



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Hon. D. Kemei – J)

JUDICIAL REVIEW MISC.APPL. NO. 1 OF 2021

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF PROHIBITION

AND

IN THE MATTER OF THE PENAL CODE (CAP 75) LAWS OF KENYA

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT

AT MAVOKO LAW COURTS CRIMINAL CASE NO.533 OF 2020

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT

AT MAVOKO LAW COURTS CRIMINAL CASE NO.557 OF 2020

REPUBLIC.....APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE INSPECTOR OF GENERAL POLICE.....2ND RESPONDENT

THE CHIEF MAGISTRATE'S COURT,

MAVOKO LAW COURTS.....3RD RESPONDENT

AND

MAISHA PACKAGING COMPANY LIMITED.....1ST INTERESTED PARTY

VIAMI IMPEX LIMITED.....2ND INTERESTED PARTY

EX PARTE APPLICANT: SOMESH KUMAR CHOUDHURY

RULING

1. Vide a Notice of Motion dated 1st February 2021 supported by the Statutory Statement of facts dated 17th December 2020, verifying affidavit of the Ex parte Applicant sworn on the same day, the *Ex parte Applicant* seeks the following orders:

(1) **THAT** this Honourable court be pleased to issue an Order of Prohibition directed at the Respondents prohibiting, forbidding and acting as a restraint to any trial or any further proceedings before the Mavoko Law Courts Chief Magistrate's court in Criminal Case No.533 of 2020 and Criminal Case No.557 of 2020 where the Ex parte Applicant is the 2nd Accused Person.

(2) **THAT** the Honourable Court be pleased to grant such other orders or writs as may be fair and just in the circumstances.

(3) **THAT** costs of this application be borne by the Respondents.

2. The Ex parte Applicant's application is based on grounds inter alia that this court has jurisdiction to supervise and oversee exercise of judicial discretion and proceedings by subordinate courts and independent administrative entities of the government such as the 1st and 2nd Respondent. The Ex parte Applicant maintains that he is a mere employee of the company and discharged his duties religiously with no prior knowledge and/or being privy to information that the company did not have money in its accounts as an innocent employee. According to him, he was not a signatory to the company's banks accounts nor was he a director or shareholder of the company hence it beats logic how the police concluded that he had knowledge of the same. He asserts that he was arrested and charged for offences which he is not privy to. According to him, the Respondents decision to undertake proceedings against him are in excess/ultra vires of their powers and are contrary to the Constitution and Companies Act hence a reason to restrain the Respondents from abusing their statutory duties. He further maintains that the actions by the respondents are patently against that rules of procedure, law, unconstitutional, illegal and offensive to public policy, null and void. The applicant maintains that it is in the interest of fairness, justice, good governance and upholding the rule of law that the Ex parte Applicant be granted the orders sought herein to restrain the Respondents from abusing their statutory duties.

3. The 1st Respondent filed grounds of opposition stating inter alia that the Ex parte applicant has not demonstrated any peculiar or exceptional circumstances to warrant granting the orders; that he delivered the bad cheque to the Interested Party which led to the Interested Party incurring losses; that the 2nd Respondent acted within his mandate when he arrested the Ex parte applicant and charged him with the offences before the court jointly with the Director of his employing company; that the applicant was arrested and only charged after full investigations were conducted and evidence gathered was found incriminating on the part of the applicant; that the 1st Respondent made the decision to charge the applicant and the director of his employer Harun Kumar Damju Madavia after a thorough perusal of the investigation files and examination of the evidence recorded by the 2nd Respondent. It was urged that the Ex parte application lacks merit and ought to be dismissed.

4. The grounds were supported by the affidavit of Felister Njeru, a Prosecution Counsel from the office of the 1st Respondent. Counsel deponed that the Ex parte applicant has not demonstrated before this court in any way that he was wrongly arrested and charged neither has the applicant demonstrated any peculiar and exceptional circumstances to warrant the grant of the orders sought. Counsel maintained that the honourable court failed to grant stay orders in the criminal case numbers 533 of 2020 and 557 of 2020 at the Mavoko law courts hence the Ex parte applicant has not placed before court new or compelling grounds for consideration.

5. The application was canvassed by way of written submissions. On behalf of the Ex parte Applicant, it is proposed that the main issue for determination is whether the decision and process so far undertaken against the Ex parte Applicant by the Respondent's meets the threshold for procedural fairness. It is submitted that the Ex parte Applicant was a mere employee without access to the company's Bank accounts or financial details to warrant him being bundled as an accused person and charged in court. According to counsel, an agent cannot be held liable in instances where there is a disclosed principal more so where deceit or fraud has not been intimated on a party. It is submitted that the Respondents have not paced with the court the evidence that the Ex parte Applicant undertook or was directly or substantially involved in any form of deceitful act or fraudulent activities on behalf of the company or personal benefits. Reliance is placed on the case of **Anthony Francis Wareheim t/a Wareheim & 2 Others vs Kenya Post Office Savings Bank, Civil Application Nos. Nai. 5 & 48 of 2002** and **NSSF Board of Trustees vs Ankhan Holding Ltd & 2 Others [2006] eKLR**. It is submitted that the company is a separate legal entity from its shareholders and directors. The applicant has provided the company's registration certificate and CR12 showing the directorship/shareholding structure absolving him of any personal responsibility.

6. Counsel submitted that the Respondents affidavit does not lead the court on the outcome of the investigations. According to counsel, the applicant has wrongly been enjoined in a criminal trial that he should out rightly not be held to be part of. It was further submitted that the court has the power to halt criminal proceedings where the same are being brought for ulterior motives or for achievement of some collateral purpose notwithstanding the constitutional mandate of the 1st Respondent and Police. Reliance is placed on the cases of **Joram Mwenda Guantai vs The Chief Magistrate, Nairobi Civil Appeal No.228 of 2003[2007]2 EA** and **R vs AG Ex parte Kipngeno Arap Ngeny HCC Appl. No.406 of 2001**. It is submitted that the Respondents actions are undertaken with ulterior motives since no proper investigations were undertaken by the police to establish that the applicant was a mere employee in charge with delivery of goods and documents on behalf of the company. Counsel pointed out that the interested party had an option of suing for recovery of the money in a civil court but the police were used on the issue that has led to the arrest and charges against the applicant. Reliance is placed on the case of **Kuria & 3 Others vs AG [2002]2 KLR**. According to counsel, the decision taken by the Prosecution to commence prosecution against the Ex parte applicant was not procedurally fair and it amounted to abuse of the court process contrary to public policy and ultra vires. It was urged that the Prosecution should be prohibited and restrained from holding any further proceedings aimed at infringing the rights of the Ex parte applicant.

7. On the part of 1st Respondent, Mr. Mwangera submitted that Haren Kumar and the Ex parte Applicant had perfected the art of ordering for goods to be supplied to their business premises and not paying for them hence liable under section 313 of the Penal Code. It was submitted that the 1st Respondent exercised his constitutional power under Article 157(6) (a) and (10) of the Constitution. Reliance is placed on the case of **Paul Ng'ang'a Nyaga vs AG & 3 Others [2013]eKLR** that this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence they acted in contravention of the Constitution. Similarly, in **Thuita Mwangi & Another vs The EACC & 3 Others Petition No.153 & 369 of 2013** the court held that the decision to institute criminal proceedings by the DPP is discretionary and is not subject to the direction or control of any authority as provided under article 157(10) of the constitution. Reference is placed on section 24 of the National Police Service Act No.11A of 2011 where the functions of the Kenya Police Service are set out and whereby investigations of crimes and apprehension of offenders being some of the functions.

8. Counsel submitted that the Petitioner has not demonstrated that the investigation done by the police and any criminal proceedings which may be preferred against him have been in excess or without jurisdiction by the Respondent. It was submitted that a complaint was made to the police and investigated and that if the orders sought are granted then it would be tantamount to ordering the police not to discharge their mandate. Reliance is placed on the cases of **International Centre for Policy and Conflict vs AG & Others Nib Misc. Civil Cause No.226 of 2013**, **R vs Chief Magistrate Milimani & Another Ex parte Tusker Mattresses Ltd & 3 Others [2013] eKLR**, **Joram Mwenda Guantai vs The Chief Magistrate, Nairobi Civil Appeal No.228 of 2003[2007]2 EA** and **Musyoki Kimanathi vs The Inspector General of Police & 2 Others [2014] eKLR**.

9. According to Mr. Mwongera, pursuant to section 193A of the Criminal Procedure Code, the civil and criminal cases can go hand in hand hence criminal cases no.533 and 557 of 2020 filed at Mavoko law court should proceed to their logical conclusion. The Ex parte Applicant has not demonstrated how the various cases have affected his right to fair trial. He urged the court to dismiss the application in its entirety.

10. I have considered the Notice of Motion herein, 1st Respondent's grounds of opposition, rival affidavits and submissions filed by both counsels. I find the issue that falls for determination is whether the Ex parte Applicant is entitled to an order of Prohibition.

11. The Ex parte Applicant has sought for an order of prohibition against the Respondents. The Notice of Motion is premised on *Order 53 Rules 1, 2, 3 and 4 of the Civil Procedure Rules 2010* whereby the High Court is conferred with jurisdiction in granting of judicial review orders. The court therefore has powers to exercise supervisory powers over the Respondents being public statutory bodies mandated to exercise certain administrative functions breach of which will attract judicial review orders from the High Court. Similarly, the court's powers would be exercised under Articles 22, 23 and 47 of the Constitution as well as the Fair Administrative Actions Act.

12. In **Joram Mwenda Guantai vs The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170**, the Court of Appeal held:

“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that 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 of 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 the 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 the 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 the court..”

13. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process)...”

14. Similarly the Supreme Court of India in the **State of Maharashtra & Others vs Arun Gulab & Others, Criminal Appeal No. 590 of 2007**, where the Supreme Court of India outlined grounds upon which orders prohibiting criminal prosecution may be granted as follows:

(I) where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(II) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

(III) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

(IV) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.”

15. It is submitted by the prosecution that the 1st Respondent has the independence anchored under Article 157 (6) (a) and (10) to institute, takeover and discontinue proceedings. According to the Prosecution the Ex parte has not demonstrated clearly how the 1st Respondent has exceeded its constitutional mandate. Indeed, **Odunga J** in the case of **Republic v Director of Public Prosecutions & 2 others exparte Gerald Chege Gaiho & another [2016] eKLR** stated at paragraph 19 that:-

“The circumstances under which the Court will grant stay of a criminal process in these kinds of proceedings is now well settled. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake

prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.”

16. However, the court held in *Paul Ng’ang’a Nyaga vs The Attorney General & 3 Others*[2013]eKLR that this court can only interfere with and interrogate the act of the other constitutional bodies if there is sufficient evidence they acted in contravention of the Constitution. Article 157(11) of the Constitution provides that:-

“In exercising the powers conferred by this Article, the Director of Public Prosecution shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

17. The Ex parte Applicant contends that he was wrongfully arrested and charged. He contends that he is neither a director nor a shareholder of the company but a mere employee of the company discharging his duties. It is submitted that Ex parte Applicant was an agent who should not have been charged when a principal had been disclosed. According to the Ex parte Applicant an agent can only be held personally liable where he has acted outside his original or apparent authority which in this case the Ex parte Applicant contends that the criminal act was done by his employer. Reliance is placed on the case of *National Social Security Fund Board of Trustees vs Ankhan Holding Limited & 2 Others* [2006]eKLR where *Ochieng J.* quoted the case of *Standard Chartered Bank vs Pakistan National Shipping Corporation* [2002] UKHL 43, where *Lord Hoffman* said:-

“And just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another for the purposes of the Hedley Byrne rule without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not assumed any personal responsibility...”

18. Based on the above decision *Ochieng J* held that:-

“I am convinced that there is a cause of action against the 2nd and 3rd defendants, not because they were directors of the 1st defendant, but because they may be committed acts of false misrepresentation or of fraud, on the plaintiff. If the plaintiff may prove its claims against the said two defendants, they may well be found liable personally.”

19. The Ex parte Applicant has been charged along with Haren Damji Madavia. The Ex parte Applicant has attached a copy CR12 that establishes that he is not a director or shareholder of the company Shreeji Merchandising Company Limited. Based on the official document as who are the directors’ of the company that he asserts that he was wrongly arrested and charged. It is submitted by the Ex parte Applicant that Haren Kumar Damji Mandavia in Machakos Judicial Review Application No.103 of 2020 was granted interim order of stay of proceedings.

20. In my view the Ex parte Applicant seem to be saying that he is not guilty instead of the 1st Respondent acted ultra vires actions as the 1st respondent ought to target the directors of his employer. Judicial review is concerned with the decision making process and not merits of the case. In *Meixner & Another v Attorney General* [2005] 2 KLR 189, the court held, inter alia, that:-

“Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.”

21. The Court of Appeal held in the case of *Director of Public Prosecutions v Martin Maina & 4 Others* [2017] eKLR:-

“We must, however, hasten to point out that it was not the duty of the High Court in Judicial Review proceedings to evaluate the sufficiency of the evidence in the envisaged criminal proceedings, that is the function of the trial Court or the High Court in a criminal appeal. A Judicial Review Court should not usurp the functions of a trial court, except in the clearest of the cases...”

22. It is clear that the ex-parte applicant and one of the directors of his employer have been charged before Mavoko law courts where they face several charges of obtaining goods by false pretenses as well as issuing a bad cheque contrary to section 313 and 316A of the Penal Code respectively. The applicant’s gravamen is that he was just an innocent employee with no knowledge that the employer’s bank account had no funds. Indeed, the applicant and his employer’s director have been jointly charged and that the 1st respondent has indicated that the two acted in concert and which led to the complainant supplying goods with no payment. If that is the position, then the applicant’s claim of being an innocent employee could as well be raised during the proceedings and the trial court will establish his guilt or otherwise. The applicant has not presented evidence that his rights have been violated as he will have his day in court. The 1st respondent has the mandate under article 157(10) of the constitution to institute criminal proceedings against any person and the exercise of such duty is under no direction of any person or authority. The 1st respondent has conducted investigations into the matter and hence the court will not interfere with the same unless the applicant presents proper reasons as to why his request should be granted. The question as to whether the applicant was an employee with no authority to bind his employer to liabilities is one reserved for the trial court to determine. The trial court has just been presented with suspects and is yet to try them. There is a charge sheet regarding the case and hence ipso facto the applicant and his co-accused ought to be taken through trial since the material placed before this court is not sufficient to justify an order of stay of proceedings against the applicant. The trial court should proceed with the matter. I am not satisfied that the prosecution of the applicant is an abuse of the

court process sine it is through the prosecution that the truth or otherwise of the charges will be established. The purpose of judicial review is concerned with the decision process and not the merits of the impugned decision. The act of the applicant issuing cheques to the complainants was done in his capacity as an employee and/or agent of the company and hence his prosecution. The applicant has sought to suggest that the issue is a civil claim but the act of issuing dud cheques is in itself criminal under section 316A of the Penal Code and further the issue of obtaining goods by false pretence is a crime under section 313 of the Penal Code both of which entitled the 1st respondent to mount criminal prosecution against the applicant and his employer's director. It was the choice of the complainant through the 1st respondent to pursue a criminal trial and not through a civil suit and they cannot be faulted for the same. I am satisfied that the rights of the applicant have not been violated in any manner by the 1st respondent and hence the orders sought are not merited.

23. In light of the foregoing, the Notice of Motion dated 1st February 2021 lacks merit and is dismissed with costs to the 1st Respondent.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2021.

D. K. Kemei

Judge