



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 88 OF 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010.

AND

IN THE MATTER OF CRIMINAL CASE NO.4512 OF 2013 (KIBERA) BETWEEN REPUBLIC -VS- JACKLINE WAITHERA

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE CHIEF MAGISTRATE'S COURT AT KIBERA.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

JACKLIN WAITHERA.....EXPARTE

JUDGMENT

1. By notice of motion dated 27th March 2015 the **exparte** applicant Jackline Waithera seeks from this court orders:

1. That an order of prohibition be issued by the court directed against the Chief Magistrate's court Kibera from proceeding, conducting the trial, presiding or in any manner dealing with the charges laid or proceedings in criminal case No. 4512 of 2014 between **Republic V Jackline Waithera**, the **exparte** applicant.

2. That an order of certiorari be issued by the court removing into the High Court and quashing the decision made by the Director of Public Prosecutions in preferring and or directing the prosecution of Jackline Waithera the **exparte** applicant in the Chief Magistrate's Court Kibera in criminal case No. 4512 of 2014 between the Republic Vs Jackline Waithera.

2. The application is based on the grounds as set out in the statement of facts of the application for leave to apply dated 25th March 2015 and the ex parte applicant's verifying affidavit filed in court on 25th March 2015 sworn by the ex parte applicant.
3. Leave to institute these Judicial Review proceedings was granted by Honourable Odunga J on 25th March 2015 wherein the learned judge also ordered that the leave so granted shall operate as stay of prosecution of the ex parte applicant until the hearing and determination of the Judicial Review proceedings.
4. The ex parte applicant's case is that she was employed by an NGO called Joy Vision For Youth and Children International (Joytharc) on 21st July 2014 and was confirmed on 27th October 2014, earning a basic salary of shs 100,000 as a communications manager in the said NGO.
5. That the daily business of the said NGO were conducted by the directors of the organization.
6. That on 30th October 2014 while the ex parte applicant was engaged upon her duties, the police officers went to her and inquired from her the whereabouts of the Directors of the said NGO, and who they were.
7. That the applicant told the police officers that the Directors who are Samuel Mburu Njenga, Mutura Isaiah Kirewa and Irene Makena were attending a meeting and that they would return at 2.00pm.
8. That the police officers commanded the ex parte applicant to accompany them to the Nairobi Area Police Station where they booked her in the OB and held her in custody charging her with the offence of obtaining goods by false pretences contrary to Section 313 of the penal code.
9. That when she asked to be given copies of documents the prosecution were relying on, among the documents was a search conducted at the NGO Coordination Board showing the directors of the Joytharc as the ones she had given to the police.
10. That although she was facing charges related to obtaining goods by false pretences, she was only but an employee of the NGO and not even a signatory to any bank account.
11. That she was also not a signatory to any of the agreements for supply of goods/material to the Joytharc by the complainants in the criminal case.
12. That she complained to the CID Headquarters who promised to investigate further into the matter.
13. The applicant is concerned that the Directors of Joytharc have not been charged in court which she considers selective and discriminatory and in violation of the principles under Article 159 of the Constitution. She also claims that her rights under Article 50(2) of the Constitution had been violated as a result of the negative publicity that the case had been accorded.
14. The applicant also complains that the 2nd respondent Director of Public Prosecutions has violated Article 27 (1) of the Constitution by treating her differently from the Directors of Joytharc which treatment amounts to discrimination and that therefore her prosecution is meant to partially satisfy the complainants to get justice while shielding the real suspects and beneficiaries of the alleged offences which, in her view will not give the complainants any justice which is a travesty of justice and an abuse of the entire process.
15. The 2nd respondent opposed the notice of motion and filed replying affidavit on 30th October 2015 sworn by IP David Ochieng No.235115 attached to the CID special crime prevention officer in the matter.

16. The Inspector of Police deposes that on 6th August 2016 one Hezborn Omondi through the Cinative Enterprises Company Limited entered into an agreement for supply of goods to Joytharc NGO upon being introduced to the said NGO by the applicant herein but that later the goods were not paid for hence he reported to the CID for investigations and that investigations revealed that the said NGO did not exist as per the NGOs Coordination Board letter dated 18th November 2014 showing that the organization was not registered.

17. That the applicant herein is part of an intricate web of people who are out to defraud innocent people using the name or the organization that is Joytharc International and that the other persons involved had been charged in Milimani Criminal court for the offence of obtaining and forgery.

18. The 2nd respondent also contends that the letter of employment by the applicant is a forgery and is not signed, and contains a stamp of an organization Joy Vision for the Youth and Children International which was a registered entity but subsequently closed, as shown by letter dated 2nd December 2014 from the NGO's Coordination Board.

19. According to the 2nd respondent, they are still searching for the officials of the NGO to shed light on whether they are aware of the various fraudulent activities.

20. That more charges against the applicant were forthcoming and a consolidation of the criminal case facing the applicant and other accused persons who were already facing criminal trials.

21. In the 2nd respondent's view the applicant had not demonstrated any actual or threatened contravention of her constitutional rights by the respondent's instituting criminal proceedings against her. That the offences she is charged with are known in law and the prosecution has sufficient evidence to sustain the respective charges.

22. Further, that issues meant to vindicate the applicants should be canvassed in the criminal court and fairly determined, and not in the Judicial Review court.

23. In addition, it is contended by the 2nd respondent that the Judicial Review proceedings are frivolous and an abuse of the court process and meant to circumvent the criminal justice process.

24. Further, that the police did not act illegally or contravene any Code of Regulations, and neither did they act under the control or direction of any party: but that they were independently discharging their duties after conducting thorough investigations as mandated by Article 244 of the Constitution and the National Police Service Act, Sections 24 and 25 inter alia- to investigate crimes and apprehend offenders.

25. The 2nd respondent also contends that this application is based on deliberate concealment of, distortion and non disclosure of material facts leading to the subject criminal complaint, investigations and charges. And that it is in the interest of justice that the court should allow the trial court to proceed with the Kibera Criminal case No, 4512 of 2014 to its logical conclusion.

26. Both parties' counsels filed written submissions which they submitted on by way of oral highlights. The exparte applicant's submission were filed on 28th May 2015. They are dated 26th May 2015, and supported by a list of authorities filed on the same day whereas the 2nd respondent's submissions supported by authorities are dated 30th November 2015.

27. According to the exparte applicant, no reason has ever been given as to why the exparte applicant was charged and yet the likely beneficiaries of the complaint were left out and or have not been arrested or charged.

28. Reliance was placed on **George Joshua Okungu & Another Vs Chief Magistrate's court**

(ACC) Nairobi & Another [2014] e KLR where the court held:

“ the law is that the court ought not to usurp the Constitutional mandate of the Directors of Public Prosecutions of the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended ongoing criminal proceedings are in all likelihood bound to fail it has been held time and again , is not a ground that ought not to be relied on by the court to halt criminal process undertaken bonafide since the defence is always open to the petitioner in those proceedings.

However, if the petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of the process and are being carried out in breach of or threatened breach of the petitioner’s constitutional rights, the court will not hesitate in putting a halt so such proceedings.”

29. Further reliance was placed on **Republic Vs Attorney General Exparte Kipngeno Arab Ngeny, HCC Civil Application 406 of 2001** where it was held that:

“ A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”

30. In this case, the exparte applicant maintained that she was charged maliciously and in a discriminatory manner. That although the 2nd respondent charged her as the owner of the NGO, the evidence per the search clearly shows that she was an employee of the NGO and that she had annexed copy of a signed employment letter to her supplementary affidavit. That the letter of the NGO Coordination Board gives the names of officials and that the applicant is not one of them yet the Director of Public Prosecutions never looked for or arrested or charged the said officials of the NGO.

31. That the agreements for supply of goods was between the complainants and officials of Joytharc International hence her prosecution is malicious and discriminatory.

32. That the Director of Criminal Investigations Department in the letter dated 8th January 2015 clearly questioned why the applicant was charged in court yet she was not a bonafide official of the NGO but that the 2nd respondents have never acted upon the said letter which clearly shows that the Director of Public Prosecutions and the investigating officer are protecting people who benefited from the loot.

33. The applicant denied ever meeting the complainant and convincing him to supply goods to the NGO since the complainant in his statement says he was introduced by Francis Otieno Okungu to the NGO and that the contract for supply to the NGO was signed by the said Francis Otieno and not the complainant herein.

34. It was further submitted that Joytharc International is an acronym for Joy Vision for Youth and Children International hence the search for particulars of Joytharc with the NGO Board could not show the registered NGO since the NGO was registered in the full names.

35. It was submitted that the 2nd respondent abused his discretion to charge employees of Joytharc instead of the NGO.

36. Relying on **Kuria & 3 Others V Attorney General [2002] 2 KLR 69** the applicant submitted that the prosecution have shielded the real beneficiaries of the offence and that the court should be guided

by the principles set out in the George **Joshua Okungu & Another** case on the situation that the court is empowered to interfere with exercise of discretion.

37. It was submitted that based on the case of **Isaac Gathungu Wanjohi & Another Vs Director of City Planning, CCN & Another [2014] e KLR**, where the court discusses unreasonable and irrationality, and that it had been demonstrated that the trial of the applicant is irrational, illegal and laced with procedural impropriety.

38. Reliance was also placed on Judicial Review 471/2013 **Josephine Akoth Onyango & Another Vs Director of Public Prosecutions & Others** where Majanja J held that the Director of Public Prosecutions was abusing legal process and his powers.

39. Further reliance was placed on **Pastoli Vs Kabale District Local Government Council & Others [2008] 2 EA 300** on the Scope of Judicial Review; and **Joram Mwenda Guantai V The Chief Magistrate's Court Nairobi CA 228/2003** on the jurisdiction of the High Court to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression.

40. The applicant also relied on **Stanley Munga Githunguri Vs Republic [1985] KLR 91** where the court held that if a prosecution amounts to an abuse of the process of the court and that the High Court has inherent power and duty to secure fair treatment for all persons who are brought before the court or subordinate court to prevent abuse of the court process.

41. In the 2nd respondent's submissions filed on 30th November 2015, it was contended that the applicant was correctly charged as she belongs to the Joytharc Organization which is fictitious and that the name of the organization has been used to defraud people of supplies.

42. It was submitted that an order of prohibition is discretionary and is only tenable where a public body or official acted in excess of their powers and as such the order requires the public body to cease from performing a certain act.

43. Reliance was placed on **HC Miscellaneous Application 179/2012 Republic vs Chief Magistrate's Court Milimani & 2 Others Exparte Tusker Mattress Ltd** where it was held that 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.

44. Further reliance was placed on **KNEC Vs Republic Exparte Geoffrey Gathenji Njoroge & 9 Others** which articulates on when an order of prohibition is to issue. It was submitted that it is not the obligation of the court to supervise how investigations are conducted so long as they are not in contravention of any law.

45. That in this case, the applicant has not demonstrated an illegality, irrationality or procedural impropriety of the decision by the respondent to justify intervention by the court.

46. That the applicant has been charged with offences which are known in law and the criminal proceedings will be conducted within the ambit of the law as safeguarded by the constitution.

47. That the NGO was deregistered on 30th April 2014 and yet the letter of employment is dated October 2014 yet offences were committed in August 2014. Further, that James Mwangi has also been charged hence there is no discrimination.

48. That it is the Director of Public Prosecutions who decides who to charge based on the evidence gathered in investigations. Further, that it is the trial court to decide the veracity of the charge sheet and the Director of Public Prosecutions can amend the charge sheet hence there was no abuse of process or procedural irregularity.

49. It was also submitted that an order of prohibition is untenable as crimes are being committed and that neither is certiorari orders available as there is no unconstitutionality or breach of natural justice.

50. It was submitted that the applicant herein used a questionable employment letter to induce unsuspecting suppliers who lost millions of shillings.

51. Reliance was placed on **KNEC V Republic** (supra) on when an order of certiorari will issue.

52. On the whole it was submitted that this application is an abuse of the court process hence it should be dismissed.

53. In a rejoinder Mr Moindi counsel for the applicant maintained that the people charged in court are employees of the organization and that in the petition before Onguto J, the petitioner is an employee. That employees would not know whether the NGO was deregistered. Further, that matters of finance are handled by officials of the organization and that this court has power to protect abuse of power. It was submitted that the applicant will suffer trial while the culprits are walking free.

Determination

54. I have carefully considered the applicant's notice of motion, grounds, depositions and exhibits. I have also considered the responses by the 2nd respondent, depositions and exhibits. I have given equal consideration to the parties advocates rival submissions as filed and as highlighted orally in court.

55. The scope of Judicial Review remedies of certiorari, mandamus and prohibition was the subject of the Court of Appeal decision in the most quoted case of **Kenya National Examinations Council Vs Republic Exparte Geoffery Gathenji Njoroge & Others CA 266/1996 [1997] e KLR** wherein the court held inter alia:

“ prohibition looks at the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, be to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High court of Justice, directed any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is on the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly, it will issue, to the end that justice may be done, in all cases where is a specific legal right or no specific legal remedy for enforcing that right, and it may issue in cases where, although there an alternative legal remedy; yet that mode of redress is less convenient, beneficial and effectual.....only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter.”

56. From the above decision which has been applied with approval in many succeeding cases seeking for judicial review remedies, it is clear that an order of prohibition can only prevent the making of a

contemplated decision.

57. In other words, prohibition will not issue in the nature of a declaration or injunction but is directed at a contemplated action.

58. In addition, prohibition cannot quash a decision which has already been made but it issued by the High Court to the inferior body or tribunal forbidding that body or tribunal to continue proceedings therein in excess of its jurisdiction or in contravention of the law or constitution; and lies where there is exercise of excess jurisdiction or absence of jurisdiction and also for a departure from the cause of the rules of natural justice.

59. On the other hand certiorari is issued to remove into the High Court and to quash a decision of a body or inferior tribunal which is made in excess of jurisdiction, without jurisdiction or where the rules of natural justice are not adhered to in reaching the decision.

60. Judicial Review, it must be appreciated, does not concern itself with the merits of the decision itself but with the issues such as whether the procedure followed in arriving at the decision was in accordance with the law and Rules of natural justice, whether the decision as taken is lawful, rational, reasonable; whether the decision maker took into account relevant matter or did take into account irrelevant matters.

61. The court is exercising Judicial Review jurisdiction is cautioned not to act as a Court of Appeal over the decision of the inferior body, 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 (See **Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd CA No. 185 of 2001 (CA)**).

62. In **Republic of Kenya Revenue Authority exparte Yaya Towers Ltd [2008] e KLR**. 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 it.

63. That it is important to remember that in every case 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 the opinion of the Judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. (see **Halsbury's Laws of England 4th Edition VOL (1) (1) paragraph 60**).

64. In **Exparte Waldron [1986] 1QB 84 at 825 G-825H** Glidwell L.J. stated that the court should always interrogate relevant factors to be considered deciding whether the alternative remedy would resolve the question at issue fully and directly.

65. In **Commissioner of Lands V Hotel Kunste CA 234/1995** the Court of Appeal held that where the determination of the dispute before the court requires the court to make a resolution on conflicting issues of fact, that is not a suitable case for Judicial Review since Judicial Review jurisdiction is a special jurisdiction which is neither civil nor criminal. Judicial Review is a discretionary remedy and is not guaranteed hence the court may refuse to grant them even when there exists requisite grounds since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles.

66. Where the issue of Judicial Review remedy will cause administrative chaos and public inconvenience or where the object for which the application is made has already been realized, or where there has been delay or where the public authority or body has done all that it can be expected to do to fulfill its duty or where the remedy is not necessary or where its path is strewn with blockage, the

court will not issue Judicial Review.

67. The *ex parte* applicant in this case claims that she was an employee of Joytharc International which is an acronym or Joy Vision for Youth and Children International, which is a non Government Organization. That she was not an official or director of the said organization and that while she was engaged in her said employment, she was arrested and arraigned in court charged with 2 counts of the offences of obtaining money by false pretences contrary to Section 313 of the Penal Code. She claims that although the prosecution claims that she received some supplies from the respective complainants namely **Cinative Enterprises Company Limited and Facelift Enterprises Limited** by falsely pretending that she was in a position to pay for the named goods valued at shs 8,223,500 and shs 4,755,500 respectively for each count, she could not have received such goods with a promise to pay since she was not an official of the organization and that the search from NGO Board is clear that the officials of the organization dated 2nd December 2014, the officials are named as Samuel Mburu Njenga as chairman; Mutura Isaiah Kirema who is the secretary and Irene Makena who is the treasurer.

68. She further claims that the decision to charge her and not the official of the organization is selective and discriminatory and therefore in violation of Articles 27 and 50 of the Constitution, is irrational unreasonable and oppressive.

69. Further, that the DCI by his own letter dated 8th January 2015 to the officer in charge Special Crime Prevention Unit questioned why the applicant was the one charged yet she was the bona fide official of **Joytharc International a.k.a Joy Vision for Youth and Children International**. He urged that the investigating officer be prevailed upon to trace the official of the organization and record their statements in respect of the allegations of fraud leveled against them. It is therefore claimed by the applicant that there was absolutely no foundational basis upon which she was being prosecuted, which prosecution she believes will not achieve any justice for the complainants but that it is meant to shield the perpetrators of the crime.

70. On the other hand, the 2nd respondent Director of Public Prosecutions contends that the applicant is part of a team that are involved in defrauding innocent people of their properties/goods in that although there is an allegation that **Joytharc International** is the same as Joy Vision for Youth and Children International, in reality, the two are different organizations and that whereas the latter was registered with NGOs Coordination Board as per the letter of 2nd December 2014, with the postal office address and physical address being Box 101764-00201 Nairobi situate at Hurlingham –Kiambu East Nairobi North, Joytharc International according to the NGO Board letter dated 18th November 2014 was not registered as an NGO with the NGO Coordination Board. In addition, that the organization that was registered with the NGO Coordination Board was deregistered as per the newspaper advertisement annexed, showing that the organization was deregistered on 30th April 2016 for non compliance with the NGO's Coordination Act No. 19/1990 and the matter concerning allegations of criminal nature against the organization had been referred to the Nation Police Service for investigations.

71. Further, that the applicant belongs to a web, part of whom had been charged with similar offences and that they even use the Spring Valley address and adverse tenders to win the confidence of unsuspecting suppliers. Further, that the police are in the process of tracing the officials of the said non registered organization with a view to preferring charges against them.

72. It was contended that the other conspirators had also filed petition No. 563/2015 seeking to stop their prosecuting which involves a complex fraud against innocent business persons.

73. In addition, the Director of Public Prosecutions claims that it will be in the interest of justice of the applicant faces the law since there is evidence linking her to the complex web of fraudsters in order to vindicate the innocent complainants and the several pending cases would be consolidated since they form part of the same transaction.

74. It is also contended that the decision to charge the applicant and others was informed by the evidence showing her participation and connection with the conspiracy and in the public against such intricate web.

75. From the above rival opposing positions, the question that must answer is whether the Judicial Review remedies of certiorari and prohibition lie.

76. The power to prosecute persons who are suspected to have committed culpable offences is vested in the Director of Public Prosecution by Article 157 of the Constitution and Section of the Office of Director of Public Prosecutions Act, 2014.

77. In **Associated Provincial Pictures Houses Ltd V Wednesbury Corporation [1947] I KB 223** and **Wainaina V Attorney General [2008] KLR** the courts held that courts should not interfere with the exercise of discretionary powers unless certain conditions are met. And in **Githunguri V Republic** (supra). It was held that the onus was on the petitioners to prove that the Attorney General exercised his power arbitrary, oppressively or contrary to public policy.

78. As was held in the **Githunguri V Republic** (supra) case, the power to institute criminal proceedings against any person by the Director of Public Prosecutions in exercising the powers conferred by this Article, shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

79. For this court to intervene and interfere or check the free exercise of the independence and discretion of the Director of Public Prosecutions in charging persons with criminal offences, the applicant must show that there is breach of the Constitution and the law. In **KCB Ltd & 2 Others V Commissioner of Police & Another Nairobi Petition No. 218/2011**, the court held that:

“ The office of Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.

80. In this case, there are allegations of several unsuspecting suppliers being defrauded by Joytharc International which is not Joy Vision for Youth and Children International (Joytharc) which is not registered as an NGO under such name which is allegedly being used to defraud business people.

81. On the other hand, the organization by the name Joy Vision for Youth and Children International (Joytharc) which was initially registered with the NGO's Coordination Board was deregistered in April 2014 after suppliers complained that the organization was defrauding them. The NGOs Coordination Board confirmed that the latter organization had its registered offices in Hurlingham, Nairobi.

82. However, the court notes that the material availed by the ex parte applicant in this case show that the organization going by the Acronym Joytharc operated as such Joytharc International from Spring Valley Ridge/off Peponi Road, Westlands and its postal address is given as Box 9075-00100 Nairobi Kenya and it send out an advertisement for prequalification of bids for supply of a variety of goods.

83. It is not stated when the organization moved from Hurlingham to Spring Valley Ridge/off Peponi Westlands but what is clear is that there are particulars of the officials who were registered as Chairman, Treasurer and Secretary of the organization which was deregistered on 30th April 2014.

84. The ex parte applicant herein claims that she was employed as Communications Manager of the said organization **Joy Vision for Youth and Children International (Joytharc)**, on a six months contract at a

monthly basic salary of shs 100,000 from 27th October 2014 to 27th April 2015.

85. However, in paragraph 2 of the applicant's affidavit in support of her case herein, she deposes as follows:

“ That I was employed by a nongovernmental organization by the name Joy Vision for Youth and Children International (Joytharc) on 21st July 2014 and was confirmed on 27th October 2014.”

86. The exparte applicant then attached an annexure marked “JW1” letter of confirmation in her employment. However, in the said letter to confirm employment as later annexed to her supplementary affidavit duly signed by the Board of Trustees of the Organization, the first paragraph reads:

“ with reference to your offer (appointment letter dated 27th October 2014 on the basis of which you joined this company as a Communication Manager, We are pleased to inform you that you have been successful in your probation and your services with our organization.....”

87. In my humble view, a letter of offer/appointment dated the same day as the letter of confirmation in employment and claiming that that the employee has successfully completed her probationary period which period is unspecified is highly suspect.

88. Although the applicant is not registered as an official of Joytharc, it is highly improbable, from the letter of 27th October 2014 that she was an ordinary employee thereof and therefore the police in carrying out their investigations concerning alleged fraud and conspiracy to defraud and or obtaining money by false pretences, cannot be said to be acting illegally, oppressively and arbitrarily.

89. In addition the letter of the Director of Criminal Investigations dated 8th January 2015 does not exonerate the applicant from any culpability. It simply points out the status of the applicant in the organization- not being an official on the face of it and calling on the officer in charge of Special Crime Prevention Unit to prevail upon the investigating officer to trace the officials of the organization to record statements in respect of the allegations of fraud leveled against them. That letter does not conclude that there is no evidence linking the applicant herein to the offences charged.

90. The Director of Public Prosecutions has clearly stated that the case involves an intricate web of fraudsters who use the name of the organization to defraud unsuspecting business people. Fraud is an intricate offence. It must be left to the experts to investigate and if the applicant is found innocent, she will be vindicated.

91. The applicant has asked the court to find that the evidence shows that Hezborn Omondi was introduced to the Joytharc by Francis Otieno Okungu. The statement of Hezborn also shows that Jacky- the applicant herein told him that he would be paid for the supplies within 14 days of supplying the items and that when the organization defaulted, he went to inquire and Jacky the applicant herein told him to make a request for an early payment which he did make but that no payments have been made to him ever since.

92. It is not denied that the organization was deregistered by the regulatory body-NGO Coordination Board on 30th April 2014 and that as at the time the alleged fraudulent activities were taking place, the organization was non- existent. However, it is clear that despite the deregistration, the organization continued operating and receiving supplies from people on the belief that they would be paid.

93. From the affidavit evidence and annexures, placed before this court, I am unable to find that there was absolutely no foundational basis upon which the Director of Public Prosecutions made a decision to charge the applicant with the named offences.

94. In addition, I am unable to find that the Director of Public Prosecutions, at the time that he charged

the applicant with the named offences, he acted in a selective and or discriminatory manner thereby violating Articles 50 and 27 of the Constitution, for reasons that the Director of Public Prosecutions has clearly explained that at that time investigations were still ongoing to trace the officials of the organization.

95. The fact that the officials of the organization were at large at the time of charging the applicant, since, as stated in the investigating officer's affidavit, the organization's offices were closed from 17th December 2014 with a notice stating that they would reopen on 15th January 2015 which never materialized; does not in itself show any selective/discriminating action on the part of the investigating officer or the Director of Public Prosecutions.

96. The applicant did not, in her affidavit depose that she knew as a fact that the said "officials" were readily available but that the Director of Public Prosecutions and the police had deliberately refused to arraign them in court.

97. The matter of selective and discriminatory prosecution has to be examined on the facts of each case. No two cases are the same and this case can be distinguished from the **George Okungu case** in that in that case, the other suspects were readily available and not at large unlike in the instant case.

98. The 2nd respondent's further affidavit sworn on 14th March 2016 is clear at paragraph 5 that there are other co-conspirators charged with similar offences and that they had also filed Petition No. 563 of 2015 and further that they are facing charges in Kibera criminal 4512/2014 which the prosecution was contemplating consolidation.

99. This case, in my humble view, raises serious conflicting issues of fact and as was held by the Court of Appeal in **Commissioner of Lands Vs Hotel Kunste (supra)**, where the determination of the dispute before the court requires the court to make a resolution of conflicting issues of fact, that is not a suitable case for Judicial Review since Judicial Review jurisdiction is special jurisdiction which is neither civil nor criminal.

100. From the facts of this case, it is clear that the applicant is urging this court to delve into the depths of the matter and determine the merits of the case and or to assess the evidence on record in the subordinate trial court to determine its sufficiency or veracity, to sustain a charge or prosecution of the exparte applicant.

101. That is not within the purview of this court and to do otherwise in essence will be reviewing the evidence which is due for adduction in the trial court and therefore act as an appellate court in Judicial Review proceedings.

102. In the instant case, this court is unable to find evidence of malice on the part of Director of Public Prosecutions in preferring charges against the exparte applicant. I am also unable to find any irrationality, illegality or any procedural impropriety on the part of the Director of Public Prosecutions.

103. The applicant has not demonstrated on the affidavit evidence available, that she will be prejudiced by the pending trial or that she has been denied the right to a fair hearing or fair trial by the maintenance of the criminal charges against her.

104. There is also no evidence that the applicant's prosecution is malafides and that it is being undertaken with the sole intention of shielding the real perpetrators of the crime since from the affidavit evidence on record, it is clear that the matter involves an intricate wide web of fraudulent activities by persons claiming to be operating an NGO which is even deregistered.

105. There is also no evidence that the Office of Director of Public Prosecutions has in prosecuting the applicant breached any of the principles espoused in the Office of Director of Public Prosecutions Act No. 2 of 2013 namely: promotion of public confidence in the integrity of the office; promotion of constitutionalism; impartiality; rules of natural justice; the need to discharge the functions of the

office on behalf of the people of Kenya and observance of democratic values and principles.

106. The Office of Director of Public Prosecutions is mandated under Section 5 of the Office of Director of Public Prosecution Act to among others:

“ implement an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice and the effective protection of citizens against crime.”

107. From the affidavit evidence on record, this court is unable to find that the Director of Public Prosecution’s decision to prosecute the applicant amounts to abuse of court process and or abuse of the legal process.

108. Further, I am unable to find that there is any evidence that the Director of Public Prosecutions is being manipulated to act impartially by charging the applicant and leaving out the real perpetrators of the crime.

109. This court would not hesitate to intervene and interfere with the decisions of the Director of Public Prosecutions where such decisions are illegal, irrational, unreasonable and or made with procedural impropriety and or where he is manipulated to shield the wrongdoers.

110. I find, on the evidence availed, that this is not one of those clear cases where this court would exercise its discretion in favour of the applicant to tamper with the powers of the Director of Public Prosecutions which have been exercised in making the decision to prosecute the applicant herein.

111. The highly disputed facts in the matter call for in-depth interrogation by the trial court to determine the veracity of the evidence gathered by the investigating officer and not for review by this court.

112. In the end, I find that the exparte applicant’s application dated 27th March, 2015 for Judicial Review orders of certiorari and prohibition is not merited and I proceed to dismiss it without any order as to costs.

Dated, signed and delivered in open court this 11th day of October 2016.

R.E. ABURILI

JUDGE

N/A for the exparte applicant

N/A for the respondents

CA: Adline