



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW NO. 61 OF 2016**

**OSMAN ERDINC ELSEK.....APPLICANT**

**VERSUS**

**INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**CHIEF MAGISTRATE, MOMBASA LAW COURTS**

**THE ATTORNEY GENERAL .....RESPONDENTS**

**RULING**

1. Before the court for determination is the Amended Notice of Motion dated 24/8/2016 and Amended on the 5/9/2016. It seeks orders for Judicial Review in the nature of certiorari, prohibition and mandamus and is crafted as follows:-

**i) AN ORDER OF CERTIORARI bringing before the Honourable court for purposes of its being quashed, the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents signified by the Charge Sheet dated 28<sup>th</sup> July 2016 in MOMBASA CHIEF MAGISTRATE’S COURT CASE NO. CR. 1509 OF 2016, to charge and prosecute the Ex Parte Applicant for the offence of “obtaining money by false pretence contrary to Section 313 of the Penal Code”.**

**ii) AN ORDER OF CERTIORARI bringing before the Honourable court for purposes of its being quashed, the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents signified by the Charge Sheet dated 19<sup>th</sup> August, 2016 in MOMBASA CHIEF MAGISTRATE’S COURT CASE NO. CR. 1509 OF 2016, to charge and prosecute the Ex Parte Applicant for the offence of “misuse of firearm contrary to Section 34(1) of the Firearm Act, Cap 114 Laws of Kenya”.**

**iii) AN ORDER OF PROHIBITION directed at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, prohibiting further proceedings and/or trial of the Ex Parte Applicant in MOMBASA CHIEF MAGISTRATE’S COURT CASE NO. CR. 1509 OF 2016.**

**iv) AN ORDER OF MANDAMUS to compel the 1<sup>st</sup> Respondent either in person or acting through agents, servants, employees or any officer under his command, to immediately return the Ex Parte Applicant’s firearm Serial No. RBV973 (GLOCK 19 GEN 4 – SEMI AUTO PISTOL) together with 13 rounds of ammunition (9 mm RDS) therein, in a sound**

**state.**

**v) Costs.**

2. That Notice of Motion was brought pursuant to the leave of the court granted on the 31.08.2016.
3. The factual foundation of the application is briefly that by an agreement dated the 30/11/2015 two limited liability companies; Elsek & Elsele Construction Company Ltd and Kaamil Contractor Company Ltd, entered into and executed an agreement for the sale of some construction equipment at a price and consideration of USD 150,000. That agreement provided for the mode of payment of the consideration in some 5 instalment. It is contended that there were some delays leading to the cancellation of the agreement by the purchaser whereupon the purchaser made report to Anti - Terrorism Police Unit allegedly to collect the debt. As a result of such report the *ex parte* applicant was arrested on 22/7/2016 from his company's premises in Kikambala had confiscated his licensed firearm and taken to Mombasa Central Police Station where he was held overnight before being released on free bond and on payment of Kshs.500,000/- to the Purchasers and a concession to transfer to the arresting police officer six units of the vendors 309 low cost housing units in Kikambala and on condition that he refunds the sum of USD 75,000/- within 5 days.
4. On 27/7/2016 before the free bond expired the *ex parte* applicant went to the offices Anti -Terrorism Police Unit for extension of his bond terms to enable him complete negotiations with the purchasers when the bond was extended to 5/8/2016 to enable him attend on that date and confirm settlement. As the bond terms remained in force the applicant learnt that warrants for his arrest had been issued by the Chief Magistrate Mombasa a fact that led to filing of the current application on the 4/8/2016 seeking leave to apply for judicial review and stay.
5. However, before the court could deal with the application on 10/8/2016, while in the court precincts, the *ex parte* applicant was arrested by a contingent of over 10 police officers who took him to the court cells at the court before being arraigned before the Chief Magistrate and charged with the offence of obtaining money [USD 75,000] by false pretence contrary to section 313 of the penal code.
6. The *ex parte* applicant entered a plea of not guilty and was released on cash bail of Kshs.1,500,000 his passport was seized and his counsel made to give undertaking as to his attendance at trial. The trial court then made orders for the witness statements to be availed to the *ex parte* applicant but as at the date of filing the Amended Notice of Motion that order had not been complied but the prosecution instead, in the words of the *ex parte*, applicant hatched a scheme to scuttle the application in this matter by seeking to amend the charge sheet to add a second count of misuse of a firearm contrary to section 34(1) of the Firearms Act.
7. For all those complaints the *ex parte* applicant takes the position that the Respondents have been used for purposes other than for which their offices are created and therefore their decision to charge is challenged on account of impropriety as aforesaid is not in furtherance of administration of criminal justice.
8. In opposition to the Notice of Motion, the Respondents only filed Grounds of Opposition. The gist of those grounds on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was that, the application was incompetent for being a vexation, frivolous and an abuse of the court process; that the police have a legal mandate to investigate crimes while the second Respondent is by the constitution mandated to undertake criminal prosecutions against any person alleged to have committed an offence; that the law under section 214 of the Criminal Procedure Code permits amendments of the charge sheet and that the application is based on hearsay.
9. For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, it was contended that the application is an abuse of the court process; that the two counts in the charge sheet are offences created by statute; that section 193A of the Criminal Procedure Code allows concurrent proceedings in both civil and criminal over the same set of facts and therefore that these proceedings are geared towards curtailing the powers of the 2<sup>nd</sup> Respondent as

enshrined under Article 157 of the constitution; that the orders if granted would offend the principles of proportionality and separation of powers and that the petition was nonspecific or rather ambiguous on its prayers.

### **Submissions by the parties**

10. For the *ex parte* applicant, Mr. Miyare, reiterated the averments in the application and relied on decided for the proposition that criminal process should not be a tool of coercion to achieve civil remedies as far as the charge of obtaining money by false pretences is concerned and that the second charge of misuse of firearm is targeted. At defeating these proceedings. For those reasons, the counsel submitted that there is danger in the court process being abused by the criminal trial being allowed to proceed the same having been brought not to meet the ends of justice but on malicious grounds. He sought to persuade the court with the contract between the parties had by consensus settled on a dispute resolution and that to invite criminal sanctions was malice and abuse of court process in a criminal process. He placed reliance in the decision in *Re Floriculture International Ltd* for the proposition that proceedings taken in bad faith or circumstances yielding an inference that they were used to oppressively punish acts which in truth might technically a breach of criminal law but which contain no real vice and which can only be best handled under a process after their criminal process. Heavy reliance was placed on the decision *AHMED CIULLAM HUSSIN FAZAL KARNALI VS THE CHIEF MAGISTRATE [2006] eKLR* for the proposition that any state or the municipal court who fails to appreciate the importance of arbitration as a dispute resolution mechanism would do a lot of harm to the public interest.

11. On the choice of judicial review rather than injunction the *ex parte* applicant relied on the decision in *TAIB A. TAIB VS MINISTER FOR LOCAL GOVERNANCE* for its proposition that judicial review proceedings are designed to prevent the decision maker from continuing with the decision making process if the decision has not been made or to supervise the validity and implementation of the decision that has been made.

12. I find that in so far as the *ex parte* applicant has accused the police for engaging in debt collection, an allegation made on oath but not disputed by the Respondents who only filed grounds of opposition, the fact that the *ex parte* applicant has paid Kshs.500,000/- towards the payment of the sum paid as purchase price together with the fact that to the court to dispute between the parties is apparently a commercial transaction which should not invite that criminal action by the police and court process.

13. To this court, and the provisions of Section 193 Criminal Procedure Code notwithstanding, I find that the dispute between the parties although based on a commercial transaction may as well be a ground of an attack on the charges and it is best left for determination by the trial. In coming to this conclusion, I am guided by court of appeal in *David Kipruto Chingi & Another -vs- Director of Public Prosecutions [2016] eKLR* where the court said:-

**“...the guiding principle is that the chain of courts in the constitutional set up, running upto the court of Appeal, have the professional competence, and proper safety designs to resolve all matters turning on the technical complexity of the law”.**

14. In this matter the basis of the *ex parte* applicant's grievance is that the Prosecution is not acting in good faith by seeking to enforce civil remedies by criminal prosecution which to the *ex parte* applicant amounts to abuse of their constitutional powers. It is not contended that the trial court will not be able to apply the requisite standards of proof in deciding the criminal case.

15. It is additionally contended that attempting to amend the charge sheet to introduce the second charge of misuse of firearm which was not in the original charge sheet, the office of the Director of Public Prosecution while this matter was pending the Respondent had hatched a scheme to render the application herein infertile and in vain and amounts to violation of the *ex parte* applicants right to administrative action which is expeditious, efficient, lawful reasonable and procedurally fair. It is therefore contended that the *ex parte* applicant will not get justice.

16. I have said that no *scintilla* of evidence was brought forth on what founds the *ex parte* applicants fear that he will not be accorded fair trial and therefore justice. I am minded and well aware that every state organ, which all courts are, are bound by the provisions of Article 3 to respect, uphold and defend the constitution with all its principles and values. One of these values is the dictate that justice shall be done to all and human rights and fundamental freedoms contained in the bill of rights shall be respected and not be limited beyond the acceptable constitutional parameters. Indeed the right to a fair trial is one of the rights that is expressly declared as incapable of limitation howsoever.

17. If were to come to the level that the *ex parte* applicant's rights were to be proved to be violated or threatened with violation, it is not the monopoly of this court but also the duty of the trial court under article 23(2) as read with the constitution of Kenya (Protection of rights and fundamental freedoms) practice and procedure Rules, 2013, to address and where appropriate declare any such violation or threat to violation unconstitutional.

18. If I was wrong on this conclusion then I would seek reliance in the same decision by the court of Appeal in **David Kipruto Chingi (supra)** by itself relying on the Supreme Court decision in **Peter Nguge -vs- Francis Ole Kaparo & Others S C Petition No. 2 of 2012** when it was stated :-

**“We are of the view that the trial magistrate’s court has the professional competence to consider and evaluate any constitutional issues that may be urged and any applicable defence that may be raised.....it is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge”.**

19. Although, in this Judicial Review application, I am only concerned with the process and never the merits or demerits of the criminal case pending before the magistrate's court, it would only suffice that cogent evidence is placed before the court that there are malalties or factors other than the administration of criminal justice that have informed the decision to charge. All the allegations of coercion towards bribe and the high handed behavior alleged and levelled against the police and the prosecution are indeed very grave allegation which to this court may as well be a defence and a basis to challenge the constitutionality of the trial but are not sufficient to interfere with the constitutional mandate of a constitutional body like the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents. To issue the orders as prayed would be, to this court pre-emptive, presumptive and as it were, substitution of this courts discretion for that of the Directorate of Public Prosecution as a creature of the constitution. That would be inadvisable and undesirable as the constitutional design have allocated to each constitutional and state organs defined mandate and none of the organs should be eager or be seen to unduly supervise the other. Such caution has been administered by this court and even the Supreme Court. In **Diana Kethi Kalonzo and Another -vs- IEBC and 10 Others[2013] eKLR** the court said:-

**“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals are 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 court should not cross over to areas which Kenyans specifically reserved for other authorities”.**

See also Reference No. 2 of 2014 National Land Commission [2014]eKLR and Commission for the implementation of the constitution -vs- Speaker of National Assembly [2016]eKLR.

20. I fully associate myself with those pronouncements and add that the Directorate of Public Prosecution must be expected to be equipped with the requisite expertise to discharge its constitutional mandate under Article 157(6) of the constitution.

21. This is however not to say that in all situations the court will always fold its hands and let unabated demonstrated abuse of those mandates. When an abuse or improper motive is demonstrated the court will

have to answer to its duty to not only protect the functional operational and administration independence of the Directorate of Public Prosecutions but also safeguard the citizen to ensure that the spirit of the Constitution that the directorate performs its mandate in the interests of public good and the overall interest of justice to ensure that abuse of legal process in prosecutions is avoided.

22. The foregoing findings lead me to the conclusion that , the *ex parte* applicant is not rendered remediless by my decline to allow his application. Let him go before the trial court and prove the inadequacies and unreasonableness of the actions of the Respondents against him. Indeed the independence of the Office of the Director of Public Prosecution is not a blanket one without responsibilities. I am aware and appreciate that if the decision was unreasonable and unjustifiable abinitio, the *ex parte* applicant would be entitled to an acquittal with the attendant right to sue for damages in a civil court.

23. The application is therefore disallowed and ordered dismissal with costs.

Dated and delivered this 17<sup>th</sup> day of **October 2016**.

**HON. P.J.O. OTIENO**

**JUDGE**