



Republic v Director of Public Prosecutions & 2 others; Nderitu (Interested Party); Mwangi (Exparte Applicant) (Judicial Review Application E005 of 2022) [2024] KEHC 9408 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
JUDICIAL REVIEW APPLICATION E005 OF 2022
DKN MAGARE, J
JULY 30, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

AND

DAVID GATHII NDERITU INTERESTED PARTY

AND

JOHN KINGORI MWANGI EXPARTE APPLICANT

JUDGMENT

1. This is a decision in respect of the Judicial Review Application dated 22/11/2023. The Applicant is seeking for orders as follows:
 - a) an order of certiorari to quash and remove into this court hitherto the unreasonable and oppressive acts of the 1st Respondent committed vide their decision made on 24/5/2022 to prosecute the ex-parte Applicant with the offense of forgery contrary to Section 350(2) of the Penal Code or any other allied criminal offence for the core land dispute subject of a pending civil litigation.
 - b) An order of prohibition prohibiting the 1st and 2nd Respondents jointly and severally from harassing, arresting, incarcerating, charging or prosecuting the ex-parte Applicant in respect



of investigations relating to DCI Inquiry File No. 8/2020 (CR255/112/2021 or under any further proceedings related to the ex-parte Applicant's criminal prosecution.

- d) Costs.
2. The application is premised on the grounds on its face and is supported by the affidavit of the even date, sworn by John Kingori Mwangi.
 3. It is deposed that the participation of the said public officers is crucial to shed light on the genuine documents used in the transfer of the impugned titles.
 4. That, the documents relied upon for transferring the suit premises cannot be found at the land registry but are within the Land Registrar's possession. That the Land Registry had declined to avail the official search to the property. That prejudice shall be suffered by the Respondent without this court's intervention.
 5. The Respondent filed a Replying Affidavit sworn by Pithon M. Gachanja on 6/10/2023, the Prosecution counsel who deposed inter alia as follows:
 - a. That, the Applicant is seeking an order of certiorari to quash the decision to charge him with the offence of forgery contrary to Section 350(2) of the Penal Code.
 - b. That, the Applicant is also seeking prohibition to prohibit charging him as such.
 - c. That the DCI investigated the alleged matters and after a series of correspondences the Director of Public Prosecutions recommended to charge the Applicant with forgery.
 - d. That the decision to charge the Applicant was impartial and independent under Article 157(11) of *the Constitution*.
 - e. That it was not in the jurisdiction of this court to determine the merits of criminal culpability.
 - f. That the application is as such frivolous, vexatious and an abuse of the court process and should be dismissed.
 6. The Interested Party also filed replying affidavit sworn by David Gathii Nderitu on 4/10/2022
 - a. The criminal investigations followed suspicion of fraud perpetrated by the Applicant resulting to unlawful transfer of the Interested Party's Title No. Nyeri/Municipality Block 1/1674 and Title No. Nyeri/Municipality Block 1/1675.
 - b. The application is thus an abuse of the court process to prevent a lawful action by independent institutions.
 - c. The application ought to be dismissed.

Submissions

7. The Applicant filed submissions dated 12/9/2023. It was submitted that the available evidence did not disclose a realistic prospect of conviction and the intended prosecution of the Applicant was thus improper. Reliance was placed on Article 157 (11) of *the Constitution*. They also relied on R v Chief Magistrates Court at Mombasa Ex Parte Ganijee & Another [2012] eKLR.
8. Furthermore, it was submitted that the Respondent and Interested Party's actions were in contravention of the Applicant's fair administrative action right under article 47 of *the Constitution*.



9. On the part of the Interested Party, they filed submissions date 28/11/2023. They submitted that Judicial Review was to be based on the process of decision making and not merits as alleged by the Applicant. They relied on the case of Republic v Public Procurement Administrative Review Board & Another ex parte DDB Bank [2018] eKLR.
10. The Respondent also submitted that the decision by the DPP to charge was based in evidence and it was not upon this court to interfere without evidence of vendetta and unjustified prosecution. They cited a plethora of authorities including Hon James *Gesami v Attorney General & Others Petition No. 376 of 2011* to support the position that the DPP is at liberty to prefer charges against any person if there is sufficient evidence. They quoted the decision as follows:

“.....The DPP is at liberty to prefer charges against any party in respect to whom he finds sufficient evidence to prefer charges.... in my view, requiring the petitioner to subject himself to the normal criminal prosecution process mandated by the law where he has all the safeguard guaranteed by *the Constitution* does not in any way amount to an attack on the human dignity of his constitutional rights.”
11. The Respondent did not file submissions.

Analysis

12. The issue that presents to me for determination is whether the court should grant prohibition and certiorari orders as prayed by the Applicant.
13. The decision to charge is at the discretion of the DCI and the DPP but the same must be exercised in the spheres of the law. As was held by Nyamu, J (as he then was) in *Republic v Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004* (HCK) [2008] 2 EA 323.

The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable.
14. The principles for Judicial Review were set out in a landmark case of Republic Vs *Kenya National Examination Council Ex parte Gathenji and others Civil Appeal No.266 of 1996*, where the Court of Appeal stated inter alia:

“an order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.”



15. On the purpose of Judicial Review in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR, the Court of Appeal held that: -

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision.”

16. Therefore in my view, to impute the exercise of discretion on grounds other than illegality, irrationality or unreasonableness would easily venture into the merits of the decision and ought not to be made the subject of judicial review application since the effect of a judicial review court investigating such an exercise of discretion would be to find whether or not in the circumstances, the decision was merited and hence the judicial review court would be sitting on an appeal against the decision being challenged. Even on an appeal, the law is that the decision disallowing adjournment being within the Judge’s discretion an Appellate Court would be slow to interfere unless the discretion was not exercised judicially.

17. The gravamen of the judicial review proceedings by the Applicant herein in my view is founded on the theory that the decision of the Respondent to charge him has no legal basis and so the proposed charges against him are misdirected and baseless because he is the rightful interest holder in the disputed suit premises. That he ought not to be taken through a trial process whereas there was no wrong doing on his part and that the action of taking him through such process is a violation of his right under Article 47 of *the Constitution*.

18. To the contrary, it is my considered opinion that the jurisdiction to decide whether or not a charge discloses an offence lies with the trial court but not with this court. That jurisdiction is donated to the trial magistrate by Section 89 (5) of the Criminal Procedure Code which states: -

“89 (5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.”

19. Therefore, for this court to determine whether the charge against the Applicant discloses an offence would be a usurpation of the powers vested in the trial court by *the constitution* and statute. It would also be tantamount to micromanaging the proceedings in that court.

20. I find and hold that the Applicant has not demonstrated that the decision to charge him was motivated by malice or by any reason other than public interest as would entitle this court to interfere. He has equally not demonstrated how he is unlikely to get a fair hearing in the trial court on the proposed charges. As was held in the case of *Republic v Attorney General & 4 others Ex parte Kenneth Kariuki Githi* [2014] eKLR.

“.....The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process.....”



21. Similarly, in the case of *Kuria & 3 Others vs. Attorney General* [2021 2 KLR 69] the Court observed doth:

1. The court has the power and indeed the duty to prohibit the continuation of criminal prosecutions if extraneous matters divorced from the goals of justice guide their instigation.
2. It is the duty of the court to ensure that its processes are not used as tools for vilification on issues not pertaining to that which the system was even formed to perform.
3. An order of prohibition should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie on society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious.
4. The machinery of criminal justice is not to be allowed to become a pawn in personal feuds and individual vendetta. The power of judicial review is invariably invoked so as to jealously guard it from this abuse.
5. It is the duty of the court to ensure that the utilization and or invocation of its processes and the law is not actuated by other considerations so divorced from the goals of justice as to make the court virtually a scapegoat in personal score settling and vendetta.
6. The limits of judicial review should not be curtailed but should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in contemporary society.
7. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. It is therefore imperative that the intrusion of judicial review remedies into criminal proceedings would have the effect of requiring a much broader approach.
8. It does not matter whether the decision has been made or not, what matters is the objectives for which the court procedures are being utilized. Once it is decided that the process is an abuse, it matters not that it has been commenced or whether there was acquiescence by all parties. The duty of the court in such instances is to purge itself of such proceedings. Thus whereas the court cannot order that the prosecution be commenced, because already it can still order that the continued prosecution be stayed. An order of prohibition can be issued to prohibit the continued hearing.
9. An order of prohibition should be granted where there is an abuse of the process of the court, which will have the effect of stopping the prosecution already commenced. A prerogative order is an order of a serious nature and cannot and should not be granted lightly. There should be concrete grounds for supposing that continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest could be best served by staying of the prosecution.
10. In the instant case several allegations of selective prosecution, harassment and pressure from the state were made. However no evidence of those allegations or of malice unlawful actions, excess or want of authority and or manipulation had been shown.
11. In order for an application such as this one to succeed, there is need to show how the court is being abused or misused, there is need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution.



12. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in society. There is a public interest underlying every criminal prosecution, which are being jealously guarded, whereas at the same time there is private interest of the rights of an accused person to be protected. Given these bipolar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence.
22. Based on the above authorities, I find no merit in the application which is hereby declined.

Determination

23. In the upshot I make the following orders:
- a. The Application dated 22/7/2022 is dismissed in limine.
 - b. There shall be no order as to costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF JULY, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Kaniu for the 1st Respondent

Ex-parte Applicant absent

Court Assistant – Jedidah

