



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 425 OF 2016

IN THE MATTER OF JUDICIAL REVIEW PROCEEDINGS FOR AN ORDER OF PROHIBITION

IN THE MATTER OF PARALLEL INVESTIGATIONS BEING CONDUCTED BY TWO POLICE STATION OVER THE SAME CONDUCT

AND

IN THE MATTER OF SECTION 8 OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA

MARGARET WAMAHIGA GAKUHIAPPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION2ND RESPONDENT

MOSES KIIRU MWANGI INTERESTED PARTY

JUDGMENT

1. By a notice of motion dated 3rd October 2016, the exparte applicant Margaret Wamahiga Gakuhi seeks from this court orders:

a. That the court be pleased to grant to the applicant an order of prohibition to prohibit the Nairobi County Police Commandant or any police officer under him or any police officer under him or acting through him from conducting any investigations, or recording any statements, or any arresting the applicant or prosecuting the applicant in respect of the complaint relating to the purchase and delivery of Computer Norton Antivirus 360 version 5(3 in 1).

b. Costs of this application be provided for.

2. The motion was filed pursuant to leave granted on 14th September 2016 following chamber summons dated 13th September 2016. The order granting leave also operated as stay of arrest and prosecution of the exparte applicant until these proceedings are heard and determined.

3. The applicant's counsel dutifully filed the notice of motion within the 21 days stipulated in the order for leave and as provided for in Order 53 Rule 3 of the Civil Procedure Rules.
4. The application is supported by the statutory statement and verifying affidavit sworn by the applicant on 13th September 2016 and annexures.
5. Only the 2nd respondent Director of Public Prosecutions filed a replying affidavit on 11th December 2016 sworn by Joseph Obao, No. 67030 a Corporal Police Officer attached to CID Nairobi area County Headquarters opposing the exparte applicant's application.
6. The applicant also filed a further affidavit on 24th January 2017 but without leave of the court and neither did she seek leave to have the said affidavit admitted on record.
7. The applicant's case, primarily, as contained in the grounds and facts in the statutory statement and depositions is that she entered into a joint venture with Moses Kiiru Mwangi the interested party herein, for purchase and sale of 400 Computer Norton Antivirus to be supplied to Kenya Methodist University, Meru, and were introduced to the business by one Jeseo Mugambi who, unknown to the applicant and interested party, was a conman who only intended to defraud them in collusion with two other persons.
8. That the applicant and the interested party were introduced to Stanley who was the seller of the said items and they negotiated with him after which the interested party parted with shs 480,000 which was receipted. That on the same day of 12th August 2016 the applicant and the interested party (partners) took possession of the goods and the applicant transported them to Meru where they were delivered to Julius and waited for payment. That the said Julius claimed to be an employee of Methodist University and that he would cause the University to pay for the goods delivered.
9. That after the first consignment was delivered the said Julius claimed that the University would only pay full amount after delivery of the second batch of 200 pieces at shs 460,000.
10. That the partners took the second delivery to Meru and called Julius who failed to turn up to receive the goods. The applicant and interested party /partners reported the matter to the CID Meru vide OB/69/17/8/2016 and recorded statements.
11. That two days later the interested party herein called the applicant to his office to record a statement and asking her to propose on how she was going to pay him the amount that the swindlers had defrauded him but the applicant declined.
12. That after one week, a CID officer, a Mr Obao called the applicant asking her to go to Nairobi and record her statement concerning the foiled deal and to assist in the investigations which request the applicant turned down as she had already reported the matter to Meru and recorded her statement there. The applicant became apprehensive that the interested party was using Obao to harass her hence she engaged an advocate who telephoned Mr Obao and explained to him the position and also wrote a letter to the Nairobi County Police Commander and the Director of Public Prosecutions and Nairobi County Commandant on 7th September 2016.
13. The applicant therefore believes that the respondents are grossly abusing the legal process by conducting parallel investigations in respect of supply of computer Norton Antivirus 360 version 5(3 in 1) in a joint venture between the applicant and interested party and that despite requests by her counsel that the commandant defers his investigations to Meru CID Officers who were already seized of the matter, the respondents had refused to heed the request.
14. Further, that instead, the police from Nairobi and the interested party had visited the applicant's home intending to arrest her and charge her which she believes was an act of bad faith intended to undermine or override her complaint which is being investigated by the CID office, Meru hence these

judicial review proceedings.

15. In the replying affidavit sworn by CPL Joseph Obao No. 67030 attached to DCI Nairobi Area County Headquarters, who is also the investigating officer in the matter, he deposes that the Nairobi Area County Headquarters received a complaint from the interested party herein to the effect that he had been defrauded money amounting to shs 960,000. That investigations were commenced in accordance with Section 24 of the National Police Service Act and the applicant herein was summoned to clarify on the issues raised but that instead, they were served with a conservatory order on 18th September 2016 issued by this court.

16. That the complaint in Meru concerns Julius whereas the complaint in Nairobi concerns the applicant although arising from the same transactions. That the transaction took place in Nairobi where both parties reside and where they met and agreed verbally to supply the goods to Kenya Methodist University.

17. That Meru police were no longer investigating the matter hence the issue of parallel investigations did not arise.

18. That the applicant should have simply written to Director of Criminal Investigations raising her concerns and not to come to court.

19. That the applicant has not demonstrated that the investigations are being carried out with ulterior motive so as to invite the court to intervene and that once the investigations are complete, the same will be forwarded to the Director of Public Prosecutions to determine whether the evidence is sufficient to sustain a prosecution.

20. That the 1st respondent acted within its mandate and did not breach any law or regulations or constitutional provisions. That it would be a failure of the criminal justice system if the respondents failed to investigate a complaint lodged with them by a citizen hence the court should allow investigations commenced to be completed to its logical conclusion and the file forwarded to the Director of Public Prosecutions for appropriate action.

21. As earlier stated, the applicant filed an affidavit on 24th January 2017 without leave of court hence I shall not examine it.

22. The parties' advocates submitted orally in court on 24th January 2017 with Mr Njiru advocate submitting on behalf of the applicant and reiterating the statutory statement and verifying affidavit sworn by the applicant while maintaining that the police were abusing their powers by conducting parallel investigations in Meru and Nairobi. That the Director of Public Prosecutions powers are not limitless but is limited by Article 157 of the Constitution.

23. Mr Njiru submitted that it is malicious for 2 different police stations to investigate the same matter. That from the conduct of Mr Obao, he was biased and was assisting the interested party hence the Director of Public Prosecutions must act fairly and not to always defend matters, to preserve the integrity of investigations.

24. That the applicant does not wish to impede the investigations but seeks for a fair process and that there is no reason why the officers in Meru should not be left to investigate the complaint and that there is no affidavit by Meru police that they have ceased investigating the matter.

25. In opposition, Miss Spira for the DPP submitted relying on the replying affidavit sworn by Joseph Obao and contending that the complaint was made to Nairobi Area and that the Director of Public Prosecutions does not investigate complaints. That the applicant should have written to the Director of Public Prosecutions to seek for a solution. That those investigations are being carried out to meet the ends of justice and not for collateral purposes.

26. Further, that the police have not send the file to the Director of Public Prosecutions to determine whether there is a case for prosecution. That if the applicant has an issue with the current investigating officer, she should have written to DCI to appoint an independent investigator. Counsel urged the court to dismiss the motion as there is no evidence of breach of the law, irrationality or bad motive established on the part of the respondents.

27. In a brief rejoinder, Mr Njiru submitted that he wrote a letter as 6th September 2016 to the Nairobi County Police Commandant and the Director of Public Prosecutions but no response was received. Further, that these proceedings should have informed the Director of Public Prosecutions to take action which he has not hence it is not fair for 2 police stations to be involved in the investigations.

28. None of the parties relied on any case law.

Determination

29. I have carefully considered the exparte applicant's case and the serious objections raised by the respondents. In my view, the issue for determination is whether the applicant is deserving of the grant of Judicial Review order of prohibition.

30. It is the exparte applicant's claim that she and the interested party had a joint venture of supplying Norton Antivirus to Kenya Methodist University after being introduced to the business by one Julius who was known to the applicant. However, the venture turned out to be a fraud after money was paid out for the purchase of the product the said Julius vanished after the money was paid out. The applicant and interested party reported to Meru police station Imenti North DCI and in the company of the interested party on 7th August 2016 recorded her detailed statement vide OB No. 16/17/8/16.

31. While the matter was being investigated by the CID at Imenti North (Meru), the interested party made a separate complaint at Nairobi Headquarters DCI who summoned the applicant to go and record her statement to shed some light on the alleged fraudulent transaction.

32. The applicant became apprehensive that the interested party had turned her into a suspect in the whole transaction and wanted her arrested using his friends at the Headquarters and moreso, CPL Joseph Obao, the investigating officer. She wonders why there should be parallel investigations into the same transaction. She wrote a letter to the Director of Criminal Investigations Nairobi copied to the Director of Public Prosecutions, through her counsel on record complaining of the situation but no response was received, but that instead the Director of Criminal Investigations Nairobi wanted to arrest and charge her with the offence which was being investigated by the Director of Criminal Investigations at Meru. She therefore sought the court's intervention to prohibit the respondent's sinister actions and abuse of power and legal process.

33. On the other hand, the respondents through the investigating officer have maintained that the complaint at Meru was against one Julius and that the interested party lodged a complaint in Nairobi and recorded a statement on 19th August 2016 complaining against Margaret, since Margaret had told him that she knew the people very well.

34. In the respondent's view, they have the mandate to investigate the complaint as Meru DCIO was no longer investigating the matter hence it would be inappropriate to prohibit investigations as that would impede on the criminal justice system; and that in this case, the Director of Criminal Investigations should be left to complete investigations and forward the file to the Director of Public Prosecutions to establish whether there is sufficient evidence to sustain any charge.

35. In **Pastoli v Kabale District Local Government Council and Others**[2008] 2 EA 300, the court, citing with approval **Council of Civil Unions V Minister for the Civil Service** [1985] A.C 2 and **Re Bukoba Gymkhana Club** [1963] EA 478 at 479, it was held:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality irrationality and procedural impropriety. Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptance moral standards procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non observance of the Rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

36. In **Re Bivac International SA (Bureau Beritas) [2005] 2 EA 43**, it was held that the scope of the remedies of Judicial Review continues to expand in that:

“ Like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of ultra vires and the rule of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure and had become the most powerful enforcer of constitutionalism , one of the greatest promoters of the law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never ending categories of negligence after the celebrated case of Donghue Vs Stephenson in the last century.”

37. The question, therefore is, whether the conduct of the Director of Criminal Investigations in the investigation relating to the alleged fraudulent transaction wherein the interested party allegedly lost shs 960,000 to suspected fraudsters Julius and Mugambi, who were known to the applicant; is illegal, irrational and or laced with procedural impropriety as explained in the **Pastoli v Kabale** (supra) case, and therefore deserving of this court’s intervention.

38. It must however be made clear that albeit the Director of Public Prosecutions is enjoined to these proceedings, he is not an investigator and neither has the matter reached prosecution stage for his directions. I would in the premise, not make any orders against the Director of Public Prosecutions whose constitutional mandate, clearly, is public prosecution and not investigations.

39. Furthermore, no adverse reference was leveled against the Director of Public Prosecutions as there was no evidence that his office had received the investigations file and or made any decision to prosecute the applicant, on the basis of the impugned investigations being carried out by the Nairobi Area Commandant.

40. It would therefore be superfluous to seek to prohibit a party who has not received any investigation report for purposes of perusal and or directions for prosecution. In Halsbury’s **Laws of England** 4th Edition Reissue Volume 1(1) page 202 paragraph 109, it is observed that:

“ The order of prohibition is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority, which forbids that court or tribunal, or authority to act in excess of its jurisdiction or contrary to law. Prohibition is employed for the control of inferior courts, tribunals, and public authorities.

Prohibition is conceived with decisions of the future. Prohibition will issue to prohibit a determination in excess of jurisdiction, error of law on the face of the record or breach of the rules of natural justice.”

41. In **KNEC v Republic Exparte Geoffrey Gathenji Njoroge & 9 Others Nairobi CA 266/96 [1997] e KLR**, the Court of Appeal stated, inter alia, concerning what an order of prohibition will do and when it will issue:

“.....it does not however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...”

42. For this court to issue prohibition against the 1st respondent or any police officer under him or acting through him from conducting any investigations or recording any statements or arresting the applicant in respect of the complaint relating to the purchase and delivery of computer Norton Antivirus 360 version 5(3 in 1), there must be proof that the investigations are being carried out in excess of the mandate of the police or that the police have no such mandate to investigate the said complaint; or that there is breach of the rules of natural justice and or that there is abuse of power.

43. The police at Nairobi had commenced investigations into a complaint that the interested party had been defrauded by the applicant and 2 others. On the other hand, the applicant claims that she had already made a report at Meru and had even recorded a statement hence she expected the interested party to also record a statement in Meru so that investigations can be carried out there instead of having a parallel investigations in Meru and Nairobi. She claims that the interested party is being aided by the Cpl Joseph Obao to cause her arrest.

44. The statement recorded by the interested party at Nairobi area shows that it was made after the applicant had already recorded her statement in Meru.

45. In my humble view, albeit it would not be appropriate to prohibit the police from carrying out their mandate to investigate a specific complaint, as that would impede the criminal justice system, I find that there is no justifiable reason why the police which is only one state agency, would engage in parallel investigations into one complaint. In my view, that would amount to abuse of legal process since the complaint made to them by the interested party against the applicant arose from the same transaction as the complaint which was made in Meru.

46. I would however hesitate to direct that the complaint be investigated by a specific police station or officer since it is in the discretion of the police to choose which officer and or station should carry out investigations concerning a complaint.

47. From the statement of the applicant; the whole transaction commenced in Nairobi but deliveries were to be made in Meru therefore the applicant was right to report to Meru, which at that time was the closest police station after allegedly realizing that she had been dupped by Julius who did not turn up to receive the deliveries of goods for transmission to the Kenya Methodist University and or to transfer money to the interested party's KCB Bank account.

48. The applicant protested the dual investigations and she annexed letter of protest dated 6th September 2016 written by her lawyer to the Director of Criminal Investigation Nairobi Headquarters and copied to the Director of Public Prosecutions. The two agencies received the said letter of protest but they seem to have forgotten about it and claim that the applicant should have written a complaint, which she did.

49. Accordingly, I find that the appropriate order that commends itself to be issued is that the 1st respondent in carrying out investigations relating to the purchase and delivery of Computer Norton Antivirus 360 version 5 (3 in 1) is hereby prohibited from conducting parallel investigations into the matter, but is at liberty to direct the investigations to be conducted at one central place which he is free to choose and once the decision is made as to where the investigations are being carried out then

the applicant and the interested party should be notified accordingly.

50. Those shall be orders of the court with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 28th day of February, 2017.

R.E. ABURILI

JUDGE

in the presence of:

CA: George

Mr Njiru for exparte applicant/1st interested party

Miss Spira for 1st and 2nd respondents

N/A for 2nd interested party