



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JR APPLICATION NO. 243 OF 2014

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

BETWEEN

REPUBLIC.....APPLICANT

AND

THE DIRECTOR OF PUBLIC

PROSECUTIONS (DPP).....1ST RESPONDENT

THE INSPECTOR GENERAL OF THE NATIONAL

POLICE SERVICE (GNPS).....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

***EX PARTE:* GORDON NGATIA MURIUKI**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 2nd July, 2014, he ex parte applicant herein **Gordon Ngatia Muriuki** seeks the following orders:

- 1. An order of prohibition do issue to prohibit the 2nd Respondent from arresting or charging the Applicant with a criminal offence.**
- 2. Costs of the suit be borne by the Respondents.**

Applicant's Case

2. The Motion was supported by a verifying affidavit sworn by the applicant on 18th June, 2014.

3. According to the ex parte applicant, on or about July 2013, he was called by the officers from the Directorate of Criminal Investigations at their Headquarters Kiambu Road and questioned with respect to purported lubricant/petroleum products stolen from Shell Petroleum Company. According to him, he

recorded a statement to the effect that he had no knowledge of the same and left all his details and contacts with them and was allowed to go home and never went into hiding or evaded the Police in any manner.

4. He deposed that in late 2013 he learnt that some people had been charged in Mombasa Court with theft of petroleum products in Shell Petroleum Company amongst whom was **Musa Zuberi** whom the applicant used to lend money to, to be refunded with an interest.

5. The applicant deposed that on Friday the 25th day of April 2014, he upon reading **Daily Nation** Newspaper, at page 57, he was shocked and disturbed that the Economic Crime Unit under the Directorate of Criminal Investigations had placed an advert together with his picture and Identity Card Number indicating that he was a wanted person for an offence that he had no knowledge of. In his view the said advert was actuated by malice and bad faith since he had given his statement at Directorate of Criminal Investigations Headquarters way back in July 2013 and had not been notified that he was required to attend court or appear at their offices. He deposed that as he had had not refused to appear before the Economic Crimes Unit of the Criminal Investigation Department, the publication of his photograph and details in the media as a wanted person violated his fundamental rights and freedoms. Further when the said advert was published, he was immensely affected as his friends and business partners depicted him a wanted criminal.

6. Further, the applicant deposed that the 2nd Respondent moved to court under Nairobi Chief Magistrates Criminal Application No. 632 of 2014 seeking a warrant of arrest against him on allegations that the applicant was in partnership with other persons in a crime ring involved in the theft of transit goods and pursuant thereto a warrant of arrest against him was issued by the subordinate court on the 16th day of April, 2014 which action according to the applicant was actuated by other motives.

7. Aggrieved by the action, the applicant vide High Court Petition Number 207 of 2014 challenged the warrant of arrest that was issued against him on the ground that there was no legal basis for the same as the 3rd Respondent had not looked for him which petition was allowed and the warrant of arrest set aside.

8. Despite that he deposed the police were still looking for him with the intention of arresting and detaining him hence he was very apprehensive of his safety.

Respondent's Case

9. In reply to the application, the Respondents filed a replying affidavit sworn by Chief Inspector **Joseph Wambua** on 14th August, 2014.

10. According to him, the above matter was reported at Directorate of Criminal Investigations Headquarters by one **Philip Wambua Kavevi**, the Security Manager of VIVO Energy Kenya Ltd on 29th March 2013 which prompted the immediate commencement of the investigations by their office. The said Vivo Energy Kenya Ltd (formerly Shell Company Ltd) is a company that blends different quantities of petroleum and petroleum products i.e. lubricants among other oil products at their Mombasa depot and sell locally or transport to other depots in Nairobi, Eldoret and Kisumu for sale and had contracted M/s AO Bayussuf Transporters as a transport agent for their transit goods/products from Mombasa Depot to Nairobi Depot.

11. The Applicant, according to him was an employee of the Said AO Bayussuf as a truck driver and was charged with the duty of transporting various kinds of lubricants from Mombasa Vivo depot to Nairobi depot before he was dismissed summarily from employment.

12. According to the deponent, the complainant stated that around March 2013, a forensic audit was conducted KPMG on behalf of VIVO Energy Ltd on the lubricants transported from Mombasa to Nairobi depot and it was discovered that on diverse dates between June 2010 and 14th March 2013, assorted lubricants of different quantities valued at Kshs 450 million had been moved from their Mombasa Depot

to Nairobi but the said products were discovered to have never reached their intended destination (Nairobi Depot) and it was alleged that the said products were diverted on the way to unknown destination for sale.

13. As part of the team, the deponent deposed that he was directed to take over investigations which they undertook to investigate the internal involvement of the Vivo Staff, the involvement of the drivers who had been assigned to transport the goods from Mombasa to Nairobi and did not deliver the same as expected and establish other persons who might have taken part in the illegal handling and disposal of the goods.

14. The said investigations, according to him revealed that under the specified period, goods worth Kshs 450,208,293/= destined for Nairobi were stolen and never reached Nairobi depot; that several AO Bayussuf trucks' were allowed into Mombasa depots' loading yard/bay to be loaded with the said lubricants to be transported to Nairobi; that VIVO warehouse staff conspired with the truck drivers and the warehouse clerk at Nairobi terminal to falsify the acknowledgement of the documents as if the goods were actually received knowing too well that the same had been diverted and sold along the way; that the Applicant was once employed as a driver at A O Buyussuf and that before his dismissal on grounds that he occasioned unexplained loss, he was assigned the duty to transport similar goods to Nairobi and other towns.

15. Further investigations, it was deposed revealed that the Applicant was a director with Ekey Biometrics and as a director he was in partnership with other suspects before court charged before CMS Mombasa vide CR 342/172/2013 CF 2900, 2901, 2902, 2903. He added that the said investigations through banking institutions and the Registrar of Companies further indicated that the Appellant had in his accounts suspiciously transacted with the other suspects especially one **Japheth Omboko** (former employee of VIVO Energy Kenya Ltd) and **Zuberi Musa Raloo** who are before court and that such transactions had direct or indirect link with the stolen lubricants.

16. It was contended that efforts to reach out to the Applicant through the numbers provided inviting him for an interview for the purpose of shading more light of the given transactions and even a search for him at his house in Utawala were fruitless as it was found that he had relocated to unknown place. It was further found that the Applicant was a licensed firearm holder but as a result of his criminal activities, the Director of the Directorate of Criminal Investigations Department directed that the Applicant be investigated for suspicious circumstances under which he was licensed to own a firearm given that as he was not vetted as required by law.

17. The deponent therefore averred that in view of all the above events, they went to court and applied to be issued with warrants of arrest vide Misc. CR. Application No. 632 of 2014 which was granted on 14th April 2014 by Chief Magistrate's Court, Milimani. However, on the 14th day of May, 2014 the Hon. Judge discharged the said warrants of arrest on grounds that the Respondents did not disclose the facts of the offence for the Hon. Magistrate to entitle it to the warrants sought. In the deponent's view, the order by **Hon. Justice D.S Majanja** was with regard to the arrest warrant that was issued by the Nairobi Chief Magistrate's court criminal Application No. 633 of 2014 and not for subsequent arrest warrants. In any event on the 7th May 2014 the **Hon. Justice D.S. Majanja** ordered the Applicant to attend to the police as and when required, which order the Applicant wholly ignored and or failed to satisfy without reasonable justifications thereof.

18. In the result they subsequently applied to court for fresh arrest warrants to be issued and the same were issued on the 23rd May 2014 but had not been effected as efforts to trace the Applicant were been futile.

19. It was the deponent's position the Applicant herein is well aware that he is a principal suspect and in any case the Respondents are willing to furnish the Applicant with all the relevant documents and witness statements in order for him to prepare for his trial. According to him, the Applicant herein intended to steal from the complainant.

20. It was therefore contended that the police did not act illegally or contravene any code of regulation;

and neither did they act under the control or direction of any party: but were independently discharging their duties after conducting thorough investigations as mandated by Article 244 of the Constitution of Kenya, 2010 and the ***National Police Service Act***, Section 24 and 35, inter alia mandates the police with the investigations of crimes and apprehension of offenders.

21. To the Respondents, this application is based on deliberate concealment, distortion and non-disclosure of material facts made with the latent intent to mislead the honourable court as to the true facts leading to the subject criminal complaint, investigations and charges as it is manifestly clear that the Respondents acted within their respective mandates under the relevant establishing legislation and in the circumstances, it cannot be said that the actions of the Respondents were in breach of the mandate vested upon them.

22. Since in his view, the Applicants' application dated 18th June 2014 and lacked merit he urged the Court to dismiss the same and to remit the matter to the trial court which is equipped to deal with the quality and sufficiency of evidence gathered in support of the charge preferred against the Applicant as the arrest and charging of the Applicant as a suspect therefore not unconstitutional.

Determinations

23. 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. 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. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **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**

24. The applicants are seeking an order of prohibition to prohibit the 2nd Respondent from arresting or charging the Applicant with a criminal offence. If the Court was to grant the order in the manner sought it would mean that the applicant would in effect be granted permanent immunity from being arrested and prosecuted with a criminal offence. Such an order cannot be granted by any Court of law as the same would be an illegal order.

25. I have considered the grounds upon which the applicant has sought judicial review herein. The applicant contends that since the Court had set aside the earlier warrants of arrest the Respondent should not look for him. In my view where the Court sets aside warrants of arrest on procedural irregularities, there is no bar to fresh warrants being sought and issued as long as the same are procedurally applied for. In this application, the applicant does not seek to have the warrants against him quashed. There is similarly no allegations made that the process leading to the issuance of the said warrants was defective. In the premises there is no basis upon which this Court can fault the issuance of the said warrants.

26. In my view if the applicant has any issues touching on his criminal culpability the same ought to be raised before the trial court. It must always be noted that judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence to the complaint is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant to raise before the trial court which is better placed to evaluate the evidence and arrive at an informed decision.

27. In Meixner & Another vs. Attorney General [2005] 2 KLR 189, the Court of Appeal expressed itself as hereunder:

“The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

28. The duty and mandate of the police was appreciated in Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR where it was held:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

29. It is therefore clear that whereas the discretion given to the 3rd respondent to investigate criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt. However, it must be emphasised that judicial review applications do not deal with the merits of the case but only with the process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the powers of the police by halting otherwise proper complaints made before them. In this case, it is admitted even by the applicants that fraud may have been committed against innocent third parties. If what the applicants mean by harassment is the investigation of the said complaints, then this Court would be abusing its supervisory jurisdiction by granting the orders sought.

30. It is therefore clear that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements. The 3rd Respondent has enumerated the facts which led him to undertake the investigations in question and to seek statements from the applicants. It is not the mandate of this Court in these proceedings to make a finding as to the merit of the decision.

31. It is not for the Court in judicial review proceedings to minutely examine the nature of the evidence in possession of the prosecution in order to determine whether or not that evidence will mount a conviction. The decision whether or not to commence a criminal proceeding is at the discretion of the Director of Public Prosecution and whereas that discretion must be exercised bona fide and ought not to be abused, concrete evidence must be presented before the Court in order for the Court to interfere with the exercise of the discretion. An order of prohibition is an order of serious nature and cannot and should not be granted lightly.

32. In this case there is no allegation that the trial court will not be able to ensure that justice is meted to the parties before it. In fact, it is the court’s view, without deciding, that the allegations made by the ex

parte applicants herein, if true, may well found a *bona fide* defence to the offence with which he is intended to be charged and the mere fact that he has a defence to the intended charge is no ground for prohibiting the criminal trial from being instituted.

33. Having considered the material before me I am not satisfied that a case has been made out by the applicant to warrant the grant of the orders sought herein. The *ex parte* applicant is at liberty to defend himself in the lower court where he will be an opportunity afforded to challenge the veracity of the evidence against him. At this stage I cannot say with certainty that the intended criminal process has been commenced *mala fides* or with ulterior motives. If that evidence was to come out in the course of the proceedings, the *ex parte* applicants would still be at liberty to institute appropriate judicial proceedings. As was held by **Kriegler, J** in **Sanderson vs. Attorney General-Eastern Cape 1988 (2) SA 38:**

“Even if the evidence he had placed before the Court had been more damning, the relief the appellants seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far reaching. Indeed it prevents the prosecution from presenting society’s complaint against an alleged transgressor of society’s rules of conduct. That will seldom be warranted in the absence of significant prejudice...Ordinarily, and particularly where the prejudice alleged is not trial related, there is a range of “appropriate” remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay.”

34. Similarly as was held in **Jago vs. District Court (NSW) 106:**

“An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But 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.”

35. Having considered the issues raised in this application it is my view and I so hold that this application has no merit.

Order

36. Accordingly, the order that commends itself to me and which I hereby make is that the Notice of Motion dated 2nd July, 2014 be and is hereby dismissed with costs.

Dated at Nairobi this 25th day of February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Ngugi for Mr Mutei for the Applicant

Miss Spira for the Respondent

Cc Patricia