



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 24 OF 2018

MN KAFE LIMITED EX-PARTE APPLICANT

AND

CHIEF MAGISTRATES COURT OF MOMBASA 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

COUNTY LABOUR OFFICER, MOMBASA 3RD RESPONDENT

RULING

1. Pursuant to leave granted on 27th March, 2018, the ex-parte applicant filed a notice of motion dated 17th April, 2018 seeking the following orders:

a) An Order of CERTIORARI to remove to this Honourable Court for purposes of quashing the decision of the Respondents to prosecute the ex-parte applicant (MN KAFE LIMITED) and its director made on 21st February 2018 by way of summons to appear in Criminal Case No. 282 of 2018 at the chief Magistrate's Court at Mombasa.

b) An Order of PROHIBITION prohibiting the Respondent from taking further proceedings and executing any orders, decrees, warrants or any other kind of execution in Criminal Case No. 282 of 2018 at the Chief Magistrate's Court at Mombasa and from further hearing and/or adjudicating and/or determining and/or taking further proceedings in Criminal Case No. 282 of 2018.

c) Costs of the application to be provided for.

2. The application is premised on the grounds set out therein and those in the affidavit of MOHAMMED NAZIR KHAKI sworn on 27th March, 2018.

3. The ex-parte applicant alleges that Criminal Case No. 282 of 2018 instituted by the 2nd and 3rd Respondents before the Chief Magistrate's Court is in breach of Article 25 of the Constitution as it arises out of an employment dispute which dispute has already been filed before the Employment and Labour Relations Court.

4. The ex-parte applicant points out that the charges before the lower court constitute of: failure to provide house allowance; failure to pay wages; failure to pay statutory minimum wages; failure to give one month's notice; and failure to grant leave. Accordingly, the ex-parte applicant states that these claims are well before the Employment and Labour Relations Court hence the complainant in the criminal case ought to have filed a counterclaim before the labour court. Alternatively, the ex-parte applicant contends that canvassing these issues in a criminal court would expose the ex-parte applicant to double jeopardy.

5. The ex-parte applicant's case is that the 3rd Respondent's action of instituting criminal charges in response to the ex-parte applicant's case before the Employment and Labour Relations Court is hinged on ulterior motive, malice and bad faith resulting in an unfair administrative action as the criminal charges are accompanied by various requests for compensation as is in a civil suit rather than provide penalties.

Response

6. The 2nd Respondent responded to the application by way of replying affidavits sworn by JOSEPH NYAGA, the 3rd Respondent, and MWANAIDI MUSEBE WERE, the complainant in Criminal Case No. 282 of 2018 on 3rd May, 2018.

7. The 2nd Respondent avers that the MWANAIDI lodged a claim of unpaid dues with the 3rd Respondent against the ex-parte applicant. The Respondent claims that the 3rd Respondent acted on the claim by writing to the ex-parte applicant on several occasions for a response but the response was not forthcoming. Subsequently, the 2nd Respondent states that the 3rd Respondent wrote a demand letter to the ex-parte applicant seeking payment of Kshs. 59, 484/= due to the complainant deposited in their office within 14 days. The 2nd Respondent contends that the ex-parte applicant did not make good the payment.

8. The 2nd Respondent claims that the failure to pay the amount due to the complainant prompted the 3rd Respondent to issue a notice of intended prosecution dated 21st November, 2017 against the ex-parte applicant and subsequently Criminal Case No. 282 of 2018 was filed.

9. It is the 2nd Respondent's case that the criminal case emanates from the failure by the ex-parte applicant to adhere to Section 48(i) (a) of the Labour Institution's Act as read with Legal Notice No. 12 of 2017. Therefore, the 2nd Respondent avers that the charges filed against the ex-parte applicant are legally before the court and are not actuated by malice or bad faith.

Hearing and Submissions

10. The application came up for hearing on 18th June, 2018. Mr. Okere, appearing for the ex-parte applicant submitted that the criminal proceedings instituted in Criminal Case No. 282 of 2018 adversely affected the ex-parte applicant's constitutional rights. Counsel argued that criminal proceedings cannot be instituted to preempt the outcome of a civil case. Further, Counsel insisted that the criminal case was borne out of malice, ulterior motive and bad faith.

11. Mr. Mkok, learned Counsel for the 1st and 3rd Respondents submitted that it was incumbent upon the lower court to determine whether it had the jurisdiction to entertain the criminal case. Additionally, Counsel faulted the ex-parte applicant for not taking appropriate measures before the lower court to challenge the institution of the charges.

12. Mr. Isaboke, Counsel for the 2nd Respondent submitted that Article 157 of the Constitution gives the Director of Public Prosecutions (DPP) the mandate to institute criminal proceedings against any party upon proper investigations. Therefore, the ex-parte applicant cannot be stopped from carrying out its constitutional duties. Counsel concluded that the charges before the lower court were properly constituted and the case should be allowed to proceed to its logical conclusion.

13. In rebuttal, Mr. Okere stated that although the DPP is constitutionally mandated to institute criminal proceedings, he is not allowed to do so if the criminal proceedings lead to abuse of constitutional rights.

The Determination

14. The only issue that arises for determination by this court is whether the lower court should entertain Criminal Case No. 282 of 2018. The ex-parte applicant contends that if the proceedings before the lower court are allowed he is likely to suffer double jeopardy as the matters in issue therein are already before the Employment and Labour Relations Court. Also, the ex-parte applicant is adamant that the proceedings in Criminal Case No. 282 of 2018 will infringe on his right to fair hearing enshrined under Article 50 of the Constitution.

15. The Respondents, on their part have given a history of the issues arising leading up to institution of Criminal Case No. 282 of 2018. According to the 2nd Respondent, the DPP is under Article 157 of the Constitution mandated to institute criminal proceedings. This mandate they urged the court cannot be interfered with.

16. Article 157 (6) (a) of the Constitution reads as follows:

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) 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;

17. Article 157(10) creates the independence of the DPP. Accordingly, the DPP shall neither require the consent of any person before commencing criminal proceedings nor shall the DPP be under the direction or control of any person or authority. However, the powers donated above are curtailed under sub-article (11) which requires the DPP to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process while exercising the powers.

18. It is therefore apparent that a court cannot interfere with the prosecutorial powers of the DPP unless the powers are exercised in a manner that defeats public interest or abuse the legal process. This position was restated in the case of **Francis Anyango Juma v DPP & Another, Petition No. 160 of 2012**, where it was held:

“Clearly the intention under the Constitution was to enable the DPP to carry out its constitutional mandate without any interference from any party. This Court cannot direct or interfere with the exercise of the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate unless there was clear evidence of violation of a party's right under the Constitution, or violation of the Constitution itself.”

19. In the case of **Christopher Mbugua Kiiru v. The Inspector General of Police & 3 others, Mombasa HC Constitutional Petition No. 38 of 2013**, Muriithi J opined that the High Court in determining an application for stay or striking out of criminal proceedings must consider the following issues:

“a. the rule of law principle underpinning the discretion of the DPP to prosecute criminal cases without undue influence, direction or control by any other authority;

b. the need to protect accused persons from violation of their fundamental rights and freedom through unwarranted criminal prosecution;

c. the need to ensure that the criminal process of the court is not abused to further or defeat private interests which are, or should be, the subject of civil proceedings or for other improper purposes; and

d. as an over-arching principle, the existence of fair trial guarantees for accused persons in the criminal process by virtue of Articles 25 and 50 of the Constitution of Kenya, 2010.”

20. Will the prosecution of the ex-parte applicant in the subject suit amount to abuse of the legal process? The ex-parte applicant has pegged his assertion of abuse of legal process on the premise the he will suffer double jeopardy as there is already in existence a civil suit before the Employment and Labour Relations Court. I respectfully disagree. The existence of a civil suit does not preclude the institution of criminal charges. A copy of the charge sheet is attached to the affidavit of MOHAMED NAZIR KHAKI sworn on 27th March, 2018 and marked “MNK-3”. The charge sheet reveals that the ex-parte applicant is charged with various offences under the Labour Institutions Act and its subsidiary legislation and the Employment Act. The ex-parte applicant claimed that these charges are borne out of malice, bad faith and ulterior motive. Consequently, the ex-parte applicant alluded to breach of his right to fair trial. The ex-parte applicant has not led any evidence to suggest that the Respondents, specifically the 2nd and 3rd Respondent’s decision to institute the charges was irregular or actuated by some irrelevant factors. Essentially, the ex-parte applicant did not show the Respondents were being anything less than impartial. There is nothing to show that the ex-parte applicant will not be accorded a fair trial before the lower court.

21. Accordingly I do not find that the ex-parte applicant will be prejudiced by the alleged charges. If anything, once the charges are preferred, the ex-parte applicant will have an opportunity to challenge the legality of the charges through a defence.

22. For these reasons, the application dated 17th April, 2018 is hereby dismissed. Costs of the application to the Respondents.

Dated, Signed and Delivered in Mombasa this 26th day of September, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Ogega for Respondent

Mr. Kaunda Court Assistant