



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
JUDICIAL REVIEW NO.4 OF 2012
SARAH NJOKI MUNGE EX-PARTE APPLICANT

RULING

By chamber summons dated 25th January, 2012 the *ex-parte* applicant, , seeks leave to apply for *certiorari* to remove to this court and quash the charges preferred against her by the DCIO Narok allegedly at the behest of the District Commissioner Narok North District. She also seeks leave to apply for prohibition to restrain the DCIO Narok from proceeding with the prosecution of the charges initiated against her and prays that the leave, if granted, do operate as stay of prosecution of the charges.

The application is premised on the grounds that the *ex-parte* applicant entered into a transaction for purchase of two parcels of land within Narok Town from one Samuel Kishoyian (it is alleged that the transaction was conducted on her behalf by her advocate, M/S Ochengo Oduso & Co. Advocates and that the advocate as an agent of the *ex-parte* applicant procured all the necessary consents. The land was transferred to her and a title issued in her name). A party (Dominic Saruni Torome) complained to the the District Commissioner Narok North District that he was the initial owner of the property and that the transaction entered into by the applicant was irregular. Acting on that information, the District Commissioner demanded that the title be cancelled claiming that he never consented to the sale and that the matter ended up in Narok CMCC No.1 of 2012 between the *ex-parte* applicant and the third party.

Further, the third party and the District Commissioner have lodged a criminal case at Narok police station against the *ex-parte* applicant claiming that she forged the consent to transfer and made a document without authority. The criminal case is said to have been lodged at the behest of the District Commissioner in an attempt to gain an edge in the civil case. It is also contended that the District Commissioner is in breach of the applicant's right to fair trial and lawful administrative action and that the court has a duty to step in and protect the applicant against abuse of process by the District Commissioner and the third party.

Upon considering the application this court observed:-

“This scenario raises more questions than answers. If fraud is detected, is there anything legally to stop an individual from lodging a complaint in the criminal justice system? I think this application for leave and its operation as stay must be canvassed interpartes as provided under order 53 rule 4 (proviso)”.

Consequently, the application was served on the Attorney General who filed the grounds of opposition dated 30th April, 2012.

The Attorney General has opposed the application on the grounds that it is mischievous, fatally defective

and an abuse of the process of the court. Further that the applicant has failed to lay a basis for her claim; and that the application is frivolous and without merit.

The subject matter of the application being a criminal suit, constitutionally a preserve of the Director of Public Prosecution, the application was subsequently referred to the Director of Public Prosecution to deal with.

On behalf of the Director of Public Prosecutions, the investigating officer in the impugned criminal case, Corporal George Gachanja, swore an affidavit detailing the circumstances under which the criminal charges were preferred against the applicant.

In the affidavit he has deposed that, on 18th November, 2011 he received a complaint from Dominic Torome (the third party) who alleged that irregular transfer of land had taken place in respect of a parcel of land he had interest in. The complainant informed him, that he had purchased the parcel of land and was waiting for the District Land Control Board (hereinafter referred to as "the Board") to approve his application for transfer, when he learnt that the land had already been transferred to the applicant. The complainant informed him that he went to the chairman of the Board (the District Commissioner Narok North District) to complain and he was informed that the Board had not given consent to the transfer and advised him to report to the police.

He has also deposed that he interviewed the complainant, the Chairman of the Board, the District Officer 1 Narok North District (to whom the Chairman had delegated the Chairmanship of the Board), George Ondiek (a clerical officer at the DC's office who used to record minutes at the Board meetings), the applicant, and the applicant's advocate. He recorded and/or took their statements (all annexed to the deponents affidavit).

As the Chairman of the Land control Board stated that they had not given the requisite consent for the transfer of the land, he took the specimen signatures and handwriting of the applicant, her advocate, the chairmen to the Board and George Ondiek . He also took a specimen of the stamp impressions used in the letter of consent for comparison with the impression on the letter of consent collected at the lands office.

On 22nd December, 2011 he submitted the letter of consent and the specimen signature and stamp impressions to the Forensic Document examiner at the Criminal Investigations Department, Nairobi where the documents were examined and a report given to the effect that the letter of consent was not signed by the Chairman of the District Land Control Board as purported and that the stamp impression was not by the one used for the Board.

On the basis of the results of the investigations he concluded that criminal offences, namely forgery and making a document without authority, were disclosed.

Since the forensic report implicated George Ondiek as having made the signature impressions and given the fact that the applicant was the one who had the documents (and was the ultimate beneficiary of the forged instruments) he preferred criminal charges against the two;

He has also denied the allegation that the DC Narok North influenced the decision he took, and has described the application as merely intended to cover up criminal activities, and to give legitimacy to forged documents which is unjust.

Parties, with the concurrence of the court, agreed to have the application disposed of by way of written submissions.

In the submissions filed on behalf of the applicant, it is submitted that the complaint which forms the basis of the criminal charges has all the characteristics of a civil dispute. The decision by the complainant to lodge a criminal case against the applicant is described as being induced by the need to gain advantage over the applicant in the civil suit, and to bring pressure to bear upon the applicant to give in and possibly give up her property rights. It is contended that the applicant is a genuinely aggrieved party and that there

is sufficient ground for the court to investigate the instant criminal proceedings on the basis that they have been instituted to bring pressure upon the applicant to concede to the civil suit and that the proceedings have been presented with an oblique purpose.

The Director of Public Prosecutions, on his part, has submitted that the purpose of leave is to filter frivolous applications and that the process involves exercise of judicial discretion. The Director of Public Prosecutions, in exercise of the powers conferred on him under Article 157 of the Constitution intends to commence criminal charges against the applicant; which action the applicant argues, is calculated to coerce her and give undue advantage to the complainant in a civil suit she instituted against the complainant. It is argued that judicial review is concerned with the decision making process and not the merits of the decision itself; and a decision can be upset through *certiorari* on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. The sufficiency of the evidence to support the charges, instigation or otherwise by third parties, calculations aimed at gaining undue advantage by a defendant in a related case all go to the merit of the decision of the Director of Public Prosecutions and not the legality of the decision.

It is further argued, that the criminal trial process is regulated by the Criminal Procedure Code, the Evidence Act and other relevant statutes. It is also submitted that there are Constitutional safeguards to be observed in respect of criminal prosecutions until conclusion of the trial. The contention being that the trial court is best equipped and placed to deal with the rights of an accused person. If leave is granted in this case, respondent contends that the applicant would have caused the judicial review court, to embark upon an examination and appraisal of the prosecution case with view to determine if the applicant has a case to answer which is hardly the formation of the judicial review court.

I have read and considered the foregoing submissions together with the authorities cited in support thereof.

The sole issue for determination is whether the applicant has made up a case for granting of leave to apply for *certiorari* and prohibition and if so whether the leave granted should operate as a stay of the criminal proceedings instituted against her?

The remedy of judicial review is concerned not with private rights or merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See Republic V. Secretary of state for education and Science ex parte Avon County Council (1991) 1 ALL ER 282 at 285). The point was more succinctly made in the English case of Chief Constable of North Wales Police V. Evan (1982) 1 W.L.R. 1155. Lord Hailsham of St. Marylebone, said-

“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court.”

Thus a decision of an inferior court or public authority may be quashed (by an order of *certiorari*) where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury* sense.

Under Article 157(4) of the Constitution of Kenya 2010, the Director of Public Prosecutions has power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General is obligated to comply with any such direction.

Sub-article (6) thereof provides:-

(6) The Director of Public Prosecutions shall exercise state powers of prosecution and may-

“(a) institute and undertake criminal proceedings against any person before any court (other

than a court martial) in respect of any offence alleged to have been committed.”

Sub-article (9) provides:-

“The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.”

Sub-article(10) thereof provides:-

“The Director of Public Prosecutions shall not require the consent of any person or authority for commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

From the foregoing provisions of the law it is clear that the Director of Public Prosecutions has power, either acting in person or by subordinate officers acting in accordance with general or special instructions, to take the actions complained of, that is to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.

In exercising the powers conferred on him or her, the Director of Public Prosecutions is obligated to have regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process (Article 157(11)).

By dint of the provisions of Article 157(11) of the Constitution, if it is demonstrated that the intended prosecution will offend the aforementioned principles, that is to say, are not in public interest or in the interest of administration of justice or may result in abuse of the legal process, then the proceedings may rightly be said to be without jurisdiction, in excess of jurisdiction, or unreasonable in the *Wednesbury* sense and therefore subject to be quashed by an order of *certiorari*. The test of reasonableness was enunciated in **Associated Provincial Picture Houses V Wednesbury Corporation (1948) 1 KB223** by Lord Green MR thus:-

“Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by appropriate order in judicial review proceedings where the court concludes that the decision is such that no person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.” (Emphasis mine)

The issue arising from the foregoing observation is whether in instituting the impugned proceedings, the Director of Public Prosecutions and/or his representative acted without jurisdiction, in excess of his or her jurisdiction or unreasonably.

From the evidence adduced in this application there is no doubt, that the impugned proceeding were instituted following a complaint by a person who was prejudiced by the actions of the applicant and/or her accomplices.

Although the dispute between the applicant and the complainant are said to be civil in nature, upon review of the evidence adduced in this application, I am persuaded that the Director of Public Prosecution and/or his representative had reason to believe than an offence or offences were committent by the applicant and/or her accomplices.

Without denying that the transaction was irregular or unlawful, the applicant has sought to absolve herself from any wrongdoing by alleging that the impugned transaction was conducted by her agent (advocate).

Upon being interviewed her advocate denied that allegation and instead stated:-

“The document was presented to me while typed and signed by both parties for me to commission only which I did by stamping and signing.”

Upon considering the evidence presented in this affidavit and the applicable law, particularly Section 21 of the Penal Code, I am persuaded that the Police and the Director of Public Prosecutions had reason to prefer criminal charges against the applicant and her accomplices.

Section 21 of the Penal Code provides:-

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

The question as to whether the documents used to transfer the property were forged and as to whether the applicant was involved in the unlawful transaction falls squarely in the hands of the police. I find no malice or wrong doing in the initiation of investigations to establish the circumstances upon which government instruments like stamp impressions were used to authenticate the transfer form. I also find nothing unlawful or unreasonable in the decision to charge the applicant and/or her accomplices if the investigations revealed an offence or offences against her and/or her accomplices.

The applicant has also not demonstrated how involvement of the DC Narok North, merely as a possible witness, in the criminal case preferred against her will prejudice her in the civil case and/or the criminal case or at all.

For the foregoing reasons I find and hold the applicant's application to be devoid of any merit and dismiss it with costs to the respondents.

Dated, Signed and Delivered at Nakuru this 21st day of February, 2014.

H.A OMONDI

JUDGE