



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC CIVIL APPLICATION CASE NO. 1 OF 2017 (JR)

**IN THE MATTER OF: APPLICATION BY NICKSON OCHARO OGUTA FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW (CERTIORARI & PROHIBITION)**

AND

IN THE MATTER OF: LAW OF CONTRACT ACT, CHAPTER 23, LAWS OF KENYA

AND

**IN THE MATTER OF: CRIMINAL PROSECUTION RELATING TO THE COLLAPSE OF A
STOREY BUILDING STANDING ON LR NO. KISII MUNICIPALITY/BLOCK III/236**

AND

IN THE MATTER OF: KISII CMCR NO. 3347 OF 2016

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACT, 2015

AND

**IN THE MATTER OF: ARTICLES 2 (2), 23, 27 (1), 29 (A), 48, 50 (1), 165 & 258 OF THE
CONSTITUTION, 2010**

BETWEEN

JEFF NICKSON OCHARO OGUTA.....APPLICANT

VERSUS

THE DISTRICT CRIMINAL INVESTIGATIONS OFFICER, KISII

THE DIRECTOR OF CRIMINAL INVESTIGATIONS

THE INSPECTOR GENERAL

THE DIRECTOR OF PUBLIC PROSECUTIONS

THE CHIEF MAGISTRATE'S COURT, KISII LAW COURTS.....RESPONDENTS

RULING

Introduction

1. This case relates to criminal prosecution initiated against the exparte applicant herein and his co-accused one Matoke Nyangwaro in KISII CMCR 3347 of 2016 following the collapse of a storeyed building standing on LR NO. KISII MUNICIPALITY/BLOCK III/236 on 10th November 2016. Arising from the collapse of the said building, the exparte applicant and his co-accused were jointly and severally charged with 8 counts of manslaughter contrary to Section 202 (2) as read with Section 205 as follows: **On the 10th day of November 2016 at Kisii Municipality block III/236 in Kisii Town in Kisii Central Sub-county jointly with others not before the court-**

- **Unlawfully and negligently caused the death of EUCABETH KERUMBO.**
- **Unlawfully and negligently caused the death of JOHN MOMANYI NYANG'AU.**
- **Unlawfully and negligently caused the death of BRIAN ARISI**
- **Unlawfully and negligently caused the death of JOSHUA VINCENT.**
- **Unlawfully and negligently caused the death of WILLIAM OBIERO MAGORI.**
- **Unlawfully and negligently caused the death of ROBERT MORARAOBWOGE.**
- **Unlawfully and negligently caused the death of NELSON NTABO MOGAKA.**
- **Unlawfully and negligently caused the death of ENOCK KARANJA OBIKO.**

2. The exparte applicant's co-accused Jeremiah Matoke Nyangwara also faced additional count of employing a person who is not a registered engineer by the engineer's board of Kenya contrary to **Section 49 (1)** as read with **Section 57 of the engineers at cap 530A laws of Kenya** while the applicant faced the additional count of taking up employment as a professional engineer without being registered by the Engineers' Board of Kenya Contrary to **Section 49 (2)** as read with **Section 57 of the engineers Act Cap 530A Laws of Kenya.**

3. It is the above charges filed before the chief magistrate at Kisii that precipitated the instant proceedings commenced by way of Notice of Motion dated 28th February 2017.

Application

4. This is an application for Judicial Review brought through Notice of Motion dated 28th February 2017 wherein the ex-parte applicant Jeff Nickson Ocharo Oguta seeks the following orders:

1. Spent.

2. The Honourable Court be pleased to grant an Order of Judicial Review in the nature of Certiorari to issue remove unto the High Court and Quash the Charge Sheet and Proceedings in respect of and/or pertaining to Criminal Proceedings vide KISII CMCR NO. 3347 OF 2016, together with any consequential Orders, between REPUBLIC VS JEREMIAH MATOKE NYANGWARA AND JEFF NICKSON OCHARO OGUTA, more particularly, the charges and/or portions relating to the latter (hereinafter referred to as the 2nd Accused Person), wherein the Applicant has (sic) been charged with various offences pertaining to the collapse of the Building hitherto standing and/or constructed on LR. NO. KISII MUNICIPALITY/BLOCK III/236.

3. The Honourable Court be pleased to grant an Order of Judicial Review in the nature of Prohibition, to issue to prohibit the 1st, 2nd, 3rd and 4th Respondents from further preferring and/or maintaining the Criminal Charges vide KISII CMCR NO. 3347 OF 2016, together with any consequential Orders, between REPUBLIC VS JEREMIAH MATOKE NYANGWARA AND JEFF NICKSON OCHARO OGUTA, more particularly, the charges and/or portions relating to the latter (hereinafter referred to as the 2nd Accused Person), whatsoever and/or however.

4. The Honourable Court be pleased to grant an Order of Judicial Review in the nature of Prohibition, to issue to prohibit the 5th Respondent from entertaining, further entertaining, proceeding with, deliberating upon, rendering any Decision on and/or any other manner handling the Criminal Proceedings vide Criminal Charges vide KISII CMCR NO. 3347 OF 2016, together with any consequential Orders, between REPUBLIC VS JEREMIAH MATOKE NYANGWARA AND JEFF NICKSON OCHARO OGUTA, more particularly, the charges and/or portions relating to the latter (hereinafter referred to as the 2nd Accused Person), whatsoever and/or however.

5. Costs of this Application be borne by the Respondents and the Interested Party jointly and severally.

6. Such further and/or other Orders be made as the Court may deem fit and expedient.

5. The application is supported by the statement of facts and verifying affidavit of the applicant dated 30th January 2017. In the said affidavit, the ex parte applicant states that he is a Graduate Technician Engineer duly registered with Engineers Registration Board vide Certificate Number C533 issued on 5th July 1995 as shown in the copy of certificate attached to the affidavit and marked "JNOO1". He avers that by virtue to his qualification as an engineer, he is qualified in respect to Civil and structural works in buildings but that he was not contracted to offer services in a building situate on LR. No. Kisii Municipality Block III/236 (hereinafter referred to as "suit property") belonging to one Jeremiah Matoke Nyangwara as the structural engineer assigned to the suit property was one Stephen Kimani Muragori as seen in annexure "JNOO2".

6. The ex parte applicant further states that notwithstanding the fact that his name did not appear in all the documents obtaining at the National Construction Authority (hereinafter NCA) relating to the construction work being carried out on a building on the suit property, the 1st, 2nd, 3rd and 4th Respondents had preferred charges against him alongside the developer of the suit property alleging that he was the structural engineer in charge of the construction.

7. The ex parte applicant also attached annexure "JNOO3 (a) and (b)" and "JNOO4" to this affidavit, which are copies of building plans and building inspection card respectively to show that his name did not appear in any of the said documents as the structural engineer of the suit property.

8. It is therefore the ex-parte applicants case that the criminal charges against him have been commenced and maintained without any proper documentary foundation and contrary to clear documents held at the NCA that show who the actual and correct structural engineer of the suit property was.

9. He maintains that the criminal case against him has been mounted in a vacuum, have been induced by malice and are driven by ulterior motives. He further avers that the said charges are calculated to defeat his constitutional and fundamental rights pertaining to equal protection before the law and amount to abuse of the due process of court.

10. He further avers that the criminal proceedings are mounted with a view to intimidating and harassing him while at the same time allowing the real culprits of the crime escape justice.

11. The ex parte applicant contends that the 1st, 2nd, 3rd and 4th respondents have abused and/or acted in excess of their jurisdiction and owing to the conduct of the said respondents, the proceedings before the 5th respondent are void.

12. None of the respondents filed any response or replying affidavit to the instant application despite proper and repeated service with the application and hearing notices.

13. Even though the application was not opposed, this court is still under an obligation to consider its merits and at the same time consider the principles that guide the grant of the orders in the nature sought

with a view to determining whether or not to allow the application.

14. It is worth to note that in proceedings such as the one before me, courts have held that they ought to be extremely cautious in making their findings so as not to interfere with the intended or pending criminal proceedings because judicial review proceedings are concerned with the process rather than the merits of the challenged decision or proceedings in court as the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. The court is expected to be watchful so as not to venture into areas exclusively reserved for the trial at the criminal court. At the same time, the court is expected to be careful so as not to usurp the constitutional and statutory mandates of the respondents to investigate and prosecute cases in exercise of the discretion conferred upon them.

15. In the case of **Director of Public Prosecutions vs Humphreys (1976) 2 All ER 497 at 511 the House of Lords** cautioned that:

“A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval... If there is a power..to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances.”

16. In **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, the Court of Appeal held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to 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...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute.”

17. In the instant case, the ex parte applicant contends that he was not the designated engineer taxed with overseeing the Construction Works on a building on the suit property according to the documents kept by the NCA and therefore he ought not to have been charged alongside the owner of the said suit property for the charges contained in the charge sheet which he attached to his affidavit as anenxture “JNOO5”. According to the ex parte applicant, there was no sufficient evidence to support the decision to charge him.

18. The ex parte applicant has not challenged the decision making process and neither has he stated that he was not heard before a decision was made to charge him in court. Similarly, the exparte applicant has not stated that the respondents took into account irrelevant matters or did not consider relevant matters.

19. In **Republic vs Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR**, it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself as Judicial Review is intended to ensure that an individual is accorded fair treatment by the authority to which he has been subjected. In this case, once again, I reiterate that the ex parte applicant has not stated that he was subjected to an unfair process by the respondents before the decision to charge him was made. In my view, the applicant indirectly seeks orders of this court to substitute the decision of the respondents to charge him in court with a decision not to charge him and this will amount to usurpation of the

respondents powers conferred by the Constitution.

20. In **Boundary Commission [1988] 2WLR 458, 475**: it was stated:

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”

21. In **Constitutional Petition No. 359 of 2013 Diana Kethi Kilonzo vs IEBC and 2 others**, it was held:

“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

22. In the instant case, the ex parte applicant has tendered document to show that he was not the engineer retained to supervise the construction work in the suit property and therefore, he should not have been charged in court following the collapse of the suit building. If the ex parte applicant’s contention is true, then his documents will provide a formidable defence before the court trying the criminal case with the likely result of an acquittal. However, it has been held time and again that the mere fact that criminal proceedings are likely to fail is not a ground for halting those proceedings by way of judicial review.

23. In my humble view, the issue of whether or not the ex parte applicant was the designated engineer taxed with the duty of supervising the ongoing construction on the suit property and therefore liable to be charged in court following the collapse of the said building is an issue of fact which does not fall within this court’s jurisdiction in judicial review as that is a matter to be determined by the court handling the criminal case upon hearing both parties. In other words, judicial review proceedings is not the proper forum in which the innocence or otherwise of the applicant can be determined.

24. In a nutshell, this court is not satisfied that the discretion given to the respondents to investigate and prosecute ought to be interfered with. As can be seen from the charge sheet, the charges preferred against the ex parte applicant are very weighty such that one cannot say that they have been filed out of jest or with any interior motive. In any event, I find that should it turn out, at the close of the criminal case, that the ex parte applicant was all along an innocent party whose name, character and profession has been dragged through the mud by malicious and baseless charges preferred against him by the respondents, then he shall still have a recourse in an appropriate Civil Suit for damages for malicious prosecution.

25. To my mind, the case at hand has a public interest connotation behind it considering the alleged number of people who died following the collapse of the building on the suit property.

26. In the case of **Kuria & 3 Others vs the AG [2002] 2 KLR 69**, it was held:

“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. 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 bipolar 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...

27. In the instant case, the ex parte applicant has also sought orders of judicial review in the nature of prohibition to prohibit the 5th Respondent from entertaining, proceedings with, deliberating upon or rendering any decision in Kisii CMCR No. 3347 of 2016. No allegation has however been made against the said trial court in respect to the manner in which it is conducting the subject criminal case to suggest that it has threatened the applicant's rights to fair trial. In effect, no material has been placed before this court to satisfy me that the exparte applicant will not be accorded his constitutional rights to fair trial before the said court so as to justify the granting of the orders sought. The ex parte applicant stated that the criminal proceedings instituted against him amounted to an abuse of the due process of court without elaborating on what constituted the said abuse of court. In **Jago vs District Court (NSW) 106** it was held:

“An abuse of process...it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law.”

28. I do not believe and it has not been shown, that the respondents had any ulterior motive in filing the charges against the applicant and under the circumstances I do not find that the exparte applicant has made out a proper case to warrant the halting of the criminal proceedings.

29. In **Republic vs Chief Magistrate's Court at Mombasa Ex parte Ganijee & Another [2002] 2KLR 703** it was held that the High Court would be reluctant to intervene and halt proceedings unless it has been shown that the prosecution has been initiated by an ulterior purpose or that the decision makers acted unreasonably.

30. Having considered the issued highlighted in the application and my findings hereinabove, I am not satisfied that the ex parte applicant herein has not made out a proper case to warrant the granting of the orders sought. I once again reiterate that the charges filed against the ex parte applicant before the trial court are weighty and of great public interest for which it would be in the wider interest of not only the ex parte applicant, but also the respondent, the complainants and the public at large that the said criminal prosecution be heard and determined expeditiously so that the truth can be revealed thereby giving the ex parte applicant a chance to clear his name.

31. In the end, the instant motion fails and is dismissed with no orders as to costs since the respondents did not file any pleadings in opposition to the motion.

32. It is so ordered.

Dated, signed and delivered in open court this 12th day of April, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Begi holding brief for Oguttu Mboya for the Ex parte Applicant
- N/A for the Respondent
- Omwoyo: Court Clerk