REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 275 OF 2011

REPUBLIC .....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

ETHICS & ANTI CORRUPTION COMMISSION.....2ND RESPONDENT

EX-PARTE
EMMANUEL OYUGI

JUDGEMENT

Emmanuel Francis Oyugi who is the ex-parte applicant in these proceedings is the 1st accused person in Nairobi Chief Magistrate's Court Anti-Corruption Case No. 28 of 2011. One Yobesh Amoro is the 2nd accused person. In the said criminal case the applicant herein is in count 1 charged with abuse of office contrary to Section 46 as read with Section 48(1) of the Anti Corruption and Economic Crimes Act No. 3 of 2003. The particulars of the offence state that on or about 29th March, 2005 in the City of Nairobi the applicant being the Managing Director of Kenya Wine Agencies Limited, a state corporation, used his office to improperly confer a benefit on one Yobesh Amoro by irregularly approving an application for a car loan for kshs.2,500,000/= made by the said Yobesh Amoro to the National Industrial Credit (NIC) Bank Limited purportedly made under the Kenya Wine Agencies Limited Staff Car Loan Scheme while knowing that the said Yobesh Amoro had not been formally employed by the said state corporation and was consequently ineligible for the loan.

The applicant faces an alternative count to count 1 namely that of wilful failure to comply with applicable guidelines relating to the management of funds contrary to Section 45(2)(b) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, No.3 of 2013.

In count 2 the applicant is charged together with Yobesh Amoro with conspiracy to commit an economic crime contrary to Section 47A(3) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. The particulates of the charge arise from the particulars of the charge in count 1 namely that they conspired to process a car loan for Yobesh Amoro while knowing that he was not formally employed by Kenya Wine Agencies Limited and thus ineligible for a loan from the staff car loan scheme.

In count 3 Yobesh Amoro is charged alone. It is alleged that he fraudulently acquired public property

contrary to Section 45(1)(a) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. The particulars also arise from the same car loan.

Now the applicant has moved to this court wanting to stop his prosecution. Through the notice of motion dated 23rd November, 2011 he seeks orders as follows:-

1. The Honourable Court do grant an Order of Certiorari to remove to the Court and have quashed the decision of the Respondents made jointly and severally to charge the Applicant in Anti-Corruption Criminal Case No. 28 of 2011.

2. The Honourable Court do issue an Order of Prohibition to prohibit the Respondents acting jointly and severally from prosecuting the ex-parte applicant in the said Anti-Corruption Criminal Case No. 28 of 2011 and to prohibit the Chief Magistrate's Court, Nairobi or any other court from proceeding with the hearing of the stated case.

3. That the costs herein be borne by the Respondents.

Through the statement of facts dated 8th November, 2011 and the verifying affidavit sworn on the same date, the applicant informs the court that between 2003 and 2005 he was the Managing Director of Kenya Wine Agencies Limited (KWAL). After relinquishing his position he was on several occasions summoned to the offices of the Kenya Anti-Corruption Authority (KACA) where he was questioned in respect of some events that took place during his tenure at KWAL. KACA has since been renamed Ethics & Anti-Corruption Commission (EACC). EACC is the 2nd respondent herein. Subsequently the applicant was charged in the following cases: Anti-Corruption Case (ACC) No. 20 of 2007; Anti-Corruption Case (ACC) No.32 of 2008 and Anti–Corruption Case (ACC) No.7550 of 2007. ACC No. 20 of 2007 and ACC No. 32 of 2008 were concluded in late 2010 and the applicant has appealed to the High Court against the decisions in those two cases. On 11th July, 2011 the applicant was charged in Anti-Corruption Case (ACC) No. 28 of 2011, which, as already stated is the subject of these proceedings. It is the applicant's case that the decision of the Director of Public Prosecutions (DPP) who is the 1st respondent herein and EACCA to have him charged is illegal, wrong and an abuse of the court process. The applicant detailed the cases and charges facing him as follows:-

(i) ACC No. 20 of 2007 - applicant charged for allegedly acquiring a loan between 26th March, 2003 and 3rd September, 2003 without qualification;

(ii) ACC No. 32 of 2008 - applicant charged with authorizing a car loan of Kshs.900,000/= to one Yobesh Amoro on or about 5th January, 2005;

(iii) ACC No. 7550 of 2007 – applicant charged with authorizing procurement of a motor vehicle without tendering and/or Board approval on 22nd July, 2003; and

(iv) ACC No. 28 of 2011 - applicant charged with approving a car loan application for Yobesh Amoro on 29th March, 2008.

The applicant contends that the charges arose out of the same facts and events and during the same duration of time. It is also the applicant's argument that since he has not been recalled to the offices of EACC since 2006 then it means that the charges arise from investigations that were conducted at the same time with the investigations that led to his being charged in the three other cases. It is the applicant's case that ACC No. 32 of 2008 which was concluded on 15th November, 2010 arose from the same facts with ACC No. 28 of 2011, namely approval of a car loan application for one Yobesh Amoro. It is the applicant's case that he ought to have been charged in one case and ACC No. 28 of 2011 should be quashed on the grounds that:-

(i) The same is an abuse of prosecutorial powers and a misuse of the court process.

(ii) The case exposes the applicant to double jeopardy in that it involves the same facts, witnesses and circumstances with a case for which he had been tried earlier on; and

(iii) The case violates his constitutional right to a fair hearing without undue delay and the right not to be tried for a case which he has already been tried.

(iv) It is the applicant's case that the respondents are acting maliciously with a view to keeping him in court perpetually.

The 1st respondent opposed the application through a replying affidavit sworn on 16th January, 2012 by Geoffrey Obiri, a prosecution counsel. Geoffrey Obiri averred that upon allegation that the applicant and one Yobesh Amoro had conspired to process a car loan of Kshs 2,500,000 for Yobesh Amoro who was not entitled to the said loan, the 2nd respondent carried out investigations after which it forwarded the investigations file to the 1st respondent. The 1st respondent being satisfied with the evidence gathered by the 2nd respondent and in exercise of his powers under Article 157 of the Constitution had the applicant and Yobesh Amoro charged with offences that are well spelt out in the respective statutes with specified penalties. It is also the 1st respondent's case that the matters raised by the applicant are matters of evidence which will be considered by the trial court during the hearing and on whose basis the guilt or innocence of the applicant shall be determined by the court and that the trial court is therefore the proper forum for resolution of all the factual and evidentiary matters. The 1st respondent contended that the prosecution of the applicant does not in any way violate his constitutional rights.

The 2nd respondent opposed the application by way of a replying affidavit sworn on 4th January, 2012 by Ignatius Wekesa who introduced himself as the investigating officer in ACC No. 28 of 2011. Through the said affidavit the 2nd respondent contends that the orders sought by the applicant are not within the scope of judicial review as the facts and circumstances disclosed in the application are not covered by the scope and nature of reliefs in judicial review. The 2nd respondent also contends that it is mandated by the Anti-Corruption and Economic Crimes Act to investigate any matter at the request of the National Assembly, a Minister or the Attorney General. It is also mandated to conduct investigations upon receipt of a complaint or on its own motion. The 2nd respondent submitted that acting on a report prepared in September, 2005 by the Efficiency Monitoring Unit (EMU) of the Office of the President, KACC commenced investigations into alleged abuse of office by the applicant and Yobesh Amoro and established that the applicant had approved a car loan for Kshs.2.5 million with NIC Bank under KWAL's staff car loan scheme to Yobesh Amoro while knowing that the said Yobesh Amoro was not formally employed and hence not entitled to a car loan. As a result of the said car loan, KWAL lost Kshs.3,575,221.05 being the principal loan amount, interest charges thereon and penalties for late payments.

The 2nd respondent argued that it had acted within its powers and became functus officio once it forwarded its investigation findings to the Attorney General. The 2nd respondent contended that there is no evidence of malice on its part or on the part of the 1st respondent and the trial before the magistrate's court should be allowed to proceed to conclusion.

Having summarized the positions taken by the parties herein, I need to state from the outset that this judgment only relates to the applicant herein. As can be seen from the pleadings, there is a close link between the case of the applicant and that of Yobesh Amoro but whatever comments are made in this judgement do not apply to Yobesh Amoro.

In my view the issues for determination by this court can be summarized as follows:-

1. Whether the respondents or any one of them abused their powers;

2. Whether the orders sought should be granted; and

3. Who should meet the costs of the application?

As to whether the respondents abused their powers, it was submitted for the 1st respondent that he discharged his constitutional mandate as set out in Article 157(6)(a) and (10) of the Constitution and the decision to charge the applicant was arrived at after considering the evidence placed before him by the investigating authority namely the 2nd respondent. It is the 1st respondent's argument that he has a constitutional mandate to prefer charges and prosecute suspects upon being satisfied that there is sufficient evidence to sustain a prosecution. The 1st respondent therefore submits that the applicant has not demonstrated that he acted without jurisdiction or in excess of his powers and neither has he demonstrated that he acted maliciously, unfairly or oppressively in preferring the charges against him.

On the issue of abuse of power it was submitted for the 2nd respondent that no evidence has been placed before the court to demonstrate that the 1st respondent abused the powers granted to him under Article 157(6)(a) and (10) of the Constitution. It was also argued that there is no evidence that the charges against the applicant were based on dishonesty, abuse of office or malice.

I have carefully considered the above cited submissions. In my view, the respondents have constitutional and statutory obligations to discharge. Those obligations must however be discharged within the law. In exercising his powers the 1st respondent **"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"** – Article 157(11) of the Constitution. In this regard, I agree with the observation of D.S. Majanja, J in **CHIRAU ALI MWAKWERE v ROBERT M. MABERA & 4 OTHERS [2012] eKLR** that:-

"The DPP is constitutionally mandated under Article 157 to order investigations on any information or allegation of criminal conduct and institute criminal proceedings against any person before any court. The office of the DPP is an independent office and this court would not ordinarily interfere in the running of that office and the exercise of its discretion provided it is within the Constitution and the law. The office of the DPP is 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."

I must add that orders of judicial review will issue where the 1st respondent acts outside his powers or commences prosecution which is in abuse of the legal process and which is not in the interests of administration of justice. However, this court should exercise caution in interfering with the constitutional powers of the 1st respondent. I would therefore agree with the opinion of Lord Steyn in **REG V D.P.P. EX.P KEBILENE (2000) 2 A.C. 326** that:-

"My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review. And I would further rule that the present case falls on the wrong side of that line. While passing of the Human Rights Act, 1998 marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognizes the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the Divisional Court was to open the door too widely to delay in the conduct of criminal trial proceedings. Such satellite litigation should rarely be permitted in our criminal justice system. In my view the Divisional Court should have dismissed the applicants' application."

Having established the law, I will now proceed to apply the same to the facts of the case before me. Through the replying affidavit of Ignatius Wekesa, this court was given a copy of the investigation report of the Efficiency Monitoring Unit. Pages 17 to 22 deals with the car loan advances made to Yobesh Amoro by the applicant. It is clearly noted in the report that two loans were advanced to Yobesh Amoro. The first loan for kshs.900,000/= was advanced to him on 5th January, 2005 and the second one for kshs.2.5 million was approved on 29th March, 2005. The said report clearly details what happened and

concludes that the money should be recovered from Yobesh Amoro but if this failed then the money should be recovered from the applicant. That means by 2005 the 2nd respondent had all the evidence relating to the charges which he commenced against the applicant through ACC No. 28 of 2011. No explanation has been forthcoming as to why the applicant was not charged in ACC No. 32 of 2008 with the charges facing him in ACC No. 28 of 2011. The applicant has urged this court to read malice in the respondents' actions. I find no reason why I should not agree with the applicant. For reasons only known to the respondents they have decided to prosecute the applicant in installments. This in my view is meant to punish and torture the applicant. It is immaterial that the respondents may have a watertight case against the applicant. It is agreed that corruption must be fought by all means. However, the war against corruption must be fought justly and won fairly. Judicial review looks not at the merits of the decision but at the process used to arrive at the decision. This position was reiterated by the Court of Appeal in **MEIXNER & ANOTHER VS. ATTORNEY GENERAL [2005] 2 KLR 189**. At page 194 the Court noted that:-

"As the learned judge correctly stated, judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. 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. Prohibition restrains abuse or excess of power."

In the case before me the applicant is not challenging the quality of the evidence that the 1st respondent intends to present to the trial court in his case. He is challenging the manner he has been treated by the 1st respondent. The 1st respondent all along had evidence against the applicant but has spread the charges across different case files and years. Such action is not in the interest of the administration of justice. It actually amounts to an abuse of the court process. There is a likelihood that the witnesses who testified in ACC No. 32 of 2008 will also testify in ACC No. 28 of 2011. It would have been easier and fair for all the charges to be brought in one case. I agree with the applicant that the actions of the respondents are oppressive and an abuse of the court process.

Should the applicant be granted the orders sought? The 2nd respondent submitted at length on the competency of the application before this court. It was submitted by counsel for the 2nd respondent that the statutory statement dated 9th November, 2011 does not comply with Order 53 Rule 1(2) of the Civil Procedure Rules in that it does not disclose the relief sought. It is the 2nd respondent's argument that consequently the applicant's application has no basis since Order 53 Rule 4(1) provides that an applicant can only rely on the grounds and relief sought in the statutory statement. I have carefully gone through what the applicant has titled as statement of facts and I find that it is done in the form of an affidavit. As per Order 53 Rule 1(2) a statutory statement should set out the name and description of the applicant, the relief sought and the grounds on which it is sought. The application for leave, apart from being accompanied by a statutory statement, must also be accompanied by affidavits verifying the facts relied upon. The facts must therefore be contained in the affidavit. I therefore agree with the 1st respondent that the applicant's application for leave does not meet the standards set in the Civil Procedure Rules. In fact, the verifying affidavit verifies the contents of the statutory statement. However, in the spirit of Article 159(2)(d) of the Constitution, I close my eyes and try to glean the applicant's case from the documents filed. I do not subscribe to the doctrine that a case should die on the altar of technicalities. I will therefore overlook all these glaring errors in the application for leave.

The 2nd respondent, however, went ahead and submitted that the orders sought cannot be issued as the applicant wants them issued against a person not a party to these proceedings. It is not disputed that one of the orders the applicant seeks is to prohibit the Chief Magistrate's Court at Nairobi from hearing ACC No. 28 of 2011. Rule 3(2) of Order 53 of the Civil procedure Rules provides that:-

"The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings."

This is a very clear and straight forward provision. If the intention is to quash the proceedings before a magistrate, then the magistrate hearing a case must be made a party to judicial review proceedings. After all, the magistrate is the person to implement the decision of this court. Failure to include a magistrate is not an issue of technicality but an issue that goes to the substance of the proceedings. The road to the sublime orders of judicial review is narrow and only a party who is keen on the rules of the game will benefit from judicial review remedies. It is unfortunate that applicant's application has met its Waterloo in this manner. In my view, the failure by the applicant to include the magistrate as a respondent is fatal to his case. His application is therefore dismissed. Considering what I have stated in this judgement, I direct each party to meet own costs.

Dated, signed and delivered at Nairobi this 19th day of April , 2013

W. K. KORIR,

JUDGE