



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**JUDICIAL REVIEW NO. 6 OF 2015**

**THE REPUBLIC (ex-parte)**

**thro' ENGINEER MOSES AGUMBA OROT.....APPLICANT**

**VERSUS**

**CHIEF MAGISTRATE KISUMU.....1ST RESPONDENT**

**SENIOR PRINCIPAL MAGISTRATE KISUMU.....2ND RESPONDENT**

**OFFICER-IN-CHARGE KISUMU POLICE STATION.....3RD RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT**

**RULING**

The *ex- parte'* applicants filed a Judicial Review application via Notice of Motion dated 10th September 2015 seeking an order of certiorari to remove to this Court the proceedings and the subsequent orders of the 2nd respondent dated 28th July 2015 made in Kisumu CMC Criminal Private Prosecution Case No. 226 of 2006. It also sought an order of prohibition directed at the 1st and 2nd respondent or any officer acting under their supervision from entertaining the proceedings or issuing further orders in Kisumu CMCC Private Prosecution Case No. 226 of 2006 and a further order of prohibition directed at the 3rd, 4th, 5th and 6th respondents or anyone working under their supervision prohibiting them from pursuing investigations, prosecution or criminal proceedings in respect of Kisumu CMCC Private Prosecution Case No. 226 of 2006

**APPLICANT'S CASE.**

The application was supported by the affidavit of Moses Agumba Orot the ex-parte applicant herein. According to the deponent, on 28th July, 2015 the interested party herein, Edgar Odhiambo Ochieng filed a Notice of motion dated the same day in Kisumu CMCC Private Prosecution Case No. 226 of 2006 in his private capacity seeking for orders inter alia:

- a. **leave to commence private prosecutions against the ex parte applicant herein**
- b. **The court to order the Ethics and Anti-Corruption Commission to carry out relevant investigations and forensic audit against the ex-parte applicant**
- c. **An order directing the Officer Commanding Kisumu Central Police station to arrest the ex-**

**parte applicant in line with the report made in the Occurrence Book No. 71/18/7/2014.**

- d. An order charges be drawn by the DPP against the ex-parte applicant based on the supporting affidavit of the interested party herein drawn on oath.**
- e. Summons be issued against the ex-parte applicant and that he appears on such a date fixed by court to take plea for charges.**
- f. Any other orders**

The 2nd respondent herein heard the application ex- parte on the same day(28th July 2015) and granted the following orders.

- a. That the Ethics and Anti-Corruption Commission(EACC)- Kisumu Office to carry out relevant investigations and forensic audit against the ex-parte applicant and his financial activities as CEO at the Lake Victoria South Water Services Board, as reported to the commission vide their file Ref. No. FF55 anonymous report.**
- b. The head of EACC, Kisumu office to arrest the ex-parte applicant in line with with the report made in their OB No. 71/18/7/2014**
- c. Charges be drawn out by EACC against the ex-parte applicant based on the supporting affidavit of the applicant herein sworn on oath**
- d. Summons to issue against the ex-parte applicant to appear on 26th August 2015 fixed by the court to take plea on the charges**

The ex-parte deponed further that, based on the aforementioned orders, the EACC moved to arrest him. It is his case that the Senior Principal Magistrate issued warrants of arrest against him and called for his prosecution without considering the weight of the allegations against him and without affording him a chance to be heard as against the rules of natural justice. Further that the magistrate ordered for his arrest for a non-disclosed offence and failed to heed to the rules of natural justice which require that you cannot be a prosecutor and judge at the same time.

It was contended that the 2nd respondent had no power and or jurisdiction to issue the said orders or direct any investigative body to carry out investigations as that is power vested on the Director of Public Prosecutions(DPP)

### **DPP'S CASE**

The case for the DPP is contained in the replying affidavit sworn on 3rd November, 2015 by Douglas N. Ogoti, Senior Assistant Director of Public Prosecution in charge of Kisumu County(As he then was). He deponed that the orders granted in Kisumu CMCC Private Prosecution Case No. 226 of 2006 were defective in that, the application was not served on the DPP as required by the law, that the applicant failed to demonstrate that he had reported the matter to the DPP and that the office had failed to act and that the applicant did not exhibit an offence known to the law in his application.

The DPP also filed written submission, It was submitted that the power of the court to grant a person to conduct prosecution under Section 88(1) of the CPC is discretionary and must therefore be exercised justly. That the Honourable magistrate in issuing the orders sought to be quashed did not exercise his discretion judicially and judiciously and he therefore went against the principles set out in the case of **KIMANI VS- KIHARA [1983]KLR 79** wherein the superior Court laid down rules in form of questions that a magistrate should ask and be satisfied on before granting permission for private prosecution. The DPP then went on to set out the questions as follows:

- a. Has any complaint been made to the DPP or the police and if so, what was the result? If no such report has been made the magistrate may either adjourn the matter to enable a report to be made and await a decision thereon or in simple cases like assault or trespass proceed to grant permission and notify the police of that fact**
- b. How is the complainant involved?- what is the complainant's locus standi?**
- c. Has he personally suffered any injury or danger?**
- d. Is he motivated, actuated or impelled by malice or political considerations?**

It was the DPP's case that the magistrate did not satisfy himself on the above laid principles before proceeding to make his orders.

The DPP submitted further that the interested party did not serve the application in Kisumu CMCC Private Prosecution Case No. 226 of 2006 as is required by the law and there was no evidence brought to the court to show that the interested party had made a complaint to the police or to the DPP concerning the matter. The DPP concluded by stating that the orders granted in Kisumu CMCC Private Prosecution Case No. 226 of 2006 were bad in law and defective. However it was his view that the cure to the defect would not be achieved by usurping the DPP's constitutional mandate by an order prohibiting them from carrying out their duties in the matter in question if need arose.

### **EACC'S CASE**

The EACC filed grounds of opposition and a replying affidavit of Edwin Wangwe Waudo the Acting Deputy Director in charge of the western region sworn on 24th November 2015. Mr. Waudo agreed with the DPP. He deponed that the judicial review application should not be allowed for reasons that the orders sought therein are too wide and if granted as framed may prohibit lawful investigations of the ex-parte applicant in relation to the matters raised in Kisumu CMCC Private Prosecution Case No. 226 of 2006 and this would curtail the EACC's powers and mandate granted under Article 79 of the Constitution.

Mr. Waudo deponed further that no evidence had been produced by the ex parte applicant to demonstrate that any investigations being carried out by the EACC constitute an abuse of process so as to justify the prohibiting orders sought. That the orders granted were in themselves defective as they were issued against EACC which was not even a party to the matter. Mr Waudo was of the view that a judicial review court was not the right forum to determine the ex-parte applicant's guilt or innocence.

The EACC did not file submissions neither did they make oral submissions

### **CASE FOR THE INTERESTED PARTY.**

The case for the interested party is contained in the replying affidavit of Edgar Odhiambo Ochieng sworn on 30th October 2015 and his written submissions dated 14th December 2015. Mr. Ochieng deponed that this court lacks jurisdiction to entertain and or grant the orders as sought by virtue of the express provisions of Section 9 of the Fair Administration Act, 2015 as read together with section 361 of the Criminal Procedure Code. He was of the view that if the ex- parte applicant was honestly aggrieved by the decision of the Chief Magistrate's Court, he ought to appeal against the said orders as provided under section 361 of the CPC as the issues raised herein can only be resolved via an appeal and not by way of judicial review.

The interested party deponed further that it is not true that a formal complaint was not filed with the police but that the ex-parte applicant has frustrated any investigations intended to be carried out by any one of the investigating bodies thereby necessitating the application for private prosecution. He stated further that his application in the subordinate court was not actuated by malice but by the need to protect public coffers and the ex -parte applicant had not demonstrated how the said application for private prosecution violated the rules of natural justice.

In his submissions, the interested party reiterated the contents of his replying affidavit and added that in his application, the ex parte applicant does not state that the procedure was flawed but he raises issues that go to the merit of the matter. It was submitted that it is fairly obvious that the application is moving this Court to sit as an appellate court which is not within its jurisdiction.

He submitted further that the decision by the magistrate's court to grant leave to the interested party under Section 88 of the CPC is a matter of discretion of the court which is unfettered by any other consideration and that it only need to be exercised judicially and judiciously. He concluded by arguing that the private prosecution did not amount to persecution and was still presumed innocent until proven guilty. He urged this court to disallow the application.

The other parties did not file replies to the application and neither did they make any submissions.

## **ANALYSIS AND DETERMINATION.**

I have considered the pleadings and submissions by parties and the authorities filed therewith and I am of the considered view that the application herein raises two issues for determination.

1. **whether this court has jurisdiction to entertain the application herein.**
2. **whether the ex-parte applicants have established a case for judicial review to warrant the grant of the orders sought.**

## **JURISDICTION**

The issue of jurisdiction has been raised in two facets . The interested party is of the view that this being a judicial review court, it should be guided by **section 9 of the Fair Administration Action Act, 2015** and should not deal with issues for which there are different forums and those forums have not been exhausted. On the other hand the 5th and 6th respondents have taken the position that determining the issues and granting the orders as prayed would interfere with their constitutional mandate to ever investigate the ex- parte applicant on issues concerning Kisumu CMC Criminal Private Prosecution Case No. 226 of 2006 as the prayers as sought are too wide and far reaching and that would be akin to the Court entering a territory reserved by the Constitution for the DPP and the EACC.

The courts have been very clear on the issue of jurisdiction. In the celebrated locus classicus **THE OWNERS OF MOTOR VESSEL “LILLIAN S” VS CALTEX OIL KENYA LTD [1989] KLR 1** The court stated that:

**“Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”**

The interested party has argued that the ex-parte applicant's application raises issues that go to the merit of the 2nd respondent's decision as opposed to the procedure followed. He was of the view that the right forum for the ex- parte applicant to raise such issues would be in an appellate forum and not in a judicial review court. On the other hand the ex-parte applicant argues that he was not given a chance to reply to the application for leave to carry out private prosecution and as such the he was denied his right to a fair hearing.

What is the procedure for obtaining leave for private prosecution? Section 88 of the Criminal Procedure Code provides as follows:

- (1) A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission.**
- (2) Any such person or officer shall have the same power of withdrawing from the prosecution as is provided by section 87, and the provisions of that section shall apply to withdrawal by that person or officer.**
- (3) Any person conducting the prosecution may do so personally or by an advocate.**

In asking for permission, an intended private prosecutor is expected to make a complaint in writing to the magistrate; and the magistrate if satisfied that such a complaint is substantial, may then draw or cause to be drawn up a formal charge containing a statement of the offence. Such permission is a matter of discretion see. **KIMANI VS.- KAHARA (SUPRA)**

From the foregoing, it is obvious that all a person intending to be a private prosecutor needs to do is to seek leave of court and if a magistrate is satisfied that the complaint is substantial then he will exercise his discretion and may draw up a charge or cause one to be drawn. The Act does not require that the intended accused person be called to defend himself at the leave seeking stage nor does it require that he answers to the complaint raised.

Going back to the matter at hand, it therefore becomes clear that there was no need for the ex-parte applicant to be served with the application for leave and neither was he required to answer to it. The magistrate exercised his discretion and allowed the interested party to carry out private prosecution and this court ought not interfere with the magistrate's discretion unless it can be shown that discretion was exercised in excess of jurisdiction.

**G.V Odunga J in REPUBLIC V KENYA MEDICAL PRACTITIONERS AND DENTISTS BOARD & 2 OTHERS [2013] eKLR** while quoting from **THE SUPREME COURT PRACTICE 1997 VOL 53/1-14/6:** stated in that regard as follows:

**“the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. "It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute by law the decision in the matter in question....The Court will not.....on a judicial review application act as a Court of Appeal from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which was not within that body's jurisdiction.”**

The 5th and 6th respondents have raised the issue of the magnitude of the prayers sought by the ex parte applicant. They are of the view that if the orders are granted as sought they would have a far reaching effect of curtailing them from ever investigating the ex-parte applicant on issue raised in Kisumu CMCC Private Prosecution Case No. 226 of 2006. It is their case that the orders granted by the magistrate were defective but they are not against the procedure followed. I do agree with the 5th and 6th respondents that the prayers sought are wide and far reaching and issuing them would amount to usurpation of their constitutional mandate.

For the foregoing reasons the application herein fails. All is not lost as the applicant has every right to defend his cause before the trial court. By allowing the application this court would be technically sitting as an appellate court in the private prosecution case No.226/2006.

The application is dismissed with costs to the respondents.

**Dated, signed and delivered this 18th day of May 2016.**

**H. K. CHEMITEI**

**J U D G E**