



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW NO. E025 OF 2021

IN THE MATTER OF:

**AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW FOR
ORDERS OF CERTIORARI AND PROHIBITION UNDER SECTION 8 AND 9 OF
THE LAW REFORMS ACT CAP 26 OF THE LAWS OF KENYA AND ORDER 53 OF
THE CIVIL PROCEDURE ACT**

AND

IN THE MATTER OF:

FAIR ADMINISTRATIVE ACTION ACT CAP NO. 4 OF 2015

AND

IN THE MATTER OF:

THE THREATENED/UNLAWFUL ARREST OF FLORENCE WANJIKU WANGECI

BETWEEN

FLORENCE WANJIKU WANGECI.....APPLICANT

VERSUS

- 1. DIRECTOR OF PUBLIC PROSECUTION**
- 2. THE HON. ATTORNEY GENERAL**
- 3. DIRECTOR OF CRIMINAL INVESTIGATIONS.....RESPONDENTS**

AND

FRANCIS WARUNGE NGURE.....INTERESTED PARTY

RULING

1. Before the court are two applications. The first is a Notice of motion application by the Applicant, **Florence Wanjiku Wangeci** dated **4th June, 2021** where she seeks for the following orders: -

- a) An ORDER OF CERTIORARI to quash the decision by the 1st and 3rd respondent preferring charges, arresting, directing, commencing, and/or sustaining the prosecution of the ex-parte applicant before the chief Magistrate's court at Mombasa or any other court over any other criminal charges and/or complaint made by Francis Waruige against Florence Wanjiku regarding any dealing on the motor vehicle of registration number KCM 653Z and/or other complaint.**

b) An ORDER OF PROHIBITION, directed at the Respondents restraining them either by themselves, agents, servants, or otherwise howsoever from commencing, sustain or proceeding with any criminal proceedings against the applicant in the chief Magistrate Court at Mombasa or any other Court within Republic of Kenya.

c) An ORDER OF MANDAMUS directed at the 3rd Respondent to hand over vacant possession and/or release of the motor vehicle KCM 653Z to the applicant.

2. The application is premised on the grounds set out in the Statutory Statement and Supporting Affidavit of **Florence Wanjiku Wangeci**.

The Applicant's Case

3. The Applicant's case is that she was in a romantic relationship with the Interested Party, whom she cohabited with for a period three (3) years.

4. Sometime in October, 2017, the Interested Party organised a surprise party at Voyager Hotel and gifted the Ex-parte Applicant a Motor Vehicle Registration No. KCM 653Z, a maroon, Toyota Vanguard, which was the dully registered in her name under the instructions of the Interested Party to Taj Ventures Limited where the motor vehicle was bought, and further, the interested party wrote a letter to Aboo Insurance Brokers Ltd with the instructions that the insurance policy should reflect the Applicant's name.

5. The Applicant claims that her romantic relationship with the Interested Party went sour sometime in April, 2019 and this is when the Interested Party sent emissaries to her who even attempted to accost her on the streets which led to the filing of Civil Suit No. 1241 of 2019 where she sought for and was granted a restraining order against the Interested Party.

6. It is the Applicant's contention that she was shocked when she later learnt that the Interested Party had reported her for fraud over the ownership of the car. The Interested Party renounced their affair and said that she was an errand girl who had fraudulently registered his vehicle in her name.

7. The Applicant avers that an investigation was conducted and a file forwarded to the 1st Respondent. By a letter dated **19th March, 2020**, the 1st Respondent found that the Interested Party was economical with the truth and recommended his arrest for giving false information contrary to **Section 129 of the Penal Code**.

8. The Interested Party was never arrested and in a surprising turn of events on the **30th March, 2021** the Applicant claims she was arrested for fraud when she visited the DCI offices to lift a caveat that had been placed on her car.

9. After the arrest, the Applicant avers that she was requested to furnish evidence demonstrating that the subject motor vehicle was legally acquired. She then collected more evidence from Taj Ventures who confirmed that the vehicle was a gift from the Interested Party to the Applicant.

10. The Applicant avers that although she was released unconditionally after her arrest on the **30th March, 2021**, the motor vehicle was towed on the 21st May, 2021 to the Police Station on allegations of fraud and on the 22nd May, 2021 she received a phone call from Police Officers that there were directives that she be arrested and prosecuted.

The Response

11. The Attorney General filed Grounds of Opposition on behalf of the 2nd and 3rd Respondent and stated that the application herein was an abuse of the court process as the Applicant did not disclose to the Court that she had filed JR Application No. 15 of 2021 which arose from the same cause of action. Further, that the 3rd Respondent has a statutory obligation to carry out independent investigation as per the National Police Service Act.

12. It was further pointed out that there are no constitutional rights set out that have been infringed and that the Motor vehicle KCM 653Z being held by the 3rd Respondent can only be released after completion of investigations and/or production in court.

13. The 3rd Respondent further filed a Replying Affidavit sworn by No. 258146 Oscar Mugalla, on the 8th June, 2021 where he deponed that a complaint was lodged by the Interested Party OB 42/18/7/2019 on allegations that one Florence Wanjiku had fraudulently registered Motor Vehicle KCM 653 Z in her name without his knowledge.

14. The 3rd Respondent averred that investigations were done and the file was forwarded to the 1st Respondent who at first directed that the parties seek civil remedy.

15. Mr. Mugalla, deponed that some time on 12th October, 2019, the Regional Director of the Office of the 1st Respondent resubmitted back the file for review and recommended further investigations be done, and after review on the 23rd March, 2021 the 1st Respondent decided to charge the Applicant based on non-disclosure of material facts by the Applicant when it was discovered that she was married to one Martin Nyamongo and not Francis Nguere.

16. The Interested Party filed a Replying Affidavit sworn on the 19th July, 2021. He deponed that he was not romantically linked to the Applicant. It was his case that the Applicant was his employee, employed in the capacity of a marketing officer who was paid on

commission.

17. The Interested Party averred that on 4th October, 2017 he bought a Toyota Vanguard from Taj Ventures and paid cash Kshs. 2,400,000/= through funds transfer. He denied that the said motor vehicle was bought as a birthday present for the Applicant.

18. According to the Interested Party, the Applicant as a trusted employee who had access to his identification Card and KRA PIN, colluded with one of the employees at Taj ventures and fraudulently transferred the said motor vehicle to the Applicants name and the same was done secretly on the 15th November, 2017. Once he discovered the fraud he reported the same to the 3rd Respondent who conducted investigations and forwarded the matter to the 1st Respondent who had the Constitutional right to prosecute the Applicant.

19. The second Application is a Notice of Motion dated 9th June, 2021 and filed on 10th June, 2021 by the Interested Party. The Application is brought under **Article 40, 47(1), 50(1) and 159 (2) (a) (d) and (e) of the Constitution of Kenya, Section 63 (e) of the Civil Procedure Act and Order 51 Rule 15 of the Civil Procedure Rules** and all other enabling provisions of the law. It seeks the order: -

1. Spent

2. Spent

3. Spent

4. Spent

5. **THAT this Honourable Court be pleased to issue an Order of preservation of the motor vehicle registration number KCM 653 Z subject matter of the proceedings herein pending hearing and determination of the Judicial Review herein.**

6. **THAT the costs of this Application be in the cause.**

20. The application is premised on the grounds set out therein and the Supporting Affidavit of **Francis Waruinge Ngure** sworn on 9th June, 2021.

The Interested Party's case

21. It is the Interested Party's case that he has prima facie evidence of fraud and stated that he will suffer irreparable damage and loss as the proprietary interest in the vehicle leans towards him. He averred that the Court is vested with wide and unfettered discretion to order the motor vehicle to continue being held at the Police Station.

The Response

22. The 1st -3rd Respondents did not oppose the Interested Party's Application.

23. The Ex-parte Applicant opposed the Interested Party's Application vide a Replying Affidavit sworn by **Florence Wanjiku Wangeci, on the 15th August, 2021**. She deponed that the prayer 5 cannot be granted because she is not seeking any property rights over the motor vehicle **KCM 653 Z** in her Judicial review Application. The Applicant averred that the dispute over the custody of the car is already before a competent court of law in **CMCC NO. 1241 of 2019**.

Submissions

24. It was agreed that the two applications be heard together and dispensed with by way of written submissions. For the Ex-parte Applicant **Ms. Khomo** learned Counsel filed her submissions on both applications on the **16th August, 2021**, **Mr. Fedha** learned Counsel for the 1st Respondents filed submission on the **22nd July, 2021**, while **Mr. Kiragu** learned counsel for the Interested Party filed submission on the **19th July, 2021**.

The Determination

25. I have considered the two applications, responses thereto and submissions by parties. I have also considered the authorities relied on. The issues that arise for determination are as follows: -

i) Whether the Court can interfere with the 1st and 3rd Respondent's mandate to investigate and prosecute

ii) Whether the reliefs sought are available to the Ex-parte Applicant

Whether the Court can interfere with the 1st and 3rd Respondent's mandate to investigate and prosecute

26. The Applicant has submitted that facts and evidence in the case herein do not disclose any wrong doing on her part and has accused the 1st and 3rd Respondents of acting in bad faith to accuse her of fraud when it is very clear that she is the owner of the Motor Vehicle

27. The functions of the 3rd Respondent are provided under the **National Police Service Act No. 11 A of 2011**. The functions of the Police under **Section 24 (e)** include the investigation of crimes. Further under **Section 35** the functions of the Directorate of Criminal Investigations as provided under **Section 35 the National Police Service Act No. 11 A of 2011** are to:

a) collect and provide criminal intelligence;

b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;

28. Turning on the mandate of the Director of Public Prosecutions, the 1st Respondent herein, the office derives powers from **Article 157(4), (6), (10) & (11) of the Constitution** which provides as follows:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(10) The Director of Public Prosecutions 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 functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

29. **Article 157 of the Constitution** is read in tandem with **Section 5(1) of the Office of the Director of Public Prosecutions Act, 2013** which states, *inter alia*:-

Pursuant to Article 157 of the Constitution the Director shall—

(a) have power to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction;

(b) exercise State powers of prosecution;

30. Further, under **Section 6 of the Office of the Director of Public Prosecutions Act, 2013** the Office of the Director of Public Prosecutions enjoys independence to prosecute, provided the same is done within the confines of the law. Section 6 of the Act provides: -

Pursuant to Article 157(10) of the Constitution, the Director shall—

(a) not require the consent of any person or authority for the commencement of criminal proceedings;

(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law.

31. The law is thus clear that the 3rd Respondent is mandated to investigate crimes and offences they suspect have been committed under any provisions of the law. The 1st Respondent, in the same breath is also sanctioned to analyse the evidence presented and to prosecute any person suspected of committing an offence known to the law

32. In the case of **Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others [2019] eKLR**, this Court held: -

“The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an

abuse of power.

33. The burden of proof in this case lies with the Applicant to show this court that the investigations conducted by the 3rd Respondent on the subject Motor Vehicle were malicious or an abuse of power. In this case there is no such proof that the Police have acted outside their mandate. All the Applicant has attempted to do is to shift the burden of proof to the Police to prove that she is the true owner of the Motor Vehicle. That appears to be a formidable defence to the alleged criminal charges against her.

34. In this case it is evident that both the Ex-parte Applicant and the Interested Party have filed a complaint with the 3rd Respondent over the subject motor vehicle and the 3rd Respondent confirmed that they investigated the said matter and compiled their findings and forwarded the same to the Office of the Director of Public Prosecutions for perusal and further advice and thus there is no reason for finding that the 3rd Respondent did not act in conformity with the law.

35. It was submitted that the Director of Public Prosecutions had first advised against prosecution but on discovery of new evidence gave the instructions that Applicant be investigated afresh and be prosecuted. The Applicant has submitted that the said discovery of new evidence is immaterial to her case and lacked foundation as it only proved that she was married to someone else and not related to the ownership of the subject motor vehicle.

36. In the case of **Republic Vs Attorney General & Others Exparte Diamond Hashim Lalji & Ahmed Hashim Lalji [2014] e KLR** learned Justice Odunga held: -

“...where a decision had been made to close an inquiry file, it is my view that before reopening the investigations resulting from discovery of new evidence, the people sought to be charged ought to be given an opportunity to comment on the fresh evidence...”

37. It is evident that the new discovered evidence has been disclosed to the Applicant, which evidence she has rubbished as being immaterial. As it is, the Applicant has not brought before the court any evidence that the 1st Respondent has acted *ultra vires*.

38. In the case of **Michael Monari & Another [2012] eKLR** Warsame J held, *inter alia*, that:

“Under Article 157(4) of the Constitution, the Director shall have power to direct the police to investigate any information or allegation of criminal conduct and it is mandatory for the police to comply with any directions given by the Director of Public Prosecutions. Under Article 157 (10), the Director of Public Prosecutions shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the directions or control of any person. It is clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their Constitutional mandate to detect and prevent crime. The police need only establish reasonable suspicion before preferring the charges. The rest is for the trial court ...”

39. In applying the legal tests above to the facts and circumstances of this case, I find and hold that there is nothing to show that the prosecution of the Applicant is irrational or is unprocedural and/or an abuse of court process or abuse of police powers or judicial process. The 1st and 3rd Respondent have acted on reasonable suspicion to investigate and allegedly prosecute the Applicant herein.

Whether the reliefs sought are available to the Ex-parte Applicant

40. For the court to issue orders of certiorari, prohibition or mandamus the court must be satisfied that the act or omission complained of was arrived at illegally, unreasonably, improperly, irrationally, biased, in bad faith or otherwise *ultra vires* hence breach of the principles of natural justice.

41. In this case **Mr. Fedha** submitted that an order of **Certiorari** can only issue to quash a decision which has already been made and in this case the 1st Respondent has not made any decision to charge the Applicant neither has the Applicant proved before this court that the same have been instituted against her.

42. **Certiorari** orders can only be issued under certain circumstances as elucidated in the case of **Captain Geoffrey Kugoya Murungi vs A.G misc. civil Application no.293 of 1993** wherein the court held that: -

“...certiorari deals with decisions already made...such an order (certiorari) can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice or contrary to law. Thus, an order of certiorari is not a restraining order...”

43. I agree with the submission of 1st Respondent that as it is before court there is no decision that has been placed before it that can be quashed by an Order of Certiorari.

44. An order for prohibition is prospective in character and is intended to restrain an inferior tribunal body or authority from assuming jurisdiction where there is none or from doing what it is not authorised to do. This position was upheld in the case of **Kenya Examination Council vs R Experte Geofrey Gathenji Njoroge and 9 others (1997)eKLR** where the court held that:

“where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of rules of natural justice, an

order of prohibition will not be efficacious against the decision so made. Prohibition cannot quash a decision that has already been made, it can only prevent the making of a contemplated decision.”

45. In this case the Applicant has not brought any proof before court that the 1st and 3rd Respondents have acted outside their mandate as provided under the law for an order of Prohibition to issue.

46. Having found the investigations and alleged prosecution to be within the confines of the law, this Court will not interfere with the process. Further the said motor vehicle is a subject of an ongoing civil suit **CMCC NO. 1241 of 2019**. Therefore the orders of Mandamus cannot issue.

47. Onto the Interested Party’s application, it is not clear if the same was abandoned by the Interested Party as they did not submit on it at all.

48. For the foregoing reasons, the Notice of Motion dated **4th June, 2021** seeking orders of Certiorari, Prohibition and Mandamus against the Respondents fails.

49. For both applications parties shall bear own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF SEPTEMBER, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Ms. Khama for Ex Applicant

Mr. Kiragu for Interested Party

Ms. Peris Court Assistant