REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 144 of 2007

LINUS WANJOHI WARUIRU……..APPLICANT

Versus

THE HON. THE ATTORNEY GENERAL & 2 OTHERS…...RESPONDENTS

JUDGMENT

By the Notice of Motion dated 16th March 2007, the ex parte Applicant, Linus Wanjohi Waruiru seeks several orders against the Honourable the Attorney General, the Judicial Service Commission and the Police Commissioner.

The prayers are as follows:-

(i) That the matter be heard urgently and service be disponed with in first instance;

(ii) That the Criminal proceedings No. 821 of 2006, Karatina Senior Resident Magistrate's Court be stayed pending the hearing and determination of these proceedings;

(iii) That an order of certiorari to move into the High Court and quash the decision of the Judicial Service Commission to interdict/suspend the Applicant from the Judiciary;

(iv) An order of certiorari do issue to quash the decision of the DCIO Nyeri to charge the Applicant with the charge of conspiracy to defeat the execution of justice contrary to Section 395 (a) of the Penal Code;

(v) An order of prohibition prohibiting the DCIO Nyeri and Principal Magistrate from charging, and prosecuting the Applicant in CRC 821/06 at Karatina Senior Resident Magistrate's Court;

(vi) That an order of mandamus do issue to compel the Judiciary to pay all emoluments during the period of dismissal;

(vii) Costs of this Application be granted to the Applicant.

The Notice of Motion is premised on the Verifying Affidavit sworn by the Applicant on 2nd February 2007 and a statutory statement of the same date. The Applicant also filed skeleton arguments on 15th June 2007.

The Application was opposed and a Replying Affidavit dated 8th November 2007 was sworn by Corporal Godfrey Mburugu of CID, Nyeri Police Station. Though the hearing date was taken by consent, the Respondent's Counsel Mr. Wohoro did not appear at the hearing of the Motion on 5th December 2007. No submissions were made by the Respondent but the court will consider the Affidavit on record.

The Notice of Motion challenges the decision of the Registrar dated 29th September 2001, interdicting the Applicant from his duties as a clerk at Nyeri Law Courts. It also challenges the decision of the police in charging the Applicant with the offence of conspiracy to defeat execution of justice contrary to Section 395 (a) of the Penal Code. (LWW2 & 1). The facts leading to the charge and interdiction are that one Michael Kinyanjui Kamau was charged with a Traffic offence of Careless Driving at Nyeri Resident Magistrate, Traffic Court case 1000/06 on 3rd August 2006, where he pleaded guilty and was fined kshs.4000/=, in default, 3 months imprisonment. The same Michael Kamau was charged before another court for a similar offence on 8th August 2006 when the presiding magistrate noticed the anomaly and drew it to the attention of the Chief Magistrate, Mr. Nyakundi. It was found that the proceedings in Traffic Court 1000/06 were obliterated with white out and the plea & sentence erased, the sentence in the police file was also erased and a new one prepared. Mr. Nyakundi referred the matter to the Registrar who interdicted the Applicant on 29th September 2007 (WW 1 (a). The Applicant denies that his duties involved the filing of charges but that that was the duty of the DCIO and he could not therefore have altered a police charge sheet. That despite the fact that the investigation officer confessed to having made the alteration he was not charged and therefore the charges were preferred selectively as no charges were preferred against the police officer.

He also blames Mr. Nyakundi for investigating his own officers and the fact that the Criminal case being heard in Karatina makes the Chief Magistrate a judge in his own cause. The Applicant also pleads that rules of natural justice were flouted in that the Judicial Service Commission never gave him a chance to defend himself before the interdiction and that that decision is an error and ultra vires, that the charge is preferred with vindictiveness, mala fides, and without statutory power. That is why he wants the said decisions to be quashed.

In opposing the Motion, CPL Mbugua indicates that he investigated **CRC 821/06 R V Linus Wanjohi Waruiru and Michael Kinyanjui Kamau**. That he recorded statements of two magistrates before whom the pleas were taken on 3rd August 2006 and 7th august 2006, Mrs. Osoro and Mr. Kibet respectively. He established that Kinyanjui Kamau had been fined by Mrs. Osoro on 3rd August 2006 after pleading guilty to traffic offences. But that on the same day, the Applicant approached a court orderly with court bonds for the said Kinyanjui Kamau and he was released from cells. The results of the plea were indicated on the police file by IP Yusuf Yahya the prosecutor. However on 7th August 2006, the accused, Kinyanjui Kamau appeared before Mr. Kibet to answer the same charges like those before Mrs. Osoro where he denied the charges and was released on bond of Kshs.10,000/=.

One PC Maina informed the investigating officer that that accused had informed him that the results entered on the police file were wrong and that the plea was taken on 7th August 2006 and he handed the file back. However I.P. Yusuf discovered that the results of the 1st plea were whitewashed from the file. CPL Mburugu found that the court proceedings of 3rd January 2006 were also whitewashed and the results of the case had not been entered in the register. From those facts, he formed the opinion that the Applicant worked in collusion with the accused in Traffic 1000/06 and he charged them accordingly. It is the Respondent's case that the Respondent is mandated by S. 23 of Service Commissions Act to interdict for such conduct and that the Applicant has not shown what law has been breached by the Respondent. It is also denied that the 2nd charge sheet that was presented to the court was prepared by the DCIO and that in any case the DCIO does not deal with such cases but the Divisional Traffic Officer (DTO) and that it is I.P Yusuf who noticed the anornally because the police file had not been returned

to the police station. That the interdiction was justified because of the pending criminal charges that have been preferred against the Applicant. It is also the Respondent's contention that the criminal charges that the Applicant faces are justified.

The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the Application for Judicial Review is made, but with the decision making process itself. In the case of **CHIEF CONSTABLE OF NORTH WALES POLICE V EVAN (1982) 1 WLR 155 pg 1160 (1982) 3 ALL ER 142** Lord Hailsham said:-

"**It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."**

Lord Brightman in the same case said "**The court will not however interfere on a Judicial Review application or act as "Court of Appeal" from the body concerned; nor will the court interfere in anyway with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction or the decision is unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court is to attempt itself the task entrusted to that authority by the law, the court, would under the guise of preventing the abuse of power be guilty itself of usurping power."**

Judicial Review orders may issue against an inferior court or tribunal when the court or tribunal has acted without jurisdiction or exceeded its jurisdiction or has failed to comply with rules of natural justice or where there is an error on the face of the record or if the decision is unreasonable.

The Applicant has challenged two decisions herein. The first decision is the charge preferred against him jointly with Richard Kinyanjui Kamau. The offence he faces is one of conspiracy to defeat the execution of justice contrary to Section 395 (9) of the Penal Code (PC). It is alleged that on 3rd August 2006, at Nyeri Law Court Nyeri District, in Central Province, jointly conspired to defeat the execution of justice by destroying court judgment records in respect of Nyeri CMS Court Traffic Case No. 1000/06 which judgment had been delivered on 3rd August 2006 by Mrs. N.J. Osoro SRM. The Applicant and theco-accused denied the offence and the Applicant filed this Application to have that decision to charge him quashed. Firstly, the Respondent denied that the DCIO ever preferred any charges against the Applicant but that it is the Divisional Traffic Officer (DTO) who deals with Traffic cases. That fact has not been challenged. CPL Mburugu has given a detailed explanation in his affidavit regarding what led him to prefer the charges against the two, the Applicant and his co-accused. The 2nd accused had taken plea before Mrs. Osoro on 3rd August 2006, had pleaded guilty, convicted and sentenced to a fine of Kshs.4000/= in default, 3 months imprisonment. The Appellant was then the court clerk. The results of this conviction were not entered in the register as required. Later, the results they were found to have been whitewashed. After the conviction, the Applicant informed the court orderly who had the police file that the plea had not yet been taken and yet he knew that the plea had already been taken. Another charge sheet was prepared which is disputed that the DCIO ever prepared. Indeed the DCIO should have sworn an affidavit to that effect. However, even without the Affidavit of the DCIO who, as noted above, did not prefer the charges, CPL Mburugu, after recording statements of witnesses formed the opinion that the above offence had been committed. The question is whether the Respondent was justified in preferring the said charges and what was the predominant purpose for preferring the charges? In the Australian case of **SPAUTZ V WILLIAM (1992) 68 ALJ R 585,** the court observed; that in such a case where abuse of the criminal justice system is alleged, the court had to consider what the predominant purpose for instituting the criminal charges is. The court said;

"**The proceedings complained of were instituted and/or maintained for a purpose other than that for which they were properly designed to exist or to achieve for the person instituting them, some collateral advantage beyond that which the law offers or to exert pressure to effect an object not within the scope of the process. The focus in such suit is on the purpose for which the proceedings exist, and is the pre dominant purpose of the person charged with abuse of the process in instituting them."**

The purpose of criminal proceedings is to hear and determine whether the accused has engaged in conduct which amounts an offence and on that account is deserving of punishment. The court can stop the criminal proceedings if they are oppressive, vexatious or used as personal vendetta to resolve personal scores as a tool for vilification. In the case of **STANLEY MUNGA GITHUNGURI V REP HCR 271/1985** the court considered the following principles;

(a) where a criminal prosecution amounts to nothing more than an abuse of the court process, the court will employ its inherent power and Common Law to stop it;

(b) A prosecution that does not accord with an individual's freedom and rights under the constitution will be halted;

(c) A prosecution that is contrary to public policy or interest will not be allowed.

In **KURIA & OTHERS V AG (2002) 2 KLR 70,** Justice Mulwa held that:-

"**1) The court has the power and indeed the duty to prohibit the continuation of criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation;**

2) It is the duty of the court to ensure that the processes are not used as tools for vilification on issues not pertaining to that which the system was even conferred to perform.

As observed in the above case, it is the duty of the court to ensure that it maintains its integrity and ensure that justice is done to all and it does not matter that the decision has been made but what matters is the objective for which the court procedure is being utilized.

In the instant case the Applicant alleges that the criminal case is vindictive, oppressive and an abuse of the court process. However, the Applicant has in no way demonstrated how these proceedings are vindictive, brought in bad faith or for any other improper purpose than that for which the criminal process is supposed to achieve. There is a reasonable cause to charge the Applicant, that is, for the alleged destruction of the court file, the alteration of the police file and having the plea in a traffic case to be taken twice. It is not for this court to deal with the merits of the criminal case. The merits will be dealt with by the criminal court and this court cannot interfere with that criminal process as it lacks the mandate.

As to whether the police had power to prosecute the Applicant, S.26 of the constitution gives the Attorney General inherent powers to institute and undertake criminal proceedings which he usually delegate to the Commissioner of Police. Those powers can only be challenged under S. 123 (8) of the Constitution, if the said powers are exercised contrary to the constitution or any other law for example, if the police acted with mala fides, oppressively or in excess of their powers. As pointed out earlier, that has not been demonstrated by the Applicant.

The 2nd decision that the Applicant challenges is contained in the letter of 29th September 2006 interdicting the Applicant following his being charged in Crc 821/06 for allegedly destroying the court records. The Applicant alleges that he was not accorded a chance to defend himself before the interdiction. The Applicant was interdicted pursuant to S.23 of the Service Commissions Act. That Section reads as follows:

"**23 (1) In any case an authorized officer is satisfied that the public interest requires that a public officer should cease forthwith to exercise the powers and functions of his public office, he may interdict the public officer from the exercise of those powers and functions, provided proceedings which may lead to his dismissal are being taken or about to be taken or that criminal proceedings are being instituted against him;**

2) A public officer who is interdicted shall receive such salary not being less than half his salary as the authorized officer shall think fit;

3) Where disciplinary or criminal proceedings have been taken or instituted against a public officer under interdiction and such public officer is neither dismissed nor otherwise punished under those regulations, the whole or any salary withheld under paragraph 2 shall be restored to him upon the termination of such proceedings."

The Applicant has already been charged with a criminal offence. The interdiction was therefore instantaneous, or automatically follows the preference of the criminal charges. There can be no hearing of the affected officer under the circumstances because then such hearing would deal with the issues that may arise in the criminal case which is sub judice. Interdiction is a process put in place to help the employer await the outcome of the criminal proceedings and commence disciplinary proceedings against the officer if that is necessary. The Registrar who is the authorized officer acted on behalf of the Judicial Service Commission and acted in accordance with the statutory provision relating to discipline. The Applicant has not demonstrated that any statutory provision has been flouted. In my view, the Applicant has brought this application prematurely because there is a process under Regulation 23 whereby, if the criminal proceedings are dismissed, then the Applicant can be reinstated and he will be paid all his outstanding emoluments but if found guilty then disciplinary proceedings would follow to dismiss him or award any other disciplinary action. The Registrar's decision was made within the statutory provision.

Can Judicial Review orders lie?

The 1st prayer is that this matter be certified urgent and service be dispensed with. That prayer is misplaced. A Notice of Motion cannot be heard without service on the other party/parties. The prayer is in any event spent because the Respondent was served.

The 2nd prayer is for stay of the criminal proceedings in No. 821/06 Karatina SRM Court pending hearing and determination of these proceedings. A prayer for stay of the proceedings could only have been sought in the Chamber summons seeking leave. The court considered the same in the Chamber Summons that sought leave to commence Judicial Review proceedings and the courtdeclined to grant it. It is the practice and it is trite that an order of stay and leave are considered simultaneously at the time the Chamber summons seeking leave is heard. It was so held in **NJUGUNA V MINISTER FOR AGRICULTURE CA 144/2000** and **AGA KHAN EDUCATION SERVICES V REP (2004) 1 EA 3**. An order of stay cannot be at this stage of the proceedings.

The 3rd prayer is for an order of certiorari to quash the decision of the Judicial Service Commission to interdict/suspend the Applicant from the Judiciary. As observed above, the Judicial Service Commission never made any decision to interdict or suspend the Applicant. The letter dated 29th September 2006 was authored on behalf of the Registrar who is the authorized officer of the High Court. An order of certiorari can only issue if it has been shown that the said officer breached rules of natural justice acted in excess or without jurisdiction, or that there was an error on the face of the record. None of the above has been demonstrated by the Applicant.

The 4th prayer is for an order of certiorari to quash the decision of the DCIO Nyeri to charge the

Applicant. As earlier observed there is no evidence that the DCIO is the one who preferred the charges and charged the Applicant. Besides there is no evidence that the Respondent acted in excess or without jurisdiction or that the proceedings were commenced for a purpose other than criminal justice.

The 5th prayer is for an order of prohibition, prohibiting both the DCIO Nyeri and SRM from charging or prosecuting the Applicant in CRC 821/06. Prohibition lies to stop a decision that is yet to be made. In this case, the charges have been preferred and the court cannot prohibit the DCIO or the PMs Courts from charging the Applicant. The second part of the prayer seeks to stop the DCIO and PM's Court from prosecuting the Applicant. No such order can lie against the court because the court does not prosecute. The court merely adjudicates. An order of prohibition can only lie if the public body or officer has acted in excess or without jurisdiction or in breach of rules of natural justice. The Respondents acted within their jurisdiction and there has been no breach of rules of natural justice proved. Prohibition can not lie.

The 6th prayer is for an order of mandamus to compel the Judiciary to pay all emoluments during the period of dismissal. That prayer is totally misplaced. The Applicant has only been interdicted, not dismissed. He is being paid ½ salary in accordance with the statutory provisions relating to interdiction, Regulation 23 (2). He cannot be paid emoluments that have not accrued. That prayer is premature and cannot lie.

The last point I wish to address is the competence of the Notice of Motion. This motion is fatally defective because the Applicant did not comply with Order 53 rule 3(2) Civil Procedure Rules. That sub rule provides that the notice shall be served on all persons directly affected and on all parties to the proceedings. The Rule is couched in mandatory terms. The Applicant was charged with one Michael Kinyanjui Kamau in CRC 821/06. The said Michael would be directly affected by any orders that the court may make in this case. He should have been served with this motion. Service on all parties that may be affected by the court's orders is to ensure that no party is condemned unheard. If the orders were granted by this court Michael K. Kamau will be condemned unheard. Failure to serve him renders this motion fatally defective.

In sum I find that apart from the Notice of Motion being fatally defective, it is also unmerited and it is hereby dismissed with costs to the Respondent.

Dated and delivered this 14th day of March 2008.

R.P.V. WENDOH

JUDGE

Mr. Macharia for Applicant

Mr. Kiage holding brief for Wahuro for the Respondent

Daniel: Court Clerk