REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISC. JUDICIAL REVIEW NO. 8 OF 2017

IN THE MATTER OF ARTICLE 22, 23, 40, 43. 47 & 165 OF THE CONSTITUTION

IN THE MATTER OF SECTION 4, 7, 8, 9(4) & 10 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 AND ALL APPLICABLE LAWS

BETWEEN

KAPUTIEI SAFARILAND HOTEL LIMITED.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KAJIADO.....RESPONDENT

DORCAS APONDI OMONDI

T/A KAPUTIEI SPRINGS PURIFIED DRINKING WATER.....INTERESTED PARTY

RULING

1. Whether this court in its nature on the judicial review jurisdiction can restrict or prevent a lawful executive action by issuing writs of prohibition, certiorari or mandamus.

2. Measured against the evidence has the applicant made out a case for a remedy in judicial Review.

Background

The exparte applicant Kaputiei Safariland Hotel and Limited filed a notice of motion dated 29/12/2017 pursuant to Order 53 Rule 1 and 2 of the Civil Procedure Rules seeking the following orders:

1. That the matter be certified as urgent

2. That leave do issue for the Applicant to file a substantive motion seeking judicial review remedies

    a. An Order of Certiorari to remove into the honourable court and quash the Notice not to use food plant of 21st December 2017 issued by the County Department of Health Services, County Government of Kajiado.

    b. An Order of Prohibition against the Respondent from storming into the business premise, disturbing, interfering or in any way impeding the smooth running of business and maliciously bandying names of law abiding citizens Omondi Jairus Gilbert and Dorcas A. Omondi in matters to do with another person Kaputiei Safariland Hotel Limited

    c. An Order of Mandamus directed to the Respondent to open the locked premise and release of the seized water

    d. Any other orders deemed expedient and just in the circumstances

In support of the application was an affidavit deponed by Dorcas A. Omondi in her capacity as a Director of the company. In her affidavit she deponed that the dispute which necessitated an application for Judicial Review revolves around the conduct of a Public Health Officer who issued and served her with a notice not to use bottling plant and subsequently issued with seizure forms to stop production until she complies with the provisions of the Act.

According to the Director she had complied with all requirements under the Public Health Act more particularly on employee medical fitness. Further, she deponed that inclusion of her name and that of a Mr. Omondi – Jairus Gilbert on the notice not to use food plant was malicious and meant to injure, embarrass and ridicule the two law abiding citizens.

However, before the court could determine the notice of motion the exparte applicant filed an amended substantive motion dated 7/2/2018. It was majorly pleaded on the same initial orders on prohibition, certiorari and mandamus.

The exparte applicant in reference to objects of the fundamental rights provisions of the constitution sought the following reliefs:

a. The Respondent through its agents, representatives and employees personally addressed Mr. Gilbert Omondi and Mrs. Dorcas Omondi in the letter dated with regards to the affairs relating to the Kaputei Hotel, which is owned by the Kaputiei Safariland Hotel Limited, a different legal person.

b. The Respondent County Government/or her agents stormed into the Applicant Company's hotel premises, locking the said premises and confiscating products without giving prior and adequate notice, contrary to Section 4(3)(a) of the Fair Administration Act and the opportunity to be heard contrary to Section 4(4) of the Fair Administration Act.

c. That the exercise of power by the Respondent County Government and/or her agents was ultra vires since any authority emanating from section 30 of the food, Drugs and Chemical Act allows for seizure of products but does not authorize the closure of premises

d. The Respondent through its agents, representatives and employees has purportedly drafted a charge sheet with tramped up charges whose particulars are fabrications and grounded on no known facts but meant to intimidate the Mrs. Dorcas Omondi

e. The purported charge sheet as drawn is meant to change the focus of the conduct of the officials from the Public Health and the illegalities presided over by them which goes against Article 10 of the Constitution as read together with Article 75 of the said Supreme Law of the Land.

f. The purported charge sheet is meant to circumvent the course of justice as and to put the applicant through Mrs. Dorcas Omondi to perpetual attendance in court coupled with intimidation and harassment

g. The Applicant knows the procedures required to set up a water plant and being a law abiding citizen and of good standing, the actions by the Respondent of locking his premises unheard has infringed on the right to Fair Administrative action under Article 47 of Constitution and as read with Article 50 of the said Supreme Law on Fair Hearing.

In the meantime, Dorcas Omondi T/A Kaputiei Springs Purified Drinking water was enjoined as an Interested Party to the Judicial Review proceedings vide an application filed on 20/2/2018.

In view of the matter the respondent opposed the application as supported in the replying affidavit of Levi Matere Chisaina who works as a Public Health Officer with the County Government of Kajiado.

As regards the petition the respondent raised pertinent issues on the basic structure of law on locus standi contending that there is no company resolution for Interested Party to institute the suit. That the orders sought not to prosecute the interested party for violation of Public Health Act provisions would run counter to the constitution and section 5 and 6 of Food, Drugs and Chemical Substances Act Cap 254 of the Laws of Kenya.

The Respondent further pointed out that the water purifying plant for purposes of this petition is a complete separate legal entity with Kaputiei Safariland Hotel Limited. Referring to the documents and annexures adopted by the applicant, it was deponed herein that there is no distinct license on water purification and sale trading in the style and name (Kaputiei-Springs Purified Drinking water) safe for a certificate of registration issued on 28/8/2017.

It was further deponed by the respondent that on making an impromptu visit to the facilities he observed that the water purifying plant was in operation before complying with pre-requisite legal provisions and regulation on production and sale of drinking water.

According to the respondent to invoke the Food and Drugs Chemical Substances Act and the Public Health Act and the Public Health Act he served the application Interested party with a seizure notice restricting them not to continue with the operations of the water purifying and bottling plant until they comply with the statutory provisions. Reliance was placed on the inventory taken of empty bottles for refill and other cartons of already packaged water ready for distribution and sale to various market points.

The applicant objected to four counts in the indictment based on section 30(4) as read with section 36 Regulation 3 as read with Regulation 17, Regulation 15(1) (b) as read with Regulation 17(a) of the Food Drugs and Chemical Substances Act Cap 254 of the Laws of Kenya.

On 12/4/2018 the court holding that a reasonable ground exists to have the dispute referred it to mediation which culminated to a partial consent filed in court on 17/12.2018. on this same day Mr. Naikuni Learned Counsel for the respondent and Mr. Kanyonge Learned Counsel for the applicant/Interested Party reserved a single question of law to be determined by this court convicted as herein under:

"whether the writs of prohibition, Cetiorari and Mandamus in consideration of the application should issue against the respondent from further prosecution of the applicant on the preferred charges under the Food, Drugs and Chemical Subordinate Act. The matter was argued before me by way of written submissions."

Learned counsel Mr. Kanyonge for the Interested Party submitted and supported the view that any further prosecution of the applicant lays bare. The level of malice on the part of the respondent. Learned counsel contended and submitted that it is an error in holding that the framed charge be held as maintainable in view of the mediation agreement reached between both parties to the dispute. Learned Counsel placed reliance on guiding principles in which the court can exercise discretion to prohibit the respondent conduct on the following cases: **Joram Mwenda Guantai v the Chief Magistrate Nairobi Civil Appeal No. 228 of 2003 (2007 eKLR. Kurea & 3 Others v Attorney General 2002 2KLR 69**.

On the part of Mr. Naikuni submitting on behalf of the respondent adopted the approach of weighing and appreciating the salient features of the charges facing the applicant. According to Learned Counsel arguments he urged this court not to overlook the aspect of this case being deserving for the authority charged with the responsibility of investigation and provision to carry its duty to dispose of the case conclusively. Counsel referred to the various provisions of the Food, Drugs and Chemical Submissions Act, Public Health Act, the Criminal Procedure Code and the Penal Code that provide for the widest range of legal provisions which could measurably address the contentious issues raised by applicant.

Learned Counsel contended that this process should result in a smooth presentation of the evidence by the respondent to the court and equally the applicant would have an opportunity to answer the allegations.

Analysis and Resolution

I have considered the thrust of the application together with the submissions made by both counsels. What I am being asked to do is to review the decision by the respondent to prosecute the applicant. The threshold that an applicant must meet to prohibit a trial is a high one. In law prohibition restrains the inferior tribunal or court from proceeding further with the decision or action on the various grounds provided for in Section 7 of the Fair Administrative Act. While certiorari requires of the review court to inquire into the legality, propriety, regularity, law fairness and correctness of the order or decision with a view of having it quashed.

The Hallmark of Judicial reviewed jurisdictions is directed to any person, public body, authority exercising judicial or quasi-judicial function and whose decision forms the basis of imposing liability impacts on the rights of others. Such an application may duly succeed if the applicant satisfies the exceptional circumstances provided for in section 7 of the Fair Administration Action Act No. 4 of 2015. The Act stipulates that:

> **"For one to institute judicial review proceedings he or she must demonstrate that the person who made the decision:**
>
> > **(i) Was not authorized to do so by the empowering provision**
> >
> > **(ii)Acted in excess of jurisdiction or power conferred under any written law**
> >
> > **(iii) Acted pursuant to delegated power in contravention of anyhow prohibiting such delegation**
> >
> > **(iv) was biased or may reasonably be suspected of bias or**
> >
> > **(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case**
>
> **(b) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice. The legal rights of the applicant, the administrative action or decision is not rationally connected: to the purpose for which it was taken**
>
> > ***(*ii) the purpose of the empowering provision**
> >
> > **(iii) the information before the decision or for the reasons given for it by the administrator**
> >
> > **(iv) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law …etc"**

It is also trite that for an applicant to succeed on any of the above grounds the pleadings should be precise and not merely for a fanciful recitals of the provisions without clear relevant evidence that strongly supports the claim. In considering the application, the test is to establish whether on any of the grounds relied upon the applicant suffered a failure of justice or was prejudiced by the decision.

The Director of Public Prosecution functions are protected. Under Article 157(6), (7), (8), (9), (10) and (11) of the constitution. The ODPP enjoys special powers to decide whether or not to prosecute any individual on behalf of the state subject to certain grounds proven under section 7 of the Fair Administrative Action Act on this court may review the decision which is found to be malafides, influenced by an improper motive, abuse of the process, against public policy or not for the interest of justice. These provisions confirm that as the powers of the DPP are conferred by the constitution he is not exempt from the constitutional requirements to act fairly and in compliance with Fair Administrative Procedures.

In my view, under the doctrine of separation of powers the decision to prosecute or not by the Director of Public Prosecution as a subject of judicial review should be exercised sparingly and in rarest of situations by the High Court.

What is the rationale of the case of **Republic v DPP & 2Others Exparte Francis Njakede Maina 2015 eKLR** the court held that:

> **"Judicial Review is concerned with the decision making process and not with merits of the decision itself. Judicial review deals with legality of the decisions of bodies or persons whose decisions are susceptible to judicial review."**

The court in the case of **Republic v Chief Magistrate Court and 3 Others Exparte Stephen Oyugo** underpinned that:

> **"The Director of Public Prosecution decision cannot be interfered with in absence of clear evidence to the contrary to show malice, irregularity or an abuse of the process."**

The case of the **Council for Civil Service Union v Minister for Civil Service 1985 AC 3714.** The English Court from which our Jurisprudence on judicial review is drawn from also sets out the high threshold which an applicant must meet in order to succeed in a judicial review application to prohibit on constitution organ like the DPP not to prosecute. The first specific area of concern to the applicant in her statement is by the respondent presenting a charge against her is deemed to be malicious and in bad faith.

The brief facts of this case are that the respondent Public Health Officer on visiting the applicant premises, conducting inspection and examining the water purifying plant he served her with a seizure notice. The notice seen by this court raised several grounds touching on violations of the Food, Drugs, Chemical Substances Act. The respondent sought an explanation as to why the decision to commence water bottling and sale has not complied with laid down statutory provisions and regulations.

On this, my view is to discharge the burden of comprehensively responding to the issues raised in the notice of seizure. However as can be seen from the affidavit evidence the applicant aggrieved with the decision by the respondent preferred to file a judicial review application for writs of prohibition, Cetiorari and mandamus to issue against the respondent.

There was no permanent estoppel issued to the applicant not operate a water bottling plant. The broader issue was for her decision not to commence operations and be afforded an opportunity to legitimately abide with the law. Whether in this particular case the respondent was in breach of fair procedures given the evidence is not a difficult question to answer.

Taking a queue from **Aburiri, J in her decision in the case of Bitange Ndemo v DPP and others** together with other superior court decisions. I have emphasized and stressed in my other judgements on this issue that out jurisprudence rests on the following principles: ***"That the criminal justice system and therefore criminal law trials, are matters of public interest to ensure the rule of law, as one of the pillars of good governance is protected."***

It is in the same constitutional dictates that our system of law provides for safeguards that enables errors and omissions of judgment by decision makers as provided for under section 7 of the Fair Administrative Action Act to be subject of litigation so that under review jurisdiction they are ultimately corrected. The supreme law of the land recognizing the central role of judicial review remedy entrenched it as part of the remedy available to any person aggrieved by the decision of a public body, authority or person.

I have reviewed the legal principles in the cases of **George Joshua Okungu & Another v Chief Magistrate Court, Anti-corruption court 2014 eKLR, Republic v Kenya National Examinations Council exparte Gathinji & Others CA No. 260 of 1996 Kerea & 3 Others v Attorney General**. All these is perfectly settled that:

The Director of Public Prosecution has a constitutional mandate and duty to prosecute and not to prosecute in a particular case and his decision is not reviewable unless on the exceptional grounds provided for in section 7 of the Fair Administrative Action Act. It is not even the change of mind by the DPP to terminate, discontinue or bring up of fresh charges, or varying the decision can automatically be a subject of judicial review remedy. Further the extent of the inquiries which will render the decision to be reviewed must disclose material evidence that the prosecution and maintenance of it is an abuse of the criminal process and in contravention of the applicants right on fundamental freedoms and rights protected under the bill of rights. That the purpose of the prosecution was designed to achieve ulterior motive other than fair administration of justice. Thirdly, that the prosecution of the criminal case amounts to harassment prejudice and infringement of the applicant constitutional rights. Fourth, that in the context of substantive justice the DPP is using the criminal process to vex and oppress the applicant. Fifth, that the DPP has duty acted in excess of jurisdiction and finally there has been a departure from the rules of natural justice.

Viewing the instant application objectively in light of the above principles, without extending any sympathy to the applicant I am satisfied that her case falls short of any of the grounds stated section 7 of the Act.

The application in this case in the event she takes plea will be entitled to the basic fundamental rights to a fair trial and due process of law under Article 50 of the constitution. To ensure equality before the law the state has the right and duty to have the charges preferred against the applicant determined by the court. We are not told that the prosecution of the applicant is not in accordance with the law. I reckon that in our criminal justice system the presumption of innocence is the cornerstone of a fair trial. This right is guaranteed that even with the charges the applicant is considered innocent until she is either proven guilty and convicted of the offence or acquitted altogether.

In considering the application and the basis on being asked to strike out the decision not to prosecute the applicant if judicial review is granted it would certainly destroy the legal principles on which our Kenyan Law is based. The power of the courts to review actions of other branches of government should only be confined to those acts that do not conform to the constitution.

This case by the applicant and the controversy surrounding it has not satisfied the prima facie threshold of ripeness to review the administrative decision of the public Health Officer to subject her to a criminal process to determine whether she is in breach of the relevant statutes. Permission to prefer charges as a result of the inspection conducted by the respondent authorized officer, servant or body shall not be interrupted or reviewed by this court we all depend on the rule of law for the moral, ethical well-being of our country. As citizens of this

great republic our solemn duty is to uphold the rule of law.

In the instant application if there are any defects to impugn the decision by the public Health Officer, or any such employee, agent or authorized officer of the respondent there is no such evidence to support the claim to bring remedy sought within the ambit of Section 7 of the fair Administrative Act.

In the present context there is therefore a clear forum provided for by the constitution in which the tension between the applicant and respondent can be resolved perhaps and more substantially the fears the applicant might have on whether she would have a fair trial is all constitutionally codified under Article 50 of the constitution to protect her from any abuses and excesses which may result in an injustice.

This court in applying the proportionality test use in so far as it's possible to this application between the rights of the applicant and the relative weight to the interests to be served by the decision the scale tilts in favour of the public common good. For the above reasons I would decline to grant the writs of prohibition or certiorari against the respondent not to have an opportunity to undertake the constitutional mandate of prosecuting the applicant. As I see it prohibiting certain unlawful acts defined in a statute meant to protect the public interest will in effect be a perpetuation of an illegality.

Notwithstanding the above orders, the consent orders agreed between the parties hereby adopted as a court order remain binding upon the parties as the judgment of this court. The costs of this application be borne by the applicant.

Dated, Signed and Delivered at Kajiado this 25th day of January 2019.

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R. NYAKUNDI

JUDGE

Representation

Mr. Kaikai for Mr. Naikuni for the Respondent - present

Mr. Kanyonge for the Applicant – Present

The Applicant: Present