



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

JUDICIAL REVIEW NO. 1 OF 2019

JANE KERUBO MOGIRE.....EX-PARTE APPLICANT

VERSUS

1. THE HON. ATTORNEY GENERAL OF KENYA.....1ST RESPONDENT
2. THE DIRECTOR PUBLIC PROSECUTIONS.....2ND RESPONDENT
3. INSPECTOR GENERAL OF NATIONAL
POLICE SERVICE OF KENYA.....3RD RESPONDENT
4. PRINCIPAL SECRETARY NATIONAL TREASURY.....4TH RESPONDENT
5. OCS KEROKA POLICE STATION.....5TH RESPONDENT
6. SENIOR SERGEANT HASSAN ABDI
(OCPD – KINOO POLICE POST).....6TH RESPONDENT
7. DORCA NYABOKE ONSARIGO.....7TH RESPONDENT
8. RUTH NYAMARI.....8TH RESPONDENT
9. FARUK NYAMARI.....9TH RESPONDENT
10. JARED GICHABA NYAOSI.....10TH RESPONDENT
11. ZIPPORAH NYAMBEKI KEBENO.....11TH RESPONDENT
12. SENIOR RESIDENT MAGISTRATE
COURT AT KEROKA LAW COURTS.....12TH RESPONDENT
- EXECUTIVE OFFICER (IPOA).....INTERESTED PARTY

JUDGEMENT

The Ex-parte applicant approached this court by way of a Notice of Motion dated 15th July 2019 in which the orders sought on page 18 of the application were framed as follows: -

“1. THAT this application is heard and certified as extremely urgent and order granted EX-PARTE.

2. THAT PENDING such hearing AT KEROKA SENIOR RESIDENT MAGISTRATE COURT, HON. COURT stay on all actions on the basis OF THE HIGH COURT Proceeding IN THE HIGH COURT OF KENYA AT KISII – JUDICIAL REVIEW CIVIL APPLICATION NO. 4 OF 2018.

3. THAT PENDING SUCH HEARING AT KEROKA SENIOR RESIDENT MAGISTRATE COURT, HON. COURT stays and recalls the CRIMINAL CASE FILE NO. 987 OF 2018 – KEROKA SENIOR RESIDENT MAGISTRATE COURT, REPUBLIC OF KENYA – EX-PARTE.”

And on page 22 of the application as follows: -

“1. It is hereby Declared that the initiation, maintenance and prosecution of the EX-PARTE APPLICANT JANE KERUBO MOGIRE in the SENIOR RESIDENT Magistrate’s court at KEROKA LAW COURTS vide criminal case No. 985 of 2018 is an abuse of the criminal justice system and in contravention of the applicant’s constitutional rights and freedoms and security of the person and the right to secure the protection of the law;

2. It is hereby Declared that the initiation and prosecution of the criminal case against the EX-PARTE APPLICANT JANE KERUBO MOGIRE in the SENIOR RESIDENT Magistrate’s court at KEROKA LAW COURTS vide criminal case No. 985 of 2018 amounts to selective and therefore discriminatory prosecution and a gross abuse of the process of court.

3. It is hereby Declared that the initiation, maintenance and continued prosecution of the EX-PARTE APPLICANT JANE KERUBO MOGIRE in the SENIOR RESIDENT Magistrate’s court at KEROKA LAW COURTS vide criminal case No. 985 of 2018 vide criminal case No. 985 of 2018 is oppressive, malicious and an abuse of the process of court.

4. Orders of Prohibition be and are hereby issued prohibiting the continuance of the EX-PARTE APPLICANT JANE KERUBO MOGIRE in the SENIOR RESIDENT Magistrate’s court at KEROKA LAW COURTS vide criminal case No. 985 of 2018 in the manner intended against the ex-parte applicant JANE KERUBO MOGIRE.”

Thereafter on 24th July 2019 this court received from the ex-parte applicant a pleading headed **“IN THE MATTER OF AN APPLICATION FOR LEAVE BY JANE KERUBO MOGIRE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF PROHIBITION AND CERTIORARI AND MANDAMUS.”** However, the same was not brought to the attention of this court and so on 19th September 2019 this court noting that the proceedings were for judicial review orders directed the ex-parte applicant to amend her pleadings so as to first seek leave. However instead of filing a chamber summons for leave to bring judicial proceedings, the ex-parte applicant filed the Amended Notice of Motion dated 2nd October 2019. Article 159 (2) (d) of the Constitution enjoins this court to administer justice without undue regard to procedural technicalities so this court ignored the irregularity and on 8th October 2019 it heard the ex-parte applicant, granted her the requisite leave, directed her to file the substantive motion within 21 days and scheduled it for hearing on 7th November 2019.

Following the order made on 8th October 2019, the ex-parte applicant filed the **“AMENDED SUBSTANTIVE/MAIN NOTICE OF MOTION”** dated 22nd October 2019 which seeks orders that: -

“(i) A Declaration that the initiation, maintenance and prosecution of the applicant in the KEROKA PRINCIPAL/RESIDENT MAGISTRATE LAW COURTS vide Criminal Case No. 987 of 2018 is an abuse of the criminal justice system and a contravention of the applicant’s Constitutional Rights to freedom and security of the person and also the right to secure protection of the law;

(ii) A Declaration that the initiation and prosecution of the case against the applicant in KEROKA PRINCIPAL/RESIDENT MAGISTRATE LAW COURTS the vide criminal case No. 987 of 2018 amounts to selective prosecution and a gross abuse of the process of court;

(iii) A declaration that the initiation, maintenance and continued prosecution of the applicant in the KEROKA PRINCIPAL/RESIDENT MAGISTRATE LAW COURTS vide criminal case No. 987 of 2018 is oppressive, malicious and an abuse of the process of the court;

(iv) Orders of prohibition do issue the continuance of the KEROKA PRINCIPAL/RESIDENT MAGISTRATE LAW COURTS Criminal case No. 987 of 2018.

(v) Costs of the application.

(vi) Any other order that the court may deem just and expedient to grant in the circumstances.”

That Notice of Motion is the subject of this judgement. In the proceedings the ex-parte applicant acted in person while the 1st to 6th & 12th respondents were represented by Mr. Nyauma, Senior Litigation Counsel in the Office of the Attorney General in Kisii. The 11th respondent was represented by Mr. S. N. Mainga Advocate. I note from the record that on 20th November 2019 Mr. Nyauma filed a notice of preliminary objection but the same was not prosecuted. On 5th December 2019 this court gave directions that the application be canvassed through written submissions but only those of the ex-parte applicant and the 11th respondent were received.

From the submissions it is near impossible to decipher what the ex-parte applicant is saying as all she has done is to restate the law as she understands it. Be that as it may if I understood her, it is her case that the charges preferred against her in the Principal Magistrate’s Court at Keroka which she seeks to halt by these proceedings are intended to settle personal scores and to harass her but are not geared towards genuine enforcement of the law and they ought therefore to be stopped. On page 17 of her submissions, she contends that no person can claim any right or remedy under an illegal transaction in which he has participated and that a court is bound to veto such a contract whether

knowledge that it is illegal comes from the statement of the guilty party or from outside sources. On page 19 she submits that the 7th respondent (Dorca Nyaboke Onsarigo) was jailed by Keroka court for obtaining by false pretences from the 8th respondent (Ruth Nyamari) and that on 4th August 2019 the 7th respondent gave evidence without first recording a statement with the police. She faults the trial Magistrate for ignoring this fact when she brought it to his attention and further seems to submit that as the 7th, 8th, 9th and 10th respondents did not file responses to these proceedings then judgement should be entered against them with costs to her. She has also submitted that Baruk Nyamari alias Faruk Nyamari (9th respondent) is an imposter who cannot stand in law as a state witness as according to her he lied he was a student of Kabete National Polytechnic in Nairobi but a letter from the institution dated 4th August 2019 confirmed that he was not a student in that institution. She contended that he therefore lied and lying under oath is a criminal offence. In respect to Jared Gichaba Nyaosi (10th respondent), her submission is that he is involved in shylock business or Ponzi schemes with his wife Zipporah Nyambeki Kebeno (11th respondent) and that they unleash criminal gangs upon those who fail to pay. As for the 12th respondent, she contends that he was sued in these proceedings only because this court exercises supervisory jurisdiction over his court. On page 32 of the submissions she raises issues of the court record and states: -

- “(i) The court record is everything to the judicial process. Inefficient modes of generating and maintaining full and reliable court records, hence defeating the ends of justice.**
- (ii) Evidence is lost in the process of recording and during the preservation of court records through fires and malpractices.**
- (iii) The court record is the basis for a fair trial. Any determination of a court is founded on the material in the record and such decision is placed and preserved on the face of the record.**
- (iv) Fair trial guarantees of appeal and review are initiated by the court record. An appeal is a trial of the record.**
- (v) The competence of a court that cannot accurately record its proceedings and preserve the records to guarantee a fair trial is questionable.**
- (vi) There is a need to facilitate a reliable mode of producing and maintaining the court record, towards a culture of fulfilling the right to a fair trial in Kenya.”**

From page 32 to page 64 she submits on the importance of proper maintenance and management of records and the consequences that would ensue if a court record is lost or destroyed. She then submits at page 65 that a defective court record is the subject of judicial review and that on-going proceedings may be discontinued on account of deficiencies in the court record; that in the case that a charge sheet is irretrievably lost or not on the record the court concludes that the applicant had been put through trial while no formal charge had been laid against him and the applicant is discharged. It is also her submission that the 2nd respondent failed to produce her cautionary statements made at Keroka, Kikuyu and Kinoo Police Stations and the attendant occurrence book numbers. Finally, she submits that no authority, approval or consent was granted to prosecute her in Keroka Criminal Case No. 987 of 2018 and contends that **“the prosecution and police witnesses are involved with abetment of crime, defrauding by false pretences, carrying on a deposit taking business without licence, unlawful deposit taking and money laundering”** and they require to be taken to the police station to assist in investigations. She prays therefore that her application be allowed with costs here and in Kisii HC Judicial Review No. 4 of 2019. To support her submissions, she relied on two cases: -

1. Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR.

2. Bitange Ndemo v Director of Public Prosecutions & 4 others [2016] eKLR.

Relying on the cases of **Thuita Mwangi & 2 others v The Ethics & Anti-corruption Commission & 3 others [2013] eKLR** and **Republic v Commissioner of Police and another, Ex-parte Michael Monari & another [2012] eKLR**, Mr. Mainga for the 11th respondent submitted that the matters complained of by the ex-parte applicant are prematurely before this court as they form the basis of the defences of the ex-parte applicant and ought to be canvassed at the trial. That there is nothing to demonstrate that the decision to charge the ex-parte applicant is an abuse of the powers vested on the 5th respondent or that the decision is irrational, unreasonable or actuated by ulterior motive or malice and it would not be in the interest of justice to halt the trial. Mr. Mainga further submitted that the applicant has been unable to pinpoint the basis of alleged malice save to say that she was arrested and released on bail. He stated that malice must go to the root of the proceedings and it must be demonstrated how the proceedings are an abuse of court process. Counsel further argues that as the court below which is inferior to this court has not rendered a decision, this court ought to refuse this application in view of Section 9 of the Fair Administrative Action Act. Counsel further submitted that the ex-parte applicant failed to disclose a cause of action against the 11th respondent as the order sought is not in any way related to the actions of the 11th respondent being that she does not act and has not previously acted in any state or any state agency exercising administrative authority or in performance of a judicial or quasi-judicial function. Mr. Mainga urged this court to dismiss the application for want of merit and further strike out the 11th respondent's name from these proceedings as they are res judicata and an abuse of the court process as a similar matter had been heard by the High Court in Kisii and dismissed on 30th April 2019.

As defined in **Halsbury's Laws of England, 4th Edition Page 91** **Judicial Review is the process by which the court exercises its supervisory jurisdiction over the proceedings and decision of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.** In essence therefore, judicial review is a remedy only available against subordinate courts, tribunals, public bodies or persons who perform public duties. **(See Republic v Kenya Cricket Association & 2 others, ex-parte Maurice Omondi Odumbe [2006] eKLR** and also **Kenya National Examination Council v Republic, Ex-parte Geoffrey Gathenji & 9 others [1997] eKLR.** This is so because the objective of the remedy is to ensure that the government and its various entities operate within their legal bounds and do not exceed or abuse their powers to the detriment of the people.

Given the above definition therefore it would seem that the 7th, 8th, 9th, 10th & 11th respondents are not properly enjoined to these proceedings and their names ought to be expunged. It would however appear from the ex-parte applicant's pleadings that her application is also geared towards enforcement of her fundamental rights as guaranteed in the Constitution in which case the said respondents are properly sued. This court will consider the application from both angles – **as an application for the judicial review under Order 53 of the Civil Procedure Act** and also **as a constitutional application for the enforcement of rights**.

It has also been argued by counsel for the respondents that these proceedings are incompetent for reason of being res judicata the ex-parte applicant having filed similar proceedings in the High Court at Kisii which were dismissed. Proof of the said proceedings was however not tendered in this court. He who asserts must prove and in the absence of evidence that similar orders were sought in another court, this court shall proceed to determine this application on the merits.

Having considered the pleadings, submissions and cases cited by the parties, the issues that call for determination in my view are: -

- 1. Whether the ex-parte applicant's constitutional rights to freedom, security of the person and right to protection of the law have been violated or is threatened.**
- 2. Whether the initiation, maintenance and prosecution of Keroka Principal Magistrate's Criminal Case No. 987 of 2018 is an abuse of the court process.**
- 3. Whether this court ought to grant the order to halt the prosecution of the ex-parte applicant in Keroka Principal Magistrate Criminal Case No. 987 of 2018.**
- 4. Who bears the costs of these proceedings?**

Article 22 (1) of the Constitution gives every person a right to institute court proceedings for the enforcement of fundamental rights where such rights have been denied, violated or infringed or are threatened. In this case, the ex-parte applicant asserts that her rights have been violated by her prosecution in the impugned case and has cited several Articles of the Constitution. It is however trite that an assertion and the mere mention of constitutional articles is not sufficient. The ex-parte applicant must also establish through evidence that the rights under those articles have in fact been violated or threatened. In **Mohamed Mire v Attorney General & another [2016] eKLR** the court held: -

“I must hasten to point out that it is for the petitioner to prove on a balance of probabilities that his fundamental freedoms and rights as protected by or under the Constitution have been violated. The petitioner must establish this by not only clearly identifying the relevant and specific Articles of the Constitution but availing evidence through affidavit or otherwise of such violation. The petitioner has to satisfy an evidential burden to show and establish that a specific right existed and that it has been restricted or violated.”

See also **Kuria & 3 others v Attorney General [2002] 2 KLR 69** where Mulwa J, stated at pages 80, 81: -

“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. In Githunguri v Republic HCCR Appeal No. 271 of 1985 this concern was exemplified thus: -

“What kind of a mad man who has an opportunity to apply for an order of prohibition would opt for a criminal trial with the risk of conviction and imprisonment or a fine or both, hanging over his head like the sworn of Domocles.” (Italics supplied).

Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence.

However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without evidence that there is a manipulation, abuse of misuse of the court process or that there is a danger to the right of the accused person to have a fair trial.”

It is my finding that the ex-parte applicant has not demonstrated through evidence that any of her rights set out in the Articles cited have been violated or are threatened. There is no such evidence either in her various affidavits or submissions and the answer to issue number 1 is that there is no evidence on a balance of probabilities that her prosecution in Keroka Principal Magistrate Criminal Case No. 987 of 2018 threatens or is a violation of her rights.

In regard to issue 2 and 3, the scope of judicial review was set out by Lord Diplock in the case of **Council for Civil Service Unions vs Minister for Civil Service (1985) AC 374 at 401 D** when he stated: -

“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 of judicial review: the first ground I will call illegality, the second irrationality and the third procedural impropriety. By illegality 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 it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has 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.”

To succeed it was imperative for the ex-parte applicant to establish that the decision to prosecute her was illegal, irrational and tainted with procedural impropriety which again she has not. A closer scrutiny of her pleadings and submissions reveals that it is her case that the hands of the witnesses in the case are tainted: In her words they are engaged in shylocking businesses and Ponzi schemes and as such they are not fit to throw mud at her. In other words, she cannot be prosecuted based on their complaints as they too are in the business of defrauding others. That in my view is not acceptable. In the case of **Republic v Commissioner of Police and another Ex-parte Michael Monari & another [2012] eKLR** the court made it clear that;

“As long as the prosecution and those responsible for making the decision to charge act in a reasonable manner the High Court would be reluctant to interfere.”

The ex-parte applicant has not satisfied this court that the 2nd respondent’s decision to charge her was unreasonable. Her reasons for alleging that the court process is being abused are not only unreasonable but also not acceptable. Moreover, her allegations against the witnesses should be put to the witnesses at the trial so that their truth and relevancy to the case can be determined by the trial court. The ex-parte applicant has also not satisfied this court that the decision to charge her is irrational or is based on ulterior motives or that it is an abuse of the legal process to warrant this court to interfere. Her allegation that there was no authority given to prosecute her has no basis either, as the 2nd respondent does not require such permission or leave. The application has no merit and it is dismissed.

On the issue of costs, it is trite that costs follow the event and in this case therefore the ex-parte applicant shall bear the costs of the proceedings of those respondents who participated in the proceedings whether personally or through their Advocates. It is so ordered.

Signed, dated and delivered in open court this 27th day of February 2020.

E. N. MAINA

JUDGE