



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**JUDICIAL REVIEW NO. E3 OF 2021**

**IN THE MATTER OF**

**AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF PROHIBITION AND**

**IN THE MATTER OF**

**SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26**

**AND**

**IN THE MATTER OF**

**SECTIONS 291 OF THE PENAL CODE**

**AND**

**IN THE MATTER OF**

**AN APPLICATION BY: -**

REPUBLIC .....APPLICANT

**VERSUS**

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

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS

NAKURU.....3<sup>RD</sup> RESPONDENT

BAK FRAUD INVESTIGATIONS UNIT.....4<sup>TH</sup> RESPONDENT

EXPARTE APPLICANTS

HASMUKH R. SHAH.....1<sup>ST</sup> APPLICANT

SANJAY R. SHAH.....2<sup>ND</sup> APPLICANT

KAVIT H. SHAH.....3<sup>RD</sup> APPLICANT

FLAMCO LIMITED.....4<sup>TH</sup> APPLICANT

AND

**BANK OF BARODA KENYA LTD.....INTERESTED PARTY**

**JUDGMENT**

1. The applicants herein filed an application dated 22<sup>nd</sup> January 2021 seeking leave to apply for an order prohibition restraining the respondents from instituting criminal proceedings against the ex-parte applicant and the leave to operate as a stay of the intended prosecution of the applicants.

**EXPARTE APPLICANT'S APPLICATION DATED 10<sup>TH</sup> FEBRUARY 2021**

2. Upon being granted leave the exparte applicants filed the main Notice of Motion dated 10<sup>th</sup> February 2021 seeking the following orders:-

i. That the leave granted do operate as a stay of the intended prosecution against the Ex-parte applicants.

3. In response, the interested party filed replying affidavit and averred that the application is frivolous, mischievous, lack in merit, incompetent, and is based on falsehoods, and the same has been brought in bad faith. Further that the ex-parte applicants have an outstanding loan balance of Kshs 871, 936,421.82/= which is non-performing and they have disposed of their charged assets without the consent of the interested party contrary to the debenture instrument clause 8.2.

4. The interested party averred that the applicants in an attempt to defeat the interest of the interested party sold the stocks in trade and divided the money amongst themselves; that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are only carrying out their duty of investigation pursuant to **Section 35 of the National Police Service Act**; that the matter is still under investigation. Further that applicants have sub-divided property situated in Land parcel no. Nakuru /Municipality/ Block 5/119, a charged property.

5. The interested party filed a supplementary affidavit and averred that the judicial review proceedings brought by the ex-parte applicant is an abuse of the court process; that the complaint by the interested party is serious and there is a need to commence investigations.; that the application is intended to frustrate the interested party by filing various suits in different courts; that they have not demonstrated what prejudice they will suffer if the investigations are to be commenced.

6. In response to the Ex-parte applicants' application, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents filed grounds of opposition as hereunder:-

*i. That he 1<sup>st</sup> respondent under Article 157 of the constitution is vested with state powers to institute criminal proceedings and prosecute offenders.*

*ii. That the application intends to obstruct and interfere with the 1<sup>st</sup> respondent's constitution mandate.*

*iii. The applicants have not demonstrated that the 1<sup>st</sup> respondent in executing its mandate has acted in excess of its powers conferred by law.*

*iv. The applicants have not demonstrated that the 1<sup>st</sup> Respondent in executing its mandate has acted oppressively, infringes, violated, or contravened the foregoing provision of the constitution or any provisions of the law.*

*v. The applicants have not demonstrated that the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents in executing their mandate to investigate have acted oppressively, infringed, or in any way the applicants' rights have been violated.*

*vi. The decision to charge the applicants by the 1<sup>st</sup> respondent's would be premised on cogent evidence obtained from the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents herein.*

*vii. That the applicants have not demonstrated any prejudice they will suffer pursuant to further investigations by the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents.*

*viii. That the application is an abuse of the court process.*

*ix. That the application lacks merit and the same should be dismissed.*

**INTERESTED PARTY'S APPLICATION DATED 10<sup>TH</sup> FEBRUARY 2021.**

7. The interested party filed an application dated 10<sup>th</sup> February 2021 seeking the following orders:-

*a. Spent*

*b. Spent*

c. Spent

d. That the Ex- parte order made on 26<sup>th</sup> January 2021 granting leave to the applicant to take out judicial review proceedings by way of prohibition be reviewed, varied, set aside, or discharged.

e. That the Ex-parte order made on 26<sup>th</sup> January 2021 that leave granted does operate as a stay of the intended prosecution against the applicants be reviewed, varied, set aside, or discharged.

f. That on the alternative to prayer 5 and 6 above, this Honourable Court be and is hereby pleased to order the applicants HASMUKH R. SHAH, SANJAY R. SHAH, KAVIT H. SHAH, and FLAMCO LIMITED to deposit in court the sum of Kshs.871,936,421.81/= being the outstanding balance of the loan and the interest owed by the Applicants to the interested party.

8. The application is premised on the following grounds:-

i. THAT the Orders issued on 26<sup>th</sup> January 2021 are pre-judicial to the Respondents/Interested Party and continued subsistence of the aforementioned orders is causing the Interested Party untold suffering, embarrassment and likely to bankrupt the interested party.

ii. THAT the complaint about fraudulent depletion of stock and diversion of funds made against the Applicants by the Interested Party is serious and there is a need to allow the investigative Agencies time to carry out an investigation bring to light the truth behind the said allegations and institute criminal charges if merited.

iii. THAT the orders issued by the Honorable Court are oppressive to the interested party.

iv. THAT there is no allegation by the Applicants, that in deciding to commence investigations and/or to charge the Applicants, the Respondents herein breached the provisions of the Constitution of the law.

v. THAT the Applicants in their pleadings have not stated and/or alleged that the decision by the Respondents herein to commence investigations against the Applicants was irrational, or abuse of prosecutorial of investigative powers or that they erred in their decision.

vi. THAT the Applicants are inviting the court to analyze the evidence and make a conclusion as to whether there is a case against the Applicants.

vii. THAT based on the material presented to the court, the Applicants did not show that they have an arguable case as they did not present any evidence to show that the Respondents or the Interested Party acted irrationally and with bias.

viii. THAT the power to prohibit criminal prosecution should be exercised with great care.

ix. THAT in accordance with Article 157 of the Constitution, the 1<sup>st</sup> Respondent herein has decisional autonomy, and the 1<sup>st</sup> Respondent is expected to use his expertise in determining which case to prosecute and which one not to prosecute, without interference.

x. THAT equally, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have a mandate to investigate crimes and recommend prosecution pursuant to Section 35 of the National Police Service Act, cap84.

xi. THAT in any event, the 1<sup>st</sup> Respondent has not made a decision to prosecute the Applicants as the matter is still at the investigative stage.

xii. THAT the Applicants are guilty of non-disclosure of material facts, concealment of material documents/facts, and misrepresentation.

xiii. THAT further, the proceedings commenced by the Applicants is an abuse of the court process.

xiv. THAT the Applicants are playing Ping-Pong with the court process to frustrate the Interested Party, which now stands to lose a whopping Kshs. 871, 936, 421.82/= at the hands of the Applicants.

xv. THAT ex-parte orders are essentially provisional in nature as they are made by a judge on the basis of evidence and submissions emanating from one side only and therefore, the orders can be reviewed, varied, set aside, or discharged on an application by an aggrieved party.

9. The application is supported by the affidavit of Justus Paul Muga restating the grounds of the application.

**EXPARTE APPLICANT'S APPLICATION DATED 7<sup>TH</sup> APRIL 2021**

10. The ex-parte applicants filed a further application seeking the following orders:

a. Spent

b. The Ex-parte order issued on 16<sup>th</sup> February 2021, requiring the applicants to deposit their passports in court be discharged, reviewed, set aside, and or varied.

c. The costs of this application be provided for.

11. The application is premised on the following grounds:-

i. That the interested party through an offer letter dated 17<sup>th</sup> October 2019, offered to extend a banking facility to the Ex-parte applicants which included an overdraft facility of Kshs. 650,000,000/=, a term loan of Kshs. 30,000,000/= and non-refund based bank guarantees of Kshs 70,000,000/=.

ii. That those facilities were secured by the following securities A.title Number Nakuru/Municipality block 5/116

B. title Number Nakuru/ Municipality Block 5/119

C. Title Number Nakuru/ Municipality block 10/105

D.Title Number Nakuru/ Municipality Block 6/39

E.Title number apartment numbers E21 erected on land reference number 209/2018

F. Debenture on stocks and assets in trade.

iii. That the Ex-parte applicants secured the aforementioned banking facilities through several securities including, in particulars a further debenture charge on stocks and assets and stocks in trade owned by the Ex-parte applicant.

iv. That the interested party launched a nefarious complaint with the 1<sup>st</sup> Respondent herein accusing the Ex-parte applicants of disposing of mortgaged goods without the authority of the interested party contrary to section 291 of the penal code

v. That pursuant to the applicant's application dated 10<sup>th</sup> February 2021 by the interested party the court ordered the applicants to deposit their passport with the court pending the hearing and determination of the said application.

vi. That the under the lending contract between the applicant and the interested party the recourse that the interested party has is to sell the mortgaged properties and realize the aforementioned securities, notice of which they have already issued to the Ex-parte applicants for the intended sale of their mortgaged properties, and therefore the interested party cannot then move the court and request that the applicant deposit their passports within yet there is no such recourse contained in the offer letter agreement.

vii. That additionally, Ex-parte applicants' passports are not a form of security and there is no provision anywhere in-law or in the offer letter agreement that requires that the ex-parte applicants' passport should be deposited in court as security in any event.

viii. That even assuming that there were personal guarantees by the Ex-parte applicants, there are modalities in place to enforce those personal guarantees and to reiterate there is no such provision in the law requiring the Ex-parte applicants to deposit their passports in court.

ix. That assuming the Ex-parte applicants were to leave the country, the interested party is holding the applicants' securities and have a remedy to sell the mortgaged properties or to file suit to seek enforcement of the personal guarantees by the directors of the company whereas the depositing their passports in court is not a remedy of the lending contract between the interested party and the Ex-parte applicants.

x. That to reiterate, there are clearly set out remedies for the interested party who has already given notice of their intention to realize the Ex-parte applicant's securities to recover the loan amount and it is, therefore, absurd that they would insist the Ex-parte applicants deposit the outstanding loan amount in court yet it is not a remedy under the lending contract.

xi. That in the circumstance it is only fair and just and in the wider interest of justice that the orders dated 16<sup>th</sup> February 2021 be discharged, reviewed, set aside, and or varied.

12. The application is supported by the affidavit of **Hasmukh R. Shah** who restated the grounds of the application.

13. The three applications were canvassed by way of written submissions.

**EX-PARTE APPLICANTS' SUBMISSIONS**

14. In respect to the application dated 10<sup>th</sup> February 2021, the applicants submitted that the contract between the interested party and the 4<sup>th</sup> Ex-parte applicant is not disputed and as per clause 8.2.3, the Ex-parte applicant was at liberty to dispose of the goods in trade offered as a mortgage without the consent of the interested party.

15. The exparte applicants submitted that they have not committed any offence under section 291 of the Penal code as they have subdivided property No. Nakuru/ Municipality Block 5/1819 with the intention of leasing to other third parties but have not yet leased out the property; that the demarcations and the beaconing are clear evidence of the new partitions and a party is not prohibited from using a mortgaged property even if it is sub-division.

16. They further submitted that clauses 17 and 18 of the debenture provide the consequences for default by the 4<sup>th</sup> applicant and in case of default in servicing the loan, the interested party should pursue the realization of the securities as provided by the law in a civil court rather than submit the 1<sup>st</sup> to 3<sup>rd</sup> applicants to arbitrary arrests and detentions, criminal prosecutions, and limiting their fundamental rights and freedom including freedom of movement.

17. They further submitted that the 4<sup>th</sup> applicant is a separate legal entity and the financial records are available at the registrar of companies for the respondent to scrutinize and further; the insolvency Act spells out the offenses in respect to debentures when a company goes under liquidation and fails to pay debts. That the interested party has not established a proper factual foundation on the applicants to prosecute them and cited the case of **R vs. Attorney General Ex-parte Kipngeno Arap Ngeny High court Civil application No. 406 of 2001**.

18. Further, that the applicants submitted that respondents have acted ultra vires in their mandate and urged this court to intervene and prohibit the actions of the Respondents; that criminal proceedings are an abuse of the court process as the criminal justice system is being used for an improper purpose to serve personal goals and vendetta to settle personal scores; that the interested party is estopped from pursuing criminal prosecution as there is a remedy in a civil claim and cited the case of **Meme vs. Republic & Another (2004) 1KLR 637 at page 678**.

19. The applicants further submitted that the fundamental rights of the applicants have been infringed and the applicants have a right to be protected under the constitution; that the respondents have not participated in the matter and the interested party is not an agent of the respondent. They urged this court to allow the application for judicial review.

20. The applicants submitted that the application seeking to have the applicants deposit the loan amount of Kshs 871,936,421.82 is bad in law, fatally defective dead on arrival, and warrant striking out. The application is brought by a third party who is not a party to the dispute. Thus the interested party lacks the *locus standi* to file the application. An interested party cannot form new issues or cross-petition nor bring in a new cause of action. Cited the case of **Methodist Church in Kenya vs. Mohamed Fugicha & 3 others (2019) eKLR Petition No. 6 of 2016**.

21. They submitted that the interested parties have failed to follow the right channel in addressing a civil dispute. The debt has not been sufficiently proven and the issues have not been tried.

22. Further that the Ex-parte application dated 7<sup>th</sup> April 2021 was aimed at vacating the orders issued on 16<sup>th</sup> February 2021, and the same has been overtaken by events.

23. The exparte applicants urged this court to dismiss the interested party's application dated 10<sup>th</sup> February 2021 and allow the judicial review application.

#### **INTERESTED PARTY'S SUBMISSIONS**

24. The interested party submitted that they are objecting to the grant of orders of judicial review sought by the applicants on the basis the application lacks merit and the applicants have not proved their case to warrant the grant of the orders of judicial review; that they have failed to show that the decision to conduct investigations is tainted with illegality, irrationality, and procedural impunity; that the orders sought are geared towards restraining threatened or impending unlawful conduct and cited the case of **Republic vs. Kenya Revenue Authority Ex-parte Yaya Towers Ltd (2008)eKLR**

25. The interested party further submitted that the 1<sup>st</sup> Respondent has constitutional and statutory powers over prosecutions as per Article 157 (6) of the constitution; that the constitutional mandate of the Director of Public Prosecutions is not subject to control or interference from any other party and relied on the case **Republic vs. Commissioner of Police & Another Ex-parte Michael Monari & Anor (2012)eKLR**

26. The interested party further submitted that even if the proceedings are unmerited, there exist an avenue for compensation on malicious prosecution and cited the case of **Ex-parte Ewart Frey Salins (2018) eKLR** and **Republic v inspector General of police & 2 others ex-parte Jimi Richard Wanjigi (2019) eKLR**

27. The interested party submitted that the respondents are about to commence investigation on the ex-parte applicants on the alleged disposal of the mortgaged property contrary to section 291 of the Penal code which is within their mandate and the court should not interfere; that no breach of the respondent mandate has been proved by the Exparte- applicants; and further, it is prudent to have the applicants deposit the loan amount in court since they do not dispute owing the interested party the said amount and urged this court to uphold the order for depositing the passports in court as the interested party is apprehensive the applicants will leave the jurisdiction of the court.

28. The interested party urged this court to find no merit in the applicants' application dated 10<sup>th</sup> February 2021 and 7<sup>th</sup> April 2021, and conversely allow the interested party's application dated 10<sup>th</sup> February 2021 with costs.

## ANALYSIS AND DETERMINATION

29. I have considered the three applications herein and note the following as issues for determination?

- a. Whether the applicants are entitled to the orders sought judicial review application dated 10<sup>th</sup> February 2021
- b. Whether orders directing the applicants to deposit their passport in court should be vacated?

### **(i) Whether the ex parte applicants are entitled to judicial review orders sought?**

30. Article 165 of the constitution empowers the High court to hear and determine a claim for redress of a denial, violation or infringement or threat to a right or fundamental freedom in the Bill of Rights and may grant an order of judicial review. Judicial review remedies are discretionary. Circumstances under which judicial review reliefs can be granted were stated in *Hallsbury's Laws of England 4<sup>th</sup> Edition Vol 1 (1) paragraph 12 pg. 270* as follows:-

**“The remedies of quashing orders (formerly known as order of certiorari), prohibition orders (formerly known as orders of prohibition) mandatory orders (formerly known as orders of mandamus) are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief, the court will take into account the conduct of the party applying and consider, whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.**

**Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or further, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question; would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfillment. The court has an ultimate discretion whether to set aside the decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow a temporary decisions to take their course, considering the compliance and intervening if at all later and in retrospect by declaratory orders.”**

31. A party seeking judicial review must establish that his rights and freedom have been infringed and/or violated as was set out in *Council for Civil Service Unions v Minister for Civil Service [1985] AC 374 at 401 D* where the court stated as follows:-

**“Judicial review has I think developed to a stage today when one can conveniently classify under three heads, the grounds upon which administrative action is subject to control by judicial review: the first ground I will call illegality, the second irrationality, and the third procedural impropriety. 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. By irrationality, I mean what can now be succinctly referred to as unreasonableness 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... 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.”**

32. The applicant must show by way of evidence that the actions of the respondent were tainted with procedural impropriety and failure to observe the rules of natural justice. The applicant should also show that the respondent acted outside their scope of jurisdiction. In the instance case, the respondents are about to commence investigations on a complaint raised by the interested party. For the respondent to arrive at a decision of prosecuting the applicant, proper investigations must be conducted. The applicants have failed to demonstrate investigations will result in infringement of their rights neither have they demonstrated that the respondents are likely to act outside the mandate.

33. From the foregoing, the application for judicial review reliefs is unmerited and the same is dismissed with costs.

### **(ii) Whether orders directing the applicants to deposit their passport in court should be vacated?**

34. In respect to the release of the passports, the applicants have admitted to owing the interested party money advanced. The interested party is apprehensive that the ex parte applicants may leave the jurisdiction of the court and they stand to lose colossal amounts of money not disputed as owing from the ex parte applicants. On the other hand, the ex parte applicants have not demonstrated what prejudice they stand to suffer if their passports are deposited in court. The purpose of depositing the passport is intended to secure the availability of the applicants for investigation I find the application dated 7<sup>th</sup> April 2021 unmerited and the same is dismissed with costs.

## **35. FINAL ORDER**

- 1) Judicial review application dated 10<sup>th</sup> February 2021 is hereby dismissed.
- 2) Costs in respect to 1 above to be paid by ex parte applicants to the respondents and interested party.

3) Application dated 7<sup>th</sup> April 2021 is hereby dismissed.

4) Costs in respect to 3 above to be paid the interested party.

**RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 28TH DAY OF OCTOBER, 2021**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

Mr.Munyiri holding brief for Murimi for Exparte Applicants

Ms.Rita Rorich for ODPP

Mr.Langat for interested party.