



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC CIVIL APP NO. 36 OF 2015

**IN THE MATTER OF: AN APPLICATION BY GILBERT OKERO OMBACI FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI AND
PROHIBITION**

IN THE MATTER OF: THE ADVOCATES ACT, CAP 16, LAWS OF KENYA

AND

IN THE MATTER OF: THE PENAL CODE, CAP 63, LAWS OF KENYA

AND

IN THE MATTER OF: THE LAW REFORM ACT CAP 26, LAWS OF KENYA

BETWEEN

**REPUBLIC.....
.....APPLICANT**

AND

**THE DIVISIONAL CRIMINAL INVESTIGATION OFFICER, LAIKIPIA EAST
DIVISION....1ST RESPONDENT**

**THE CHIEF MAGISTRATS COURT AT NANYUKI.....2ND
RESPONDENT**

AND

**GILBERT OKERO OMBACHI.....EX-PARTE
APPLICANT**

RULING

By a chamber summons expressed under Articles 20, 21, 22, 23, 25, 27, 47 and 50 of the constitution of Kenya 2010 and under order 53 Rules 1 & 2 of the Civil Procedure Rules 2010 dated 29th June 2015 filed in this court the same day, the *ex-parte* applicant herein, **Gilbert Okero Ombachi** moved this honourable court seeking the following orders:-

- i. Leave be granted to the *ex-parte* applicant herein to apply for an order of certiorari directed at the Chief Magistrate's Court at Nanyuki to bring to the High Court and quash the decision of the said Court to admit charges and to continue further criminal proceedings in Nanyuki Criminal Case number 508 of 2015, **Republic vs Gilbert Okeru Ombachi** against the applicant **Gilbert Okeru Ombachi** for purported offences of conspiracy to defraud contrary to Section 317 of the Penal Code and obtaining money by false pretences contrary to Section 313 of the Penal Code, Cap 63, Laws of Kenya.
- ii. Leave be granted to the applicant to apply for an order of prohibition directed at the Chief Magistrates Court at Nanyuki prohibiting the said court from continuing with further criminal proceedings in Nanyuki Criminal Case number 508 of 2015, **Republic vs Gilbert Okeru Ombachi** against the applicant **Gilbert Okeru Ombachi** for purported offences of conspiracy to defraud contrary to Section 317 of the Penal Code and obtaining money by false pretences contrary to Section 313 of the Penal Code, Cap 63, Laws of Kenya.
- iii. The Leave granted herein to operate as a stay of any further criminal proceedings in Nanyuki Criminal Case No. 508 of 2015-**Republic vs Gilbert Okeru Ombachi** against the *ex-parte* applicant **Gilbert Okeru Ombachi** for purported offences of conspiracy to defraud contrary to Section 317 of the Penal Code and obtaining money by false pretences contrary to Section 313 of the Penal Code Cap 63, Laws of Kenya until the determination of this application for the reliefs sought.
- iv. The costs of the application be provided for.

The application is supported by the grounds stated in the statement filed therewith and the annexed verifying affidavit of the *ex-parte* applicant. The applicant was granted leave to apply the above orders on 1st July 2015 and leave so granted was to operate as stay until the hearing and determination of this application for the reliefs sought. The importance of obtaining leave in a judicial review application was well captured in the words of **Waki J** (as he then was in the case of **Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others** where he stated:-

“ is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived..”

The respondents were served with the court order and the application scheduled for *inter-partes* hearing on 17th September 2015 as evidenced by the affidavit of service filed by the advocates for the *ex-parte* applicant. However, on the said date, there was no appearance on the part of the respondent's in spite of being duly served.

Upon perusing the affidavit of service, I was satisfied that the respondents were served on 3rd July 2015, and I allowed the *ex-parte* applicant to proceed with the application the respondents absence notwithstanding as the law and procedure permits. I also note that the respondents have not filed any reply to the application; hence the court will determine the application before on the material presented to the court by the *ex-parte* applicant.

The *ex-parte* applicant is an advocate of the High Court of Kenya practicing at Nanyuki in the name and style of **G. O. Ombachi & company** and that and that during and in the course of his duties as an advocate, he drew a land sale agreement between a one **Emmah Wairimu Wambui** and **Jacinta Wangui Wanjau** for the sale of **Laikipia/Nanyuki Marura Block 111/2858** a copy of which is annexed to the supporting affidavit at pages **16** and **17** of the bundle of documents filed in court. In the said

agreement the vendor agreed to sell to the purchaser (hereinafter referred to as the first purchaser) the above mentioned land at **Ksh. 322,500/=**. The *ex-parte* applicant states that his role was limited to drawing and attesting the agreement. Thereafter the purchaser left Kenya before the parties could seek and obtain the requisite consent of the relevant land control board and she was out of the country for 2 years.

While the purchaser was away, the vendor sold and transferred the same land to a one **Victor Gitonga Alfred** (the second purchaser) as evidenced by the agreement appearing at pages **18 & 19** and title deed appearing at pages **20 to 21** of the record. The vendors deposited the full purchase price paid by the first purchaser into the clients' account of the firm of the *ex-parte* applicant and the applicant communicated this development to his client, the first purchaser. She never collected her refund as advised by the *ex-parte* applicant.

There is evidence that the first purchaser wrote to the vendors demanding *inter alia* **Ksh. 741,000/=** which was a total tabulation of the costs incurred inclusive of the purchase price paid, a confirmation that the first purchaser had conceded that the sale agreement executed between her and the vendor had been frustrated, hence her claim for the refund of the purchase price and damages as tabulated in the letter dated 18.03.2015 appearing at page **23 to 25** of the record.

The *ex-parte* applicant argues that the claim in question is civil in nature and not criminal, and that the first purchaser has refused to collect the purchase price refunded by the vendor from his firm and has instead opted to institute criminal proceedings against the *ex-parte* applicant as evidenced by the charge sheet appearing at page **25** of the record.

The *ex-parte* applicant took the earliest opportunity and raised his objections in the Chief Magistrates court, handling the said criminal case but the said court dismissed the said objection. A copy of the ruling appears at pages **27 to 30** of the record.

The *ex-parte* applicant has now moved to this court seeking the orders enumerated earlier in this ruling. His main argument is that the entire transaction is civil in nature and there is nothing criminal at all in the entire transaction, hence the involvement of the police and the arraignment in court and the criminal proceedings against him are all illegal and a violation of his rights and the law. I have carefully scrutinized the documents submitted in court and I am satisfied that the entire transaction is purely civil and from the documents, there is nothing to support or disclose a criminal offence in the entire transaction. It's not clear on what basis the police preferred the charges in question, but one thing is clear, the police acted improperly by criminalizing a purely civil transaction.

The applicants advocate relied on the decision by **Makhandia J** (as he then was) in **Milka Wairimu Muthee vs Republic** where the learned judge held as follows:-

"...I abhor the practice which has gained currency where police stations have been turned into dens for debt collection. This is a classic example where the police have abused their mandate and turned a matter which was essentially and purely civil into a criminal matter. The criminal case was instituted against the appellant not because the police believed that the appellant had committed any offence to pressure the appellant into refunding the money she owed to the complainant. I think that time has come for the police to be told in no uncertain terms that the practice of them being turned into debt collectors by those owed money must come to an end or be halted....."

The above decision dealt with debt collection, but can offer useful guidance in the present case where the transaction in question is evidently civil and the remedy for the aggrieved party lies in a civil suit. In any event the *ex-parte* applicant acted as an advocate in the transaction and it's the vendor who sold the property to a second buyer as evidenced by the second agreement. The offence of conspiracy to defraud or obtaining money by false pretences cannot be sustained at all and this is a deserving case for the court to exercise its judicial review powers and come to the aid of the *ex-parte* applicant and bring to a halt the blatant abuse of the criminal process.

I agree with the decision of the court of appeal in the case of **Commissioner of Police and Director of Criminal Investigations Department vs Kenya Commercial Bank and others** where it was held *inter alia*:-

‘.....while it is the prerogative of the Police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith.....it is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes.....’

Broadly speaking, the grounds upon which the courts grant judicial review were stated in the case of **Pastoli vs Kabale District Local Government Council and Others** where it was held as follows:-

“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 decision is usually a 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.....It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument.....”

The grounds upon which the court can exercise its judicial review jurisdiction are incapable of exhaustive listing. I also find useful guidance in the words of **Nyamu J in Republic vs The Commissioner of Lands Ex Parte Lake Flowers Ltd** where he held as follows:-

“Availability of other remedies is no bar to the granting of the judicial relief but can however be an important factor in exercising the discretion whether or not to grant the relief....The high court has the same power as the high court in England up to 1977 and much more because it has the exceptional heritage of a written constitution and the doctrines of the common law and equity in so far as they are applicable and the courts must resist the temptation to try and contain judicial review in a strait jacket....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the principle of establishing standing for the purposes of judicial review the courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case to case basis.....”

Judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure and become the most powerful enforcement of constitutionalism, one of the greatest promoters of rule of law and perhaps one of the greatest and most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the ever never ending categories of negligence after the celebrated case of **Donoghue vs Stevenson** in the last century.

As was held in the case of **Sanghani Investments Ltd vs Officer in charge Nairobi Remand and allocation Prison**, Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in Judicial Review proceedings and the orders are Mandamus, Certiorari and Prohibition. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most

efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

Judicial review is primarily concerned with controlling the exercise by public bodies and statutory bodies on powers conferred upon them. The role of the court is to ensure that those bodies do not exercise those powers unlawfully. In **Nasieku Tarayia vs Board of Directors, AFC & another** it was held that judicial review is an alternative remedy of last resort and where alternative remedy exists, the court has to be satisfied that judicial review is the more convenient, beneficial, efficacious alternative remedy available for the court to grant. I stand guided by the said finding and hold the view that the prayers sought in this application satisfy the above tests because there is no satisfactory alternative remedy.

Also relevant and of useful guidance in these proceedings is the decision of the court of appeal in the court of **Joram Mwenda Guantai vs The Chief Magistrate** where it was held:-

“It is trite that an order of 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 in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the judge has the power to intervene and High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

I find myself in total agreement with the decision of the high court in the case of **Kuria & 3 others vs Attorney General** where it was held *inter alia* that:-

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-setting or vilification on issues not pertaining to that which the system was formed to perform.a stay (by an order of prohibition) should be granted where compelling an accused person to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and or where the proceedings are oppressive or vexatious....The machinery for criminal justice is not to be allowed to become a pawn in personal feuds and vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the courts) independence and impartiality.....the violation of the invocation of the law, whichever party is unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilization is far that which the courts indeed the entire system is constitutionally mandated to administer. In the instant case, criminal prosecution is alleged to be tainted with ulterior motives.....It is further alleged that the criminal prosecution is an abuse of the court process.....”

In my view, it would be a travesty to justice, a sad day for justice should the procedures or the process of the court be allowed to be manipulated, abused and or misused, all in the name that the court simply has no say in the matter because the decision to so utilize the procedures has already been made. It should never be argued that because a decision to charge the accused person, the court should simply as it were fold its arms. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in the law. Where the prosecution is an abuse of the law, there is no greater duty for the court than to ensure that it maintains its integrity and the integrity of the judicial process and the system of the administration of justice by staying or quashing or prohibiting prosecutions initiated by extraneous considerations. It must be emphasised that the use of court procedures for other purposes amounts to abuse of the court process.

In **Republic vs Chief Magistrates Court, Mombasa, ex-parte Ganinjee & Another** it was held:-

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. This is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, a prohibition or certiorari will issue.....”

I also find myself in agreement with the decision in **Republic vs Attorney General ex-parte Arap Ngeny** where the court stated that “a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives 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.” However, as long as the prosecution and those charged with the responsibility of making the decisions to charge act in reasonable manner, the High Court will be reluctant to intervene.

I have carefully evaluated the material before the court and I am persuaded that the *ex-parte* applicant has demonstrated sound grounds for the court to exercise its discretion in his favour and grant the reliefs sought so as to stop abuse of the court process.

At the hearing of the application learned counsel informed the court that he was only pursuing prayers 1 and 3 of the application. Accordingly I hereby allow the application and grant the reliefs sought in terms of prayers one (1) and (3) of the chamber summons dated 29th June 2015 as follows:-

- i. *An order of certiorari be and is hereby issued directed at the Chief Magistrate’s Court at Nanyuki to bring to the High Court and quash the decision of the said Court to admit charges and to continue further proceedings in Nanyuki Criminal Case number 508 of 2015, **Republic vs Gilbert Okero Ombachi** against the applicant **Gilbert Okero Ombachi** for purported offences of conspiracy to defraud contrary to Section 317 of the Penal Code and obtaining money by false pretences contrary to Section 313 of the Penal Code, Cap 63, Laws of Kenya.*
- ii. *An order be and is hereby issued staying any further proceedings in Nanyuki Criminal Case No. 508 of 2015-**Republic vs Gilbert Okero Ombachi** against the ex-parte applicant **Gilbert Okero Ombachi** for purported offences of conspiracy to defraud contrary to Section 317 of the Penal Code and obtaining money by false pretences contrary to Section 313 of the Penal Code Cap 63, Laws of Kenya.*
- iii. *No orders as to costs*

Orders accordingly

Dated at Nyeri this 18th day of September 2015

JOHN M. MATIVO

JUDGE
