REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPLICATION NO. 271 OF 2002

IN THE MATTER OF: AN APPLICATION BY DR. JOSEPH HASTINGS KINYILI FOR ORDERS OF CERTIORARI AND PROHIBITION.
IN THE MATTER OF: THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF: ORDER LIII CIVIL PROCEDURE ACT AND RULES, THE LAW REFORM ACT, CHAPTER 26, THE JUDICATURE ACT, CHAPTER 8, THE PENAL CODE CHAPTER 63, THE CRIMINAL PROCEDURE ACT, CHAPTER 75, SECTIONS 14, 25 AND 16 OF
THE STATE CORPORATIONS ACT, CHAPTER 446, SECTION 3A OF THE CIVIL PROCEDURE ACT,
CHAPTER 21, AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW
AND
IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 2183 OF 2001
REPUBLIC VERSUS JOSEPH HASTINGS KINYILI, THOMAS OYUGA ABOK AND GEORGE MWANGI
KARUGA
BETWEEN

DR. JOSEPH HASTINGS KINYILI……..…..APPLICANT

AND

REPUBLIC ……..……..1ST RESPONDENT

CHIEF MAGISTRATE'S COURT NAIROBI…….……...2ND RESPONDENT

KENYA VETERINARY VACCINES PRODUCTION INSTITUTE…..…1ST INTERESTED PARTY

THOMAS OYUGA ABOK ……...…2ND INTERESTED PARTY

GEORGE MWANGI KARUGA …….…..…3RD INTERESTED PARTY

R U L I N G

1. The Ex-parte Applicant in this matter is Dr. Joseph Hastings Kinyili and he has approached this court by Notice of Motion under Section 8 and 9 of the Law Reform Act. Cap. 26, Order 53 Rules 1(1), (2), (3) and (4) of the Civil Procedure Rules, Sections 84(5), 65(2), 70, 77, 78, 79, 80 and 81 of the Constitution and Section 3A of the Civil Procedure Act. Leave to institute judicial review proceeding as is required by the Rules was granted on 25th April 2002.

2. The orders sought as set out at page 2 of the Application dated 14th May 2002 are these: -

1. That an Order of Prohibition be directed to the 2nd Respondent or any other Court from hearing, determining or in any matter whatsoever dealing with Criminal Case Number 2183 of 2001 – Republic vs. Dr. Joseph Hastings Kinyili, Thomas Oyuga Abok and George Mwangi Karuga - or any variation thereof of akin to the same in Criminal Case Number 2183 of 2001

2. That an Order of Prohibition be directed to the Attorney General barring him from further prosecution or preferring prosecution in Criminal Case Number 2183 of 2001 in its present form, in any intended variation thereof or akin to the charges in Criminal Case Number 2180 of 2001.

3. That an Order of Certiorari do issue to remove and bring to the High Court for purposes of being quashed the charge sheet dated 5th October 2001 – Republic vs. Dr. Joseph Hastings Kinyili, Thomas Oyuga Abok and George Mwangi Karuga, before the 2nd Respondent.

4. That costs of this Application be provided for.

3. The grounds on which the Application is based and the statement of facts elaborately set out the reasons of fact why the Applicant thinks that this court should step in and save him the agony of a protracted trial at the lower court case. FACTS IN SUPPORT

4. The Applicant was the Managing Director of the Kenya Veterinary Vaccines Production Institute between 24th September 1999 and 5th October 2001. Prior to that he had worked for the same institute as Manager in Quality Assurance, Research and Development and Technical matters for a cumulative period of twelve (12) years.

5. On 5th October 2001, the ex-parte Applicant, one Thomas Oyuga Abok and one George Mwangi Karuga were charged before the Chief Magistrate's Court in Nairobi with fifteen (15) counts of stealing contrary to Section 275 of the Penal Code, Cap 63 in Criminal Case No. 2183/2003.

6. The particulars of the fifteen counts are that on or about 14th July, 10th August, 24th August, 29th November, 7th December, all in the year 2000 and 14th June, 12th January, 23rd February, 11th April, 30th May, 8th May all in the year 2001 at Kenya Veterinary Production Institute in Nairobi stole in cash Kshs.5,000, Kshs.15,000, Kshs.40,000, Kshs.20,000, Kshs.15,000, Kshs.25,000, Kshs.40,000, Kshs.150,000, Kshs.20,000, Kshs.20,000, Kshs.150,000 and Kshs.150,000 respectively, the property of the said institute.

7. The Applicant contends that the above sums of money were and could not have been said to have been stolen because they related to payments made lawfully by the Institute to third parties in respect of water charges during the drought in the year 2000 - 2001. He further states that he indeed authorized all the payments but he did so in good faith and in any event, there was no Board of Directors of the Institute during the relevant period and he was as it were, the sole decision maker with regard to the affairs of the Institute.

8. The Applicant blames a certain Senior Manager at the Institute as being the one who engineered both his arrest and eventual removal from the institute. He also says that he raised the malicious actions of the said Senior Manager at a meeting held on 11th June 2001 and the minutes of that meeting are exhibited as "JHK2A".

9. As regards the accounting processes of the Institute, the Applicant argues that both internal and external audits should have been effected to confirm if indeed there was mismanagement and/or theft of funds instead of the Anti-Corruption Authority and the Police being given the opportunity to move in and make arrests. In any event, he submits that when the Anti-corruption Authority agents came to do their investigations they reached a conclusion of theft of monies without hearing the Applicant's version of events. For himself, however, he says that he authorized payments only after his juniors had made verifications on the delivery of the water and the validity of the cost thereof. He did not handle or have any contact with the water suppliers at all.

10. Counsel for the Applicant while re-iterating all the above matters also delved deeply into issues of law, which I should set out before turning to the Respondent's side of things

. **LAW IN SUPPORT**

11. I was referred to a number of issues of law which I was urged to carefully look at and find that the Applicant ought not to suffer a day more the indignity of the trial at the lower court.

12. Firstly, it was argued that the charge that the Applicant is facing is one of stealing yet all that the Respondent has shown, if at all, is fraud and theft/stealing cannot have the same ingredients of fact as fraud.

13. Secondly, it is also said that payments were made for services not rendered to the institute. Yet the payment vouchers have more than three signatories – one from the Heads of Departments concerned, a second from the Personnel Officer, a third from the Internal Auditor and then the Applicant's signature in approval. I am asked the question; how does approval of payment now become theft in law?

14. Thirdly, I was referred to the State Corporations Act, Cap. 446 and asked to hold that looking at the process of auditing State Corporations, the case before the lower court is so utterly legally flawed that it should be stopped immediately. Section 14(3) of the Act provides for an audit query as the precusor to an investigation and under Section 15, the Board of Directors and not the Managing Director is responsible for the moneys of a corporation and the Inspector of State Corporations is expected to be the watchdog under Section 18. It is the Inspector of State Corporations who should do a report leading to arrest and prosecution of any member of the institute deemed or suspected to have committed an offence. In the instant case, it was argued that all the steps were circumvented and the Applicant was arrested and charged without the benefit of putting his case to the Inspector of State Corporations.

15. On the authorities, I was referred to

> *(1) Misc. Appl. No. 206/2001 – Republic vs. Attorney General Ex -parte Kipng'eno Arap Ngeny* where the court held that where a criminal charge is seen as an abuse of court process, then the court can interfere in favour of the accused person. I was told to be persuaded that this was also true of the instant case.
>
> *(2) In Connelly vs. Deputy Public Prosecutor (1964) 2 All E.R. 401* , It was held that a prosecution must not be oppressive and where an indictment is seen as an abuse of the process of court, then the court should move in and protect itself from such abuse
>
> (*3) Deputy Public Prosecutor vs. Humphreys (1976) 2 All E.R. 497*, where the court held that it had discretion to stop abuse of the process of court.

16. I was urged firstly to heed the plea of the Ex-parte Applicant and stop the proceedings in the lower court and release him from the burden and shackles that he has now been saddled with.

17. The Respondent/Attorney General thinks otherwise.

RESPONDENT'S CASE

18. The Respondent relies on the Affidavit of Edwin Okello sworn on 2nd July 2002. The said Edwin Okello depones at paragraph 1 of his Affidavit that he is a State Counsel and his knowledge of the matter is limited to what he gathered after reading the relevant police file No. 141/988/2001 with regard to this matter. Investigations carried out and as per the police file aforesaid indicated that no water was supplied to the Institute as alleged by the Applicant. Further, that the witnesses at the Institute only saw water being delivered from external sources twice and on both occasions the delivery was made by City Council of Nairobi trucks and no payment was made on behalf of the Institute.

19. It is further deponed that all investigations indicated that there was sufficient evidence to charge the Applicant with the offence as all documents to be produced in trial indicated glaring anomalies and total refusal by the Applicant to follow laid down procedures. Certain documents that were missing from the "water file" surfaced in court during this Application and yet they could not be found in the relevant file during investigations.

20. I am urged to disallow the Application and further order that the trial at the lower court should proceed as the Applicant has sufficient opportunity to defend himself against the charges.

21. Counsel for the Respondent on the basis of the above matters then addressed me on the issues of law that he deemed important.

22. Firstly, I was informed that where the Attorney General or his agents determine that a matter ought to be taken to court based on the preliminary findings of certain investigations, then constitutionally he cannot be stopped except by the trial court, perhaps.

23. *In Misc. Appl. No. 1384/2001 – Republic vs. Attorney Genral Ex -parte Emmanuel Kuria Gathoni & Another* , I am asked to be guided by the decision of a three-judge bench, which determined that it is only the trial court that can determine the merits or demerits of a case once the Attorney General has laid charges before it.

24. *In C.A. 366/1999 – Kenya National Examination Council vs. Republic* , it was held that prohibition cannot quash a decision already made; it can only prevent a contemplated decision. In the instance case, the decision was made, the Applicant and others charged and all that is left is for the trial court to make its decision based on the evidence that will be presented to it.

25. On the question of jurisdiction, I am referred to Section 5 of the Criminal Procedure Code and more particularly Section 5 (2) where an offence of stealing such as the one the Applicant is facing must be tried by the subordinate court, not the High Court.

26. It is also the subordinate court to determine whether an offence has been committed or not and whether the evidence supports the charge as laid.

27. The Interested Party, the Institute earlier referred to supported the case as presented by the Respondent in entirety save to add that the Board of Directors of the Institute took no part in the decision to pay for water supply which formed the basis for the charges facing the Applicant.

28. I shall now apply my mind to the issues as presented and proceed to determine whether the Applicant is entitled to the orders he has sought from this court.

JUDICIAL REVIEW IN CRIMINAL PROCEEDINGS

29. The Applicant is seeking orders of Prohibition and Certiorari directed at the Chief Magistrate, Nairobi and the Attorney General barring them from hearing or prosecuting the Criminal case and to remove those proceedings to this court and quash them. (see page 2 paragraph 2 of this Ruling for specific prayers).

30. As I understand these matters, prohibition is issued to stop a decision and is futuristic in nature. It cannot look to acts or complaints of the past. It is not historical. It would be for example be perfectly within the ambit of prohibitive orders to require a court or an administrative authority to do something, for example not to act in excess of its jurisdiction. It cannot on the other hand be contemplated that prohibition would operate to stop a court or an administrative body from pursuing an act which has already taken place, for example prohibit the commencement of a trial when the plea has been taken.

31. In this, I am being asked to prohibit the hearing and determination of Criminal Case No. 2183 of 2001. I am also being asked to prohibit further prosecution or preferring a prosecution in the said criminal

case in its present form, *"in any intended variation thereof akin to the charges*" in that case.

32. These words have been used carefully by the Applicant to escape the futuristic demands of prohibition yet although so carefully crafted, the import and meaning is that the decision to prosecute and to begin to hear the case should be prohibited. The determination cannot possibly be prohibited once prosecution and hearing has come to an end as the avenue would properly be an appeal or where there are compelling reasons to apply other limbs of judicial review.

33. Nevertheless, the decision to authorize prosecution of the Applicant has been taken and this is what the Applicant could have sought prohibition of. It would not do to compartmentalize prosecution and the hearing of the case. This court so eloquently held in the constitutional case of *Emmanuel Kuria Gathoni & Another vs. Attorney General, H.C. Misc. Appl. No. 1354/2001 that "this court cannot and should not, compartmentalize the actions of the police, the Attorney General, and the learned Chief Magistrate …. In our view, the ru le of law and fairness require us to consider the evidence as a whole before we issue prohibition. We also mention in passing, that the process of prosecution in reality stops at the close of the prosecution case before trial court." I wholly agree. The Applicant is creating stages or compartments of prosecution and hearing. It is as if there is "part*" prosecution and "*further"* prosecution and "*preferred"* prosecution, all in the same trial and as if all must be treated differently in matters such as this. I think not. The proposition may sound verbose and focused but it merely leads the Applicant to a blind alley.

34. Lord Hope did state in *R. vs. Director of Public Prosecutions, ex -parte Kebilene and others {1999} UKHz 43* that a decision of the Director of Public Prosecution was not capable of being judicially reviewed unless dishonesty, bad faith or other exceptional circumstance could be shown. As I said earlier, the exceptions are matters for other limbs of judicial review, as I shall shortly demonstrate, and not for prohibition in the nature of a case such as this and especially after the charge has been laid.

35. On the whole, based on the evidence before me and taking into account the issues I have raised regarding the grant of orders of prohibition, I do find that the Applicant has made no case to warrant grant of prayers 1 and 2 of his Application and I dismiss the same.

36. As regards the third prayer for certiorari, ordinarily the orders are issued to quash the decision of the trial court for example in summary convictions and more rarely if there is an acquittal.

37. In this case, I am being asked to quash "*the charge sheet dated 5 th October 2001"*. The reasons are that the offence disclosed is one of fraud, not of stealing and that in any event; the Applicant could not have perpetrated the fraud or even committed the theft. He merely authorized payment (refer to page 4 & 5 paragraph 7 of this Ruling). It is also generally argued that the prosecution is in breach of the human rights of the Applicant and there was lack of due process.

38. Again there the Applicant has put himself in a legal and procedural quandary. The decision that really ought to be removed and quashed, if at all, is that of the Attorney General to commence proceedings. As Lord Hope stated above, the decision to be looked at by judicial review is the one to "authorize" prosecution. I did not hear the Applicant to be saying quite that. I am told that the "charges in Criminal Case No. 2183 of 2000 are defective and incapable of withstanding the scrutiny of daylight", and that "the charges and prosecution of the Applicant is not based on any or any intelligent material evidence, nor are the charges thereof supported by the particulars alleged" . The Applicant without the benefit of knowing what evidence is being lined up against him, is already dismissing it as unintelligent and weak. Is that his place? I think the right authority to determine and evaluate the weight or lack of it, of the evidence to be tendered against the Applicant is the trial magistrate.

39. Is the Applicant casting a stone at the trial magistrate? No. In the entire Application no finger is pointed at the court, yet the matter upon the charges being laid is in the hands of the court. What has the court now done to warrant the case being plucked from it and quashed by the boots of certiorari? Nothing.

40. There are instances where this court can grant certiorari. Githinji, *J. in Dinak Panachand vs. Attorney*

General & Another Misc. Appl. No . 189 of 2000 quoted with approval, Regina vs. Thames Magistrates Court ex -parte {1974} IWLR 1371 where a court refused to grant an adjournment as this amounted to refusing the Applicant a reasonable opportunity to prepare his case. Orders of certiorari were issued to quash that decision.

41. In the instant case, the jurisdiction of the court or the manner in which it is conducting the trial is not questioned and I do not as I have said know what quarrel the Applicant has with the case handling of the case generally by the court seized of it.

42. On due process, save for the argument that the investigators did not give the Applicant an opportunity to defend himself, I see no other ground for saying that he is being denied a chance to defend himself at the trial court. The former question is spent and the latter is within his grasp. I see no compelling reason to find that there is no due process accorded to him.

43. Back to the Attorney General's role in the trial, it is not said that he has acted in any manner outside his constitutional powers. This court has on many occasions discussed those powers in prosecutions. In this case, it is merely said that the case he has at present cannot stand the *"scrutiny of daylight"*. That may be a dazzling statement but has no ray of light beyond semantics. It is the trial court's duty to determine the heat of a case and whether it will burn the Applicant or not. And as I said, the Applicant has ample opportunity to shut the case down and to his favour.

44. I must in conclusion say this: - the Applicant has the opportunity to say all that he has said here in the trial court. If he is stopped by the court from doing so or the court for some reason, I cannot fathom now does something so outrageous as to necessitate judicial review proceedings, then the applicant may come back to this court. Other matters may well be handled on appeal in the event of the trial coming to conclusion in whichever terms.

45. As it is I find that the Application although well presented and with persuasion, has failed the test for grant of the orders sought.

46. Accordingly, the Application dated 14th May 2002 is hereby dismissed.

Dated and delivered at Nairobi this 4th day of February 2004

I. LENAOLA

Ag. JUDGE

4.2.2004

Coram; Lenaola Ag. J.

Mutula Jnr. For the Applicant

Mrs. Mbaabu for 2nd Interested Party

Mr. Monda for the Respondents

No appearance for the interested party

Ruling read

I. LENAOLA

Ag. JUDGE