



**Baslum v Directorate of Criminal Investigations & 3 others
(Judicial Review Miscellaneous Application E181 of 2021)
[2022] KEHC 14288 (KLR) (Judicial Review) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E181 OF 2021
AK NDUNG'U, J
OCTOBER 26, 2022**

BETWEEN

OMAR SALIM BASLUM APPLICANT

AND

**DIRECTORATE OF CRIMINAL INVESTIGATIONS & 3
OTHERS RESPONDENT**

JUDGMENT

1. Vide a Notice of Motion amended on 16th December, 2021 Omar Salim Baslum (hereinafter, the applicant) seeks orders:
 - a. An Order Of Certiorarito bring into this Honourable Court and quash the decision by the Inspector General Police and the Directorate Of Criminal Investigations office under the authority of the 3rd and 4th Respondents from intimidating, harassing and threatening to arrest at Home or place of work on matters touching the conduct of Commsu No. 1372 of 2021.
 - b. An Order of Prohibitionto issue against the 1st and 2nd respondent prohibiting the office of the Inspector General of police and the Director of Criminal Investigations under the authority of the 3rd and 4th Respondent from Intimidating, harassing and threatening to arrest at Home or place of work on matters touching the conduct of Commsu No. 1372 of 2021.
 - c. An Order of Declarationthat the decision of the Inspector General under the authority of 3rd and 4th Respondent to keep issuing summons or sending Police Officers to harass and intimidate, threaten to arrest the applicant causing mayhem at his office or elsewhere in the excuse of conducting investigations on matters touching or related to Commsu No. 1372 of



2021 is unlawful, ultra vires conducted in bad faith and the procedures used are bias against the applicant.

- d. That costs of this application be provided for.
2. The application is based on grounds that:
 1. That the procedure in arriving to the decision by the 1st and 2nd respondents through the authority of 3rd and 4th Respondents to harass and intimidate and threaten to arrest the applicant at his office or elsewhere in the excuse of conducting investigations on matters touching or related to Commsu No. 1372 of 2021 was made in excess of power and is ultra-vires.
 2. That the procedure used by the 1st and 2nd respondents under the authority of the 3rd and 4th Respondents to arrive to the decision to harass, intimidate and threaten to arrest the applicant at her office or elsewhere in the excuse of conducting investigations on matters touching or related to Commsu No. 1372 of 2021 was made outside the law and therefore illegal and void ab initio.
 3. That the procedure used by the 1st and 2nd respondents under the authority of 3rd and 4th respondents to harass, intimidate and threaten to arrest the applicant at her office or elsewhere in the excuse of conducting investigations on matters touching or related to Commsu No. 1372 of 2021 is marred with procedural impropriety.
 4. That the procedure used in arriving at the 1st and 2nd respondents under the authority of 3rd and 4th respondents to harass, intimidate and threaten to arrest the applicant at her office or elsewhere in the excuse of conducting investigations on matters touching or related to Commsu No. 1372 of 2021 was opaque and inimical to the rule of law.
 5. That the procedure used by the 1st and 2nd respondents under the authority of 3rd and 4th respondents to harass, intimidate and threaten to arrest the applicant at his office or elsewhere in the excuse of conducting investigations on matters touching or related to Commsu No. 1372 of 2021 is contrary to the fundamental Rights and Freedoms guaranteed by *the Constitution*.
 6. That it is in the interest of justice fair and expedient in all circumstances of the case that the application be allowed.
 3. It is also anchored on the Statutory Statement and verifying affidavit filed with the Chamber Summons seeking leave.
 4. In a replying affidavit Talib Abdul Walli Shariff depones that the amended Notice of Motion is grossly incompetent and incurably defective as regards the 3rd Respondent and its name ought to be expunged.
 5. Shariff depones that no application for leave to amend notwithstanding the service of the Notice of Motion date 2nd December, 2021. Further, that the orders sought are solely and exclusively against the 1st and 2nd Respondent.
 6. Further, that the initial notice of motion was defective and an incurably defective amended motion cannot cure an incompetent and defective notice of motion.
 7. Shariff adds that the inclusion of the 3rd Respondent in the suit while no orders are sought against it is meant to merely sully the 3rd Respondent's reputation and cause it damage.



8. He confirms writing to the DCI requesting investigation on whether the verifying affidavit purportedly sworn in Nairobi on 23rd Septebmer,2021 was in fact sworn by the plaintiff in Nairobi Comsu Case No. E1327 of 2021. He did so as a director of the 3rd Respondent.
9. In a further affidavit, the applicant states that an amended notice of motion was served on the Respondents on 17th December, 2021. He reiterates that the 1st and 2nd Respondents were acting on authority of the 3rd and 4th Respondents.
10. The 1st and 2nd Respondents did not enter appearance and/or file responses to the application.
11. The matter was canvassed by way of written submissions and the submissions by the applicant and by the 3rd and 4th Respondents are on record.
12. I have considered the application, the affidavit evidence as well as submissions by learned counsel.
13. To begin with, I note that applicant filed an amended Notice of Motion without leave. Heavy weather has been made of this by the 3rd and 4th Respondents. In pursuit of substantive justice guided by Article 159 of *the constitution* and the overriding objective espoused in Supplementary Affidavit and 1B of the Civil Procedure rules, and noting that the amended motion was replied to adequately, I deem the amended notice of motion a properly on record.
14. As regards whether the applicant has met the threshold for the grant of the judicial review orders sought, I am alive to the powers of the 1st and 2nd respondents in investigation of crime and the unfettered constitutional power of the Director of Public Prosecution to institute criminal proceedings without the consent of any person or authority and under no direction or control of any person or authority (see Article 157 of *the constitution* of Kenya)
15. In an ideal situation, once 1st and 2nd Respondents conduct investigations and with the advice of the Director of Public Prosecutions a Criminal Prosecution is lodged in court, this court ought not to fetter the exercise of such powers.
16. Article 157 of *the Constitution* provides the legal foundation for the 2nd Respondent's expansive and unrestricted control over public prosecutions. According to the Article, the 2nd Respondent may begin criminal proceedings without the approval of any person or authority and may exercise his or her powers or functions without being subject to the direction or control of anyone. However, according to sub article 11 of *the Constitution*, he or she must respect public interest, the interests of administering justice, and the need to prevent and avoid abuse of the legal system.
17. Nonetheless, Article 157 is not a carte blanche for the office holder to commit crimes or violate the law. If the office behaves in violation of the law or without following due process, the court will be there to provide redress. By definition, the decision to charge is an administrative action that falls under the Fair Administrative Actions Act's guidelines and is overseen by this court in accordance with Article 47 of *the Constitution*.
18. The court in *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR, 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 the 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"



19. Paragraph 4 (B)(Z) 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. The court in *Diamond Hasham Lalji* (supra), went ahead to hold 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”
21. In Para.45 the court went further to state thus;

“(45) In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which 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 conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative.”
22. From the foregoing, it is obvious that the standard of review of the discretion of the DPP to prosecute or not to prosecute is high and courts will interfere with the exercise sparingly. 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.”
23. In our instant suit, I am disadvantaged in that the 1st and 2nd Respondents have not appeared in this matter and/or filed responses. The nature of the investigation that they were in process of is not illuminated.
24. What is clear from the record is that there is in court Nairobi Comsu Case no. E1327 of 2021 between Omar Salim Baslum (the Applicant) and Tunasco Insaat Anomim Sirk et Co. Ltd. Abdulwalli Shariff Ahmed has sworn a replying affidavit herein stating that as a director of the 3rd Respondent, he is aware that the verifying affidavit purportedly sworn in Nairobi on 23rd September 2021 as being that of the applicant and the witnesses statement recorded were forgeries.
25. It is within this background that the DCI was invited to investigate the matter.
26. Suffice it to note that in the absence of any explanation from the DCI, the bona fides of the said investigations cannot be authenticated.
27. The affidavit and statement said to be forgeries form part of the record of the court in Nairobi COMSU Case no. E1327 of 2021. The court seized of the said suit has the necessary wherewithal during the trial



to inquire into the propriety or otherwise of the impugned verifying affidavit and witness statement and to make recommendations as necessary including a recommendation for criminal investigations should that be necessary.

28. The surrounding circumstances raise founded fears as to whether the said investigations may be geared towards scuttling the Civil Case filed by the Applicant against the 3rd Respondent.
29. In the premises therefore, I find and hold that the applicant has established the threshold for the grant of the judicial review orders sought. I allow the amended Notice of Motion and make the following orders:
 1. An order of Prohibition be and is hereby issued against the 1st and 2nd Respondent prohibiting the office of the Inspector General of police and the Director of Criminal Investigations from intimidating, harassing and threatening to arrest the applicant at home or place of work on matters touching the conduct of Commsu no. 1372 of 2020.
 2. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OCTOBER 2022

A. K. NDUNG'U

JUDGE

