



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. E046 OF 2020

REPUBLIC.....APPLICANT

-VERSUS-

THE CHIEF MAGISTRATE'S COURT MILIMANI LAW COURTS.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

HEZBON OMONDI, HELEN ADHIAMBO OBURU AND NIKITTA AKINYI.....3RD RESPONDENTS

-AND-

PATEL RAVJI LALJI.....EX PARTE APPLICANT

JUDGEMENT

1. The *ex parte* Applicant (hereinafter “the Applicant”) moved this court vide an application dated 24th May, 2021 seeking for **ORDERS**:

1) *THAT* this Court to issue an Order of Certiorari to move into this Honourable Court and quash the charge sheet dated 17th August, 2020 containing seven (7) malicious counts in the Nairobi Chief Magistrate’s Court at Milimani Law Courts in private prosecution Criminal Case No. E2308 of 2020.

2) *THAT* this Court do issue an Order of Prohibition restraining the Respondents and in particular the 3rd Respondents from peddling false information and other Respondents from prosecuting the *ex parte* Applicant in private prosecution Criminal Case No. E2308 of 2020 at the Chief Magistrate’s Court at Milimani Law Court.

3) *THAT* this Court do issue an Order of Prohibition restraining the Respondents from proceedings with the prosecution of the *ex parte* Applicant in private prosecution Criminal Case No. 2308 of 2020 at the Chief Magistrate’s Court at Milimani Law Courts pending the hearing and determination of the *ex-parte* Applicant’s application.

4) *THAT* costs of this Application be provided for.

2. The application is founded on the grounds set out on the face therein, the Amended Statutory Statement dated 30th April, 2021 and the Verifying Affidavit of **Patel Ravji Lalji** sworn on even date. It was deponed that on 5th October, 2011, Domicile Auctioneers Services advertised for the sale of L.R No. 209/8323 (hereinafter “the suit Property”) by public auction on the Star Newspaper which was scheduled to take place on 27th October, 2011 at Reli Co-operative House and as a result, one Gopal Harish and Vekaria Lalji Gopal were declared the highest bidders. Thereafter, the auctioneers gave a certificate of sale dated 23rd July, 2012 and a vesting order dated 8th July, 2013 to enable the bidder obtain a provisional registration of title that was indicated as entry no. 18 on the said title.

3. That after the irregular sale by Domicile Auctioneers Services Limited purportedly with instructions from Nairobi City County and after the transfer of the suit property to two companies, Gilbi Construction Company Limited and Cinatine Enterprises Limited , Electrical Marketing (Wholesale) Limited who was the initial registered owner on realizing that the suit property had exchanged hands severally challenged the sale by public auction in Civil Suit No. 3 of 2011 which later led to an appeal in the High Court being ELC Appeal No. 22 of 2017. A judgment was delivered on 15th July, 2019 and the Learned Judge concluded that there was material irregularities and fraud in the

conduct of the sale of the suit property through public auction by Nairobi City County and the court proceeded to set aside the order for the sale of the said property by way of public auction and all other consequential orders.

4. It is the Applicant's case that the 3rd Respondents and the complainants in Criminal Case No. E2308 of 2020 having knowledge of the judgment falsely gave information at the CID Regional Investigating Offices leading to the arrest and charging of the Applicant with forgery. The Applicant was later released on a cash bail of Kshs. 600,000/-. The Applicant contends that the charges are in relation to the forgeries of signatures of the 3rd Respondents in respect to the sale and transfer of the suit property. It was also alleged that the petty cash vouchers in respect to the sale of the suit property were also forged by the Applicant.

5. In his view, the Superior Court having delivered its judgment touching on how the transaction on the suit property was conducted, then it means that all entries were all set aside and therefore none of the institutions and/or persons within the range of those entries set aside by the Honourable Court can claim, ownership, occupation or possession apart from Enterprise Marketing (Wholesale) Limited and therefore the charges labelled against the Applicant were ill-thought. The 3rd Respondents cannot therefore be complainants in E2308 of 2020 by virtue of that judgment which clearly stated that the auction was marred with fraud and irregularities. Accordingly, the Applicant urged the court to prohibit his intended illegal and malicious prosecution in the interest of justice.

Responses

6. In response to the Application the 3rd Respondent filed a Replying Affidavit sworn by **Hesbon Omondi** sworn on 13th November, 2020. He averred that the aforesaid criminal matter does not constitute private prosecution as alleged and the decision to institute the criminal matter was made by the Office of the Director of Public Prosecutions following comprehensive investigations by the relevant investigating agencies. Indeed, he averred that the nature of his complaint is that the Applicant forged conveyance instruments including a sale agreement and a transfer whereas he purported to rely on these illegal documents to claim propriety interests over the suit property.

7. The particulars of the aforesaid fraud is that the Applicant forged signatures of Hellen Adhiambo and Nikita Akinyi on one part as the Vendors and the signatures of P. Ongonji on the other part as the Commissioner for Oaths. Mr. Omondi contended that he was conversant with the said parties and, based on their previous transactions, the signatures captured on the said documents were forgeries. Furthermore, he contended that one of the alleged signatories, Nikita Akinyi, was not within the jurisdiction of Kenya when the alleged execution took place. Likewise, the Applicant forged the "receiving stamp" of Cinatine Enterprises Company which Mr. Omondi is associated with.

8. It was however his contention that he has never received any money on account of the purchase of the suit property on behalf of Cinatine Enterprises Limited and the petty cash receipts that the Applicant spouts as evidence of his receipt of the purchase price are subject to the said criminal case on the basis that the signatures thereon were forged. He also claimed that while he was aware of ELC Appeal No. 22 of 2017 and had preferred an appeal against the same, the said ruling has no bearing on Milimani Criminal Case No. E2308 of 2020 given that the criminal case is based on elements of criminality on the part of the Applicant and/or his associates as demonstrated by the document examination report drawn and prepared by the Directorate of Criminal Investigations.

9. It was his deposition that the court cannot usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. It was further his deposition that the institution of the criminal matter was informed by complaints made arising out of fraudulent dealings by the Applicant in the suit property and whereas the ruling delivered by the Honourable Lady Justice Bor was adversarial, the same is not a ground for halting the criminal proceedings since judicial review is not concerned with the merits but the decision making process. In any event, he contended that the Applicant has not demonstrated that the criminal proceedings is an abuse of the court process. Be that as it may, he averred that the Applicant has brought the present application with a view to determining contested matters of facts and in effect is urging the court to determine two or more versions presented by the parties and this court does not have the jurisdiction to make such a determination.

Parties Submissions

10. The Applicant filed written submissions dated 9th October, 2020 and 25th May, 2021 in support of the application. In sum, Learned Counsel reiterated the events leading to the sale of the suit property and the alleged forgery of the conveyance documents as enumerated in his Amended Statutory Statement and Verifying Affidavit. Learned counsel urged the court to find that the Lower Court has no jurisdiction to reopen this matter in a version of a criminal matter against the Applicant and to be guided by the annexed documents in making its determination. He therefore urged that the application be allowed.

11. The 3rd Respondent on the other hand filed written submissions dated 5th July, 2021. On the issue whether Nairobi Chief Magistrate Court Criminal Case No. E2308 of 2020 is a private prosecution, counsel cited Article 157(6) of the Constitution as well as Section 88 of the Criminal Procedure Code for the proposition that our laws do not provide for private prosecutions in criminal matters.

12. On whether the Applicant is entitled to the orders sought, counsel submitted that the criminal matter was instituted following the establishment of admissible, substantial and reliable evidence that a criminal offence known by law had been committed by the Applicant. Indeed, counsel submitted that assessment of the efficiency of the evidence on record in the criminal court is within the purview of the trial court and not this court. Learned Counsel however submitted that while this court has the inherent power to 'stay' an indictment or stop prosecution if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process or infringement of a citizen's fundamental rights, the Applicant must lead evidence in support of that claim that his prosecution has offended his fundamental rights. Accordingly, it was urged that the application is misplaced and is an abuse of the court process.

Analysis and Determination

13. I have considered the pleadings herein as well as the submissions and the arguments advanced by the parties and in my view, the main issue for determination is whether the Respondents' decision to prefer charges in Milimani Chief Magistrates' Criminal Case No. E2308 of

2020 against the Applicant is tainted with illegality, irrationality and procedural impropriety and if so, whether the Applicant is entitled to the orders sought.

14. The parameters of judicial review was elucidated in the Ugandan case of **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300** where the court held as follows;

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

15. Similarly, the Court in **Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University [2018] eKLR** held as follows;

*“The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, **irrationality** or **procedural impropriety** has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.*

“In Council of Civil Service Unions v. Minister for the Civil Service Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action in concern, ultra vires. These grounds are; illegality, irrationality and procedural impropriety. Later judicial decisions have incorporated a fourth ground to Lord Diplock’s classification, namely; proportionality. What Lord Diplock meant by “Illegality” as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term “Irrationality” by succinctly referring it to “unreasonableness” in Wednesbury Case. By “Procedural Impropriety” His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.”

16. It is therefore imperative to note that for a court to grant judicial review orders, the Applicant must prove to the court that the alleged impugned decision was marred with **illegality, irrationality or procedural impropriety**. In the present case, the Applicant is alleging to have been charged with Criminal Case No. E2308 of 2020 yet the Judgment in ELC Appeal No. ELC No, 22 of 2017 delivered on 15th July, 2019 annulled all the entries on the suit property which forms the basis of the criminal case and is therefore without any factual basis. The 3rd Respondent on the other hand contend that the said judgment has no bearing on the Milimani Criminal Case No. E2308 of 2020 given that the criminal case is based on elements of criminality on the part on the Applicant as demonstrated by the documents examination report drawn and prepared by the Directorate of Criminal Investigations. The Applicant also claims that the criminal case is a private prosecution initiated by the 3rd Respondent which the 3rd Respondent denies.

17. The constitutional underpinning of the vast and unfettered powers over public prosecutions vested on the 2nd respondent is found at Article 157 of the constitution. The Article provides that the 2nd respondent shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or function ,shall not be under the direction or control of any person or authority. Under Sub Article 11, he or she is required to have regard for the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.

18. Article 157 of the constitution is not, however, a *carte blanche* for the holder of the office to act illegally or unconstitutionally. Where the office acts unconstitutionally, illegally or without due process, the court will be on hand to offer a remedy. The decision to charge is by its very nature an administrative action which is subject to the supervision of this court under Article 47 of the constitution and within the parameters in the Fair Administrative Actions Act. Where appropriate the judicial review jurisdiction of this court can and is often resorted to for suitable remedies.

19. In the case of **Diamond Hasham Lalji and another vs Attorney General and 4 others [2018] eKLR** the court of appeal extensively considered in detail the applicable law and circumstances under which the court could interfere with the exercise of prosecutorial discretion by the DPP. Among the guiding principles outlined in section 4 of ODPP’S Act No. 2 of 2013 and the National prosecution policy formulated by the DPP pursuant to section 5(1)(c) of the ODPP Act are that; **“The decision to prosecute as a concept envisages two basic components namely; that the evidence available is admissible and sufficient and that public interest requires a prosecution to be conducted”**

75. Paragraph 4 (B)(2), of the said policy provides ; **“the Evidence test- public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, public prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available”**

20.. In diamond’s case (supra), the court held in Para. 42 as follows;

“The burden of proof rests with the person alleging unconstitutional power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision”

In para.45 the court went further to state thus;

“In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which the DPP’s decision is made establishes a prima facie case necessitating prosecution. At this stage the courts should not hold a fully fledged inquiry to find if evidence would end in a conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of the facts and circumstances of the case are absolutely imperative”

21. The jurisprudence show that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise sparingly and Lenaola J (as he then was) summed it up aptly in **Patrick Ngunjiri Muiruri v DPP [2017]eKLR**

Where he stated;

“The law and practice, then, are quite clear; while the discretion of the Dpp is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the Dpp, it is not absolute. On the other hand, while the power of the court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the court can review the Dpp’s decisions for rationality and procedural infirmities, it cannot review them on merit”.

22. The applicant has raised what I consider as substantive issues regarding other proceedings before the ELC Court. I note that the same relate to the propriety of an auction that was under challenge. In my view those will be relevant matters to be raised in defence by the applicant. This is not the forum to resolve the contested issues between the parties. Certainly, the trial court is well equipped to resolve them and the applicant’s right to a fair hearing are well ring fenced under Articles 49 and 50 of the constitution. No doubt that in the criminal proceedings before the trial court, the Applicant will be afforded an opportunity to be heard and to adduce evidence in support of their defence and the Applicant has not adduced any evidence that the right to a fair hearing has been curtailed.

23. It is trite law that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail 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. Whether an applicant has a good defence in the criminal process is not a ground that ought to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

24. In my view, the issues raised by the Applicant herein are live issues before the trial court and outside the ambit of judicial review. Section 28 of the National Police Service establishes the Directorate of Criminal Investigations with its functions provided for under Section 35 of the said Act while Article 157 of the Constitution of Kenya mandates the Directorate of Public Prosecutions to institute and undertake criminal proceedings against any person, in respect of any offence alleged to have been committed.

25. In addition, the Applicant has also failed to prove before this court how the 2nd Respondent’s decision is in defiance of logic and moral standards. The Respondents clearly addressed themselves to the facts and the provisions of the law before reaching the decision to charge. A complaint in relation to the said charges was recorded by the 3rd Respondents and as provided by law the Directorate of Criminal Investigations began investigations which investigation culminated with a report from a document examiner. The contents of this report led to the institution of charges against the Applicant.

26. This court would fall into great error if it was to usurp the duty of the trial court by evaluating the sufficiency or otherwise of the evidence and to make a finding whether the same can sustain a conviction. (See **Erick Kibiwott & 2 Others v DPP & 2 Others [2014]Eklr**) illuminates this .

27. The upshot is that the Applicant has failed to prove that the Respondents acted illegally, irrationally and without following due procedure and as such, the Application dated 24th May, 2021 is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH 2022

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A. K. NDUNG’U

JUDGE