



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Judicial Review 250 of 2011**

**IN THE MATTER OF AN APPLICATION BY YOBESH AMORO FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE DIRECTOR OF PUBLIC  
PROSECUTION, THE KENYA ANTI-CORRUPTION COMMISSION AND THE CHIEF  
MAGISTRATE, MILIMANI LAW COURTS**

**AND**

**IN THE MATTER OF THE CRIMINAL PROCEDURE CODE CAP 75 OF THE LAWS OF  
KENYA, THE LAW REFORM ACT CAP 26**

**OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE ANTI-CORRUPTION AND  
ECONOMIC CRIMES ACT NO.3 OF 2003**

**AND**

**IN THE MATTER OF THE ANTI-CORRUPTION COURT NO.1 AT THE NAIROBI LAW  
COURTS CRIMINAL CASE ACC NO.28 OF 2011**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF  
THE REPUBLIC OF KENYA, 2010**

**BETWEEN**

**YOBESH AMORO .....APPLICANT**

**V E R S U S**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**KENYA ANTI-CORRUPTION COMMISSION .....2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATE MILIMANI LAW COURTS .....3<sup>RD</sup> RESPONDENT**

**RULING**

In the Notice of Motion dated 1<sup>st</sup> August 2011, the applicant seeks the following orders;

- (1) An order of certiorari to remove into this court the charge sheet in Anti corruption court Criminal Case No.28 of 2011 for the purposes of being quashed.**
- (2) An order of prohibition to issue prohibiting the 1<sup>st</sup> respondent, his servants, officers or appointees from prosecuting the applicant with reference to Kenya Wine Agencies Limited or any other matter related to that subject.**
- (3) An order of prohibition to issue prohibiting the respondents, their servants, officers or employees from taking any steps to prosecute the applicant with reference to Kenya Wine Agencies Limited or any other matter related to that subject.**

The application is based on the grounds;

- (1) That Criminal Case No.28 of 2011 is tainted with ulterior motives namely to put pressure on the applicant to settle civil case No.312 of 2006.**
- (2) That the said suit was filed against the applicants on 30<sup>th</sup> June 2006 being a claim for monies advanced to the applicants and repayment for a loan guaranteed by Kenya Wine Agencies Limited.**
- (3) That the plaintiff in Civil Suit No.312 of 2006 did not allege any unlawful conduct on the part of the applicant in its claim.**
- (4) That there was no claim of fraud in the civil suit against the applicants as the matter was purely a dispute on alleged money owed as a result of advancement as an employee and a loan guaranteed on behalf of an employee.**

It is the case of the applicant that he was employed by Kenya Wines Agencies Limited as the finance and administration manager between December 2004 and April 2005. He alleges that in the course of his employment he received various advances on accounts of salaries and other emoluments. He also contends that he applied for and obtained a loan from NIC bank with Kenya Wines Agencies Limited acting as guarantor. After his employment was terminated, Kenya Wines Agencies Limited instituted a suit claiming monies owed and advanced without lawful authority.

Later, an investigation was carried out by the Efficiency Monitoring Unit, and the Kenya anti Corruption Commission into allegation of abuse of office by the applicant and the former Managing Director of Kenya Wine Agencies. It is alleged that the then managing director had irregularly approved a loan

application made by the applicant to national Industrial Credit Bank for Kshs.2,500,000/= and that he had caused Kenya Wines Agencies Limited to guarantee the said loan while knowing that the applicant had not been formally employed. It is contended that their actions of the applicant and the then Managing Director occasioned a loss of Kshs.3,575,000/= to Kenya Wines Agencies Limited.

It is clear that the applicant was issued with a letter of offer of employment dated 9<sup>th</sup> December 2004 for the position of Finance and Administration Manager. It is contended that the applicant did not formally acknowledge in writing the offer of employment. Consequently he was never issued with a formal letter of employment by Kenya Wines Agencies Limited. It is also the position of the respondent that the applicant's employment was terminated prior to the expiry of his six months probationary period. It is further contended that the applicant's terms of service had not been approved by Kenya Wines Agencies Limited Board of Directors by the time his services were terminated.

It is also contended that NIC bank had an agreement with Kenya Wines Agencies Limited for a staff loan scheme to employees but the applicant was not formally employed and therefore he was ineligible for the loan scheme. It is contended the loan obtained by the applicant and guaranteed by Kenya Wines Agencies Limited was not approved by the Board of Directors. According to investigations, the then Managing director and applicant contravened the staff car loan scheme which requires any vehicle purchased under the loan scheme to be registered in the joint names of individuals and the finance company. It also requires that the log book and signed transfer forms to remain in the custody of the finance company until such time when the loan has been recovered in full. The loan scheme also requires that the loan purchased be comprehensively insured with an insurance company duly approved by the employer and the finance company. The rule further requires that the rights and the interests of the employer and the finance company to be noted on the insurance policy.

It is contended that the then managing director and applicant did not comply with the rules and procedures for obtaining a car loan scheme in respect of the applicant thereby exposing the employer to great risks and loss. It is also clear that at the time the applicant left the employment Kenya Wines Agencies Limited he had not fully repaid the alleged irregularly acquired car loan, thereby making the employer to incur a loss of over 3.5 million. It is on the strength of the investigations and conclusions therein that a decision was made to charge the applicant with various offences.

The question is whether there is any abuse of power on the part of the respondent in undertaking the investigation and the decision to prefer charges against him. It is clear in my mind that the Director of Public Prosecution is constitutionally empowered under article 157 (6) of the Constitution of Kenya to institute and undertake criminal proceedings against any person before any other court in respect of any offence alleged to have been committed. In doing so, the Director of Public Prosecution does not require the consent of any other person or authority to commence criminal proceedings and cannot be under the direction or control of any person or authority in the exercise of his constitutional power or functions. The only issue this court is required to decide is whether there is an abuse of constitutional mandate or powers entrusted in the said office.

From the documents filed, there is no material or evidence to demonstrate that the Director of Public Prosecution has not discharged his constitutional mandate otherwise than in accordance with the law in arriving at the decision to prosecute the applicant to warrant the intervention of this court. There is no evidence of dishonesty, abuse of office, mala fides or any other exceptional circumstances to show that the decision of the Director of Public Prosecution was arrived at without due consideration of the relevant matters in question. The applicant has been charged before a competent court of law with an offence that is known to law. There is no evidence to show that the applicant will not receive a fair trial before the trial court. My understanding of the issues raised by the applicant are matters which can be ventilated and resolved before the trial court. In my view a court sitting in a judicial review application will not interfere or act as a court of appeal from the decision reached by an inferior tribunal, unless there is evidence to show that the body did not have jurisdiction or that the decision is unreasonable.

The function of this court is to ensure that lawful authority is not abused by an unfair treatment or in excess of jurisdiction. The primary and guiding factor in every case of judicial review is to ensure that the

individual is given fair treatment by authority to which he has been subjected and that it is not the duty of the court to substitute the opinion of the decision making authority to that of the court. I cannot at this stage determine whether or not the charges facing the applicant disclose an offence. In my humble view the trial court is sufficiently empowered under section 89(5) of the CPC to determine that issue and the applicant only needs to move the trial court to strike out the charge from being incompetent if he truly believes to be so. It is also clear in my mind that this court cannot determine the veracity and competence of the evidence gathered by the prosecution. It is the trial court which is best equipped to deal with quality, veracity and sufficiency of the evidence gathered to support the charge.

The applicant also complains that his former employer filed civil suit No.312 of 2006 before the High Court of Kenya Milimani Commercial Courts. It is clear the respondents are not parties to the said civil suit and the dispute is between the applicant and Kenya Wines Agencies Limited. There is no bar against the prosecution of a civil and criminal charges against an individual unless there is evidence to show that one of them is instigated or brought in an attempt to harass or intimidate one of the parties. In this case there is no manifest malice or abuse of power committed by the respondents in arriving at the decision of charging the applicants with the criminal offence.

Consequently it is my decision that the applicant has not demonstrated that he is entitled to the orders sought. There is no illegality and/or error of law and fact committed by the respondent. Equally, there is no evidence to show that the respondents considered irrelevant or extraneous factors in making the decision against the applicant. Consequently, the application has no merit and it is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of February 2012.

**M. WARSAME**  
**JUDGE**