Republic v Director of Public Prosecutions & another; Jumbo Commodities Limited (Exparte); Kotecha & another (Interested Parties) (Application 310 of 2018) [2022] KEHC 18098 (KLR) (Judicial Review) (23 September 2022) (Judgment)

Neutral citation: [2022] KEHC 18098 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION 310 OF 2018

J NGAAH, J

SEPTEMBER 23, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

MILIMANI CHIEF MAGISTRATES COURT ..... 2ND RESPONDENT

AND

JUMBO COMMODITIES LIMITED ..... EXPARTE

AND

HEMAL KISHOR KOTECHA ..... INTERESTED PARTY

HARSHIL KISHOR KOTECHA ..... INTERESTED PARTY

JUDGMENT

1. The application before court is a chamber summons dated 17 June 2019 filed under Order 53 Rules 1, 2, 3 and 4 of the *Civil Procedure Rules* and Section 8(2) of the *Law Reform Act*, cap 26. It seeks judicial review orders of certiorari and mandamus whose prayers have been framed as follows:

    1. That an order of *certiorari* do (sic) issue to remove into this Honourable Court and quash the decisions(s) (sic) of the Office of the Director of Public Prosecutions contained in the letter dated February 7, 2018 addressed to the officer in charge Banking Fraud Investigation Unit in relation to criminal cases numbers 48 of 2017 and Criminal Case No 1444 of 2017.

2. That an order of *mandamus* do (sic) issue against the 1st and 2nd respondents directing them to reinstate, hear and determine criminal cases numbers 1248 of 2017 and criminal case number 1444 of 2017 to their logical conclusion."

2. The application is based on a statutory statement dated July 27, 2018 and a verifying affidavit sworn on even date by Piyush Savla, the managing director of the applicant.

3. According to Order 53 Rule 3(1) the application ought to have been by way of motion and not chamber summons. That rule reads as follows:

3.

(1) When leave has been granted to apply for an order of mandamus, prohibition or *certiorari*, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing. (Emphasis added).

4. I must therefore state at the onset that, to the extent that the rule is couched in mandatory terms, the applicant's application would be incompetent.

5. For reasons that will become apparent in due course, the application would not have succeeded even if it the applicant had moved the court appropriately.

6. The genesis of the application is a letter dated February 7,2018 by the Director of Public Prosecutions directed to one B Ngatia Iregi, the officer in charge of Banking Fraud Investigations.

7. The letter was in response to a letter dated October 10, 2017 by the said Ngatia Iregi in which he enclosed an inquiry file relating to an investigation of fraudulent transactions involving the interested parties. The latter are alleged to have issued the applicant with cheques for the amount of Kshs 39,310,000/= in settlement of a debt arising from purchase of a consignment or consignments of sugar. However, upon presentation of the cheques for payment, they were dishonoured.

8. The interested parties were then charged with the offence of issuing bad cheques contrary to section 316(1)(c) (4) of the *Penal Code*, cap 63.

9. In his letter, the Director of Public Prosecutions gave what appeals to me to be a comprehensive opinion on why he thought the charges against the interested parties could not be sustained. He concluded his opinion by stating as follows:

> From the foregoing analysis of the inquiry file and the evidence gathered, the charges against the accused persons cannot be proved. They should be withdrawn forthwith under section 87 (a) of the *CPC* and the complainant been advised to pursue civil measures to recover the amount owed."

10. When the criminal case was mentioned before the chief magistrate, Hon Francis Andayi on 15 February 2018, the prosecutor applied to withdraw the case against the accused, obviously acting under the directions of the Director of Public Prosecutions. Counsel for the accused did not oppose the application. Mr Kimani, the learned counsel who apparently appeared for the complainant, the applicant in this case, sought an adjournment to get instructions from his client. The court made its ruling which is captured in the proceedings as follows:

> I have heard submissions by all learned counsel herein. I have also read the letter dated February 7, 2018 from the deputy DPP. In his conclusion the letter says that the charges

filed against the accused persons cannot be proved. In other words proceedings with the prosecution of this case will be worthless. I therefore allow the application by the prosecution.

The charges are withdrawn under section 87 (a) *CPC* and the accused persons discharged. Orders accordingly."

11. Basically, these are the facts out of which the applicant's application arises.

12. The respondents did not file any sort of response to the application; at least, I have not found any on record. But the interested did file a replying affidavit sworn by the 2nd interested party on his behalf and on behalf of the 1st interested party.

13. They do not dispute the facts leading to the decision to withdraw the criminal cases against them and most of what they have purported to depose are really matters of law. This, of course, is out of order, for law is simply that; it is not evidence to be covered as facts in an affidavit.

14. Whenever a judicial review court is faced with an application for judicial review, the court would be concerned about, among other things, the grounds upon which the application is based. And the "grounds" here are not just any other grounds but grounds for judicial review as enunciated in the English case of *Council of Civil Service Unions versus Minister for the Civil Service* (1985) AC 374,410 in which Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's

> exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v Bairstow [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
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> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

15. Thus, grounds for judicial review upon which the application is made is a vital component in an application for judicial review. Perhaps to underscore their importance, Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

> (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. (Emphasis added).

16. Further, Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

17. The grounds provide the window through which a judicial review court intervenes to correct abuse of power by a public body. Put differently, there would be no basis for intervention and interrogation of an administrative action where none of the judicial review grounds is expressly stated.

18. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, *Judicial Review Handbook*, at Paragraph 34.1 states as follows:

> The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

19. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in *pari materia* with our own Order 53 of the *Civil Procedure Rules, 2010*. The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity.

20. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built. The applicants' application is such an application because all that has been given as grounds is a rehash of the averments in what has been covered under the head

of 'name and description' in the statutory statement and the depositions contained in the verifying affidavit. To this extent the application is fatally flawed.

21. Even if the application was properly before the court one question that lingers even after consideration of the submissions for the applicant is whether the appropriate decision to be interrogated is the Director of Public Prosecution's letter of February 7, 2018 or the decision of the learned magistrate made on 15 February 2018. In considering the answer to this question, I have had to make reference to section 25 of the *Office of Director of Public Prosecutions Act* which states that the director can only withdraw a case with the permission of the court. The section reads as follows:

> 25. Discontinuing of criminal proceedings
>
> (1) The Director may, with the permission of the court, discontinue a prosecution commenced by the Director, any person or authority at any stage before delivery of judgement. (emphasis added).

22. If the director can discontinue proceedings only with the permission of the court, it follows that his letter of 7 February 2018 is nothing more than a proposal made to the court for the court's consideration. And perhaps to drive home the point that this letter was not an end in itself, the record shows that the prosecutor still had to make an application to withdraw the case and it is only after the court considered the reasons proffered that it allowed the application and withdrew the case under section 87(a) of the *Criminal Procedure Code*.

23. In these circumstances, I would opine, and humbly so, that as long as the Director of Public Prosecution's letter was not only in respect of a case of which the court was seized and which, for all intents and purposes, was subject to the court's approval, the decision that mattered for judicial review purposes was the 'approval' by the court and not the 'proposal' by the Director of Public Prosecutions.

24. The logic should be simple to see: As long as the ruling of the court allowing the application for withdrawal remains intact, the applicant's quest to reignite the interested parties' prosecution would be rendered futile even if the impugned letter of February 7, 2022 is quashed. Certainly, the court would not overlook its own order withdrawing the case against the interested parties and discharging them of the charges levelled against them and proceed with the case as if that order is not on record.

25. Not that the impugned letter could not be attacked but, in these circumstances, the decision of the court allowing the prosecution application to withdraw the charges against the interested parties cannot be omitted from the equation if the applicant's application was to succeed.

26. One other thing, the Director's letter and the decision of the court anchored on discretionary powers respectively conferred upon the director and the court. Section 25(1) of the *Office of the Director of Public Prosecutions Act* is couched in such terms that the Director has the discretion to withdraw a criminal case subject to the permission of the court. The court, on the other hand, may or may not accede to the application to withdraw.

27. Where a public body is clothed with discretion, a judicial review court will be hesitant to interfere with the exercise of discretion simply because it would have itself exercised the discretion differently. As long as the exercise of discretion is for public good and is exercised honestly and in good faith, there would be no basis to interfere with it. It has been held in *Secretary of State for Education and Science v Tameside MBC* (1976) UKHL 6 that:

> In many statutes a Minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinion for that of the Minister:

> they can interfere on such grounds as that the Minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact. But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at." (Per Lord Wilberforce at P 4)

28. In the same case Lord Diplock had the following to say on the same point:

> The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred". (Per Lord Diplock at p18.)

29. It has not been demonstrated, and indeed there is no proof, that the exercise of the discretion by either of the respondents was motivated by some purpose other than public interest and administration of justice. Neither has it been proved that any of the respondents acted outside their respective powers or outside the provisions of the law under which they ought to act. It has not also been proved that they acted unfairly or upon an incorrect basis of fact.

30. It ultimate, I am inclined to conclude that from whichever angle one considers the applicant's application, it does not muster any weight. It is incompetent, defective and without any merit. It is hereby dismissed with costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 23 SEPTEMBER 2022

Ngaah Jairus

JUDGE