



Republic v Director of Public Prosecutions & another; Shree Hari Steel Works Ltd (Interested Party); Maranya & another (Exparte) (Judicial Review E003 of 2023) [2024] KEHC 12594 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
JUDICIAL REVIEW E003 OF 2023
EM MURIITHI, J
OCTOBER 17, 2024**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
ORDERS IN THENATURE OF CERTIORARI AND PROHIBITION BY
JAPHETH KOBIAH MARANYA AND GABRIEL MWENDA MIUNGI
AGAINST THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE
INSPECTOR GENERAL OF POLICE OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF MERU CHIEF MAGISTRATE’S CRIMINAL
CASE NUMBER E155 OF 2023: (REPUBLIC VERSUS JAPHETH
KOBIAH MARANYA AND GABRIEL MWENDA MIUNGI)**

AND

**IN THE MATTER OF INFRINGEMENT OF CONSTITUTIONAL RIGHTS UNDER
ARTICLES 47, 48 & 50 (1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

AND

SHREE HARI STEEL WORKS LTD INTERESTED PARTY

AND

JAPHETH KOBIAH MARANYA EXPARTE

GABRIEL MWENDA MIUNGI EXPARTE



JUDGMENT

1. By an application dated 9/6/2023 pursuant to Order 53 Rules 3, 4 & 5 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act, Sections 8 & 9 of the Law Reform Act & Sections 7(1) & 9 of the Fair Administrative Action Act, the Ex-parte Applicants seek:
 1. This Honourable Court do remove into itself and quash in their entirety the charges preferred against the Ex-parte applicants (Japheth Kobiah Maranya and Gabriel Mwenda Miungi) in Meru Chief Magistrate's Criminal Case No. E155 of 2023 together with any/all proceedings and consequential orders arising therefrom.
 2. The Honorable court do issue an order of prohibition to bar the Respondents from further prosecuting the Ex-parte applicants in Meru Criminal Case Number E155 of 2023 or from preferring any further Criminal charges against the Ex-parte applicants arising from the agreement dated 11/5/2016 between the applicants and Shree Hari Steel Works LTD (hereafter the Interested Party).
 3. Costs of this application be borne by the Respondents and the interested party.
 4. The court do make any other or such better orders which it may deem fit to grant in the circumstances.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Japheth Kobiah Maranya, the 1st Ex-parte Applicant sworn on even date. He avers that the Ex-parte Applicants are the directors of Newspace Creators LTD (hereinafter called the Contractor), which successfully bid for and was awarded a tender for the upgrading and renovation of Kinoru Stadium to International Standards by the County Government of Meru (hereinafter called the Client). The tender document allowed the Contractor to subcontract for some works in the contract to ensure that the main contract was effectively carried out to the desired conclusion. The Client then handed over the site to the Contractor and works commenced in earnest though not without the normal challenges of mobilization of the agreed works. To ensure the works were carried out within strict timelines as required by the Client, the Contractor through representation by the 2nd Ex-parte Applicant entered into a written agreement with the Interested Party, in which the latter was subcontracted for purposes of roof construction of the straight terraces at the site. It was an express term of the agreement at clause 4 that the contractual sum of Ksh.11,288,592 was to be paid after completion of the roof. After the main works began and after the Interested Party had moved to the sight in readiness for the commencement of the subcontract, the main contract was substantially frustrated by the Client for failure to provide the required support in terms of technical specifications, drawings, supervision and payments for works done. Without addressing the issues raised in the myriad of correspondences exchanged between the parties, the Client unilaterally and unlawfully terminated the main contract as awarded to the Contractor, which consequently terminated the subcontract. The Contractor was then literally evicted out of the site and all the machinery, equipment and other items of trade were detained at the site by the Client, which prompted the Contractor to make a report before the police at Meru. On 17/8/2016 and 25/8/2016, the Contractor wrote to the Client requesting for the release of some of the detained items, which request the Client contemptuously ignored, save for a lorry belonging to Harun Muthomi which was only released pursuant to an order of the court. The stoppage of the works was even reported in the Nation Daily Newspaper on 16/8/2016. The Contractor subsequently obtained orders restraining the Client from entering into any other contract over the subject. The dispute was finally referred to arbitration and the award arising out of that process was



published on 30/9/2019, where the Client was found fully liable on all counts presented, but the arbitral award contained glaring errors for which the Contractor has sought redress under Section 35 of the *Arbitration Act*. The determination by the High Court on this issue is still pending but crucial since all the issues raised by the Interested Party will obviously be adequately addressed especially the extent of the works executed. By the time the main contract was terminated, the Interested Party had done nothing much in performance of the subcontract and anything that it may have done is yet to be valued. It cannot therefore be possible to pay all or part of the subcontracted sum without evaluation and verification of the same by the Client. In light of the above, the works carried out in respect of the tender awarded to the Contractor and the subcontract awarded to the Interested Party can only be determined after the final determination by the Arbitrator. Notwithstanding the above situation, the Interested Party has now moved the police through the Directorate of Criminal Investigations and upon flawed investigations caused preference of Criminal Charges against the Applicants in Meru Criminal Case No. E155 of 2023 on two counts to wit; obtaining services by false pretences contrary to section 312 as read with 313 of the Penal Code and Conspiracy to defraud contrary to section 317 of the Penal Code. The Interested Party took advantage of the fall out between the Contractor and the Client to harass and threaten the Applicants with criminal charges. He is advised by his counsel on record that the Interested Party's claim is purely civil in nature and that the charges before the court are not only malicious but also grossly unfair. Prior to being arraigned in court, the Interested Party had categorically said that unless it was paid the entire sum of Ksh. 11, 288,592, it would ensure that the Applicants would spend a fortune in litigation. When they were arraigned in court, each Applicant was slapped with punitive bond terms of Ksh. 5,000,000 with one surety of a similar amount or cash bail of Ksh. 2,000,000. They had earlier been summoned before the DCI Meru to give their side of the story, but the officers largely ignored them and insisted that the Interested Party must be paid the whole claim. He was threatened with incarceration if he did not sign an agreement between the 2nd Ex-parte Applicant and the Interested Party, as a consequence of which he signed it without reading the contents. His counsel wrote to the 1st Respondent explaining the circumstances under which they had been suspected but the 1st Respondent went ahead to recommend that they be charged in court.

3. The 1st Respondent opposed the application vide the replying affidavit sworn by Masila E. Masila, its Principal Prosecution Counsel on 14/11/2023. He contends that the Interested Party made a complaint vide OB No. 44/23/4/2022 at DCI Meru regarding payment for services provided to the Ex-parte Applicants on diverse dates between 15/5/2016 and July 2016. Upon completion of the investigations, the 1st Respondent directed charges to be preferred against the Ex-parte Applicants and one Mary Karuthu Nkubitu, and the Ex-parte Applicants subsequently took plea before the Chief Magistrates Court in Criminal Case No. E155/2023. The actions of the 2nd Respondent were independent, proper, legal and lawful since they were undertaken in accordance with Articles 244 and 245 of *the Constitution*. The claim that the 2nd Respondent acted at the behest of the Interested Party is merely speculative as the Ex-parte Applicants have failed to establish that the Respondents' acts are tainted with illegality, irrationality and procedural impropriety. The 1st Respondent conducted a merit review of its decision to charge based on the law and facts, and the arbitration proceedings between the Ex-parte Applicants and the County Government of Meru are not in any way a bar to criminal prosecution. In any event, the 1st Respondent exercises its powers to prosecute independently pursuant to its mandate by dint of Article 157 of *the Constitution*. He urges the court to exercise extreme caution and restraint not to unnecessarily interfere with the 1st Respondent's decision by dismissing the application. The Interested Party has not instituted civil proceedings against the Ex-parte Applicants and as such, there can be no proof that the criminal proceedings were instituted for ulterior motives or amounted to an abuse of the court process.



Submissions

4. The Ex-parte Applicants urge that the prosecutorial powers donated to the 1st Respondent by Article 157 of *the Constitution* must be exercised judiciously and cite *Commissioner of Police & another v Kenya Commercial Bank Ltd & 4 Others* (2013) eKLR. They urge that the charges preferred against them, which emanate from a purely civil claim are actuated by malice and are tailored to force them to pay an unnecessary fortune. They urge that the charges are oppressive, vexatious, an abuse of the court process and a total breach of their fundamental rights and freedoms, which precipitates their halting. They cite *Maina & 4 Others v DPP & 4 Others* (2022) eKLR, where it was held that the prosecutorial powers of the DPP are subject to control of the court in instances where illegality, irrationality and procedural impropriety is demonstrated. They urge the court to find that the criminal charges are not only unjustified but unconstitutional and malicious.
5. The 1st Respondent cites *RP Kapur v State of Punjab* where the Supreme Court of India laid down the guidelines to be considered by courts when reviewing the prosecutorial powers. It urges that the prosecution of the Applicants was instituted based on admissible, substantial and reliable evidence. It urges that the Interested Party is not a party to the civil suit pitting the Applicants against the County Government of Meru and faults the Applicants for failing to prove that their prosecution was perpetuated for ulterior motives or amounted to an abuse of the court process or its office. It urges that it adhered to the right to a fair administrative action as the decision to charge passed the constitutional and statutory test of lawfulness, reasonableness and procedural fairness, and cites *Dande & 3 Others Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) and *Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019* (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment). It urges that the Applicants will have the constitutional safeguards in respect of their rights under Article 50 (1) of *the Constitution* when undergoing the trial, and they will be accorded an opportunity to challenge the veracity of the evidence, including whether the evidence was properly obtained.
6. The 2nd Respondent neither responded to the application nor filed any submissions.

Analysis and Determination

7. The question for determination is whether the prosecution of the applicants has been shown to be an abuse of the process of the court and a violation of the applicants' rights so as to justify intervention by the Judicial Review court.
8. Whereas there can be no doubt that the field of investigations of criminal offences is exclusively within the domain of the police and the Respondents, this Court has the powers to halt such a process if the intended criminal proceedings are oppressive, an abuse of the court process and amount to a breach of fundamental rights and freedoms.
9. It has been held by case law that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. (See *Ndarua V. R* [2002] 1 EA 205).
10. This Court in *Christina Gakuhi Kubai v DPP* (2016) eKLR has on Prosecutorial Mandate and Abuse of the Legal Process discussed the limit of the State's Prosecutorial powers.



11. In *Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another* [2002] eKLR, the court (P. Waki J) cited with approval the decision in *Vincent Kibiigo Saina v The Attorney-General* where Kuloba, J. held that:

“...No one is allowed to use the 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...”

12. In *Sylvester Gaitano Odhiambo v Republic* [2022] eKLR, the court (G.V Odunga J. as he then was) stated;

“ 56. It is my view however that as opposed to where the prosecution has no evidence at all, in which event an order of prohibition may issue, the court will not halt a prosecution simply because the court is of the view that the evidence would not in all probability lead to a conviction. To do that would, as I have stated hereinabove, amount to this court stepping into the shoes of the trial court and usurping the powers of the trial court. Similarly, it is not for this Court to stop the DPP in his tracks simply because the Court believes that the DPP ought to have done better. The constitutional discretion given to the DPP ought not to be lightly interfered with especially if on the evidence in his possession if true may well sustain a prosecution. Trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on his defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution.”

13. The 1st Respondent has given a detailed account of how a report was made to the police by the Interested Party, thorough investigations were undertaken, the evidence was collected and correlated, which culminated in the arrest and prosecution of the Applicants. Suffice to state, the alleged existence of arbitral proceedings between the Contractor and the Client, which the Interested Party is not privy to, is by no means a bar to concurrent criminal proceedings. See Section 193A of the Criminal Procedure Code.



14. In determining whether sufficient cause is shown on the principles for stay of criminal prosecution, and without going into the merits of the criminal case, the court reproduces verbatim an excerpt of the 1st Applicant's statement marked as MEM 4 that –

“Our company was paid partly of the work that was done. I also state that I have never worked with Shree Hari Steelworks Limited. I have also never signed any agreement as either other party or witness with the said company.”
15. Those sentiments were echoed by the 2nd Applicant in his statement marked as MEM 5 as follows:

“For the time I was working with County Government of Meru. I never signed any contract with the said agreement with any company in connection to the construction of Kinoru Stadium. About signing any agreement with Shree Hari Steelworks, I don't know anything about it. The signature that appears on the agreement purported to be mine is not mine. I also don't know anybody from the said company.”
16. This evident repudiation by the Applicants of any contractual relationship between them and the Interested Party precipitated the subsequent specimen collection of their signatures and handwriting for forensic analysis. The Applicants cannot in this judicial review process now cling on the very civil contract they openly denied executing, in urging this court to halt the pending criminal charges on the ground that the charges preferred against them emanate from a purely civil claim. How can it be said to be a civil claim when the applicants have denied the existence of the very contract with the Interested party? Nothing comes out of nothing!
17. The Court finds that the Applicants have failed to prove that their prosecution was an abuse of the court process having been instigated by malice or ulterior motive rather than the genuine desire to prevent and or punish criminal acts and keep the society free from crime. When the applicants deny any contractual agreement with the Interested Party, they cannot be heard to say that the prosecution is calculated to pursue or redress any civil claim, or that the Interested Party's claim may be redressed through the civil process of the Court in lieu of criminal prosecution, never mind the possibility of contemporaneous civil proceedings under section 193A of the Criminal Procedure Code.
18. It is not for this Court, as a Judicial Review Court, to inquire into the paucity or otherwise of the evidence to be presented before the trial court because that would be tantamount to usurpation of the role of the fact finder in determining the merits of the charges. For the very reason, the court does not discuss in detail the merits of the case, or make any determinations thereon, so as not to prejudice the trial before the trial court.
19. The Court considers that justice will be done if the Applicants are properly and fairly tried by the fact-finding court, where their fundamental rights as entrenched under Article 50 of *the Constitution* can be fully actualized. There has not been proved in this case that the prosecution of the applicants has violated, or will likely violate, or threaten to violate any rights of fair trial guaranteed to the applicants under Articles 25 and 50 (2) of *the Constitution*.
20. The Court is, therefore, not persuaded to exercise its judicial review jurisdiction to halt the criminal proceedings pending before the trial court.

Orders

21. Accordingly, for the reasons set out above, the Court finds that the application by Notice of Motion dated 9/6/2023 is without merit and it is dismissed.



22. Each party will bear its own costs.

Order accordingly.

DATED AND DELIVERED THIS 17TH DAY OF OCTOBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. B. Gitonga for the 1st Applicant.

Mr. K. Muriuki for the 2nd Applicant.

Mr. Masila and Ms. Mukangu for the DPP.

Mr. Otieno C. for the Interested Party.

3

