

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 69 OF 2018

IN THE MATTER OF AN APPLICATION BY DR. BEATRICE HILDA OMUNJIA FOR LEAVE TO

APPLY FOR JUDICIAL REVIEW ORDERS OR CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLE 165 (6) & (7), ARTICLES 23 (3) OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT, LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS (DPP).....2ND RESPONDENT

AND

PETER NGANGA CHEGE.....1ST INTERESTED PARTY

KENNETH NGOTHO RIECHE.....2ND INTERESTED PARTY

BESTIMES TRAVEL & TOURS LTD.....3RD INTERESTED PARTY

AND

DR. BEATRICE HILDA OMUNIA.....EX PARTE APPLICANT

JUDGMENT

Introduction.

1. By way of a Notice of Motion dated 26th February 2018, the ex parte applicant seeks the following Orders:-

*a. **That** an order of **Certiorari** to remove to this Honorable Court and quash the first and second Respondent's decision to require the applicant to pay the interested parties a sum of Ksh. 986,689/= being the value of cancelled air tickets and to require the payment of cancelled air ticket from the interested parties.*

*b. **That** an order of **Prohibition** directed at the first and second Respondents, its officers and any other authority on their instructions prohibiting them from prosecuting the applicant on any purported or alleged offence requiring the applicant to pay the interested parties **Ksh. 986,689/=** they could have lost had the Nairobi girls chorade utilized the return tickets.*

*c. **That** the court be at liberty to make such further and other orders as it deems fit to meet the ends of justice.*

d. That the costs of this application be provided for.

Factual Background.

2. The grounds relied upon are enumerated in the Affidavit of **Beatrice Hilda Omunjia Ohutso**, the ex parte applicant herein annexed to the application seeking leave and the statutory statement filed therewith. She avers inter alia in December 2015, the Nairobi Girls Chorale Group received invitation to perform in Chicago (USA) and, that, they first approached Terto Tours & Travels Limited with whom they mutually agreed that they would secure **20** air tickets to Chicago at an agreed cost of **Ksh. 113,000/=** per return ticket, and, they subsequently paid a deposit of **Ksh. 1,304,000/=** to the said company, and, the balance was to be paid directly to the agent from the USA.

3. She also averred that upon going to pick their tickets on **14th** May 2016, they found that the company had not booked them, hence, they were introduced to the interested parties herein who charged them **Ksh. 157,000/=** per person for the return tickets. She averred that the mode of payment was agreed as follows:-

a. *Ksh. 400,000/= by RTGS payable immediately.*

b. *Ksh. 130,000/= cash was paid to the Interested Party.*

c. *\$2000 USD (Ksh. 201,021/=) was paid directly to the Interested Parties from the USA.*

d. *Other direct deposits to the interested parties accounts which were not accounted for.*

4. **M/s Ohutso** further averred that the Interested Parties secured air tickets for the first **12** passengers who had to leave immediately, and, that, they sent **US\$ 2000** to the Interested Parties and the balance was to be paid upon returning. She also averred that upon checking in at the airport for their return journey, they discovered that the Interested Parties had cancelled all the return tickets, and, upon calling the second Interested party he confirmed cancelling the tickets, forcing them to make alternative arrangements to secure fresh return tickets, thus, compelling them to use the cash they were to pay the interested party on returning. She averred that upon returning to Nairobi, the Interested Party kept on demanding payment for the cancelled tickets.

5. Further, she also averred that the third Interested party made a complaint to the Police and Baking Fraud Investigations Department who arrested and charged the Chorade Director a one **David Isindu** in Criminal case Number **318** of 2017, and, that, the police are determined to charge her for obtaining credit facilities contrary to section **316(a)** of the Penal Code.^[1] Additionally, **M/s Ohutso** stated that the Investigating Officer has been calling her threatening her with arrest if she does not pay the said sum of **Ksh. 986,689/=**, which she avers the interested parties are not entitled to.

Second Respondent's Grounds of Opposition.

6. The second Respondent filed grounds of opposition stating inter alia that the application lacks clarity and precision and that it discloses no cause of action against the second Respondent.

7. The second Respondent also states that the matter is of civil nature and has nothing to do with the Respondent and that the orders sought are not tenable against the second Respondent. Lastly, the second Respondent states that Article 157 of the Constitution permits the second Respondent to institute criminal proceedings where a criminal offence has been committed.

8. The first Respondent does not seem to have filed any Replying Affidavit or grounds.

Interested Parties Replying Affidavit.

9. **Peter Nganga Chege**, the first Interested Party and a director of the third Interested Party swore the Replying Affidavit dated **26th** April 2018 on his own behalf and on behalf of the second and third Interested Parties. He averred that they agreed to charge the ex parte applicant and her group of **12** people **Ksh. 157,000/=** per person for a return ticket from Nairobi to Chicago at a cost of **Ksh. 1,848,000/=** out of which they were to pay **Ksh. 400,000/=** by way of RTGS but this not honoured. He averred that after they paid for the **12** tickets and the group left for the USA, the arrangement was that they were to sent the balance once they hold their performances in the USA, but they failed to do so. Also, he averred that the ex parte applicant is not honest when she says that they were to pay the said sum upon returning. He averred that failure to pay for the departure tickets left them with no option but to cancel the return tickets to mitigate their loses. Also, he averred that they received a text message from the ex parte applicants complaining about the cancellation and they confirmed to them that they cancelled the tickets because they failed to honour the agreement to pay on or before **6th** June 2015.

10. **Mr. Chege** also averred that upon returning to Kenya, they continued demanding the money being the amount due for the departure ticket as enumerated in paragraph **11** of his affidavit. He further averred that **Mr. Isindu** was charged in court, and, also, he averred that the ex parte applicant is wanted for her role in the said transaction and for offering to pay **Ksh. 400,000/=** by way of RTGS which was never honoured for lack of funds. Further he averred that the only tickets that were cancelled were the return tickets, hence, the ex parte applicants obtained credit facilities from them but breached the agreement to pay. Lastly, he averred that the investigating officer is only doing the job mandated by law, and, that the ex parte applicant is using the court to avoid her obligations.

Determination.

11. The crux of the ex parte applicant's Advocate's submission is that this is a civil dispute, hence, the police have nothing to do with it. He

argued that the police are not debt collectors, and, that they are charging the ex parte applicant with the offence of obtaining money by false pretences which is an abuse of the law. He relied on Commissioner of Police and Director of Criminal Investigations Department vs Kenya Commercial Bank & Others.[2]

12. The crux of the Interested Parties Advocates submission is that the application is not made in good faith "as she has not demonstrated how she intend to settle the amount."

13. A special feature of the Constitution of Kenya, 2010 is the establishment of an independent office of the **DPP**. Its independence is provided under Article **157 (10)** of the Constitution which provides that the **DPP** shall not require the consent of any person or authority to commence criminal proceedings and that in the exercise of his powers or functions, the **DPP** shall not be under the direction or control of any person or authority. This position is replicated in Section **6** of the Office of the Director of Public Prosecutions Act[3]which provides that pursuant to Article **157 (10)** of the Constitution, the Director of Public Prosecutions shall- **(a) not require the consent of any person or authority for the commencement of criminal proceedings; (b) not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, this Act or any other written law; and (c) be subject only to the Constitution and the law.**

14. The **DPP** is not only required to act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. A reading of Article **157** of the Constitution leaves no doubt that the **DPP** is required to not only act independently, but to remain fiercely so. It is also important to mention that Article **245 (4) (a)** of the Constitution provides that:-*"no person may give a direction to the Inspector General with respect to the investigation of any offence or offences."* Just like the constitutionally guaranteed independence of the **DPP**, this provision is aimed at ensuring that investigations are undertaken independently.

15. Section **24** of the National Police Service Act[4]provides for the functions of the Kenya Police Service. These include maintenance of law and order; preservation of peace; protection of life and property; investigation of crimes; collection of criminal intelligence; prevention and detection of crime; apprehension of offenders; enforcement of all laws and regulations with which it is charged; and performance of any other duties that may be prescribed by the Inspector-General under the Act or any other written law from time to time.

16. Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution or investigation) if the court is of the opinion that to allow the prosecution or investigation to continue would amount to an abuse of the process of the court or infringement of a citizens' fundamental rights. Whether an intended prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case.

17. It is admitted that the *ex parte* applicant procured air tickets from the Interested Parties. It is also admitted that the Interested Parties cancelled the tickets. The contestation is whether the *ex parte* applicant obtained credit and failed to pay, and whether such conduct if true is criminal. It is common ground that the police are investigating an offence under section **316 (a)** of the Penal Code.[5] It is also uncontested that police Investigations is a lawful process which has a statutory underpinning. It is anchored on section **24** cited above.

18. The offence under investigation is provided under section **316 (a)** of the Penal Code.[6] Whether or not an offence was committed is a matter for the trial court after hearing evidence.

19. It is a fundamental principle of law that it is not for this court to determine the veracity or to weigh the strength of the evidence or accused person's defence. That is a function for the trial court hearing the criminal trial. This court can only intervene if there are cogent allegations of violation of the Constitution or the law or violation of constitutional Rights or threat to violation of the Rights or in clear circumstances where it is evident that an accused will not be afforded a fair trial or the right to a Fair Trial has been infringed or threatened or where the prosecution is commenced without a factual basis. The *ex parte* applicant has not alleged or demonstrated any violation of the police powers or infringement of her rights or breach of the constitution.

20. Whether an investigation or prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. The concept of a fair trial involves fairness to the prosecution, the complainant, the public as well as to the accused.[7]

21. The inherent jurisdiction of the court to stop an investigation or a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[8] The essential focus of the doctrine is on preventing unfairness at the trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution.

22. The high court will only prohibit or quash prosecutions or investigations in cases where it would be **impossible to give the accused a fair trial or where the investigation is blatantly an abuse of the law**; or 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. [9] It is in public interest that prosecutions be mounted to uphold law and order and justice for the victims of crime.

23. A criminal prosecution or investigation can also be stopped if it was commenced in the absence of proper factual foundation. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. [10] The basis of the investigation and the intended prosecution is an alleged offence under section **316(a)** of the Penal Code.[11]

24. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as *Certiorari, Prohibition, Mandamus* or permanent stay of criminal proceedings or stop an investigation are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the court or that the ends of justice require that the proceedings ought to be quashed.

25. The saving High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice.

26. The High Court's inherent powers to quash, stay or prohibit criminal proceedings are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India^[12] revisited the law on the issue and held that *'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.'*

27. The Supreme Court of India in the above case delineated the law in the following terms:- *"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings...The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers."*^[13]

28. Criminal proceedings commenced to advance other gains other than promotion of public good are vexatious and ought not to be allowed to stand. The word "vexatious" means "harassment by the process of law," "lacking justification" or with "intention to harass." It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.

29. As stated above, the power to quash proceedings is immense since it amounts to exonerating a suspect before trial. Such power must be exercised with extreme care and caution. It is a power which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution.

30. I find nothing to suggest that the Police acted illegally. There is nothing to suggest that the **DPP** acted illegally or intends to act illegally. In fact, no allegations have been made against the **DPP**. It has not been demonstrated that the decision to investigate or prosecute was influenced by irrelevant or extraneous considerations. The *ex parte* applicant has not demonstrated that there was no sufficient evidence or factual basis to justify the investigation or a prosecution. As stated earlier, it is not the function of this court to weigh the veracity of the evidence. In my view, a prosecution should be instituted or continued if there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused. It has not been established that the facts presented in this case do not disclose an offence known to the law.

31. Article 157 (10) of the Constitution 2010 ensures that the **DPP** has complete independence in his decision making processes, which is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. This court respects this constitutional imperative and will hesitate to interfere with the functions of the **DPP** unless there is clear evidence of breach of the Constitution or abuse of discretion to prosecute. No evidence has been tendered to show that the **DPP** abused his discretion or powers under the Constitution. The court is inclined to respect the decision by the **DPP** to prosecute for two reasons, (a) it is a constitutional imperative that the constitutional independence of the **DPP** must be respected, (b) for the court to intervene, there must be clear evidence of breach of the constitutional duty to act on the part of the **DPP** or abuse of discretion.

30. Even though it is not for this court to consider the defense of the accused persons, which is basically a function of the trial court, the core issue raised by the *ex parte* applicant is that the dispute is purely civil. Section 193A of the Criminal Procedure Code permits parallel civil and criminal proceedings, hence, even if there was a civil suit in court, the existence of a parallel civil case is not bar to criminal proceedings.^[14] The offence being investigated is known to the law, hence, the cited provision. The conduct under investigation can attract a criminal sanction if proved.

33. I find and hold that there is nothing to show that the investigation or the intended prosecution is unfair or an abuse of court process or abuse of police powers or judicial process. There is no material before me to demonstrate that the investigation was undertaken without a proper factual foundation^[15] or was conducted or is being undertaken without due regard to traditional considerations of candour, fairness, and justice, nor has it been shown that it is being conducted in a manner different from what is prescribed under the law, or that the intended trial is bad in law.^[16]

34. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

35. The *ex parte* applicant also seek an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established nor has it been established that the Respondents acted illegally or in excess of their powers nor has the decision to prosecute been shown to be illegal, irrational or a nullity.

36. In view of my above reasoning, the conclusion becomes irresistible that the applicants Notice of Motion dated 26th February 2018 does

not satisfy the threshold to warrant the orders sought. Accordingly, I hereby dismiss the applicants Notice of Motion dated 26th February 2018 with no orders as to costs.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 1st day of February 2019.

John M. Mativo

Judge.

[1] Cap 63, Laws of Kenya.

[2] {2013}eKLR.

[3] Act No. 2 of 2013.

[4] Ibid.

[5] Cap 63, Laws of Kenya.

[6] Cap 63, Laws of Kenya.

[7] *DPP vs Meakin* {2006} EWHC 1067.

[8] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[9] See *Bennett vs Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R vs Methyr Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.

[10] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94.

[11] Cap 63, Laws of Kenya.

[12] See *Maharashtra vs Arun Gulab Gawali*.

[13] See *State of West Bengal & Others vs Swapn Kumar Guha & Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128 & *G. Ugar Suri & Ano vs State of U.P & Others*, AIR 2000 Sc 754.

[14] Section 193A of the Criminal Procedure Code provides:- **193A "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 proceeding."**

[15] *Republic vs Attorney General ex-parte Arap Ngeny* HCC APP NO. 406 of 2001.

[16] Indian Case of *Pulukiri Kotayya vs Emperor* L.R. 74 Ind App 65.