



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW CAUSE NO. 2 OF 2017

**IN THE MATTER OF APPLICATION FOR AN ORDER OF JUDICIAL REVIEW BY WAY OF
CERTIORARI**

AND

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF JUDICIAL REVIEW BY WAY
OF PROHIBITION**

REPUBLIC

VERSUS

THE CHIEF MAGISTRATE'S COURT AT NANYUKI.....1st RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2nd RESPONDENT

CSILLA SZABOst RESPONDENT INTERESTED PARTY

DAVID MWENDA GITARIEX PARTE APPLICANT

JUDGMENT

1. **DAVID MWENDA GITARI (hereinafter referred to as the ex parte applicant)** has been charged before the Nanyuki Chief Magistrate's court, Criminal Case No. 964 of 2017 (**herein after referred to as the Criminal case**) with the **offence of obtaining money by false pretences contrary to Section 313 of the Penal Code.**

2. By his Notice of Motion dated 24th August, 2017 the ex parte applicant seeks for orders of Certiorari and Prohibition. He seeks an order of Certiorari to remove to this court and quash the decision, of Chief Magistrate's court at Nanyuki, to admit charges and continue with the criminal proceedings in the Criminal case. He also seeks the order of Prohibition Prohibiting the Nanyuki Chief Magistrate's Court (**the 1st Respondent**) from entertaining any matter as against the ex-parte applicant.

3. By his affidavit the ex-parte applicant deposed that he is a director of Dsquare Ventures Limited an entity that entered into a land buying – reselling transaction with Csilla Szabo (**the proposed interested party**).

4. It is important at this point to state that the ex-parte applicant in drafting this action stated Csilla Szabo

was a proposed interested party but at no point did the ex-parte applicant seek leave to make that party a substantive party in this action. That party therefore remained a proposed interested party and was not served and therefore did not participate in this action.

5. The ex-parte applicant deponed that the agreement between him and the proposed interested party was a commercial transaction which was structured in **three stages**. The **first** stage was the purchase of the land. The **second** was the sub-division of the purchased land. And **thirdly** was the marketing and resale of the sub-divided land.

6. The ex-parte applicant's role, according to his deposition, was to identify and purchase a parcel of land, oversee its subdivision, and to market and sell the resultant plots. For that purpose that it was agreed that the proposed interested party would deposit with the ex-parte applicant Ksh. 800,000/=.

7. Further the ex-parte applicant deponed that he explained to the proposed interested party, who is not a Kenyan Citizen, that she being a foreigner could not own free-hold land in Kenya. Ex-parte applicant stated that he severally requested the proposed interested party to nominate a trustee to hold the land for her but to no avail. That it was then that the ex-parte applicant transferred the purchased property, **NANYUKI MARURA BLOCK 6/3871(ENDANA)**, into his name.

8. That the ex-parte applicant sub-divided that land with a view to resell it but due to the prevailing atmosphere, whereby the general election was due, the sub-divided plots could not obtain buyers.

9. That the ex-parte applicant communicated this difficulty to the proposed interested party but the said proposed interested party requested for a refund of the money paid by her.

10. Subsequently the ex-parte applicant was arrested and charged with the offence of obtaining money by false pretences before the Nanyuki Chief Magistrate's court in the criminal case.

11. Before plea was taken the ex-parte applicant raised a preliminary objection based on **Section 89 (5) of the Criminal Procedure Code** and submitted that the trial court should decline to admit the charge on the basis the same did not disclose any offence.

12. The Learned Chief Magistrate by her considered Ruling of 26th June 2017 inter alia stated thus:

"I have carefully looked at the charge. It is that of obtaining money by false pretence Contrary to Section 313 of the Penal Code. The charge indeed contains a statement of specific offence. The particulars contains the time, the place the alleged offence occurred. The subject and the particulars of the complainant are also disclosed. As such I am satisfied that the charge indeed discloses an offence".

By that Ruling the Learned trial Magistrate proceeded to dismiss the Preliminary objection.

13. The Respondent (Director of Public Prosecution) opposed the prayers through the replying affidavit of the police officer CPL Peter Nzemya.

14. By that replying affidavit the police officer deponed that the proposed interested party reported a crime against the ex-parte applicant on 10th June 2017. This officer carried out investigation and found that contrary to the written agreement dated 23rd May, 2016, between the proposed interested party and the ex-parte applicant, the ex-parte applicant had the parcel of land registered in his name. That the agreement had provided that the property would be registered in the name of the proposed interested party's company namely Levashe Company Limited.

15. The police officer carried out a search over the property and confirmed it had been registered in the name of the ex-parte applicant's name.

16. By his replying affidavit the police officer stated that the issues raised by the ex-parte applicant were

issues that ought to be raised in the criminal trial. That the ex-parte applicant moved this court by this Judicial Review after the proposed interested party had left the county and this the police officer deponed was a calculation to interrupt the due process of the criminal litigation.

ANALYSIS AND DETERMINATION

17. **Section 193 A** of the Criminal Procedure Code Cap 75 Provides as follows:

“Notwithstanding the provisions of any other Written Law, the fact that any matter in issue in any criminal proceedings is also directly on substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the Criminal Proceedings”.

It is clear from the above provision that the fact there is pending matter in civil Proceedings does not act as bar to criminal action. In this case there is no pending civil proceedings touching on the same issue.

18. Justice Ngaah Jairo by his judgment in the case: **STEPHEN MBURU NDIBA – V- ETHICS & ANTI CORRUPTION COMMISSION & ANOTHER [2015] eKRL** had an opportunity to consider that **Section 193 A of Cap 75** and stated thus:

“It is beyond peradventure then that the existence of a civil suit per se cannot be a bar to criminal proceedings simply because the subject matter in the criminal proceedings is directly in issue or substantially in issue in the pending civil suit. Where civil proceedings exist side by side with criminal proceedings, the latter would only be stayed or terminated altogether if there is every indication that they were initiated to bring pressure to bear upon a party to settle the civil suit: in that regard, the criminal proceedings are for ulterior motives and not for the purpose of which they are meant, which is, upholding criminal law. It was so held in the case of Cruisair Ltd Versus CMC aviation Ltd(Ltd), (1978)KLR 131 which was quoted in Nairobi High Court Miscellaneous application No. 839 and 1088 of 1999 Vincent Kibiego Saina Versus the Attorney General where the court of Appeal stated with regard to winding up proceedings, that:

“..... a winding up court is not to be used for debt collection purposes, or to exert pressure to force payment of a debt which is bona fide disputed and contested. A fortiori, to institute or sustain or prop criminal proceedings, like bring winding up proceedings, to exert pressure for the payment of a debt or sum which is disputed in good faith, that which is disputed on substantial and not insubstantial grounds, and the criminal proceedings cannot decide the disputed debt or sum, constitutes an abuse of the process of the court, is oppressive, mala fides...”

19. The courts have often noted that there is the possibility of criminal process to be used for improper motive in the case:

JERALD WACHIRA GICHUKI – V- G. NORTH & SONS LIMITED & ANOTHER [2013] eKLR the court stated in considering improper motive of criminal process: **MACHARIA & ANOTHER V THE AG [2001] 449** that -

“the court can declare a prosecution improper if-

(a) It is for a purpose other than upholding criminal law.

(b) It is meant to bring pressure to bear upon the applicants to settle a civil dispute.

a it is an abuse of the court’s criminal process, it amounts to harassment and is contrary to public policy”.

20. The court in the **JERALD WACHIRA GICHUKI** (supra) further stated thus:

“In the present case there is an allegation by the Applicant that the 1st Respondent intends to use the 2nd Respondent to intimidate him into settling a civil debt by instituting criminal proceedings. Abuse of criminal process was defined in the case of Floriculture International Limited High Court Misc. 144 of 1997 as cited with approval in Republic V Commissioner of Police & Another Ex-parte Michael Monari & Another [2012] eKLR as:-

“Proceedings taken in bad faith or circumstances yielding an inference that they were up to no good. Criminal law is not to be used oppressively to punish acts which in truth might be technically a breach of criminal law but which contain no real vice and which can only be best handled under a process other than the criminal process namely any of the different systems of civil remedies.”

The court also relied on the holding in William V SPAUTZ [1992] 66 NWS LR 585 that:

“the purpose of criminal proceedings generally speaking, is to hear and determine finally whether the accused engaged in conduct which amounts to an offence and, on that account, is deserving of punishment”.

21. The ex-parte applicant in seeking before this court the termination of the criminal case annexed an agreement allegedly entered between him and the proposed interested party. That agreement had no date and was not signed by the ex-parte applicant. What however is of great concern is that it bears no resemblance to the one attached to the replying affidavit of police officer Corporal Peter Nzemya. The one annexed by that police officer is dated and is signed in the presence of an advocate by both the ex-parte applicant and the proposed interested party. What that indicated to me is that the ex-parte applicant relied on a false agreement in order to obtain orders in this Judicial Review. In this regard it is important to remember that the court exercises a discretionary jurisdiction in granting judicial review orders and can refuse to grant such an order where the ex-applicant has unclean hands.

22. Justice G V ODUNGA in the case: REPUBLIC V CHIEF MAGISTRATE MILIMANI COMMERCIAL COURT & 2 OTHERS EX-PARTE VIOLENT NDANU MUTINDA & 5 OTHERS [2014] eKLR considered the grounds upon which the court will exercise its judicial review jurisdiction and stated thus:

“The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300. In that case the Court cited with approval Council of Civil Unions Vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 and 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 of the 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 acceptable 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”.

23. I have considered the ex-parte applicant's prayers and I am unable, from the material presented before me to find any illegality, irrationality or procedural impropriety leading to the prosecution of the ex-parte applicant. It was not enough for the ex-parte applicant to say that the basis of the criminal trial was a civil debt or that it was a commercial transaction. The ex-parte applicant needed to show that the process of the court was being abused or misused. He needed to show the basis upon which his rights were being threatened or undermined See: **KURIA & 3 OTHERS – V- ATTORNEY GENERAL [2002] 2KLR.**

24. This court cannot issue orders of Certiorari or Prohibition as sought without any evidence of illegality, irrationality or impropriety. In my view with the evidence before me the prosecution cannot be said to be absent of proper factual basis to prosecute the exparte applicant. **Accordingly the Notice of Motion dated 24th August, 2017 is dismissed with costs.**

Dated and Delivered at Nanyuki this 6thDecember, 2017

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue

Applicant:

1st respondent

2nd respondent

1st interested party.....

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE