



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT MISC. APPLICATION NO. 4 OF 2019 (JR)

IN THE MATTER OF AN APPLICATION BY JOSEPH MULI

KALAVI FOR A JUDICIAL REVIEW ORDER OF PROHIBITION

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF KITUI CHIEF MAGISTRATE COURT

CRIMINAL CASE NO. 1036 OF 2017

BETWEEN

JOSEPH MULI KALAVI.....APPLICANT

VERSUS

1. THE CHIEF MAGISTRATE-(KITUI).....1ST RESPONDENT

2. THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

AND

1. SCHOLASTICA MUTUA.....1ST INTERESTED PARTY

2. AGNES KATHINI KATIWA.....2ND INTERESTED PARTY

VERSUS

JOSEPH MULI KALAVI.....EX PARTE APPLICANT

Being an appeal against the ruling of Hon. S.N. Mbungi- (Chief Magistrate)

Kitui CM's Court delivered/issued on the 22nd of August, 2019.

J U D G E M E N T

1. **Joseph Muli Kalavi**, the ex parte applicant has brought this Judicial Review, Proceedings to challenge the decision by the D.P.P, the 2nd Respondent to prefer charges vide *Kitui CM's Court Criminal Case No. 1036 of 2017*. The Applicant complains that he has unfairly been treated and subjected to a criminal process over matters he claims are civil in nature. He has, therefore, approached this court to vide his substantive Notice of Motion dated 16th July 2019 for the following reliefs namely: -

(i) That a *Judicial Review Order* of prohibition does issue directed to the Respondents and any other authority prohibiting them from proceeding with ***Kitui Chief Magistrate's Court Criminal Case Number 1036 of 2017 Republic Versus Joseph Muli Kalavi***.

(ii) That costs be provided for.

2. The grounds upon which the Exparte Applicant has challenged the decision to charge him for a criminal offense are listed as follows:-

a) He claims that he is a property developer and the Managing Director of a Company known as Eastern Property Developers Ltd. He avers that he bought a parcel known as B2/Kwa Vonza/2a measuring 2.426ha from one MBESA MULWO and has exhibited an agreement of sale to assert his claims.

b) The Exparte Applicant avers that the purpose of the purchaser was to subdivide the parcel and sell the same to people and that, that purpose saw him entering into a transaction with both the 1st Interested Party Scholastica Mutua and Agnes Kathini Katiwa-the 2nd Interested Party.

c) He further states that, through a sale agreement dated 16th May 2015, between him and the Interested Parties, he sold part of the parcel of land at agreed consideration of Kshs. 1,500,000, which was paid to him.

d) He adds that the deal fell through when he failed to avail title deeds to the Interested Parties as initially undertaken, but blames the failure to a delay in a succession cause in court that dealt with the said property.

e) The Exparte Applicant insists that he refunded the amount he had received in consideration when the interested parties became impatient and blames them for going ahead to file criminal proceedings before the Chief Magistrate's Court which he terms as oppressive, callous vexatious, and or abuse of court process.

3. In his written submissions dated 8th January 2020, filed through learned Counsel M/s Kalili and Co. Advocates, the Applicant submits that he entered into a contractual engagement with the interested parties and that any dispute over the interpretation of the agreement should be handled in a civil court, rather than a criminal court which he opines has no mandate to go into the terms of a contract.

4. He contends that the interested parties are employing the criminal justice system to assist them in resolving a contractual dispute. He relies on the case of ***Pastoli versus Kabale District Local Government Council and Others [2008] E.A*** to support his contention. In the said decision, the court pointed out some considerations to be taken into account in the Judicial Review application stating that, an Applicant has to show that the decision or act complained of is tainted with illegality, irrationality, and procedural impropriety.

5. The ex-party Applicant has also cited the following decisions to buttress his submissions.

(i) ***Republic versus Nairobi City Council and Anor. Exparte Wainaina Kigathe Mungai [2014] eKLR.***

(ii) ***Republic versus Chief Magistrate's Court Mombasa Ex parte Ganijee & Anor. [2002]eKLR.***

(iii) ***Commissioner of Police and Director of Criminal Investigations Department and Anor. Versus Kenya Commercial Bank & Others [2013] eKLR.***

(iv) ***Kuria & 3 Others versus Attorney General [2002] eKLR.***

(v) ***Republic Versus Attorney General & Another Versus Ex-Parte Kipngeno Arap Ng'eny [2001] eKLR.***

(vi) ***Joram Mwenda Guntai versus Chief Magistrate (Nairobi) Court of Appeal No. 228 of 2003) [2007] E.A. 170.***

(vii) ***Republic versus Inspector General National Police Service & 2 Others Exparte Charles Musee Kyaka & Anor. [2018] eKLR.***

6. The Interested Parties case.

The interested parties have opposed this application through a replying affidavit sworn by the 2nd Interested Party Agnes Kathini Katiwa on 24th September 2019.

7. The Interested parties claim that together they brought two parcels of land from the ex parte Applicant at Kwa Vonza at Kshs. 600,000 each. It is their case that the title deeds would have been issued shortly thereafter but later they were informed that the parcels were subject to a succession cause in court.

8. They aver that the ex parte Applicant offered them other parcels but asked them to top up the amount to Kshs. 700,000 and 800,000 each for the new parcels which they agreed and topped up with the 2nd I.P. topping up her deposit to Kshs. 850,000.

9. They claimed that they later found that the ex parte Applicant was not the owner of the parcels they had bought and that they demanded a refund of their money from the ex parte Applicant.

10. They aver that the ex parte Applicant complied with their demand and refunded their money after they lodged a complainant with County Criminal Investigation Officer at Kitui.

11. The Interested Parties claim that the fact that they got refunded Kshs. 1,500,000, does not absolve the ex parte Applicant from offenses he is charged with within the Criminal Court.

12. They submit that the Exparte Applicant obtained money from them through false pretenses. They further contend that this court does not have jurisdiction to evaluate the evidence regarding the transaction arguing that the same is a preserve of a trial court, adding that the Applicant shall have the opportunity at the trial to tender evidence to controvert the prosecution's evidence. According to them, this suit is an abuse of the court process.

13. They submit the issues raised in this Judicial Review regarding ownership of the parcels sold and the refunds made ought to be heard and determined by the criminal court. According to them, the ex parte Applicant sold them the parcels he did not own and hence the basis of the charges before the criminal court. They have relied on the case of *William versus Spauts [1992] 66 MWS L.R. which is an Australian High Court* decision that reiterated that the purpose of Criminal proceedings is to hear and determine whether an Accused person engaged in conduct that amounted to an offense deserving punishment.

14. The interested parties have also cited two other authorities to support their case. The cited cases are:-

(i) :-*Republic versus Commissioner of Police and Anor. Ex Parte Michael Monari & Anor. [2012] eKLR*, where the court found that there was no evidence tendered by the Applicants to suggest that there was a gross abuse of criminal process by the State in preferring charges against them.

(ii) *Republic versus Attorney General & 4 Others Ex Parte Kenneth Kariuki Githii [2014] eKLR*, in that case, the court dismissed an Applicant seeking Judicial Review orders of prohibition and certiorari stating that the court in Judicial Review proceedings does not deal with the merits of the cases but only with the process.

15. The Respondents through the Attorney General and the Director of Public Prosecution did not file any pleadings in response to this Judicial Review proceeding. The 2nd Respondent through the Director of Public Prosecution made a lame attempt seeking more time to file a response on 14th June 2021, almost 3 years after being served with the motion herein. This court declined their belated attempt to be given more time concluding that either they were not keen or serious in filing a response or had nothing to offer in terms of opposing the Judicial Review Application.

16. The above notwithstanding, this court has considered this Judicial review, the grounds advanced and the response made by the interested parties. The main issue for determination is whether the 2nd Respondent abused its Constitutional and statutory powers in preferring charges against the ex parte Applicant to warrant the intervention of this court.

17. There is no denying the fact that the office of Director of Public Prosecution is constitutionally clothed with decisional independence and mandate to commence any criminal proceedings against anyone in *Kenya Article 157 (11)* stipulates as follows: -

“..(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions 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..”

18. The independence of the office of the Director of Public Prosecution, however, is not absolute and the exercise of its powers and mandate comes with responsibilities. *Article 157 (ii)* clearly states: -

“The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President..”

19. The 2nd Respondent in this matter has been faulted for commencing criminal proceedings against the ex parte Applicant which are termed as oppressive, vexatious, and an abuse of the process of the court. The 2nd Respondent is accused of having been influenced by ulterior motives in its decisions to prefer criminal charges in what the ex parte Applicant refers to as Civil dispute. The 2nd Respondent has no response to that accusation but I will get back to you shortly.

20. The main purpose of Judicial Review proceedings is not to challenge the merit of decisions made by statutory or administrative bodies per se, but rather the process itself. Constitutional statutory or administrative bodies operate within the confines of the law creating them and when a thing or things are done beyond the scope provided, any party aggrieved can successfully challenge the acts or decisions for being ultra vires, illegal or irrational. The scope of Judicial Review proceedings is well captured in the decision of *Republic versus Communications Authority of Kenya Ex parte Information Communication Technology Association of Kenya (ICTAK) [2021] eKLR*, where the court made the following observations: -

“The purpose of judicial review is to ensure that public bodies, execute their mandates within their statutory remit while at the same time, ensuring fairness by complying with the rules of natural justice. There is also the need to ensure that those decisions are rational. The boundaries of judicial review were demarcated by Lord Diplock in the famous case of Council of Civil Service Unions versus Minister for the Civil Service [1984]3 ALL ER 935 thus:

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the

development has come about, one can conveniently classify under three heads, the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality” the second “irrationality” and the third “procedural impropriety”....

By “illegality” as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable....

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness”

(Associated Provincial Picture Houses Ltd. Versus Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision that is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided, could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong without our judicial system.

I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with the procedural fairness towards the person who will be affected by the decision. This is because, susceptibility to judicial review, under this head, covers also a failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

Kasule J. of Uganda explained the meaning of illegality, irrationality, and procedural impropriety in the case of *Pastoli versus Kabale District Local Government Council & Others* [2008] 2 EA 300 when he stated that: -

“To succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety:

Illegality is when the decision-making authority commits an error of law in the process of making the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re an Application by Bukoba Gymkhana Club* [1963] EA 478 at Page 479 paragraph “E”.

Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of making a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi versus Secretary of State for the Home Department* [1990] AC 876...”

21. As observed above, the ODPP has the mandate and discretion under *Article 157 (6)* to decide either to prefer or not to prefer Criminal charges upon being presented with a file investigated by the police or the DCI. However, the discretion must be rational and done in the Public interest. In *Republic versus Vice-Chancellor Jomo Kenyatta University of Agriculture and technology Ex parte Cecilia Mwathi & Another*, [2008], *eKLR*, *Nyamy Judge* (as he then was), listed grounds upon which Judicial Review Orders can be issued as follows: -

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- (i) *Where there is an abuse of discretion.*
- (ii) *Where the decision-maker exercises discretion for an improper purpose.*
- (iii) *Where the decision-making is in breach of duty to act fairly.*
- (iv) *Where the decision-maker acts in a manner to frustrate the purpose of the Act donating power.*
- (v) *Where the decision-maker acts in a manner to frustrate the purpose of the Act donating power.*
- (vi) *Where the decision-maker fails to exercise discretion.*
- (vii) *Where the decision-maker fetters the discretion given.*
- (viii) *Where the decision is irrational and unreasonable....”*

22. It is the Ex parte Applicant’s case that the Interested parties are employing the Criminal Justice System to assist them in resolving a

contractual dispute. They further fault the 2nd Respondent in preferring Criminal charges against him on matters relating to the interpretation of an agreement, which he contends is a civil dispute. He claims that the 2nd Respondent's action is tainted with procedural impropriety and irrationality and though the Applicant has not clearly stated or shown how the action by DPP is tainted with illegality or procedural impropriety, I am satisfied that he has sufficiently shown that the action was irrational. He says that he refunded the interested parties their money and this fact is conceded by the Interested Parties in this case. The question posed and which required answers from the Office of the Director of Public Prosecution is, why then did it went ahead to prefer criminal charges, when the amount paid had been refunded in full? What was the purpose to pursue the Criminal proceedings? Was it intended to force the Ex parte Applicant to pay damages for frustrating or breaching the terms of the agreement? If so, is the criminal court, the right forum to seek damages for breach of the agreement? The Office of the Director of Public Prosecution (ODPP) as observed above, when challenged to explain, failed to provide answers and the net effect of that is that this court finds that the ex parte Applicant has proved to the required standard in civil cases that the 2nd Respondent's decision to charge him in a criminal court was aimed at interior motives or collateral objectives other than objectives stipulated under **Article 157 (11) of the Constitution**. The conspicuous silence by the Office of the Director of Public Prosecution or failure to respond to the Judicial Review proceedings to this Judicial Review proceedings in time or at all gives credence to the ex parte Applicants claim that their decision to charge him in criminal court was tainted with impropriety. I am persuaded by the cited decision in Republic versus The **Chief Magistrate's Court Mombasa Ex parte Ganijee & Another [2002] eKLR** where the court granted an order of prohibition observing that the Interested Party was more interested in punishing the Applicant under criminal law for a dispute that arose from a civil arrangement between the parties. The court observed: -

“So, it is not the purpose of a criminal investigation or a criminal charge or prosecution, to help individuals in the advancement of frustration 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 in a civil dispute, but it is to be impartially exercised in the interest of the general public interest....”

23. This court has considered the spirited opposition mounted by the Interested Parties and while I agree that the mandate to evaluate evidence on the culpability of a person charged in a criminal court falls on the criminal court, this court can always intervene where a decision to institute criminal proceedings by Office of the Director of Public Prosecution is not done in compliance with **Article 157 (11) of the Constitution**. As I have observed above, the Office of the Director of Public Prosecution the 2nd Respondent herein has not defended its action to prefer criminal charges. That omission by the 2nd Respondent and the facts or evidence presented before me shows that the complaints raised by the Ex parte Applicant are legitimate and merited.

24. The Interested Parties may feel hard done by the breach of the agreement by the Ex parte Applicant, but the remedy in my view lies not in the criminal proceedings but in a civil court where they can claim damages if they were not satisfied with the refund of the amount paid in consideration. Certainly, the Office of the Director of Public Prosecution had no business entering into the arena for the claim on damages because that is within the purview of a civil claim and hence the civil court.

In the premises, this court finds merit in the substantive motion dated 16th July 2019. The same for the reasons aforesaid is allowed in the following terms: -

a) That a Judicial Review Order of prohibition is hereby issued to the Respondents prohibiting them from proceeding with Kitui Chief Magistrate's Court Criminal Case Number 1036 of 2017.

b) Cost to the Ex parte Applicant.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 6TH DAY OF OCTOBER 2021.

HON. JUSTICE R. K. LIMO

JUDGE