



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. E075 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

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

ATTORNEY GENERAL.....3RD RESPONDENT

MAGISTRATE COURTS, CRIMINAL, NAIROBI.....4TH RESPONDENT

AND

LEVI NYAMU MULEIINTERESTED PARTY

EX PARTE: FELIX KIPROTICH KIRUI

RULING

The Application

1. Felix Kiprotich Kirui, the *ex parte* Applicant herein, filed an application by way of a Notice of Motion dated 29th December 2020, seeking the following orders:

1. An order of certiorari directed to the 1st, 2nd, 3rd and 4th Respondents to quash the charges, charge sheet dated 17/12/2020 arising from OB N.121/12/8/2020 and criminal proceedings of case No. E4945 OF 2020, R vs Felix Kiprotich Kirui brought against the ex-parte applicant because they are civil in nature.

2. An order of prohibition directed at the 1st, 2nd, 3rd, and 4th Respondents and interested party from interfering with the civil proceedings of MCCC/ E7446 of 2020, Felix Kiprotich Kirui vs Levi Nyamu Mulei by use of criminal proceedings to harass, intimidate, imprison the Ex-parte Applicant.

3. An order of prohibition directed at the 1st, 2nd, 3rd, and 4th Respondents and interested party from interfering with the Ex-parte Applicant's lawful private businesses.

4. An order to restrain the 1st and 2nd Respondents from acting or continuing to take further administrative action against the Ex-parte Applicants with an aim of frustrating his businesses.

5. An order directing the 1st and 2nd Respondents compelling them to undertake public duty owed in law and in respect of which the Ex-Parte applicant has a legally enforceable right and legitimate expectation.

6. The costs of this application be provided for.

2. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 14th December 2020, a verifying affidavit sworn on the same date, and a supporting affidavit sworn on 29th December 2020 by the *ex parte* Applicant. In summary, the main grounds are that the prosecution arises from several contractual transactions between the *ex parte* Applicant and the Interested Party from 2018 which are in civil nature.

3. The *ex parte* Applicant detailed the said transactions as follows:

- a) On the 19th March 2020, the Interested party hired his motor vehicle Toyota Prado KCV 303P at a daily cost of Kshs 11,000/= and at the time of demand, the debt was at Kshs 1,866,550/=.
- b) On various dates of 19/8/2019, 22/8/2019, 23/9/2019, 7/6/2019 he extended a soft loan to the Interested Party amounting to Kshs 405,000/=.
- c) The Interested Party hired motor vehicle KCV 009E Mitsubishi Pajero on even dates and the outstanding debt not paid stands at Kshs. 977,000/-.
- d) The Interested Party on given dates hired motor vehicle Reg. no. KCM 683K Nissan X-trail and the outstanding debt is at kshs. 400,000/-
- e) On 7/02/2018 to 11/02/2018 the Interested Party hired motor vehicle Reg no. KCL 061X Prado and to date there is a debt of Kshs. 44,000/- not paid.

4. Further, that in 2018, the Interested Party intending to purchase motor vehicle reg.no KCP 297X, a Toyota Harrier at Kshs. 3,000,000/- on hire purchase, deposited Kshs. 850,000/- and took possession of the said motor vehicle. However, that the Interested Party failed to honour the contractual terms on payment, and the car was repossessed in 2020 after 2 years of failing to make payment and resold at a loss due to depreciation. The *ex parte* Applicant averred that he instructed his advocate to sue the Interested Party and letters of demand were written in this respect. That at the end of the timelines given by the advocate for the Interested Party to refund the money owed or be sued, the Interested Party on 17th October, 2020 made a complaint at Kilimani Police Station relating to the same cause of action and facts, and the *ex parte* Applicant was consequently charged with obtaining money by false pretence.

5. The *ex parte* Applicant averred that regardless of the Interested Party's and First Respondent's intent, on 11th December 2020 he instructed his advocate to file civil proceedings against the Interested Party in **Nairobi Chief Magistrates Court Case Number E7446 of 2020**. Further, that following service of the pleadings upon the Interested Party, the 1st Respondent summoned the *ex parte* Applicant to appear before the 4th Respondent on 16th December, 2020 for plea taking, and the 1st and 2nd Respondents preferred charges of obtaining money by false pretenses against him contrary to section 313 of the Penal Code vide **Cr. Case No.4945 of 2020 - R vs Felix Kiprotich Kirui**.

6. It is the *ex parte* Applicant's case that the Interested Party's complaint was made to undermine and frustrate the civil proceedings that he initiated, and that the 1st & 2nd Respondents do not have any mandate to subject him to criminal proceedings over civil proceedings in Nairobi CMCC Number E7446 of 2020. The *ex parte* Applicant in this respect annexed copies of a copy of one of the sale agreements dated the 17th March, 2018, statements of payment made by the Interested Party, the demand letters written by his Advocates to the Interested Party for payment of sums of monies owed, the pleadings in the civil case he filed against the Interested Party in **Nairobi Chief Magistrates Court No. E7446 Of 2020**, and of the charge sheet is **Cr. Case No.4945 of 2020 - R vs Felix Kiprotich Kirui**.

7. The 1st and 2nd Respondents did not file any response to the application, while the 3rd and 4th Respondent filed Grounds of Opposition dated 11th March 2021 as follows:

- a) The 4th Respondent was only carrying out its statutory mandate as provided for by the Law.
- b) The application as drawn offends the provisions of Article 160 (5) of the Constitution of Kenya 2010.
- c) The application contravenes section 6 of the Judicature Act.
- d) There are no orders sought against the Hon. Attorney-General and as such ought to be struck out of the proceedings.
- e) The application ought to dismiss with costs.

The Determination

8. The Instant application was canvassed by written submissions. The *ex parte* Applicant's advocates on record, KBN Associates Advocates, filed submissions dated 5th March 2021, while Munene E. Wanjohi, Senior State Counsel at the Attorney General's Office, filed submissions dated 11th March 2021 on behalf of the 3rd and 4th Respondents. The main issue urged and arising from the pleadings and submissions is whether the 1st & 2nd Respondents have instituted **CR. Case No. E 4945 OF 2020 - R vs Felix Kiprotich Kirui** in abuse of their powers and for ulterior motives, and whether the relief sought is merited.

9. The *ex parte* Applicant in this respect, while citing the decisions in **Bennet vs Horseferry Magistrates Court & another, (1993) All E.R 138**, and **Republic vs Inspector General of Police & 4 Others ex parte John Lopez Lutuka Kibwenge & Another (2018) e KLR** submitted that that an abuse of process justifying the stay of a prosecution could arise in the following circumstances: -

- a) Where it would be impossible to give the accused a fair trial; or;
- b) Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

10. It was counsel's submission that the *ex-parte* applicant will not be given a fair trial, and that the criminal justice system is being misused so as to manipulate him as he instituted a genuine civil suit for breach of contract to recover monies lost in a transaction. Further, that the criminal proceedings instituted under **CR. Case No. E4945 of 2020** are meant to inconvenience, harass and subject the *ex parte* Applicant to unnecessary expenses. According to the counsel, from the sequence of the suits filed by the *ex parte* Applicant, which are all for liquidated claims, there is no doubt the Interested Party instigated criminal charges to harass and keep the *ex parte* Applicant in fear.

11. The decision in **Republic vs Attorney General ex parte Arap Ngeny, High Court Civil application number 406 of 2001** was also cited for the position that before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. That in the present case, the *ex parte* applicant is being charged with obtaining through false pretense contrary to section 313 of the Penal Code, and it is not possible to import into the country a motor vehicle which has already acquired a registration number plate as indicated in the particulars of the offence in the charge sheet. Further, that from the facts of this case, there was no presentations on the part of the *ex parte* Applicant that were false, and the Interested Party failed on his part to satisfy his obligations under the contract and cannot use the criminal justice system to defraud and harass the *ex-parte* Applicant, as held **Joseph Wanyonyi Wafukho v Republic [2014] e KLR**.

12. The 3rd and 4th Respondents' counsel on his part submitted that section 6 of the Magistrate Courts Act provides for the jurisdiction of the Magistrate Court, and the 4th Respondent was therefore required by law to hear the criminal case and determine it. Therefore, that the *ex parte* Applicant's claim that the intended criminal proceedings are unlawful and malicious, and that the decision to arraign him for plea taking while pursuing civil action of the same cause of action is baseless and bad in law. The counsel in this regard relied on section 193A of the Criminal Procedure Code which provides that the existence of a civil dispute on the same subject matter is not a bar to any criminal investigations or even possible prosecutions.

13. Lastly, it was submitted that Article 160(5) of the Constitution provides that a member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be in good faith in the lawful performance of a judicial function. Reliance was placed on the decisions to this effect in **Bellevue Development Company Ltd vs Francis Gikonyo & 7 others [2018] eKLR**, and **Maina Gitonga vs Catherine Nyawira Maina & Another [2015] eKLR**.

14. I have considered the arguments made by the *ex parte* Applicant and the 3rd and 4th Respondents. It is important at this stage to set out the applicable principles and circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process. In this respect, 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 merits of the case, and particularly whether the criminal proceedings have a likelihood of success, or that the Applicant has a good defence is also not a ground for halting criminal proceedings by way of judicial review, in light of the purpose and limits of judicial review.

15. However, if an applicant demonstrates that the criminal proceedings constitute an illegality or abuse of process, this Court will not hesitate in putting a halt to such proceedings, as that fall squarely within its mandate as a judicial review Court. The cases of **Peter Ngunjiri Maina v DPP & 2 Others (2017) eKLR**, and **R v DPP & 2 Others Ex parte Nomoni Saisi (2016) eKLR** identified various scenarios that would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions as follows:

- (a) Where there is an abuse of discretion;
- (b) Where the decision-maker exercises discretion for an improper purpose;
- (c) Whether decision-maker is in breach of the duty to act fairly;
- (d) Whether decision-maker has failed to exercise statutory discretion reasonably;
- (e) Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
- (f) Where the decision-maker fetters the discretion given;
- (g) Where the decision-maker fails to exercise discretion;
- (h) Where the decision-maker is irrational and unreasonable."

16. In this regard, the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court as recognised by section 193A of the Criminal Procedure Code, unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.

17. These principles have been restated in various judicial decisions. The role of the different players in the criminal process was recognised in **Republic vs Commissioner of Police and Another ex parte Michael Monari & Another**, [2012] eKLR where it was held that:

“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. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. 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”.

18. In **Joram Mwenda Guantai vs The Chief Magistrate**, [2007] 2 EA 170, the Court of Appeal explained the applicable principles as follows:

“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 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.”

19. The Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others**, [2013] eKLR also held as follows on concurrent criminal a civil proceedings on the same issues:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”

20. The circumstances when a Court can intervene in a criminal prosecution was also the subject of the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny**, High Court Civil Application No. 406 of 2001 wherein it was held that:

“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 existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. 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”.

21. The question that therefore need to be answered by this Court is whether the criminal proceedings against the *ex parte* Applicant were brought in abuse of the 1st and 2nd Respondent’s powers, were unreasonable or were motivated by improper motives. In this respect, it is not disputed that there were contractual dealings and a civil case filed by the *ex parte* Applicant against the Interested Party, over the subject matter of the prosecution, which is the sale of a motor vehicle. It is also notable that the 1st and 2nd Respondent did not bring any evidence of the basis of their prosecution of the *ex parte* Applicant. It is thus proper and justified in the circumstances to conclude that the prosecution of the *ex parte* Applicant was made without any basis, and was thus not only in abuse of prosecutorial powers but also unreasonable.

22. The *ex parte* Applicant has in this respect sought orders of certiorari and prohibition. The Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards the nature of the two judicial review orders:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...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 for 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....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

23. The prosecution of the *ex parte* Applicant by the 1st and 2nd Respondents has been found by this Court to be in abuse of the process of Court, unreasonable and for improper purposes and ulterior motives. The order sought of certiorari to quash the said prosecution is thus

merited. Consequently, an order of prohibition stopping any further prosecution of the *ex parte* Applicant in the said criminal case is also merited, to ensure that this Court does not act in vain. Lastly the *ex parte* Applicant also sought orders in relation to his businesses, but did not plead, nor bring evidence of the Respondents' illegal actions in this regard. The said prayers cannot therefore be granted for this reason.

24. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 29th December 2020 is merited to the extent of the following orders:

I. An order of Certiorari directed to the 1st, 2nd, 3rd and 4th Respondents be and is hereby issued to bring into the High Court for purposes of being quashed and to quash the charges, charge sheet dated 17/12/2020 arising from OB N.121/12/8/2020 and criminal proceedings of Case No. E4945 OF 2020, R vs Felix Kiprotich Kirui brought against the *ex-parte* applicant because they are civil in nature.

II. An order of prohibition directed at the 1st, 2nd, 3rd, and 4th Respondents and interested party from interfering with the civil proceedings of MCCC/ E7446 of 2020, Felix Kiprotich Kirui vs Levi Nyamu Mulei by use of criminal proceedings to harass, intimidate, imprison the *Ex-parte* Applicant.

III. An order of Prohibition directed at the 1st, 2nd, 3rd, and 4th Respondents be and is hereby issued prohibiting the Respondents from charging and/or proceeding with any criminal process against the *ex parte* Applicant in Criminal case No. E4945 OF 2020, R vs Felix Kiprotich Kirui.

IV. There shall be no order as to costs.

25. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 9TH DAY OF NOVEMBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 9TH DAY OF NOVEMBER 2021

A. NDUNG'U

JUDGE