IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 108 OF 2009

MARY WANGARI MWANGI.....APPLICANT

VERSUS

HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Mary Wangari Mwangi filed the Originating Notice of Motion dated 11/12/08 against the Hon. The Attorney General seeking the following orders:-

3 There be a declaration that the Nolle Prosequi filed and presented to the Chief Magistrate Court in Naivasha Criminal Court No. 434 of 2006 dated 30th October, 2008 and purportedly signed by for and/or by the Respondent namely through Assistant Deputy Public Prosecutor, Nakuru be declared invalid, of no consequence and null and void.

4 That upon granting of prayer 3 hereinabove, or such other relief found suitable, the trial magistrate's court be directed to dispose of the pending criminal case No. 434 of 2006 in line with the direction, namely, to reject and/or ignore, and disregard, the entry and filing of the Nolle prosequi and continue to finalize the case, in the normal manner set out by the provisions of the Criminal Procedure Code.

5 The costs of this reference/application be provided for."

The motion is expressed to be brought pursuant to **Sections 65, 70, 71, 72 3(b)(5), 77(1), 81(1)** and **84(1), (2), (6)** of the Constitution and Rule 3 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Freedom Rules, 2006 (now repealed). It is predicated on grounds found on the face of the motion and the supporting affidavit of the applicant.

The applicant is challenging her prosecution in Criminal Case No. 434 of 2006. She depones to have been arrested by Naivasha police sometime in April 2007, was held for two days without access to legal service then moved to Nakuru police station and later charged in court. On 16/7/2007 she was arraigned before Chief Magistrate's court Naivasha and charged with the offences of making documents without authority contrary to **Section 357(a)** of the **Penal Code (PC)** and uttering a false document contrary to **Section 353** of the **PC** and two counts of obtaining land registration and money fraudulently contrary to **Section 313** of the **PC**. She denied the offences and was released on bail. After 8 prosecution witnesses had testified and the matter was adjourned for ruling on 31/10/08 and when the court indicated that its ruling was ready, the state counsel presented a nolle prosequi dated 30/10/2008 giving notice of the

intention to discontinue the criminal proceedings. She deponed that earlier on, another nolle prosequi had been entered on 29/9/2007 discontinuing the case against the co-accused persons but one was again rearrested charged in Criminal Case 992/08, she further deponed that she had seen police arrive with the complainant on that day and positioned themselves at the entrance to the court and she was sure that she would be re-arrested after the nolle prosequi was allowed. That the respondent is taking advantage of the applicant's line of defence disclosed in the cross examination and submissions and thus giving the prosecution an unfair advantage over the applicant if the case were to start afresh. That there also exists HCCC No. 48/06 and 50/06 seeking relief against the applicant over the same subject matter Naivasha/Municipality Block 5/225. The applicant exhibited copies of the charge sheets in the criminal court and pleadings in HCCC Nos. 48/06 and 50/06.

The respondent was aware of this matter, the state having appeared through its representative on record. The respondent was served with the hearing notice on 22/9/2010 as evidenced by the affidavit of service filed in court on 11/10/2010, but there was no representation at the hearing. The respondent had not filed any reply. The matter therefore proceeded to hearing unopposed. This being the position, the court will presume that the facts deponed to by the applicant represent the true and correct factual position.

The applicant urged that when the nolle prosequi was presented to the magistrate no reasons were given by the prosecution for the discontinuation of the proceedings. I wish to point out that the subordinate court had no power to question the AG's powers to enter a nolle prosequi. That was the preserve of the High Court and that is why the applicant moved this court.

A part from bringing this motion under the supervisory jurisdiction of the High Court under Section 65, the application is also brought under the enforcement section of the Bill of Rights, Section 84 of the Constitution.

It is trite law and the courts have repeatedly held that applications under the Bill of Rights, Section 70 to 83 both inclusive have to be pleaded with precision. For a cause of action to arise, the applicant must specifically state the provisions of the law said to infringed and the manner in which they are said to be infringed in relation to the applicant. In **ANARITA KARIMI NJERU V R (NO.1) 1979 KLR 154**, Trevelyan and Hon. Hancox JJ held as follows:-

"We would however again stress that a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is upon that (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."

This view was upheld in **MATIBA V AG Misc. App. 666/1990, CYPRIAN KUBA V STANLEY KANYONGA MWENDA, NRB HMSC 612/02 K.B.S. LTD V AG (2005) 1 KLR 787** and a host of other cases. In the instant case, the only mention of the breach of the applicant's Constitutional rights is at paragraph 21 of the applicant's affidavit and an allegation that there was delay in taking her to court. However, there are no specific pleadings as to exactly when she was arrested or when she was arraigned before the court. She should have been specific to enable the respondent respond to the said allegations. In the grounds and affidavit in support of the Originating Notice of Motion there is no specific allegation on how each of her rights under the sections cited i.e. **70(a), 72(3)(b), (5), 77(1)** and **81(1)** were infringed. It was not enough to allege or invoke sections of the **Constitution**.

In addition to the above, an application for enforcement of ones rights under the Bill of Rights (Chapter 5 of the Constitution) should have been brought by way of petition but not by way of Originating Notice of Motion as the applicant has purported to do. Though **Section 65** of the Constitution which gives the High Court supervisory jurisdiction over subordinate courts and tribunals was cited, there is really no pleading in support of the court's supervisory powers. What the applicant seems to be alleging is breach or likely breach of her fundamental rights. **Rule 12** of the Rules made under **Section 84** of the Constitution (Legal Notice 6/2006) provides, **"An application under Rule 11 shall be made by way of petition as set out in Form D in the schedule to those Rules." Rule 11** provides that when contravention of fundamental

rights and freedoms of the individual under **Sections 70 to 83** (inclusive) of the **Constitution** is alleged, or apprehended, then an application has to be made to the High Court. The applicant should have come by way of petition. The applicants have not properly invoked this court's jurisdiction.

The applicant did not exhibit the proceedings in the criminal case but exhibited a copy as the nolle prosequi dated 30/10/08 (MWN2) by which the State was presenting to court just before the court could read its ruling as to whether the applicant had a case to answer or not. The applicant urged that it was also her submission at that stage that the charges were defective. That has not been challenged. Having heard the prosecution evidence and the applicant's submissions on whether or not she had a case to answer, the prosecution must have known the applicant's line of defence and it would be unfair for the prosecution to await for proceedings to reach that stage to enter the nolle prosequi. It is on record that the prosecution had earlier entered another nolle prosequi when some of the applicant's co-accused were discharged but one was re-arrested and charged afresh. Might this be the way the prosecution wanted to proceed with the applicant's case? The prosecution would have an unfair advantage over the applicant if a new case were to be preferred against the applicant afresh. Besides, the case having taken that long to be heard and determined since 2007, whereby 8 witnesses had testified, it would be against the tenets of natural justice to have the matter start afresh and it was likely to infringe the applicant's rights to a speedy and fair trial envisaged under **Section 77(1)** of the **Constitution.**

In the case of **WEHLIYE V RFP (2005) 1 KLR**, Nyamu, Kasango and Makhandia JJ dealt with a similar case where the prosecution attempted to enter a nolle prosequi after 11 witnesses had testified and about 8 others were remaining. There was clear intimation from the prosecution that the applicant would be charged with the offence afresh. The court in declaring the nolle prosequi to be invalid, oppressive, unreasonable, capricious, null and void and of no legal consequence held:-

"5. Considering the stage at which the applicant's case had reached, the prosecution was aware of the applicant's line of defence. For the prosecution to seek to terminate the trial and charge the applicant afresh would be to give the prosecution an unfair advantage in the prosecution of the new case that would lead to an unfair and unjust result.

6. The practice by the prosecution of arraigning persons in Court on insufficient evidence and seeking to start the trial afresh through the entry of a nolle prosequi when it finds itself at a dead end infringed on the individual rights to liberty, protection of the law under section 70 of the Constitution and also on the provisions of section 72(5) and 77(1) which entitled the applicant to a fair and speedy trial within a reasonable time. Section 81(1) was also likely to be infringed because the applicant would have to be held for a longer period awaiting the commencement of a fresh trial.

7. The respondent acted capriciously and oppressively in presenting the nolle prosequi when the trial was about come to an end. That would amount to an abuse of the process of the court. On a scale of justice the Court should lean towards the liberty of the individual as opposed to the respondent's convenience. The power of nolle prosequi should be used to advance the cause of criminal justice and not to obstruct it. The power cannot be used to infringe the Constitutional rights of accused persons."

In the above case the applicant moved the court by way of petition under **Section 84** of the **Constitution** and the rules made thereunder. Though the applicant may not have come to court in the proper manner, I find that the nolle prosque would infringe on the applicant's right to a fair and speedy trial and amounted to an abuse of the court process taking into account the fact that the respondents were likely to take an unfair advantage over the applicant by virtue of the fact that they knew her line of defence. The High Court has inherent powers to supervise the exercise of power by the AG under **Section 26** by virtue of **Section 123(8)** of the **Constitution.** That power is meant to advance the cause of criminal justice but not to be an obstruction as it was being used in the instant case. See also the case of **ALIELO V REP. (2004) KLR 333.**

Even though the procedure by which the applicant approached this court may have been wanting, in the interests of justice this court has gone ahead to consider the application on its merits and I do declare the

nolle prosequi presented before CM's Court Naivasha in Criminal Case No. 434/06, dated 30/10/06 to be null and void and of no consequence. It is therefore directed that the Chief Magistrate do disregard the said nolle prosequi and proceed to finalize the case in the normal manner under the **Criminal Procedure code.** The respondent do bear the costs of this application.

DATED and DELIVERED this 12th day of November 2010.

R. P. V. WENDOH

JUDGE

PRESENT:
Mr. Kamau – applicant
Kennedy - CC