSA/FI/INQ/13/2022 pending hearing and determination of this Judicial Review.
 - c. Any other or further relief that this honourable court may deem fit and just to grant in the circumstances.
 3. That leave so granted in 2(a) and (b) above do operate as stay of the decision of the 1st respondent to charge the appellant with the offences related to allegations of corruption and mismanagement of public funds at Taita Taveta County Assembly regarding travel clearance to Zanzibar vide inquiry file No EACC/MSA/FI/INQ/13/2022.
 4. That costs of the application be provided for.
2. The application has grounds on the face of the Chamber Summons that the applicant is the Clerk of Taita Taveta County Assembly and Secretary to the County Assembly Service Board; that on 24th February 2024 a contingent of officers of 2nd respondent conducted a raid at his residence at Shalemba Mwatate to effect his arrest on a day when he could not access legal recourse through courts; that subsequently the 2nd respondent received a complaint and insisted on investigations; that 1st respondent prepared a charge sheet against the applicant for alleged abuse of office contrary to Section 46 as read with section 48(1) of the *Anti Corruption and Economic Crimes Act* No 3 of 2003; that the 1st



- respondent did not consider material and crucial facts in arriving to decide to charge the applicant as the alleged public funds were not lost.
3. The application was filed with a verifying affidavit sworn by the applicant on 6th March 2024 amplifying the grounds and annexing several documents.
 4. The *ex-parte* Chamber Summons being primarily an application for leave to commence Judicial Review proceedings, this court on 7th March 2024 issued *ex-parte* orders in chambers granting leave to the applicant to file the main Notice of Motion for Judicial Review orders within the time prescribed by law, which is 21 days from 7th March 2024.
 5. With regard to the request for the leave operating as a stay, this court ordered that the application be served for inter-partes hearing.
 6. When the application came up for mention on 13th March 2024, the court was informed that there is likelihood of the *ex-parte* applicant being charged in Mombasa Magistrate's Court, which was then explained further that the applicant had not taken plea in Mombasa because he had been hospitalized. The court was also informed that the 1st respondent (DPP) had not yet filed a response herein, but 2nd respondent (EACC) had filed grounds of opposition.
 7. On that date, I declined to issue interim stay orders, as I was informed that on request of applicant's counsel, plea in the Mombasa Magistrate's Court had been deferred to 4th April 2024.
 8. On this application coming again for mention on 4th April 2024, the court was informed again that plea had not been taken in Mombasa court. I was further informed that parties had now filed responses herein, and I then granted interim stay orders as requested till ruling on 25th April 2024.
 9. It is important to put on record here that on 9th April 2024, there came up for mention an earlier application Voi High Court Misc. Application E010 of 2024, wherein based on the same facts and circumstances herein, the *ex-parte* applicant herein had asked this court for orders of anticipatory bail and in which this court had on 13th March 2024 ordered that:-

 “As the request for anticipatory bail reinstatement has not been opposed, I reinstate the anticipatory bail to 8th April 2024. From then on the CM's court will 'deal with the issue of bail, if it arises.”
 10. In effect, the issue of anticipatory bail granted by this court was spent by 8th April 2024. Thus when the file came up before me for mention again on 9th April 2024 therefore, the said Miscellaneous file was marked by this court as closed.
 11. Coming back to the present application, I have perused and considered the application, and grounds of opposition filed by the 2nd respondent, as well as the replying affidavit filed by the 1st respondent (DPP), and the submissions filed by M/s Sharia Nyange Njuguna advocates for the *ex-parte* applicant as well as the submissions filed by the Director of Public Prosecutions the 1st respondent, and submissions filed by Songole A. Brilliant for the 2nd respondent EACC.
 12. In my view, decided cases are clear on the considerations for grant of stay orders pending determination of a matter pending in court. Such stay orders are an exercise of discretionary power of the court, in order to do justice to all parties.
 13. The applicant herein contends that if he is charged in court or takes plea, in the already pending criminal case in the Magistrate's court in Mombasa, he stands to suffer grave prejudice and has given reasons such as suspension from duty. The respondents maintain that they are merely performing their



constitutional or statutory duty in taking the applicant to the criminal court before the Mombasa Chief Magistrate.

14. In my view, the request for the interim stay of the intended investigations or criminal proceedings herein can not succeed.
15. The first reason is that this court granted the applicant leave to file the Notice of Motion for Judicial Review orders on 7th March 2024. According to the law, the Notice of Motion was to be filed within 21 days from that date. So by end of March 2024 latest, the Notice of Motion should have been filed, but as at the date of this ruling I have not seen the said Notice of Motion, nor has it been confirmed in the pleadings or submissions that it has been filed.
16. That being so, there are actually no live proceedings in this matter, as if the Notice of Motion application was not filed within 21 days, all previous orders granted by this court and the *ex-parte* Chamber Summons herein for Judicial Review lapse and have no effect. Thus there being no Notice of Motion filed within 21 days, there are technically no proceedings pending hearing in this matter, and thus there can be no interim orders to be issued pending determination of proceedings herein.
17. Even if I am wrong on the above, I am still of the view that this application cannot succeed, as the applicant has not alleged any clear violation or intended violation of the Constitution or the law against him, which this court may persuade this court to stay pending enquiry by this court and issuing of appropriate remedial orders in the interest of justice.
18. By the applicant claiming that no money was lost, that is not a ground for issuing interim stay orders as there is no disclosed violation of the Constitution or the law therein which this court can redress, as such allegation by the applicant if true, goes to his evidential defence in the criminal proceedings, which this court is not able to address through interim stay orders herein. That issue can and should be addressed in the court where criminal proceedings are filed, not in this Judicial Review court.
19. I thus find no merits in the request for interim stay orders herein pending hearing of the main application for Judicial Review. The request for interim stay orders herein is consequently hereby dismissed. Any temporary stay orders previously granted by this court are hereby vacated.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF APRIL 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Mr. Nyange for applicant

Mr. Sirima for 1st respondent

Ms. Songole for 2nd respondent

