



Republic v Director of Public Prosecution & another; Chege (Exparte Applicant) (Judicial Review Miscellaneous Application E124 of 2022) [2023] KEHC 19043 (KLR) (Judicial Review) (15 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E124 OF 2022**

JM CHIGITI, J

JUNE 15, 2023

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION 2ND RESPONDENT

AND

BEATRICE NJERI CHEGE EXPARTE APPLICANT

RULING

Brief Background:

1. The applicant herein filed an application by way of notice of motion dated November 4, 2022 seeking orders that:-
 1. This court be minded to grant an order of prohibition directed at the Respondents prohibiting them from arresting, incarcerating and prosecuting the applicant .
 2. This court be minded to grant an order of certiorari to remove and quash the decision of the Respondents to arrest, incarcerate and prosecute the applicant herein.
 3. Costs of this suit be borne by the Respondents.
2. The application is anchored on the grounds that are on the face of it supported by the supporting affidavit of Beatrice Njeri Chege sworn on November 4, 2022.



applicant s' case:

3. It is the applicant s case that she was engaged in a business relationship with the complainant and that the dispute between the parties escalated to a complaint before the police that spilled over to the Office of the Director of Public Prosecution (the 1st Respondent).
4. The applicant points out that the 2nd Respondent through a Misc. Application E073 OF 2021 sought to have the applicant 's goods seized during her investigations.
5. The applicant avers that the 2nd Respondent through the advice of the 1st Respondent withdrew the criminal investigation after advice that the matter was Civil in nature.
6. The applicant indicated that the complainant filed a civil suit being CMCC E462 of 2022 seeking a judgment against the applicant on account of breach of contract.
7. The applicant argues that the matter before the Chief Magistrate's Court has mutated to Civil Appeal No. E096 OF 2022 and Civil Appeal No. E549 of 2022 which are all pending before the court.
8. The Respondents have intimated that they would arrest and press charges against the applicant over the same subject matter pending before the courts.
9. From the material before the court the applicant contends that the applicant and the Complainant were in business where the applicant was an agent selling motorcycles for a commission.
10. Over time the applicant opened her own business through a company where she was the sole director by the name Tris Motorcycles Limited which teamed up with another company Tua International Limited (where the applicant hold some shares).
11. The applicant became a free agent and the complainants would over time take their products to the applicant for sale and the proceeds were paid to the complainant less commission.
12. It is through this interaction that a dispute on the debt arose and the complainant made a complaint to the police with allegations of inter alia theft by agent.
13. The complaint led to investigations which were coupled with orders of seizure being obtained under a Miscellaneous Cause No. E073 OF 2021 filed at Kibera Law Courts.
14. The matter in Kibera Law courts was compromised through a withdrawn by the Respondents upon the advice of the Director of Public Prosecution with the following recommendations.
15. According to the applicant , the foundation of this complaint was based purely on a gentleman's agreement between the suspect and the complainants which did not stipulate payment timelines and schedules. This is corroborated in the statements of all witness's privy to the transactions between the complainants.
16. The applicant strongly believes that there is no sufficient evidence in the file to admit them based on the evidence presented. From the statements of both the complainants and the suspect it is evident that both parties were transacting as partners and there are no implied terms to show that one was acting on behalf of the other. No documents have been availed to show the creation of agency relationship.
17. Nothing has been presented in the police file to show the nature extent in which the suspect and others not exposed by the investigations conspired to defraud the complainants of their property contrary to section 317 of the penal code.



18. It is evident that the parties in this complaint had transacted together over a period of time regarding the same subject matter. The basis of the gentleman's agreement was the knowledge of the complainant that the suspect had capacity to carry out the business venture before.
19. The applicant maintains that the office of the Director of Public Prosecutions cannot entertain issues of ambiguity that rely solely on -contractual interpretation of agreements entered into by independent capable parties. The office is of the view that this matter leans majorly on issues of contractual law which can be exclusively resolved through a civil suit.
20. Upon the withdrawal of the criminal matter (inquiry) the complainant proceeded to file recovery suit being CMCC E462 of 2022 at the Milimani Law Courts which matter has culminated into appeals being filed being Civil Appeal No. E096 of 2022 and Civil Appeal No. E487 of 2022 which are both pending before the courts.
21. The applicant argues that to arrest and cause the applicant to be charged with the same offence that was investigated, recommendation given, matter withdrawn and civil suits instituted for and against the parties which are pending before the courts is illegal.
22. The applicant cited the case of High Court in Judicial Review No. 26 of 2017 *in the matter of exparte applicant Pius Kiprop Chelimo and Jonah Kiprotich Telo* where the court stated as follows:-

“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of proceedings. Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of court.

The Court further in the said judgment stated the following;

“It is not the purpose of the criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties on a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For



in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law; than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in.

"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in offence material evidence. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."

23. Accordingly the DPP doesn't require the consent or authority for commencement of criminal proceedings and in exercise of his/her powers or functions he/she ought not to be under the direction or control of any persons or authority according to article 157 (10) of *the constitution*.
24. The applicant relies on section 4 of the *Office of Public Prosecution Act* No. 2 of 2013 which provides that:-
- “In fulfilling its mandate the office shall be guided by *the constitution* and the following fundamental principles:-
1. The adversity of the people of Kenya;
 2. Impartiality and gender equity;
 3. The rules of natural justice;
 4. Promotion of public confidence in the integrity of the office;
 5. The need to discharge the functions of the office on behalf of the people of Kenya;
 6. The need to serve the cause of justice, prevent abuse of the legal process and public interest;
 7. Protection of the sovereignty of the people;
 8. Secure the observance of democratic values and principles; and
 9. Promotion of *the constitution*.
25. The applicant submits that the DPP in exercise of his powers certain standards have to be met at all times and his/her discretion must be within the standards set out in the Office of the Public Prosecution Act and *the Constitution*.
26. The applicant is persuaded that it is the duty of the court to investigate any allegations to the effect that the exercise of such power has been made ultra vires relying on the case of *Nakusa -vs- Tororei & 2 others (No.2)* Nairobi HCEP No. 4 of 2003 /2008/2KLR (EP) 565 and *Republic -vs- Director of Public Prosecution and 2 Others*.



27. The applicant submits that there has been no material placed before the court to demonstrate any suspicion or criminal culpability by the applicant in this matter by way of affidavit or otherwise is compliant, suspicious document or statement that they may claim to have triggered the intended prosecution.
28. In *Republic -vs- Director of Public Prosecution & 2 others; Evanson Muriuki Karinki (interested party); Ex parte James M. Kabumbura* [2019] EkIr Justice Mativo stated as follows:-
- “The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. The DPP must consider whether to request the police to investigate the case further; or whether to institute a prosecution; or whether to decline to prosecute; or terminate a criminal trial. ”
- “The decision whether or not to prosecute must be taken with care because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decisions may also undermine the community’s confidence in their prosecution system and the criminal justice system as a whole.”
29. The applicant also relies on the case of *DPP & 2 others; Evans Muriuki Kariuki (Interested party); Ex parte James Kabumbura* the judge held that “It is also true that the decision as to whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence.”

Respondents’ case:

30. The Respondents oppose the Application by way of a replying affidavit sworn by Nelson Ashiali dated January 2023.
31. The investigating officer stated that he was assigned to investigate the complaint on alleged offences of Stealing By Agent contrary to section 283(a) of the *penal code*, Conspiracy to defraud contrary to section 317 of the penal code Obtaining credit By False Pretenses contrary to section 316 of the *penal code* and among other related criminal offences reported on 20th December, 2021 by Philip Mwangi Kamau and Moses Mwangi Ndungu both representatives of by Beth Mobility LLP and Quest works Motorlabs LLP herein referred to as “the complainant” vide Kilimani Police Station Vide OB/No 29/20/12/2021.
32. The Respondent averred that it had not gone through the Application and its contents and therefore requested for more time to consult the Legal officers attached at the DCI Headquarters.

Analysis and Determination:

33. I have looked at the Application, the submissions, the law applicable and the case law around the issues.
34. Section 35 of the *National Police Service Act* sets the duties out the Directorate of Criminal Investigations as below;

“To collect and provide criminal intelligence; undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber-crime among others; maintain law and order; detect and prevent crime; apprehend offenders; maintain criminal records; conduct



forensic analysis; execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to article 157 (4) of *the Constitution*; co-ordinate country Interpol Affairs; investigate any matter that may be referred to it by the Independent Police Oversight Authority; and perform any other function conferred on it by any other written law.”

35. In the case of *Francis Matheka & 10 others v Director of Public Prosecutions & another* (2015) eKLR. The court held as follows:

“With respect to the applicant’s innocence, that is an issue for the trial Court. To determine the same would amount to this Court on a judicial review application usurping the powers of the trial Court and that is not the jurisdiction conferred on this Court in these kinds of proceedings. It must be remembered that justice must be done to both the complainant and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case.”

36. This position was appreciated in *Republic vs Commissioner of Police and Another ex parte Michael Monari & another* (2012) eKLR where it was held:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

37. The fact that there exists a civil suit is not a bar to any criminal proceedings or investigations.
38. Section 193A of the *Criminal Procedure Code* on this issue provides that, “notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”
39. This court is cognizant of the fact that there is need to uphold victims’ rights and this court is under a duty to promote access to justice which includes the rights of victims as highlighted under the *Victim Protection Act*.
40. Section 9(2) (a) of the *Victims Protection Act* provides that victims assist the courts to obtain a clear picture of what happened (to them) and how they suffered as a result of the offenders conduct or omission.
41. Victim participation should meaningfully contribute to the justice process. Article 50 of *the constitution* provides for the right to fair hearing. Victims of crime are entitled to the right to fair hearing and they do participate in proceedings. This was settled by the Supreme Court in the case of *Joseph Lendrix Waswa v Republic* [2020] eKLR.
42. The victims of an offense lodged a complaint with the police who initiated investigations. By filing a replying affidavit and submissions in opposition of the application before this court, I am satisfied that the victims have an interest in the outcome of the investigations. Allowing the Application will deny the complainants to their right to fair hearing.



43. The power to investigate crime is an important component of the rule of law it is no wonder the police are under a duty under the National Police Act, to investigate crimes whenever they reported. To stop the police from investigating crimes would usher in anarchy. That would appear to be what the applicant seeks to do.
44. The applicant will have his day in court in the event the Director of Public prosecution decides to charge him with the appropriate offences once the investigations are over. The applicant has also failed to tender any evidence nor produced a charge sheet that would have informed the court on whether the applicant will be charged. The applicant has put the cart before the horse.

Disposition:

45. The application is misconceived and the ex parte applicant has failed to prove to the court that he is entitled to leave as sought.
46. Stay orders in judicial review proceedings serve the purpose of preserving the substratum of the subject matter pending the filing and the hearing of the substantive motion.
47. Any other pending applications or processes within the suit cannot stand on nothing and the same must collapse with the failure to secure leave and stay orders.

Order:

48. The notice of motion dated November 4, 2022 lacks merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2023

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J. CHIGITI (SC)

JUDGE

