REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO 651 OF 2017

REPUBLIC…….....……APPLICANT

VERSUS

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE…….....2ND RESPONDENT

CHIEF MAGISTRATE KIBERA LAW COURTS.....3RD RESPONDENT

AND

INTERMNATIONAL CENTRE FOR LAW AND POLICY....1ST INTERESTED PARTY

ZCHARIA ETALE ELWANGA &

CAROLINE NASIKE NANJALA….....2ND INTERESTED PARTY

EX-PARTE:

SYLVIA WAIRIMU NJUGUNA ALSO KNOWN AS SYLVIA WAIRIMU MULI

RULING

1. On 22nd day of January, 2018, upon hearing an application for joinder of the 1st interested party herein, I expressed myself as hereunder:

> **"Since the applicant herein is one of the entities alluded to by the ex parte applicant as having exerted pressure on the Respondents to reopen a closed matter and prosecute the applicant, it is only fair that the applicant be afforded an opportunity to be heard on such allegations otherwise the Court may well be accused of having violated the rights of the applicant."**

2. According to the ex parte applicant herein, **Sylvia Mulinge**, the Director-Consumer Business Unit, Safaricom Ltd. by virtue of her said employment she was, as at February, 2015, assigned a motor vehicle registration number KBU 483M, Toyota Prado which vehicle was involved in a road accident on or about 1st February, 2015 at around 11.35 a.m. along the Southern By-Pass as she drove from Ngong Road direction towards Lang'ata Road.

3. According to the applicant she reported the said accident the same day and recorded her statement on 2nd February, 2015. However as a result of the said accident, a female minor aged 8 years old, **Mary Kusa Etale,** died.

4. It was averred that upon recording her statement the applicant was requested to furnish the police with all her contact details for future contacts. It was however her case that the initial investigations revealed that the applicant was not in the wrong since at the point of the accident there was a wall and road barrier preventing pedestrians from crossing over the by-pass and there was an underpass for pedestrian crossing and according to the road signs vehicles were not allowed to stop thereat.

5. It was however averred that the applicant was shocked when two years after the occurrence of the accident, a petition was filed by **International Centre for Policy and Conflict** (hereinafter referred to as "ICPC" or "the Applicant"), in which it was sought inter alia, an order compelling the Respondents to perform their constitutional duty and investigate and institute appropriate proceedings against the ex parte applicant. It was averred that whereas the ex parte applicant and her employer responded to the petition the 1st and 2nd Respondents despite being aware of the same did not do so though the substantial orders were directed at them.

6. However by a letter dated 19th October, 2017, the 1st Respondent directed the 2nd Respondent to charge the applicant with the offence of causing death by dangerous driving contrary to section 46 of the ***Traffic Act*** and a charge sheet was drawn and circulated to the media in accordance with the 1st Respondent's directions. It was averred hat the 1st Respondent released to the social media all the information relating to the accident before contacting the Applicant on the same.

7. It was the applicant's case that the Respondents' conduct amounts to clear violations of the provisions of the ***Fair Administrative Action Act*** and the applicant's constitutional rights by reopening the case on social media where the applicant has been condemned unheard instead of responding to the petition. To the applicant that decision amount to capricious use of power by the State contrary to Articles 50 and 159 of the Constitution as read with Article 50(1)(e) thereof.

8. It was contended that the charges filed against the ex parte applicant were instigated by third parties such as the International Centre for Conflict and Policy, Suyianka Lempaa t/a Suyianka Lempaa & Co. Advocates and **Mike Njeru** since there is no evidence of any complaint, fresh or otherwise filed by the family of the deceased. It was however contended that ICPC and/or Suyianka Lempaa t/a Suyianka Lempaa & Co. Advocates did not have the authority of the deceased's parents to lodge Petition 313 o 2017 or any other complaint against the ex parte applicant.

9. It was therefore the ex parte applicant's case that the letter dated 21st September, 2017 must have been written on directions and/or pressure from third parties and is thus not a product borne of the exercise lawful discretion by the 1st and 2nd Respondents having been written long after the e parte applicant had responded to the petition. By filing the Traffic Offence Case, it was contended that the Respondents at the behest of the Petitioner in the said petition or other undisclosed persons, are creating an impression that either the applicant or her employer acted unlawfully in making payment to the parents of the deceased or influenced the closure of the file.

10. It was disclosed that an inquest No. 15 of 2017 was commenced at Kibera Law Courts in order to inquire into the circumstances that led to the death of the deceased but despite that the DPP had now directed that the traffic offence file be opened against the applicant.

11. This ruling arises from two applications. The first is an application dated 2nd February, 2018 made on behalf of Mike Njeru seeking that he be joined to these proceedings as an interested party.

12. The said application is based on the fact that applicant alleges in her pleadings and affidavits that the impugned decision of the D.P.P to charge her was orchestrated and /or was instigated by the said Applicant, yet Applicant was not in any way connected to the events surrounding the *Ex-Parte*

Applicant's prosecution and the mention of his person is scandalous and vexatious.

13. According to the applicant, some of the allegations so made by the *Ex-Parte* Applicant raise issues of criminal nature against the Applicant herein and is only fair that the Applicant have an opportunity to respond to them in person. He averred that the *Ex-Parte* Applicant continues to publicly peddle falsehood in order to malign the Applicant's name and avoid accounting for her criminal conduct as charged in Kibera Law Court for Traffic offence.

Determination

14. I have considered the issues raised hereinabove.

15. Order 53 rule 3(2) and (4) of the ***Civil Procedure Rules*** provides:

> **(2)The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.**
>
> **(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.**

16. Therefore whereas subrule (2) of Order 53 rule 3 aforesaid restricts persons who should be served to those who are "***directly affected",*** subrule (4) on the other hand gives the Court wide discretion to order that the application be served on any other person notwithstanding that that person ought to have been served under subrule (2) or not and the Court's decision to do so is only subject to ***such terms (if any) as the court may direct.*** It is therefore my view that unlike under subrule (2) the Court has unfettered powers under subrule (4) and in my view this power is meant to ensure that justice is done. Therefore where the Court is of the view that a person ought to be joined to the proceedings the Court is properly entitled to direct that that person be joined notwithstanding that such a person has not made an application to Court. Under such circumstances a formal application is not necessary

17. However where an application is made under subrule (2), it is incumbent upon a person who alleges that he or she ought to have been served to show how the proceedings directly affect him or her. The mere fact, however that a person has made such an application does not preclude the Court from invoking its unfettered discretion under subrule (4) to have such a person joined to the proceedings even if the applicant does not satisfy the Court that the person is directly affected thereby. The word "direct" is defined by ***Black's Law Dictionary***, 9th Edn. page 525 as "straight; undeviating, a direct line, straightforward, immediate." It must be kept in mind that judicial review orders are concerned with the decision making process rather than the merits of the decision. Therefore judicial review proceedings ought not to be modified into a vehicle through which matters which ought to be ventilated in other forums are to be determined. This was the position in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003,** where it was held that for the Court to require the alternative procedure to be exhausted where the alternative procedures are more convenient and appropriate prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort. Similarly, in **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980** the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order.

18. Since judicial review orders are concerned with the decision making process rather than the merits of

the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation. To paraphrase **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** and **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8**, in determining whether or not to join parties to judicial review proceedings, the Court must guard against its time and resources being wasted by busybodies, cranks and other mischief-makers with misguided or trivial complaints or administrative error, and to remove the unnecessary uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

19. In my view, for a party to be joined to the proceedings under Order 53 rule 3(2) aforesaid the applicant ought to disclose to the Court how he or she is directly affected. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings.

20. However, the decision whether or not to join a party is an exercise of discretion and if no substantial purpose or benefit will be gained by the joinder of a person to the proceedings and where the said joinder will militate against the expeditious disposal of the said proceedings which by their nature ought to be heard and determined speedily, the Court will be reluctant to join the intended party to the proceedings.

21. In an application of this nature, the applicant ought to adduce some material upon which the Court can determine whether the applicant is directly affected by the proceedings. In judicial review especially where a party's interests can be catered for by another party participating in the proceedings, there would be no reason to join the party intending to join the proceedings as a party thereto. It is therefore upon the applicant to satisfy the Court that the issues it intends to raise, which issues are relevant to the matter for determination before the Court, cannot adequately be canvassed by any of the parties before the Court.

22. In this case, the applicant's complaint seems to be that he is aggrieved by the ex parte applicant's averments that:

> **"…the said Mike Njeru has sworn on several occasions and told a number of people, including my own brothers, namely; Gerald Kanyingi Njuguna and Thomas Nganga Njuguna that he will kill me for my perceived role in his failure to clinch contracts with Safaricom…''**

23. It seems that the reason why the applicant intends to participate in these proceedings is to enable him clear his name in respect of the allegations that he intends to harm the ex parte applicant herein. That in my view, is not the issue before me. If the applicant feels that the said allegations are untrue and that the said allegations have injured him, he is free to institute appropriate civil proceedings in respect thereof.

24. However in paragraph 3(a) of the further affidavit, it is deposed by the ex parte applicant:

> **That the charges filed against me are instigated by third parties, such as the International Centre for Conflict and Policy (ICPC), Suyianka Lempaa t/a Suyianka Lempaa & Company Advocates and Mike Njeru.**

25. According to paragraph 3(i), (j) and (k) of the same affidavit:

> **(i)That the decision to charge me is not informed by evidence on record but is influenced by extraneous factors;**
>
> **(j) That ICPC, Suyianka Lempaa and Mike Njeru are bent on harassing and embarrassing me on account of my position at Safaricom Limited; and,**
>
> **(k) That in the result, the criminal justice system is being subverted and mis-used by the**

above-named persons to advance personal objectives and to advance a vindictive campaign against me.

26. In other words the applicant contends that the belated decision to prefer charges against her was actuated by extraneous and collateral considerations and factors such as the pressure by said third parties. That consideration of collateral factors is one of the grounds for prohibiting a prosecution is now old hat. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** while citing **Reg vs. Secretary of State for the Environment Ex Parte NottinghamShire Country Council [1986] AC**:

> **"A power which is abused should be treated as a power which has not been lawfully exercised…*Abuse of power includes the use of power for a collateral purpose, as set out in ex-parte Preston, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals.* I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief."**

27. In **Jared Benson Kangwana vs. Attorney General Nairobi High Court Misc. Application No. 446 of 1995** (unreported) **Khamoni, J** noted that:

> **"The essence of abuse as stated in the case of *Spautz v Williams*...is that:**
>
> **'the proceedings complained of were (instigated and) instituted and/or maintained for a purpose other than that for which they were properly designed or exist or to achieve for the person (instigating), instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process…whether there are circumstances which will make the proceedings an abuse of the process of the court. Acts of such abuse are not restricted to what the prosecution or the State does but extend to acts of any party" and the prosecution or the Respondent should not be telling this court not to rely on anything done by the victim to decide whether there is an abuse...The court should ask whether its process is being fairly invoked…The functions of abuse of the process of the court are not limited to what the prosecution or the State or the court does. They extend to what any other interested party, like the person aggrieved, does and case authorities have shown that it is not the events at the trial that necessarily give rise to the granting of a prohibition on the ground of abuse of the process of the court. They can be events outside the court. They can be events not done by the State but done by the person aggrieved who succeeds in getting the unsuspecting State or Public Prosecutor to prosecute the Accused person."**

28. In **George Joshua Okungu and Another vs. Chief Magistrate Court Anti Corruption Court at Nairobi and Another (2014) eKLR** the Court held that:

> **"It is therefore clear that whereas the discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner's rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt. In so doing, it must be emphasised that the Court is not concerned about the innocence or otherwise of the Petitioner. The Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and upheld…Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals**

other than those legally recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would, in our view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by in *Koinange vs. Attorney General and Others* (supra):

> **'Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy.'"**

29. Kuloba, J in **Vincent Kibiego Saina vs. The Attorney General H.C Misc Appl. 839 and 1088/99** expressed himself as hereunder:

> **"So, it is not the purpose of a criminal investigation or a criminal charge or prosecution, to help individuals in the advancement of frustration of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other and ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice. No one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth."**

30. Since the applicant herein is one of the persons alluded to by the ex parte applicant as having exerted pressure on the Respondents to reopen a closed matter and prosecute the applicant, it is only fair that the applicant be afforded an opportunity to be heard on those allegations.

31. In the premises I allow the application and direct that the **Mike Njeru** be joined to these proceedings as the 3rd interested party, for the limited purposes of dealing with the allegations made against him in paragraphs 3, 25 and 27 of the further affidavit only.

32. In the premises since paragraphs 28, 28A and 28B are *prima facie* scandalous, irrelevant and oppressive for the purposes of these proceedings, the same are struck out.

33. The costs of the application will however be in the cause.

34. The second application is dated 5th February, 2018 seeking an order that the applicant be summoned to court to clarify the contents of her affidavit dated 15th January, 2018.

35. The said application is premised on the fact that the firm of Suyianka Lempaa and their principals intend to direct a thorough investigation which they allege that the police failed/or refused to undertake. To the applicant, in light of the allegations that Mike Njeru has sworn on several occasions and told a number of people that he will kill the applicant, these averments can only be authenticated by the applicant in adducing *viva voce* evidence and not the advocate representing her. To the applicant, the parties adversely mentioned in the affidavit have the right to confront the applicant and exonerate

themselves from the adverse allegations and to controvert them.

36. Cross-examination on the affidavit is a discretionary power conferred upon the court by the provision of Order 19 Rule 2 of the ***Civil Procedure Rules***. It is not given as a matter of right and therefore any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent's affidavits otherwise if the courts become too willing to allow for cross-examination, the already limited time available for applications would be further curtailed to the detriment of the wider interests of justice. Therefore, in order to ensure that no more time than is really necessary is further taken up by cross-examination, it is only in instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined. This was held by **Ochieng, J**. in the case of **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limtied (2) [2006] 2 EA 6**.

37. In fact in **Lawson And Anor vs. Odhams Press Ltd. and Anor. (1948) 2 All ER 717,** it was held that Cross-examination on an affidavit in support of interlocutory application is to be allowed only in special circumstances.

38. I also agree that the decision in **G G R vs. H-P S [2012] eKLR** states the general rule with respect to cross-examination. According to the learned Judge:

> **"The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) to is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination."**

39. The foregoing statement is the general position with respect to cross examination particularly in purely civil matters. However as I will show in this ruling, different considerations apply when the same discretion is being exercised in judicial review proceedings. The exercise of that discretionary power in such cases is placed on a higher pedestal than in ordinary civil cases. Such discretion, as was appreciated by **Korir, J** in **R. vs. Constituency Development Fund Board & Another ex parte Robert Iltaramwa ochale & 5 Others [2012] eKLR**, though can be exercised under the inherent power of the Court, ought to be invoked sparingly taking into account the fact that allowing cross examination would lead to unnecessary delays in determining judicial review matters and hence the logic behind its policy that such proceedings be fast and quick fix to challenges encountered by citizens in their interaction with the administration defeated.

40. Although the matter before me is not an interlocutory application, this rule is even more stringent in judicial review applications and the rationale for this is to be found in the holding in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** where the Court held:

> **"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is**

only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application."

41. The only ground for seeking the cross-examination of the applicant is based on the fact that serious allegations are made by the applicant which have the effect of tarnishing the names of the applicant in the instant application. As I have held elsewhere in this ruling this court is not concerned with the desire by the interested parties to clear their names in these proceedings. The only concern of this Court in these proceedings is whether the decision of the Respondent is fair to the applicant. However, judicial review, it must always be remembered deals substantially with the process rather than the merits of the case. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison** (supra) judicial review process ought not to be invoked in cases where *viva vice* evidence would be necessary. Judicial review applications only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It deals with the legality or fairness of the decision or proceedings in question hence where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits. If any of the parties are aggrieved by the allegations made by the ex parte applicant which have injured them, they are at liberty to commence appropriate civil proceedings for vindication of their names and damages. This Court, sitting as a judicial review court will not allow itself to be turned into an arena where side shows and irrelevant matters are displayed.

42. Having expunged the irrelevant paragraphs from the record, it is my view that the basis for seeking the cross-examination of the ex parte applicant is nolonger necessary. In any case I am not satisfied that the application is merited.

43. I have also noted that the application itself is incompetent. It is expressed to be brought by "advocate for the applicant" but seems to be made on behalf of "the principal of Suyianka Lempaa by the name of Mike Njeru", who by the time the application was filed was not yet a party to these proceedings.

44. In the result it is clear that that grounds relied upon do not justify an order that the ex parte applicant be summoned to court to clarify the contents of her affidavit.

45. In the premises the application dated 5th February, 2018 fails and is dismissed with costs to the ex parte Applicant against the 1st interested party since that is the only party for whom the firm that drew the affidavit is acting in these proceedings.

46. As a parting shot I must caution the parties herein that the mere fact that parties are joined to the proceedings at this stage does not amount to a bar to the Court from removing them from the proceedings if their presence clearly becomes unnecessary or untenable. Accordingly, the parties including the interested parties will be expected to restrict themselves to the matters relating to the process rather than the merits of the decision on merit and the Court will not permit itself to be engaged in merit oriented issues which do not strictly fall within the purview of judicial review jurisdiction.

47. Orders accordingly.

Dated at Nairobi this 12th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Moibi for the ex parte applicant

Mr Cheloti for the 2nd interested party

Miss Mugo for Mr Issa Mansur for the proposed 4th interested party

CA Ooko