



Nyukuri v Magistrate's Court & 12 others (Miscellaneous Civil Application E003 of 2023) [2023] KEHC 26849 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS CIVIL APPLICATION E003 OF 2023**

DK KEMEL, J

DECEMBER 19, 2023

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF ARTICLES 2(1) AND 2(2), 20, 22, 23, 25 (A) AND (C), 29 (D),
39, 47, 49, 157 (10) AND (11) AND 159 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTIONS 4(1), (2) AND (3), 6, 7 AND 9(1)
OF THE FAIR ADMINISTRATIVE ACTIONS, ACT NO. 4 OF 2015**

AND

**IN THE MATTER OF SECTION 8 AND 9 OF THE
LAW REFORM ACT CAP 26 LAWS OF KENYA**

AND

**IN THE MATTER OF ARREST AND THE INTENDED CRIMINAL
PROSECUTION CRIMINAL CASE OF OBTAINING MONEY BY FALSE
PRETENCE AT THE CHIEF MAGISTRATE'S COURT AT BUNGOMA**

BETWEEN

BARASA KUNDU NYUKURI EX PARTE APPLICANT

AND

BUNGOMA CHIEF MAGISTRATE'S COURT & 12 OTHERS RESPONDENT



RULING

1. Before the Court for determination is a Notice of Motion dated 27th July 2023 filed on even date. It seeks orders for Judicial Review in the nature of certiorari and prohibition, and is crafted as:
 - i. That the 2nd to 13th Respondents herein should not call, summon, intimidate, coerce, harass, humiliate, embarrass, dispute, vilify, arrest/re-arrest and prosecute the Ex-parte Applicant regarding the impugned criminal offence of obtaining money by false pretence, before the 1st Respondent and/or any other criminal Court in the Republic of Kenya until this instant application and his substantive judicial application are heard and determined by this Honourable Court.
2. That Notice of Motion was brought pursuant to the leave of the Court granted on 19th July 2023.
3. The application, as required by the provisions of Order 53 of the *Civil Procedure Rules*, is supported by the grounds contained in the statutory statement and supporting affidavit and annexures.
4. The ex-parte applicant's case as detailed in the facts relied upon in the statutory statement was that he is the Executive Director at Torch Africa Community Based Organization that has been operating in Bungoma and its environs since 2008. According to him, in the course of his pursuit for transparency in the recruitment process of village administrators, he attended several consultative meetings on the same to deliberate intensively with members of the Bungoma County Public Service Board. He highlighted that this meetings were attended by members of the public and interested parties who were not invited by him, Torch Africa Organization or the Clerk of the County Assembly.
5. He brought it to the attention of the Court that the complaints and allegations against him as a result of the consultative meetings is nothing but part of "smear campaign and intimidation scheme hatched" by one Mr. Joseph Samita Makata, and Mr. Johnathan Nyongesa Namulala the 7th and 8th Respondents respectively. He insisted that it was aimed at discrediting him and Torch Civil Organization due to its watch dog role against the illegal recruitment of village administrators and casual workers.
6. For all those complaints, the ex-parte applicant takes the position that the Respondents have been used for purposes other than for which their offices are created and therefore their decision to charge is challenged on account of impropriety as aforesaid and is not in furtherance of administration of criminal justice. Also, it was aimed at impeding his fight for public interest and social justice.
7. However, before the Court could deal with the application, the ex-parte applicant brought it to the attention of the Court that he was arrested by the Police on 27th April 2023 but was later released on cash bail.
8. There was no response from the Respondents on record regarding the aforesaid substantive notice of motion.
9. Although, in this Judicial Review application, i am only concerned with the process and never the merits or demerits of the criminal case that may be filed before the magistrate's Court. It is elaborate that the ex-parte Applicant was arrested on 27th April 2023 and later released on police cash bail. Counsel for the 2nd Respondent duly brought to the attention of the Court that investigations were still ongoing by the relevant authorities and should charges be preferred against the ex-parte Applicant then he shall be made aware of the same. To issue the orders as prayed would be, to this court pre-emptive, presumptive and as it were, substitution of this Courts discretion for that of the Director



of Public Prosecution as a creature of *the Constitution*. That would be inadvisable and undesirable as the constitutional design have allocated to each constitutional and state organs defined mandate and none of the organs should be eager or be seen to unduly supervise the other. Such caution has been administered by this court and even the Supreme Court. In *Diana Kethi Kalonzo and Another -vs- IEBC and 10 Others* [2013] eKLR the court said:-

“We note that *the Constitution* allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals are given leeway to discharge the mandate bestowed upon them by *the Constitution* so long as they comply with *the constitution* and National Legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing *the constitution*, found it fit that the powers of decision making be shared by different bodies. The decision of Kenyans must be respected guarded and enforced. The court should not cross over to areas which Kenyans specifically reserved for other authorities”.

10. I fully associate myself with those pronouncements and add that the Directorate of Criminal Investigations and the Director of Public Prosecution must be expected to be equipped with the requisite expertise to discharge their mandate. When an abuse or improper motive is demonstrated, the Court will have to answer to its duty to not only protect the functional operational and administration independence of these institutions but also safeguard the citizen to ensure that the spirit of *the Constitution* is adhered and that the directorates perform their mandate in the interests of public good and the overall interest of justice to ensure that abuse of legal process is avoided. Already, the applicant has confirmed that he has been granted a cash bail by the police as the matter is investigated. He should be patient for those investigations to be concluded. As to whether the eventual charges will meet the legal threshold of proof, the applicant will have the opportunity to tackle them in court as appropriate.
11. The foregoing findings lead me to the conclusion that the ex-parte Applicant is not rendered hapless without a remedy by my refusal to allow his application. Let him go before the trial Court and prove the inadequacies and unreasonableness of the actions of the Respondents against him, when the relevant charges are preferred against him. Indeed, the independence of the Director of Criminal Investigations and the Office of the Director of Public Prosecution are not a blanket one without responsibilities. I am aware and appreciate that if the decision is unreasonable and unjustifiable ab initio, the ex-parte Applicant would be entitled to an acquittal with the attendant right to sue for damages in a civil Court. It would therefore appear to me that the applicant has jumped the gun as it were. He should allow the process to take its course and once charged he can tackle the charges one way or the other as he will be accorded the opportunity to conduct his defence if need be.
12. In the result, it is my finding that the application dated 27th July, 2023 lacks merit. The same is dismissed with no order as to costs.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF DECEMBER, 2023.

D. KEMEI

JUDGE

In the presence of:

No appearance Kundu Nyukuri Ex-Parte Applicant

Mwaniki for Respondents

Kizito Court Assistant

