



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 37 OF 2017

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL
REVIEW ORDER OF PROHIBITION AND CERTIORARI**

AND

**IN THE MATTER OF: THE RESPONDENT'S DECISION TO INVESTIGATE
AND/OR ARREST THE APPLICANT IN RESPECT OF OWNERSHIP OF
MOTOR VEHICLE REGISTRATION NUMBER KBQ 507X**

AND

**IN THE MATTER OF: VIOLATION OF APPLICANT'S REASONABLE AND
LEGITIMATE EXPECTATION IN THAT THE RESPONDENT HAVE
INTERFERRED WITH APPLICANT'S POSSESSION OF MOTOR
VEHICLE REGISTRATION NUMBER KBQ 507X DESPITE BEING
RESTRAINED BY A COURT FROM DOING THE SAME.**

AND

**IN THE MATTER OF: ARTICLE 10, 27, 28, 40, 47, 50,
157 & 224 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE POLICE ACT, NATIONAL POLICE
ACT & DIRECTOR OF PUBLIC PROSECUTIONS ACT**

BETWEEN

WILSON KIPKOSGEI CHEPKWONY.....APPLICANT

VERSUS

- 1. THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT**
- 2. DIRECTOR OF CRIMINAL INVESTIGATION.....2ND RESPONDENT**
- 3. DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT**

AND

1. JONATHAN NZIOKA KIOKO.....INTERESTED PARTY

RULING

1. Pursuant to leave granted on 27th June, 2017, the ex-parte applicant filed the Notice of Motion dated 31st July, 2017 seeking the following orders:

- a. THAT an order of prohibition do issue restraining the Respondents from carrying out any further or continued investigations in any manner whatsoever, or in any intended arrest or prosecution of the Applicant in respect to owner of motor vehicle registration number KBQ 507X.
- b. THAT an order of certiorari do issue to quash the Respondents' decision to arrest and/or continue with further investigations on the Applicant in respect to owner of motor vehicle registration number KBQ 507X.
- c. THAT the costs of this application be provided for.

The application is premised on the grounds set out therein and those in the verifying affidavit of the ex-parte applicant sworn on 23rd June, 2017.

2. The ex-parte applicant alleges that he is the legal owner and bonafide purchaser for value of motor vehicle registration number KBQ 507X (hereinafter to be referred to as the suit vehicle). He claims that on 11th May, 2017 officers of the 1st and 2nd Respondents visited his place of work, Nyali Primary School and introduced themselves as officers from Kiserian Police Station. The officers informed the applicant that they were conducting investigations touching on the suit vehicle and requested him to drive the suit vehicle to Nyali Primary School. The ex-parte applicant claims that he did drive the suit vehicle to Nyali Police station and handed over custody to the OCS.

3. The ex-parte applicant contends that the suit vehicle was later driven to Ngong Police Station without his knowledge by the 1st and 2nd Respondents. The applicant then file Mombasa Chief Magistrates Court Civil case no. 810 of 2017 challenging the actions of the Respondents and got orders on 17th May, 2017 directing the 1st and 2nd Respondents to release the suit vehicle to the OCS Nyali Police Station pending the hearing of the suit. The applicant claims that the Interested Party filed Milimani Chief Magistrate Court Civil Case No. 3700 of 2017 challenging the applicant's ownership of the suit vehicle. However, as regards the proceedings in case no. 3700 of 2017 this court directed on 31st July, 2017 that the leave granted operates as a stay of the proceedings in case no. 3700 of 2017.

4. The ex-parte applicant alleged that on 21st June, 2017, the 1st and 2nd Respondents' officers visited the applicant's work place with the intent of arresting him without a warrant. The applicant contends that the intended arrest is illegal and a violation of the Constitution.

5. As regards the illegality of the intended arrest, the ex-parte applicant alleges that the intended arrest is against the court order issue on 17th May, 2017 by the subordinate court directing that the suit vehicle be released to the OCS Nyali Police Station and that it is a ploy by the Interested Party to dispossess the applicant of the suit vehicle.

6. Further, the applicant states that the intended arrest goes against the spirit of Articles 159 and 244 of the Constitution which require the Respondents to have due regard to public interest in the administration of justice.

7. It is the applicant's case that the dispute in relation to the suit vehicle is civil in nature and the intended arrest or commencement of criminal proceedings against him is a strategy by the Interested Party to assist the Interested Party to win the civil case.

Response

8. The Respondents opposed the application by way of a replying affidavit sworn by PC JOSEPH KIMANZI on 11th July, 2017.

9. The Respondents aver that the Inspector General of Police has the power to investigate any suspected crime and the application herein is an attempt to curtail the said powers. Also, the Respondents state that the investigations are ongoing and no arrest has been effected against the applicant.

10. The Respondents opine that the existence of a civil suit(s) does not preclude the 3rd Respondents from commencing criminal proceedings against the applicant. Further, the Respondents aver that the applicant cannot be allowed to assert his rights at the detriment of the rights of other people.

11. It is the Respondents' case that the applicant has not demonstrated that the Respondents have acted unreasonably or illegally to warrant stay of the investigations.

Submissions

12. The ex-parte applicant filed his submissions on 18th October, 2017 while the Respondents filed their submissions on 15th March, 2018.

13. Mr. Gikandi for the ex-parte applicant submitted that the dispute as between the applicant and the Interested Party in relation to the suit vehicle is civil in nature. This being the case, Counsel opined that the Respondents cannot purport to arrest the applicant on a matter that is already being litigated before the court. Counsel contended that the intended arrest if effected, would only aid the Interested Party in winning the civil suit.

14. Mr. Gikandi submitted that the Respondents have exercised their powers contrary to the provisions of Articles 157 and 244 of the Constitution and the Bill of Rights as the intended arrest is meant to infringe on the rights of the applicant.

15. Mr. Gikandi submitted that the Respondents are bound by the principle of legitimate and reasonable expectation. Counsel opined that since the applicant obliged the Respondents by driving the suit vehicle to Nyali Police Station, the applicant had a legitimate expectation that the Respondents would conduct the investigations and release the suit vehicle to him. Counsel contended that no reason was given to the applicant for the onward submission of the suit vehicle to Ngong Police Station.

16. Mr. Wangila, counsel for the Respondents submitted that the police are only discharging their constitutional and statutory mandate to investigate an alleged crime. Further, Counsel stated that the 3rd Respondent has not received any file from the police to make an independent assessment on whether to charge the applicant with an offence.

17. Mr. Wangila submitted that the police draw their investigatory power from Article 245 of the Constitution. Counsel argued that in conducting their investigations the police are independent and cannot be directed by any authority. Counsel stated that the police can only be inhibited from continuing an investigation if they are found to have acted ultra vires. In the instant case, counsel opined that the police had not acted ultra vires.

18. In relation to the purported intended arrest of the applicant without a warrant, Mr. Wangila submitted that arrest without a warrant is completely legal and allowed by law.

19. Mr. Wangila submitted that the subordinate court had ordered that the suit vehicle be released to the custody of the OCS Nyali Police Station but the court had not directed that the police stop their investigations. Further, Counsel stated that the 3rd Respondent under Article 157 of the Constitution has the discretion to prefer criminal charges against any person. The only test, Counsel argued, in deciding whether to institute charges is whether the material gathered meets the evidentiary threshold. Counsel submitted that this court cannot meddle in the affairs of the 3rd Respondents by deciding whether the applicant is to be charged with any offence, and cannot usurp the constitutional powers of the police to investigate a crime.

The Determination

20. The only issue that arises for determination by this court is whether the orders of prohibition and certiorari as prayed by the applicant are appropriate in this instant.

21. The applicant premises his case on the assertion that the purported intended arrest, investigations and prosecution against the applicant are illegal as there is an ongoing civil case between the applicant and the interested party on the ownership of the suit vehicle. On the other hand the Respondents claim that no arrest has been effected against the applicant. Further, the Respondents argued that this court cannot stop the ongoing investigations as this would be curtailing their powers as granted by the Constitution.

22. Article 245 (4) of the Constitution provides that the Inspector General of Police shall not be directed by any person in respect to the investigation of any office or offices. Similarly, Article 243 creates the National Police Service. Under Section 24 of the National Police Service Act the functions of the Kenya Police Service are enumerated as including detection, prevention and investigation of crimes. In carrying out these investigatory powers the 1st and 2nd Respondents cannot be directed by any person. They act independently and the courts will only step in when they are deemed to be abusing their powers, for instance, carrying out their investigations without any basis. Indeed this was the position taken in the case of **R vs. Commissioner of Police and Another Ex parte Michael Monari & Another (2012) eKLR** where the court observed as follows:

“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.”

23. In my view, investigation of a crime is not a violation of the applicant’s rights. Systems have been put in place to ensure that the 1st and 2nd Respondents carry out their investigations within the framework of the law and if they do so they cannot be faulted for doing their job. If anything, I believe the 1st and 2nd Respondents would be failing in their constitutional mandate if they failed to carry out investigations when complaints are made or when there is need to.

24. The Applicant herein wants the criminal investigations by the 1st and 2nd Respondents to be halted and also his intended arrest. The Applicant urges the court to consider that there is an ongoing civil matter and the criminal investigations are only met to sideline the civil proceedings. I do note that two civil proceedings were commenced; one by the Applicant and the other by the Interested Party over the ownership of the suit vehicle. However, the Applicant has not demonstrated that the criminal investigations are malicious and only intended to delay or subvert the civil cases. While in some instances criminal cases may be used to frustrate civil suits as was rights pointed out in the case of **R. v Chief Magistrates’ court Mombasa Ex parte Ganijee and Another (2002) 2 KLR 703**, where the court held that criminal investigation or a criminal charge or prosecution cannot be used to help individuals in the advancement of frustrations of their civil cases, I do not believe that is the case in this matter.

25. The Applicant has also sought to stop any prosecution by the 3rd Respondent. Article 157 (4) of the Constitution provides that the 3rd Respondent shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction. Further sub-article (6) of the same provision provides that the 3rd Respondent shall have the power to 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. In instituting any criminal proceedings, sub-article (10) provides that the 3rd Respondent shall not be under the direction or control of any person or authority.

26. This court can only interfere with the prosecutorial powers of 3rd Respondents if it is shown that there has been an abuse of the legal powers or exercise of the powers goes against public interest or administration of justice. As I understand it, investigations by the 1st and 2nd Respondents are ongoing. No criminal charges have been levelled against the applicant nor have any criminal proceedings been instituted. The Applicant has not shown that the 3rd Respondent has abused the legal process.

27. In my view, the Respondents should be allowed to carry out the investigations regarding the suit vehicle. If they do find that there is sufficient evidence to bring criminal charges against the applicant, then the same should be in accordance with the law. It is important to note that criminal and civil proceedings may run concurrently unless a party feel prejudiced by the concurrence of the proceedings and prays for the stay of one pending the determination of the other.

28. In conclusion, I do find that the prayers sought by the Applicant are not merited at this point. Therefore, the application dated 27th June, 2017 is dismissed. The Applicant to bear the costs of the application.

Dated, Signed and Delivered in Mombasa this 23rd day of October, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Gikandi for Ex-parte Applicant

No appearance for DPP

Mr. Kaunda Court Assistant