



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC JR MISC NO. 4 OF 2021**

ANNE NDUTA RUO.....APPLICANT

VERSUS

THE DIRECTOR PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT

THE CHIEF MAGISTRATE COURT MILIMANI ANTI-CORRUPTION COURT.....3<sup>RD</sup> RESPONDENT

**RULING**

1. Before me is the Ex parte Applicant's Chamber summons dated 25<sup>th</sup> October 2021. The application seeks orders that:-

**“1) Spent.**

**1A) This Honourable court be pleased and do hereby grant judicial review order of CERTIORARI to remove into this Honourable Court and QUASH the decision to prosecute and/or charge the Applicant for an offence of Conspiracy to commit an offence of corruption contrary to Section 47(A)(3) as read with Section 48 of Anti-Corruption and Economic Crimes Act No. 3 of 2003 under Count 1 in Milimani ACC No. E015 of 2021 before the 3<sup>rd</sup> Respondent.**

**2) The Applicant be granted leave to apply for judicial review order of PROHIBITION to remove into this Honourable Court and prohibit the Respondents, their representatives, employees, servants and/or agents or anybody working under or for them from arresting, charging or in any way commencing or sustaining any criminal proceedings against the Applicant herein with respect to bank transactions involving**

**Mr. Rigathi Gachagua and Rafiki Microfinance Bank over Account Number 0012010006030 held by Mr. Rigathi Gachagua at Rafiki Microfinance Bank Mr. Rigathi Gachagua.**

**4) The Leave so granted do operate as a stay of any further arresting, charging or in any way commencing or sustaining any criminal proceedings against the Applicant herein with respect to bank transactions involving Mr. Rigathi Gachagua and Rafiki Microfinance Bank over Account Number 0012010006030 held by Mr. Rigathi Gachagua at Rafiki Microfinance Bank.**

**5) The costs of this Application be provided for.”**

2. The gist of the application as can be discerned from the grounds on its face, and in the Amended statutory statement dated 25<sup>th</sup> October 2021 is that the Ex parte Applicant is the Relationship Manager and Head of Liabilities at Rafiki Microfinance Bank whose responsibilities are inter alia to mobilise deposits, engagement with customers and to provide advice to large commercial customers; that on 7<sup>th</sup> September 2020 the Applicant was summoned by the 2<sup>nd</sup> Respondent to shed light on transactions related to an account held in their bank by one Rigathi Gachagua; that she willingly attended the 2<sup>nd</sup> Respondent's headquarters and answered to the issues put to her none of which made mention of the County Government of Nyeri or any loss of money through fraud in the said County; that the Applicant has as at all material times acted on the instructions of the account holder and has not done anything out of the scope of her duties or violated any banking laws in the performance of her duties; that she has at all material times acted in utmost good faith and was therefore surprised to learn through print media of the existence of a charge sheet with her name as the 3<sup>rd</sup> accused person and also by her subsequent arraignment and prosecution.

The Ex parte Applicant's contention is that the decision of the 1<sup>st</sup> Respondent to prosecute her is malicious, procedurally unfair, irregular, and illegal for reasons that she was not given an opportunity to be heard on the specific particulars of the charge hence a violation of her right to fair administrative action; that the criminal charge does not disclose an offence and is therefore an abuse of the court process, oppressive, vexatious and is intended to unnecessarily harass the applicant. Further that the Applicant has never accrued any personal benefit from the alleged fraud of the County Government of Nyeri or the sum of Kshs. 27,493,860/=; that she was never asked about the said sum of money; that she has never dealt with her alleged co-conspirators other than the customer Rigathi Gachagua and that the charge against her therefore lacks foundational basis and unless this application is urgently heard and determined the Applicant's fundamental rights and freedoms more especially the right to fair trial, fair administrative action, human dignity and liberty risk to be violated by the actions of the respondents which are based on ill motive and political differences.

3. The application is vehemently opposed based on the following nine Grounds of opposition of the 1<sup>st</sup> Respondent

***"1. The prayers sought by the Applicant are unconstitutional as they seek to prevent the Director of Public Prosecutions from exercising his mandate as provided under Article 157 of the Constitution. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.***

***2. Under Article 157(10) of the Constitution of Kenya and Section 6 of the Office of the Director of Public Prosecution Act (2013) the 1<sup>st</sup> Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his powers or functions, shall not be under the direction or control of any person or authority.***

***3. The Applicants have failed to demonstrate a prima facie case to warrant court to grant the orders sought as the Respondents acted within their mandate as provided in law and the orders sought seek to unlawfully curtail the constitutional and statutory mandate of the Respondents.***

***4. The Applicant has not demonstrated any procedural impropriety on the part of the Respondents and neither has he demonstrated how the Respondents acted without or in excess of powers conferred upon them by law. The decision to charge and prosecute the Applicant was based on evidence placed before him by the investigative body after giving the Applicant an opportunity to be heard through recording of her statement.***

***5. The Application if granted would result in delay of the criminal case contrary to Article 50(2)(e) of the Constitution which demands expeditious hearing and disposal of cases.***

***6. The orders sought will in fact interfere with the process at the Chief Magistrates court where there are 9 other accused persons who are keen on having the criminal proceedings concluded expeditiously.***

***7. The Applicant has failed to demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed as she has not demonstrated to this Court that she will not get a fair hearing at the trial court.***

***8. The criminal proceedings would not render this Application nugatory since in the event that leave is granted, the Judicial Review application will be heard and determined before the conclusion of the criminal case. The criminal case is scheduled for pre-trial hearing on 7<sup>th</sup> December, 2021 when the trial court is expected to set the criminal case for hearing.***

***9. The Application is without merit, an abuse of court process and should be dismissed with costs to the Respondents as the Applicant has not met the judicial set threshold for the grant of the leave and orders sought."***

4. The application was, with the consent of Counsel for the parties, canvassed by way of written submissions.

#### **Ex parte Applicant's Submissions**

5. Counsel for the applicant reiterated the grounds and statement of facts that the Applicant was at all material times the Relationship Manager and Head of Liabilities at Rafiki Micro-finance Bank; That at all material times she acted upon the instructions of their customer one Rigathi Gachagua; that at no time was she privy to or party to any fraud meted upon the County Government of Nyeri and that therefore the charges brought against her and indeed the decision to prosecute her is malicious, procedurally unfair, irregular and illegal and it lacks any foundational basis. Counsel for the applicant submitted that the power to prosecute vested in the **Office of the Director of Public Prosecutions** by **Article 157** of the Constitution is not absolute and this court can intervene where it is appropriate to do so. Counsel stated that **Section 4** of the **Office of the Director of Public Prosecutions Act** lays down the guidelines by which the holder of that officer ought to exercise the functions of the office in order to avoid incidents of abuse or excesses of power which may invite the intervention of the court. Citing Kuloba J, in the case of **Vincent Kibiego v Attorney General High Court Misc. Application No. 839 of 1999** Counsel submitted that a criminal prosecution will amount to an abuse of the process of court if, for any reason, it ought not to have been instituted. Counsel contended therefore that this application discloses arguable grounds with overwhelming chances of success and the leave sought under prayers 1A and 2 ought to be granted.

6. On whether the leave granted ought to operate as a stay, Counsel argued that the principles that should guide this court in that respect are well settled. He relied on inter *alia* the cases of **James Mburu Gitau t/a Jambo Merchant v Sub-County Public Health Officer Kiambu County [2013] eKLR**; the case of **Gikanda Farmers' Co-operative Society Ltd & Others v Commissioner of Co-operatives and another [2014] eKLR** and the case of **E-Coach Limited & 2 others v Insurance Regulatory Authority & 3 others [2015] eKLR**. Counsel submitted that drawing from the above cases the applicant must demonstrate: -

(i) That the substantive motion will be rendered nugatory or that the refusal of the stay will render the judicial review nugatory.

(ii) That the substantive motion has a high chance of succeeding.

7. On whether the motion has high chances of success counsel submitted that by charging the applicant the 1<sup>st</sup> Respondent abused their power as she was merely discharging her official duties as a banker and there was no allegation of wrong doing on her part.

8. On whether the application risks being rendered nugatory Counsel submitted that if a stay of the criminal proceedings against the applicant is not granted then the application will be rendered nugatory. Counsel submitted that there is no plausible reason why the applicant should be subjected to a “demeaning and psychologically draining” criminal process just for the sake of it; that there is no justification for the respondents to apply tax payer’s resources to prosecute a case that is a non-starter; that it is against public interest to allow a process that fundamentally violates constitutional rights of individuals under the guise of exercising powers under the same constitution. Counsel argued that as the hearing of the criminal proceedings has not commenced this court should stay the same but expedite the hearing of the substantive motion to guarantee prudent utilization of resources and judicial time. Counsel urged this court to be persuaded by the dicta in the case of **Republic v National Hospital Insurance Fund Management Board Ex parte Patanisho Maternity & Nursing Home [2019] eKLR** where after considering a similar application the court concluded that:-

**“18. From the above decisions, it follows that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is continuing nature, then it is still possible to suspend the implementation. However, once implementation is complete then such discretion to stay should be exercised sparingly and even then when the court is sure that the judicial review application can be disposed of in the shortest time possible.”**

#### **Submissions of the 1<sup>st</sup> & 2<sup>nd</sup> Respondents**

9. Counsel for the Respondents submitted that the Ex parte Applicant has not demonstrated that she has an arguable case to warrant this court to grant the orders sought. On the Applicant’s submissions that she was simply discharging her duties as a banker Counsel cited the case of **Peter Ngunjiri Maina v Director of Public Prosecutions [2017] eKLR** where the Court of Appeal stated:-

**“.....the High Court’s mandate is to take into account the nature of the process against which judicial review was sought and satisfy itself that there were reasonable basis to justify the orders sought.....”**

Counsel also cited the case of **Wilfred Josiah Manda & Another v Patrick Mutua Muthani & 2 others [2016] eKLR** where the court held:-

**“Court is mindful of the purpose of judicial review proceedings, which is to address defects in decision making processes by public bodies, and not to deal with the merits of the case. It therefore follows that where an Applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determinate the merits of two or more different versions presented by the parties, the Court would not have jurisdiction in a judicial review proceeding to determine such a matter. In my view, this is one such matter, as the applicants are disputing the validity of the 3<sup>rd</sup> Respondent’s reason to charge them with a criminal offence in light of the facts presented by the 1<sup>st</sup> Respondent.”**

And the case of **Republic v Attorney General & 4 others Ex parte Kenneth Kariuki Githii [2014] eKLR** where it was held: -

**“.....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.....”**

10. Counsel submitted that this application merely seeks to paralyse and curtail the respondents from carrying out their mandate; that the averment that the applicant was merely carrying out her duty as a banker is untenable as the same is not fit for further investigations at a full inter partes hearing and that the applicant is not challenging the process by which the respondents arrived at the decision to change her in court and has not demonstrated nor indicated any defect in that decision.

11. Counsel further submitted that the applicant did not demonstrate that the Respondents acted irregularly, unfairly, unreasonably and irrationally in arriving at the decision to charge her. Counsel asserted that malice requires a high degree of proof which requires showing the specific acts that demonstrate malice. Counsel stated that decision herein was informed by the sufficiency of the evidence on record and the law. Counsel submitted that the applicant does not allege that the 2<sup>nd</sup> Respondent acted in excess of his powers, without jurisdiction or that he breached natural justice and thereby tainted his decision with illegality. Counsel stated that the 1<sup>st</sup> Respondent’s decision was based on evidence placed before him by the 2<sup>nd</sup> Respondent after giving the Applicant an opportunity to be heard.

12. Counsel further stated that Article 157 (10) of the Constitution provides that the 1<sup>st</sup> Respondent shall not require the consent of any person or authority to commence criminal proceedings in the exercise of his powers or functions and that the applicant had failed to show how the decision to prosecute her was made without due regard of fairness and justice hence it is an abuse of the court process. Counsel cited the case of **Hon. James Ondicho Gesami v The Attorney General & Others Pet. No. 376 of 2011** where the Judge stated:-

**“.....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.”**

13. Counsel contended that there was no abuse of process and further submitted that the question whether the charge sheet discloses an offence is a matter for the trial court. Counsel asserted that Judicial Review is concerned with the decision making process but not the merit of the case. She contended that the offence facing the applicant is known to the law and that it is not up to this court to determine/consider whether the evidence gathered by the prosecution is sufficient to support the charge as that is the preserve of the trial court.

14. On the allegation that the applicant's right to fair administrative action was violated Counsel submitted that fair administrative action requires that all parties are given a fair hearing and that the statement recorded by the applicant was considered before the decision to charge her was made. Counsel submitted that the applicant understood what was being investigated and that the averment that she was not given an opportunity to be heard is untenable. Counsel submitted that the application for leave lacks merit and it should be dismissed.

15. On whether the leave if granted should operate as a stay Counsel submitted that the applicant had not demonstrated any grounds to warrant such an order; that an order for stay of criminal proceedings should be made sparingly and only in exceptional circumstances and in this case no such circumstances exist. Relying on the case of **Attorney General v Chief Magistrate, Milimani Law Courts & 3 others Ex-parte Mohan Galot [2018] eKLR** counsel submitted that the mere fact that the application discloses a prima facie case does not necessarily entitle an applicant to stay. Counsel submitted that no prejudice or injustice would be occasioned to the applicant if stay is granted. Counsel stated that it was not demonstrated that the lower court is proceeding in excess of its jurisdiction or in contravention of the law or that the Applicant will not receive a fair hearing. Counsel urged this court to balance the interest of the applicant *vis a vis* that of the other accused person and the public noting that the criminal proceedings involve colossal sums of money stolen from the public and hence it is of utmost importance that the criminal case proceeds unabated.

### **Analysis & Determination**

16. Issues for determination:-

*i) Whether this court should grant the applicant the leave sought in prayers 1A and 2 of the application*

*ii) whether if granted the leave should operate as a stay of the impugned prosecution pending hearing and determination of the substantive motion.*

### **Issue No. 1**

17. As correctly submitted by Counsel for the applicant the law applicable to grant of leave to commence judicial review proceedings is Order 53 Rule 1 of the Civil Procedure Rules which states:-

*“1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.*

*(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.*

*(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.*

*(4) 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:*

*Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days. (emphasis mine)*

Such leave is ordinarily granted *Ex parte*. It is also trite and there is a long line of decisions to the effect that the Director Public Prosecution's decision to charge is not absolute and is subject to review by this court.

18. As was observed by Odunga J in the case of **Primrose Management Limited v Chairman of The Business Premises Rent Tribunal & Anor [2015] eKLR** and by Waki J, in the case of **Republic v County Council of Kwale & Anor Ex parte Kondo & 57 others Msa HCMCA No. 384 of 1996** the purpose of leave is to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless and to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. It is trite therefore that leave is discretionary and may be granted only where on the material placed before the court without going in-depth into the case it can say that the applicant has an arguable case fit for further investigation at a full *inter partes* hearing of the substantive motion. The above principle was also confirmed by the Court of Appeal in the case of **Meixner & Another v Attorney General [2005] 2 KLR 189** when it held:-

*“1. The leave of the court is a pre-requisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion....”*

*5. The test to be applied in deciding whether or not to grant leave is whether the applicant has an arguable case. The Judge used the phrase, “a prima facie case” as test....*

**6. Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the fact of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.**

**7. The Judge was right in finding that the sufficiency or otherwise of the evidence to support the charge of murder was a murder going to the merits of the decision of the Attorney General and not to the legality of the decision. It is the trial court which is the best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court....”**

**19.** Applications for leave to bring judicial review proceedings are heard Ex parte but in this case the court directed the Ex parte Applicant to serve her application upon the Respondents as some parties named in the application had already been charged in court.

**20.** The gravamen of the judicial review proceedings sought to be brought by the Ex parte applicant is in my understanding that the decision of the respondent to charge her has no legal foundation and the charges against her do not disclose an offence because she was merely carrying out her duties as a banker; That she ought not to be taken through a trial process whereas there was no wrong doing on her part and that the action of taking her through such process is a violation of her rights. She contends that the decision to charge her is based on malice. It is my finding however 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.”**

**21.** It is my finding that for this court to grant leave to the Ex parte applicant to bring judicial review proceedings merely to determine whether the charge against her 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. The Ex parte applicant has not demonstrated that the decision to charge her was motivated by malice or by any reason other than public interest as would entitle this court to interfere. Although she avers that the decision to charge her was actuated by the desire to settle scores due to political differences she has not adduced evidence to prove it. She has also not demonstrated that she is unlikely to get a fair hearing in the trial court. In the case of **Republic v Attorney General & 4 others Ex parte Kenneth Kariuki Githi [2014] eKLR** it was held and I agree:

**“.....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.....”**

In the case of **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** Court observed that:

**“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. (emphasis mine)*

22. Accordingly, I find no merit in the application and the leave sought is declined. Having arrived at that conclusion I need not make any findings on the second issue of whether the leave should operate as a stay. The application is dismissed with costs to the Respondents.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 24TH DAY OF FEBRUARY, 2022.

E.N. MAINA

JUDGE