



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 15 of 2012

REPUBLIC.....APPLICANT

VERSUS

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

PRINCIPAL MAGISTRATE, KANGUNDO.....2ND RESPONDENT

THE COMMISSIONER OF POLICE.....3RD RESPONDENT

AND

JOSEPH MWANZIA MBITHIINTERESTED PARTY

EXPARTE

PETER MULWA MBITHI

RULING

The subject of this ruling is the notice of motion dated 4th July, 2012 brought under Sections 1A, 1B and 3A of the Civil Procedure Act; Order 51 rule 1 & Order 25 rule 2 of the Civil Procedure Rules 2010; Articles 20 and 157 of the Constitution and all other enabling provisions of the law. The application seeks to invalidate a consent entered on 18th April, 2012 between the ex-parte applicant and 1st respondent for allegedly being illegal and unconstitutional. The grounds in support of the application are:-

- 1. The Consent was entered into without taking into account the interest of the Interested Party. The said act amounts to abuse of power and is oppressive and unconstitutional.**
- 2. The Consent once recorded as an order of this Honourable Court will effectively bar the Director of Public Prosecutions, the Police Commissioner and the Principal Magistrate's Court at Kangundo, from investigating, arresting, charging, prosecuting and trying the ex-parte applicant on the basis of the facts giving rise to Kangundo PMCC No. 5 of 2012.**
- 3. The law on consents requires that for a consent to dispose off a matter, it ought to be signed by all parties to the suit, the Interested Party, being a proper party to these proceedings should have been involved in arriving at a mutually agreeable consent.**
- 4. This Honourable Court would ordinarily not issue an order to bar public institutions from performing their constitutional and statutory duties, on this basis, the Consent will perpetuate an**

illegality.

5. The Consent does not take into account and is prejudicial to the rights of the interested party as envisioned in the Constitution of Kenya, 2010.

The application is supported by an affidavit sworn by Joseph Mwanzia Mbithi on 4th July, 2012 and a supplementary affidavit sworn by the same person on 15th August, 2012.

An introduction of the parties is called for at this stage. In respect of this application, the applicant is Joseph Mwanzia Mbithi who is the interested party in the main proceedings. The respondents are Peter Mulwa Mbithi and the Director of Public Prosecutions (DPP) who are the ex-parte applicant and the 1st respondent respectively in the main matter. From the papers filed in court file it is clear that the 1st respondent in the main proceedings also acts for the Commissioner of Police who is the 3rd respondent. The Principal Magistrate, Kangundo who is the 2nd respondent appears not to have participated in these proceedings from the beginning. In order to avoid confusion, I will throughout this ruling refer to the parties in the order in which they are named in the main proceedings.

The consent that the interested party seeks to quash was filed in court on 23rd April, 2012. It is framed in the following words:-

“By Consent of the Ex-parte Applicant and the Respondents, the Ex-parte Applicant’s Notice of Motion application dated 19th day of January, 2012 be and is hereby allowed as against the Respondents with no order as to costs.”

The said consent therefore leads me to the notice of motion dated 19th January, 2012 in which the ex-parte applicant had prayed for orders that:-

- i. AN ORDER OF CERTIORARI directed at the 1st and 2nd Respondents quashing criminal proceedings instituted by them against the ex-parte applicant, being Kangundo Criminal Case No. 5/2012 Republic vs. Peter Mulwa Mbithi.**
- ii. AN ORDER OF PROHIBITION directed at the 1st Respondent restraining him from undertaking criminal proceedings against the ex-parte Applicant on the basis of the same facts as those alleged in Kangundo Criminal case No. 5/2012 Republic Vs. Peter Mulwa Mbithi.**
- iii. AN ORDER OF PROHIBITION directed at the 2nd Respondent restraining her from conducting any form of proceeding in criminal case No.5/2012 Republic Vs. Peter Mulwa Mbithi.**
- iv. AN ORDER OF PROHIBITION directed at the 3rd Respondent prohibiting the 3rd Respondent from arresting, harassing, intimidating or in any way threatening the ex-parte applicant on the basis of the same facts as those set out in Kangundo Criminal Case No. 5/2012 Republic Vs. Peter Mulwa Mbithi.**
- v. Costs of this application and the entire proceedings be awarded to the ex-parte applicant.**

In brief, the ex-parte applicant and the interested party are brothers. The ex-parte applicant was supposed to be charged in Kangundo P.M. Criminal Case No. 5/2012 Republic Vs. Peter Mulwa Mbithi following a complaint made to the police by the interested party. I say the ex-parte applicant was supposed to be charged since he did not appear before the 2nd respondent for plea. The ex-parte applicant moved to this court on 17th January, 2012 and obtained an order staying the criminal proceedings. Subsequently, the said criminal case was withdrawn by the 1st respondent under Section 87(a) of the Criminal Procedure Code on 14th May, 2012. Prior to that, the ex-parte applicant and the respondent had filed the consent dated 18th April, 2012 before this court. Before the consent was formally adopted by the court, the

interested party indicated that he intended to file an application to object to the adoption of the said consent. The interested party's application is the one now before this court.

I believe the grounds in support of the notice of motion have clearly brought out the arguments of the interested party against the proposed consent. In her submissions, Ms Kaugira for the interested party attacked the grounds of opposition and argued that the claim by the 1st respondent that there was no sufficient evidence to sustain the criminal charges against the ex-parte applicant was not proved. She took the court through the evidence that was to be used against the ex-parte applicant in the subordinate court and criticized the ex-parte applicant's argument that the criminal trial had breached his fundamental rights. She told the court that this matter was about balancing the public interest in having crime prosecuted and punished and the ex-parte applicant's fundamental rights and freedoms. She also submitted that the argument by the ex-parte applicant and the respondents that the powers of the 1st respondent are absolute cannot be bought since this court has a duty to ensure that those powers are exercised legally and reasonably.

The respondents opposed the application through a replying affidavit sworn by James Njogu. Mr. Okello for the respondents submitted that the consent only served to bar the respondents from prosecuting the ex-parte applicant on the facts as at the time the matter was taken to court. He argued that the consent does not bar the police from carrying out further investigations and taking the ex-parte applicant to court if sufficient evidence is collected. He told the court that in accordance with Articles 157(10) & (11) of the Constitution the 1st respondent when exercising prosecutorial powers cannot be directed by anybody. He further stated that there is no public interest in prosecuting the ex-parte applicant in a situation where there is no evidence to secure a conviction. He also submitted that this was a matter between the ex-parte applicant and the respondents and the interested party had no role to play in the signing of the consent.

On his part the ex-parte applicant opposed the application through a replying affidavit he swore on 24th July, 2012. Mr. Simiyu for the ex-parte applicant submitted that the issues for determination by the court are:-

1. Did the 1st respondent have powers to consent to the notice of motion application dated 19th January, 2012?
2. What is the court's power, if any, in controlling the 1st respondent's power to enter into the consent?
3. Whether the decision of the 1st respondent to enter into the consent is illegal or unconstitutional.

Mr. Simiyu argued that Article 157(6) of the Constitution authorizes the 1st respondent to enter consents in respect of any matter pending before any court whereas Article 157(10) provides that in exercising his powers the 1st respondent is not subject to the direction of anybody or authority. He submitted that the exercise of the 1st respondent's constitutional powers should not be questioned by this court. He argued that the exercise of the said power could only be questioned if it was demonstrated that it had been exercised contrary to public interest and it was upon the interested party to demonstrate that the powers had been exercised contrary to public interest. He also submitted that the consent took care of public interest in that the charging of a public servant in order to have him sacked was averted. He further submitted that the interested party had conspired with the 3rd respondent so as to have the ex-parte applicant charged.

In response Ms Kaugira for the interested party submitted that the ex-parte applicant did not object to the withdrawal of the complaint under Section 87(a) of the Criminal Procedure Code. His main complaint is that the consent would bar the prosecution of the ex-parte applicant in future in connection with the incident that gave rise to the criminal proceedings in the lower court.

Let me start by thanking the advocates for the submissions they made in this matter. Their submissions have clearly illuminated the path that this ruling will follow. The main question to be answered in this

matter is whether the consent entered into by the ex-parte applicant and the respondents is unlawful and unconstitutional. The interested party argued that failure to involve him in the formulation of the consent meant that the consent is unlawful. The ex-parte applicant and the respondents submitted that the interested party had no role to play in the proceedings and there was no need to involve him in the execution of the consent.

What is the role of an interested party in judicial review proceedings? Any person who has sufficient interest in the outcome of judicial review proceedings must be served as an interested party. Order 53 Rule 3(2) of the Civil Procedure Rules requires that all persons who will be directly affected by judicial review proceedings shall be served. The interested party herein was the complainant in the criminal trial and he was therefore directly affected by the outcome of these proceedings. Though he was not served as required, he nevertheless found his way into this matter. The interested party is therefore not a mere joyrider as the ex-parte applicant and respondents want to imply.

The interests of interested parties vary from case to case. In some cases the stakes are so high and there is need to involve the interested party before any consent is signed. In other cases the interest may be peripheral and the court in its wisdom may allow the consent to pass without the participation of an interested party. Such instances would indeed be very rare. In judicial review proceedings consents are not entered at the prompting of the parties. They are closely supervised by the court so that the ends of justice are met. This view is supported by eminent scholars. For example, the authors (H. Woolf, J. Jowell and A.L. Sueur) of the 6th edition of **De Smith's Judicial Review** at paragraph 16-071 opine that:-

“A significant proportion of claims, given permission to proceed, are withdrawn before the full hearing. If the parties agree about the final order to be made, the court may make the order without a hearing if it is satisfied that the order should be made. Because of the public interest involved in many judicial review claims, the parties cannot determine for themselves what order should be made. The court will not make an order if it is not in the public interest to do so. In addition, if a decision of a court or tribunal is the subject of the claim, it would be wrong for that decision to be altered merely by agreement of the parties. The court must be satisfied that this is appropriate.”

In the case before me it must be remembered that the 1st respondent was exercising constitutional powers and had the authority to reach consent with the ex-parte applicant. I do not think it was necessary for the 1st respondent to seek the permission of the interested party before exercising his powers.

Does the 1st respondent have absolute powers when it comes to the prosecution of cases? The interested party argued that the power is discretionary and subject to the supervision of the court. The ex-parte applicant and the respondents referred the court to the provisions of Article 157 of the Constitution and submitted that the 1st respondent is not subject to the control and direction of anybody or authority including the courts when exercising the powers of that office.

Article 157(6) of the Constitution provides that:-

(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;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)

Article 157(10) & (11) provides that:-

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the 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.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions 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.

In my view the 1st respondent must exercise his powers in a rational, lawful and constitutional manner otherwise the court may be invited to exercise its supervisory jurisdiction over the use of those powers. The court is however shy to meddle with the affairs of the 1st respondent unless good reason has been established for such interference. I therefore agree with D.S. Majanja, J when he states in **CHIRAU ALI MWAKWERE VS. 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.”

The interested party therefore needs to prove that the consent reached between the ex-parte applicant and the respondents was reached outside the law. Counsel for the respondents argued that the 1st respondent's powers were exercised in line with the Constitution. He argued that the consent was reached because there was no sufficient evidence to sustain the prosecution of the ex-parte applicant. It is difficult, from the material placed before the court, to conclude that the 1st respondent abused his powers since there is nothing to show that the 1st respondent did not **“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”** when signing the consent with the respondents.

The remaining issue would then be whether the proposed consent is lawful and constitutional. The interested party submitted that the consent is unconstitutional since it purports to bar the 1st respondent from ever prosecuting the ex-parte applicant on the same facts. Mr. Okello for the respondents appeared to agree with the interested party that the 1st respondent cannot enter into agreements that limit his constitutional powers. He submitted that the consent was not meant to stop the police from further investigating the case and charging the ex-parte applicant if need be. But is that so? Prayers 2 and 4 of the substantive notice of motion dated 19th January, 2012 clearly seeks to bar the 1st and 3rd respondents from forever prosecuting the ex-parte applicant in relation to the incident that led to his being charged in Kangundo P.M. Criminal Case No. 5 of 2012 Republic Vs. Peter Mulwa Mbithi. In my view, such an order would not be in consonance with Article 157(11) of the Constitution which requires the 1st respondent to exercise his powers in the interests of the administration of justice. The 1st respondent should not put himself in a position in which he will be unable to charge the ex-parte applicant were better evidence to be found. In fact the withdrawal of the criminal case in the subordinate court under Section 87(a) of the Criminal Procedure Code meant that the 1st respondent is at liberty to have the ex-parte applicant re-arrested and charged in connection with the same facts and the same offence. The consent would have been lawful and constitutional had it been reached in the language of Section 87(a) of the Criminal Procedure Code so that the 1st respondent will be at liberty to have the ex-parte applicant arrested and charged if sufficient evidence is found. In my view, once the 1st respondent established that the evidence was insufficient to mount a prosecution, even a private prosecution cannot be instituted on the same evidence. Such an action would amount to abuse of the court process. Whatever the case, it is

apparent that part of the consent between the ex-parte applicant and the respondents is unconstitutional and this court cannot be party to such an agreement.

In conclusion, prayers 2 & 4 of the substantive notice of motion are unconstitutional. The consent as entered cannot therefore be adopted by this court. The logical conclusion is that the interested party's application succeeds. The same is allowed with costs being in the cause.

Dated and signed at Nairobi this 21st day of November, 2012

W. K. KORIR

JUDGE