



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**HCJR/E1089/2020**

**Barasa Kundu Nyukuri.....Applicant**

vs

**The Kibera Chief Magistrates Court & others.....Respondents**

**RULING**

**(Ex parte)**

1. I have considered the applicants' application dated 25<sup>st</sup> August 2020 seeking to be heard during the current High Court vacation and also seeking leave to apply for judicial review orders in terms of prayers (2) & (3) of the application. The applicant also prays that the leave sought if granted operates as stay of the impugned decision in terms of prayer (4) of the application.
2. At this stage the issue before me is whether the applicant has established grounds to be heard during the vacation and whether the application meets the threshold for the court to grant leave as laid down in *Republic v County Council of Kwale & Another Ex-parte Kondo & 57 others*<sup>1</sup> and *Meixner & Another v A.G.*<sup>2</sup> Also for determination is the question whether if the leave sought is granted it shall operate as stay.
3. I have diligently addressed my mind to the grounds in support of the application. I have also considered the relevant provisions of the law and authorities governing the grant of leave and the tests laid down in authorities and also the tests for granting stay. It is my view that the urgency has not been demonstrated. Further, upon considering the law and authorities and upon applying them to the facts before me I find that the applicant has

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<sup>1</sup> Mombasa HCMISC APP No 384 of 1996.

<sup>2</sup>{2005} 1 KLR 189.

demonstrated an arguable case and warrants the leave sought. I am also satisfied that the applicant has established sound grounds for the stay sought to be granted.

4. It is not clear why the applicant has not enjoined the complainant in the criminal case to this application. Traditionally, common law placed an accused person in criminal cases at a higher pedestal and treated him as the most favorite child of the law. However, the emergence of transformative and progressive constitutions has altered the legal landscape. The law now recognizes the tripartite rights, namely, the right of the accused, the prosecution and the complainant. The complainant is a necessary party to these proceedings. The Supreme Court of India in *Prabodh Verma v State of U.P.*<sup>3</sup> and *Tridip Kumar Dingal v. State of W.B.*<sup>4</sup> addressed the question of necessary parties with admirable clarity. The principle culled from the above cases is that a person or a body becomes a necessary party if he is entitled in law to defend the orders sought. The term “entitled to defend” confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. The principle of *audi alteram partem* has its own sanctity. That apart, a person or an authority must have a legal right or right in law to defend or assail.
5. The other issue which this court must bear in mind is the principle of natural justice best enunciated by the Supreme Court of India in *Canara Bank v Debasis Das*<sup>5</sup> as follows:-

*“Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.”*

And again:-

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<sup>3</sup> {1984} 4 SCC 251.

<sup>4</sup> {2009} 1 SCC 768.

<sup>5</sup> {2003} 4 SCC 557.

*“Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance....”*

6. The Principles of Natural Justice and their application in Justice delivery system is not new. It is as old as the system of dispensation of justice itself and has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.
7. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.<sup>6</sup> Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.<sup>7</sup> The basic principle behind the doctrine of natural justice, that is, no order should be passed behind the back of a person who is to be adversely affected by the order. The Supreme Court of India put it succinctly in *J.S. Yadav v State of U.P. & Anr*<sup>8</sup> in Paragraph 31 held thus:-

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<sup>6</sup> *Kioa v West* (1985), Mason J

<sup>7</sup> See *Nyango v. Attorney General*,<sup>7</sup> **Nyarangi, JA** asserted at page 459 that:-"*I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.*" At page 460 the learned judge added:-"*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.*" And in *Mbaki & others v. Macharia & Another*,<sup>7</sup> at page 210, the Court stated as follows:- "*The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.*"

<sup>8</sup> {2011} 6 SCC 570.

*“No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the... Code of Civil Procedure,... provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail...”*

8. A court ought not to decide a case without the persons who would be vitally affected by its judgment being before it. In the circumstances, I issue the following orders:-
- a. **That** *this application is certified as urgent and the same is admitted for hearing on a priority basis.*
  - b. **That** *leave be and is hereby granted to the applicant as prayed in prayers (2) & (3) of the application.*
  - c. **That** *the leave herein granted shall operate as stay of the impugned decision as prayed in prayer 4 of the application dated 25<sup>th</sup> August 2020.*
  - d. **Without prejudice** *to the generality of the foregoing, pending the hearing and determination of the substantive application, the leave herein granted shall operate as stay of the Respondents decision to arrest, detain, charge, prosecute or in any manner institute criminal charges against the applicant in any court in Kenya premised on the facts particularized in the charge the dated 25<sup>th</sup> August 2020 or any facts arising or related to the complainant’s complaint which triggered the impugned decision.*
  - e. **That** *the applicant is directed to file and serve the substantive application within 15 days.*
  - f. **That** *the applicant is directed to enjoin the complainant in the substantive application as an interested party and serve it with all the pleadings filed.*
  - g. **Mention via video link** *for directions on hearing on 122th October at 12.00 noon.*

Orders accordingly

Signed, Dated and Delivered via e-mail at Nairobi this 25<sup>th</sup> day of August 2020.



**John M. Mativo**

**Judge**