



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 3 OF 2012

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

IN THE NATURE CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CHIEF MAGISTRATE COURT AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATIONS NUMBER 2091 AND 2093 BOTH OF 2011

AND

**IN THE MATTER OF APPLICATION BY BANKING FRAUD INVESTIGATION UNIT DATED
15TH DECEMBER 2011**

AND

IN THE MATTER OF ORDERS ISSUED BY THE CHIEF MAGISTRATE AT NAIROBI

IN CRIMINAL MISCELLANEOUS APPLICATION NUMBER 2091 AND 2093 BOTH OF 2011

AND

IN THE MATTER OF AN APPLICATION BY

REPUBLIC.....APPLICANT

AGAINST

THE CHIEF MAGISTRATE, NAIROBI.....1ST RESPONDENT

THE BANKING FRAUD INVESTIGATING UNIT.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

AND

EXPARTE

JUDGMENT

1. Pursuant to leave granted by Court on 24th January 2012, the Applicant filed the instant Judicial Review Application *vide* a Notice of Motion dated 25th January 2012 filed in Court on the same day seeking the following orders:-

a. That this Honourable Court be pleased to issue an order of certiorari to remove into the High Court and quash the decision of the Chief Magistrate's Court in Nairobi Miscellaneous Application No. 2091 and 2093 of 2011 freezing the Subject's account no. [xxxx] and [xxxx] at Bank of Africa (K) Ltd Nakuru Branch.

b. That this Honourable Court be pleased to issue an order of prohibition to prohibit or stop the 2nd and 4th Respondents from prosecuting or investigating the accounts of the Subject being Accounts No [xxxx] and [xxxx] at Bank of Africa (K) Ltd Nakuru Branch and the 1st Respondents from proceeding with the trial of Nairobi Chief Magistrate Court in Nairobi Miscellaneous Application No. 2091 and 2093 of 2011.

c. That the costs of this application be provided for.

2. The Applicant is a Limited Liability Company limited by shares having its registered office at Nakuru within the Republic of Kenya. It is undisputed that the Applicant entered into a Memorandum of Understanding with the 5th Respondent (Mt. Kenya University) to run a Nakuru Campus of the university. At some point, the parties disagreed. On the one hand, the Applicant claims that the 5th Respondent, jointly with others, schemed to take over the Mount Kenya University Campus from the Applicant illegally and in contravention of the MOU. On the other hand, the 5th Respondent claims that the Applicant acted fraudulently and illegally in opening bank accounts and charging school fees from students without remitting it back to the 5th Respondent.

3. The conflict between the Applicant and the 5th Respondent spawned a number of civil cases filed by the parties:

a. Nakuru HCCC No. 306 of 2011: This is a suit brought by the Applicant herein to challenge the freezing of its account by the 2nd Respondent herein. This suit is still pending before the Court.

b. Nakuru Judicial Review No. 59 of 2012: This is a suit instituted by the Applicant herein seeking the quashing of a tax demand by the Kenya Revenue Authority. In that case, the Applicant failed to get the orders it sought against the KRA; its application to have the tax demand notice by the KRA was dismissed.

c. Nakuru HCCC No. 201 of 2012: This is a suit filed by the Family Bank against the Applicant herein seeking for orders freezing the accounts of the Applicant. This suit is still pending before the Court.

d. Nakuru HCCC No. 245 of 2011: This is a suit filed by the 1st Petitioner against the 2nd Respondent. It seeks a declaration that the "take-over" of the Mount Kenya Nakuru Campus was illegal, in contravention of its property rights and in breach of the MOU. In the main, the suit seeks vacant possession of the facilities as well as damages for breach of contract.

e. **Nakuru HC Petition No. 29 of 2014:** This is a constitutional Petition filed by the Applicant and two others herein against the 5th Respondent herein and 15 others (including the 2nd Respondent herein) for certain orders. The suit was dismissed on a Preliminary Objection. The Applicant and the other Petitioners in the case have preferred an appeal against the decision to dismiss the Petition.

4. In addition to these five other civil suits, the 5th Respondent filed a Complaint with the Banking Fraud Investigating Unit (the 2nd Respondent) which led to the filing of ***Nairobi Chief Magistrate Miscellaneous Criminal Application number 2091 and 2093 of 2011***. The Applicant states that the issues in the ***Nairobi Chief Magistrate Miscellaneous Criminal Application No. 2091 and 2093 of 2011*** are substantially in issue ***Nakuru HCCC 245 of 2011*** (which is pending before this Court). In essence, the Applicant's lead argument is that the Criminal Investigations are an abuse of the Criminal Justice System

5. In response to the application, the Respondents filed the affidavits opposing the suit. The 2nd Respondent's filed Court papers make the following points:

a. They received a complaint from the 5th Respondent's legal secretary/Trustee. The Deputy Chancellor in charge of Campuses, the Director of Internal System Control, the Vice Chancellor and the Chair of Board of Trustee recorded statements.

b. They applied for orders to enable them investigate in ***Nairobi Chief Magistrate Miscellaneous Criminal Applications No. 2040, 2042, 2043 and 2064 of 2011***. The Court granted the orders and they found huge amounts of money had been transferred from accounts in the banks they were investigating. They applied for orders to investigate recipient accounts in ***Nairobi Chief Magistrate Miscellaneous Criminal Application no. 2076, 2091, 2092 and 2093 of 2011***. The same were granted.

c. The investigations revealed that Mt. Kenya University Nakuru Campus Bank accounts had been opened and operated by the Directors of Step Up Holdings (K) Limited.

d. The 2nd Respondent says that they formed the opinion that there were gross irregularities:

i. There was no authority whatsoever from Mt. Kenya University to Step Up Holdings (K) limited to open bank accounts in its name;

ii. Bank of Africa opened an account they termed 'a good will' account in the name of Mt. Kenya University Nakuru Campus.

iii. As part of the account opening documents obtained from the K-Rep bank show that permission was being sought from the Chair of the Board of Trustees and there was no evidence that the permission was granted.

iv. There was serious reluctance on the part of the bank in opening the account due to documentation being presented and the title accounts but curiously the accounts was ultimately opened in the name of the 5th Respondent.

v. There was a general failure to comply with the principle of Know Your Customer and carrying out due diligence.

vi. The accounts were opened and there were no minutes or resolution from the 5th Respondent.

vii. The Directors passed minutes to open the K-Rep account on the 25th of March 2009 when the account had been opened on the 24th of March 2009.

e. The directors of Step Up Holdings (K) limited became the signatories without any authority from the 5th Respondent. Most of the documents used to open the accounts were not verified. They established that amounts were moved from the 5th Respondents accounts to the Applicants Account.

f. The 5th Respondent concluded that the actions of the Applicants were criminal in nature. They further state that if the orders sought are granted it will be tantamount to giving the Applicant *blanche carte* to commit crime without any investigations or prosecution which will be against public policy. The money held in those accounts amount to exhibits.

6. On the other hand, the 5th Respondent makes the following salient points:

a. It states that the Applicant used to manage the Nakuru campus for Mt. Kenya University. The Applicant stopped managing the Campus on the 1st of September 2011 per a letter to the Income Tax Department dated 3rd of October 2011. They then demanded for fees since none of the students had remitted to the university. The students gave them deposit slips alleging to have paid fees for August school based program and the semester commenced in September 2012

b. Upon consultation with the Chairman of the University Council and the Vice Chancellor, the 5th Respondent confirmed that the University was not aware how the accounts had been opened in its name in Nakuru. The University then lodged a complaint with the Banking Fraud Unit to establish how the accounts had been opened. The fees for August and September had been paid by students in the said fraudulently operated accounts in the name of the 5th Respondent.

c. The 5th Respondent insists that said money belongs to it. It claims that the money was hurriedly withdrawn and channelled to other accounts. It further states that the Applicant is not absolved from criminal liability since there is a civil case. The 5th Respondent states that the Applicant should allow investigations and if they are innocent they shall be vindicated

7. The Applicant filed submission dated 30th October 2018 where the it frames three issues for the Court's determination:

a. Whether the Respondents' actions amenable to judicial review;

b. Whether the application discloses sufficient grounds for impugning the Respondents actions and decisions; and

c. Whether the Applicant is entitled to the orders sought

8. Both sides of the controversy submitted at length on whether the actions of the 2nd Respondent are amenable to Judicial Review. There is no question that they are. As the Applicant submits, the interpretation our Courts have given to Articles 10, 47, 157, 165, and 232 of the Constitution makes it clear that all exercises of public and constitutional power are amenable to Judicial Review.

9. The Applicant's position is that the 2nd Respondent and, by extension, the DPP are abusing their constitutional powers in investigating and seeking to bring charges against the Applicant. The Applicant argues that it is improper to bring criminal charges against it when the same matter is a subject of civil suit before the High Court

10. The Office of the Director of Public Prosecutions (ODPP) is established under Article 157 of the 2010 Constitution as an independent office with the monopoly of prosecutorial powers (complete with the power to direct the Inspector General of Police to do investigations) and the only person with the authority to exercise State powers of prosecution – including the power to:

i. 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;

ii. 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

iii. 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).

11. The Constitution also requires that “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.”

12. While our Courts now recognize the express powers and authority of the DPP as enshrined in the Constitution and the fact that the DPP must exercise those powers independent of any individual or institution including the Courts, like all other constitutional authority, our Courts have equally recognized that the authority must be exercised in an accountable way tethered to the precepts of “public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.” (Article 157(11) of the Constitution).

13. In this regard our decisional law is now clear that the Courts have the ultimate duty to ensure that the DPP exercises his discretion in accordance with the constitutional mandate. As our case law has now firmly established, “the Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation.” (**Kuria & 3 Others v Attorney General [2002] 2KLR 69.**) Indeed, this position, although now expressly scripted into our Constitution is of vintage judicial ancestry in Kenya. As early as 2001, the High Court had expressed this view which is now scripted in our Constitution in the following iconic words:

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.

14. Similarly, in the more recent **R v Director of Public Prosecutions & 2 Others Ex Parte Praxidis Nomoni Saisi [2016] eKLR**, Justice Odunga, after analysing a long history of similar cases concluded that “where it is clear that the [prosecutorial] discretion is being exercised with a view to achieving certain extraneous goals other than those recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would....constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion.”

15. Indeed, in this and other cases, Justice Odunga, with whom I entirely agree, located the duty and authority of the Court in reviewing the exercise of the unfettered discretion of the DPP in the same mould as the exercise of any other executive discretionary power to which Judicial review is available. Hence, Justice Odunga states:

It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive, the Court may interfere. The Court can only intervene in the following situations:

i. Where there is an abuse of discretion;

ii. Where the decision-maker exercises discretion for an improper purpose;

- iii. Where the decision-maker is in breach of the duty to act fairly;
- iv. Where the decision-maker has failed to exercise statutory discretion reasonably;
- v. where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
- vi. where the decision-maker fetters the discretion given;
- vii. where the decision-maker fails to exercise discretion;
- viii. where the decision-maker is irrational and unreasonable.

16. Consequently, our decisional law has now laid out the role of the Court in policing the exercise of the DPP's constitutional authority: the Court has the duty and authority to review the charging decisions of the DPP. However, what also emerges from our decisional law is that the Court is extremely cautious in performing that duty. Hence in the **Kuria Case (supra)**, the Court expressed itself thus:

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. 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 any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.

17. Similarly, in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** the Court held:

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 only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

18. In similar vein, this Court remarked in **Patrick Ngunjiri Muiruri v DPP [2017] eKLR** as follows:

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.

19. The singular defining question presented in the present Application, therefore, is whether it can be said that the 2nd Respondent to commence criminal investigations against the Applicant is irrational, unprocedural, informed by ill or ulterior motives or unduly fettered.

20. As I understand it, the Applicant says that the criminal investigations must be stopped and the order for freezing lifted for at least three reasons:

- a. First, because of the existence of the Civil Suit which is likely to determine the same question;
- b. Second, because the orders of freezing of accounts obtained are illegal. The Applicant argues that the provisions of sections 118 and 121(1) of the Criminal Procedure Code and section 180 of the Evidence Act do not permit the freezing of the bank accounts of a suspect. The Applicant, therefore, argues that the warrants issued in this case are illegal and unlawful.
- c. Third, the Applicant is persuaded that the decision to commence investigations is irrational, procedurally improper, and an abuse of power.

21. Our case law has now firmly established that existence of a civil case does not necessarily bar the bringing of a criminal charge against a person based on the same facts. The correct position was stated by the Court of Appeal in **Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR** Where the Court stated:

In terms of Section 193A of the Criminal Procedure Code, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings. However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene. But this power has to be exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice.

22. Hence, Courts only stay criminal proceedings even where they are concurrent with civil proceedings over the same issue when it is clear to the Court that “there has been [an] *oppressive or vexatious investigation[which] is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R.[2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR.*”

23. In the present case, I have carefully examined the documents presented by the parties as well as their arguments. I am unable to come to the conclusion that the 2nd Respondent acted illegally or unlawfully in commencing investigations. There is little basis for concluding that the 5th Respondent somehow persuaded the 2nd Respondent to (mis)use its investigative powers to give the 5th Respondent an advantage in the civil suits. There has, also, been no showing of any oppressive investigative tactics by the 2nd Respondent. Neither has there been a showing of bad faith. In this case, the 5th Respondent became convinced that it was a victim of fraud perpetuated by the Applicant. It reported the matter to the 2nd Respondent. The 2nd Respondent thought there was some basis to begin criminal investigations and did so. I am unable to see how this chain of events is vexatious or an abuse of the Criminal Justice System.

24. As Justice Hellen Omondi remarked in her ruling at the interlocutory stage, the overkill in the case seem to have been in the indefinite freezing of the accounts of the Applicant without a showing that all the funds in the various accounts were the proceeds or subject of the alleged crime they were investigating. After investigating the contours of the provisions of sections 118 and 121(1) of the Criminal Procedure Code and section 180 of the Evidence Act, Justice Omondi concluded that the sections of the law do not permit the freezing of the bank accounts of a suspect indefinitely. I have no reason to depart from that tentative finding. It is in accord with our jurisprudence on the question. Absent exceptional circumstances to be demonstrated to the Court, the 2nd Respondent is entitled to freeze bank accounts only for a short period of time to conduct investigations and obtain evidence of how funds move or moved into and out of the accounts. The law does not permit the 2nd Respondent to freeze bank accounts indefinitely.

25. In the present case, Justice Omondi already made a finding that the period the 2nd Respondent has ordered the freezing of the accounts was sufficient to conclude investigations into that account. She lifted issued interlocutory orders lifting the freezing order. I think that is a fair outcome. I note that it has been more than seven (7) years since the lifting of the freezing order. The point is most likely moot. It is fair to say, however, the blanket and indefinite order freezing the accounts was improper.

26. In the end, therefore, I see no merit whatsoever in the Applicant's prayer that the 2nd Respondent should be prohibited from commencing criminal investigations or the 4th Respondent be prohibited from commencing a criminal trial should he form the opinion that there is sufficient evidence to charge the Applicant. To this extent, I dismiss the second prayer in the Notice of Motion dated 25th January, 2012. However, I allow the first prayer: *an order of certiorari hereby issues removing into this Court and quashing the decision of the Chief Magistrate's Court in Nairobi Miscellaneous Application No. 2091 and 2093 of 2011 freezing the Subject's account no. [xxxx] and [xxxx] at Bank of Africa (K) Ltd Nakuru Branch.*

27. Since the Application is partly successful, each party will bear its own costs.

28. Orders accordingly.

Dated and delivered at Nakuru this 19th day of December, 2019

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JOEL NGUGI

JUDGE