



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
JUDICIAL REVIEW CIVIL APPLICATION NO. 4 OF 2018
(Formerly Criminal Misc. JR Application 60 of 2018)

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION

AND

IN THE MATTER OF: CRIMINAL INVESTIGATIONS ON A CIVIL CONTRACT

AND

IN THE MATTER OF: MALINDI CHIEF MAGISTRATE'S CRIMINAL CASE NO. 310 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

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

THE CHIEF MAGISTRATES COURT AT MALINDI.....2ND RESPONDENT

AND

DOMITILLA ACHIENG OBANDA.....1ST INTERSETED PARTY

NICHOLAS OTIENO OOKO.....2ND INTERESTED PARTY

AND

FATUMA AHMED ALI.....EX-PARTE APPLICANT

Coram: Hon. Justice R. Nyakundi

Mr. Otara for the Ex-parte Applicant

Ms. Sombo for the 1st Respondent

Mr. Munga for the 2nd Respondent

Mr. Gicharu for the 1st Interested Party

N/A for the 2nd Interested Party

JUDGEMENT

Introduction

1. The Ex-parte applicant, by an application dated 6th August 2018 and accompanied by the Statutory Statement and Affidavit of **Fatuma Ahmed Ali** all dated 6th and filed on 7th August 2018 sought for:

a. The application to be treated as urgent.

b. Leave to be granted to the ex-parte applicant to institute judicial review proceedings for an Order of Prohibition to prohibit the Respondents' or any other officer acting under the Respondents' from repossessing the security for loan being motor vehicle registration number KCJ 785D, harassing, arresting, prosecuting, and/or proceeding with the hearing of Malindi Chief Magistrate's Criminal Case No. 310 of 2017 against the Ex-parte Applicant while the loan is unpaid.

c. That the granting of leave do operate as stay of any further proceedings against the Ex-parte Applicant by the Respondents in Malindi Chief Magistrate's Criminal Case No. 310 of 2017 and from repossessing motor vehicle registration number KCJ 785D deposited as security for the loan pending the hearing and determination of the substantive application for judicial review

d. That costs of the application be provided for.

2. By orders issued on 9th August 2018, the court certified the application urgent and directed that the ex-parte applicant file and serve a substantive application to the Respondents. The court further granted the leave to file and pursue the judicial review application and acceded to the reliefs sought by the Ex-parte applicant in terms of prayer 1(b) and (c) above.

3. Subsequently, the ex-parte applicant filed a substantive application dated 29th August 2018 and supported by the grounds alluded to therein and the affidavit of Fatuma Ahmed Ali all sworn and filed on the 29th August 2018. The prayers sought for were: an order of certiorari be granted to the ex-parte Applicant to remove into the high court

a. THAT an Order of Prohibition do issue to prohibit the Respondents' or any other officer acting under the Respondents' from repossessing the security for loan being motor vehicle registration number KCJ 785D, harassing, arresting, prosecuting, and/or proceeding with the hearing of Malindi Chief Magistrate's Criminal Case No. 310 of 2017 against the Ex-parte Applicant while her money remains unpaid.

b. THAT the costs of be provided for.

4. In the course of the proceedings, in support of his client's case, the Advocate for the Ex-Parte Applicant **Richard Otara** filed a supplementary affidavit dated 14th June 2019 on 1st July 2019.

5. In response to the application, the 1st Respondent filed an affidavit sworn by **Alice Mathagani** on 16th January 2019 and filed on 18th January 2019. The 2nd Respondent represented by the Attorney General through grounds of opposition dated and filed on 30th October 2018 and an affidavit sworn by Kennedy Musyoki on 20th November 2018 and filed on 28th November 2018 responded to the application. The 1st interested party, **Domitilla Achieng Obanda** on her part swore an affidavit on 28th June 2019 and filed on 1st July 2019. The 2nd Interested Party did not take part in these proceedings.

6. Following directions from the court, parties filed written submissions with the 2nd Respondent filing theirs dated 27th May 2019, the 1st Interested Party's dated 1st July 2019.

The Ex-parte Applicant's Case

7. According to the Ex-parte Applicant, she is a licensed paw broker running a Rehani shop within Malindi. That the Interested Parties herein approached her on 23rd September 2016 seeking to be advanced a loan facility of Ksh. 360,000/- at a 20% interest rate. She advanced the said loan on the strength of a loan agreement which she presented in evidence and averred that the loan was to be secured by the motor vehicle registration number KCJ 785D. She further averred that at the time of depositing the security, the interested parties handed over all the original documents of ownership of the motor vehicle including the original log book and the transfer including KRA PIN numbers.

8. It is the Applicant's case that it was an express term of the said agreement that in default of payment of the said loan, she was to be at liberty to sell the security and realize her money together with interest. She averred that when the Interested Parties were unable to pay the loan together with interest, they proceeded to the Police in Malindi Police station and made a false complaint that she had stolen the said Motor Vehicle.

9. If the Ex-Parte applicant is to be believed, the police without any investigations proceeded to arrest her and charged her in **Malindi Criminal Case No. 310 of 2017** for stealing. she further avers that the police were now harassing her to release the subject motor vehicle to the Interested parties notwithstanding the outstanding loan which is now totalling to Ksh.1,872,000/-

10. The applicant's case is that the said criminal case is meant to frustrate a civil contract and make her lose her money. According to her, the interested parties are using the criminal process to run away from their obligation to pay the loan.

11. She maintains that the orders sought in the instant application do not prejudice any party herein.

The 1st Respondent's Case

12. Alice Mathangani responding to the application on behalf of the 1st Respondent avers that the applicant was charged with the offence of stealing a motor vehicle contrary to section 278A of the Penal Code on the 23rd of June 2017. The matter was fixed for hearing before the Chief Magistrate's Court on 2nd July 2018 where the 1st interested party testified. The matter was fixed for a further hearing on the 17th of October 2018 before the Hon Chief Magistrates Court. On the 10th of July 2018 the 2nd interested party was arraigned before the **Malindi Chief Magistrates Court** in criminal case No. 619 of 2018 where he took Plea. The matter was slated also for hearing on the 17th of October 2018 before the Hon Chief Magistrates Court.

13. It is averred that on 3rd September 2018, the 2nd interested party entered into a plea agreement with the 1st Respondent and both parties signed the plea bargain forms. Subsequently, on the 1st of October 2018 the facts were read to the 2nd interested party and the following were produced as exhibits in that case: Hire Agreement, Log book for KCJ 785D, Loan Agreement form, Specimen Signatures for the ex-parte applicant and a Forensic Expert report. The 2nd interested party pleaded guilty to the offence and was sentenced to 2 years suspended sentence on 10th December 2018.

14. Per the 1st Respondent, this application has been brought prematurely as **Criminal case No. 310 of 2017** is still ongoing and one witness has testified and the prosecution has 5 witness including the forensic handwriting expert.

15. The contention is put forth that at no point during the trial did the ex-parte applicant complain on how her trial was being conducted nor did she raise any objection on the plea agreement that was conducted as per Section 137A of the Criminal Procedure code with the 2nd interested party and the 1st respondent.

16. It is argued that the applicant is using the court in order to get a civil remedy in a matter that is entirely of a criminal nature. The applicant should institute a civil case in order to get an order to recover the outstanding loan balance of Ksh. 1,872,000.

17. According to the prosecution, it has suffered prejudice in the criminal case no.310 of 2017 since that matter has been unduly delayed on flimsy grounds by the applicant. Under Article 50(1) of the Constitution the complainant (1st interested party) in Criminal Case No. 310 of 2017 has not had her matter heard since 2nd July 2018 when the matter was last in court and she testified. That due to the instant application the proceedings have been stayed despite the fact that the application has been founded on half-truths and flimsy grounds. The 1st Respondent therefore urges the court to dismiss the instant application

The 2nd Respondent's Case

18. The 2nd Respondent filed five grounds of opposition to wit:

- a. That whereas the Ex-parte applicant is seeking prohibitory orders against the 2nd Respondent, she has not alleged any procedural or substantive irregularity occasioned by the said 2nd Respondent herein as to support the issuance of the same as against it.*
- b. That there is a presumption that the 2nd Respondent shall act in a fair, just and impartial manner in accordance with the Constitution and all applicable laws and that presumption has not been rebutted in any manner by the Ex-parte applicant.*
- c. That the 2nd Respondent has the jurisdiction to determine whether the prosecution actuated by malice, influenced by extraneous considerations, whether the prosecution has established a prima facie case or not, whether the Ex-parte should be put on her defence or not, whether there is adequate evidence to support the charges brought or not.*
- d. That from the evidence adduced before this Honourable Court there is no basis for any suspicion or fear that the 2nd Respondent will infringe on the Ex-parte applicant's rights as provided under Articles 50 of the Constitution.*
- e. That no allegation of irregularity, ultra vires or irrationality has been made or can be construed from the pleadings and evidence adduced against the Respondent.*

19. Kennedy Musyoki the investigating officer in **Malindi CMC Criminal Case No. 310 of 2010** testified on behalf of the 2nd Respondent. His case is that on the 22nd September 2016, the 1st interested party reported at Malindi Police station that on 20th September 2016 she had hired her motor vehicle registration number KCJ 785D Toyota Vitz to the 2nd interested party, who was to return the said motor vehicle on the same day. Upon failure by the 2nd interested party to return the motor vehicle or answer the 1st interested party's calls, the 1st interested party made the said report to seek the assistance of the Police to enable her locate the missing car. The Report was entered in the Occurrence Book as entry number 0B No. 23/22/9/2016.

20. He further avers that the police acted on the report by launching investigations into the matter and made efforts to locate the 2nd interested party who was the last person in possession of the motor vehicle. These investigations it is contended led the Police to the ex-parte applicant herein who is a pawn broker and who is alleged to have been given the car by the 2nd interested party as a security for a loan which she advanced to the 2nd interested party. Subsequently, on 24th October 2016 the ex-parte applicant was arrested and escorted to the DCI offices for further interrogation. On 20th April 2017 the ex-parte applicant was charged with the offence of stealing motor vehicle contrary to section 278A of the Penal code at the Malindi Law courts and she was released on cash bail of Ksh 100,000. Musyoki further avers that the

2nd interested party was also arrested and charged with the same offence of stealing motor vehicle contrary to section 278A of the Penal Code and is currently in custody.

21. According to the 2nd Respondent, these were the only arrests that were made by police officers and they were done based on a complaint filed, investigations conducted and for which the ex-parte applicant and the 2nd interested party were charged as provided for by law.

22. On the basis of the foregoing, the court was urged to dismiss the application

The 1st Interested Party's Case

23. The facts of the case as per the 1st interested party are that she entered into a car hire agreement with the 2nd Interested Party on 20th September 2016 wherein he paid Ksh. 2,000/- to hire the motor vehicle registration no. KCJ 785D to travel to Mombasa and was to return the motor vehicle on the same day. She avers that later on the same day, she contacted the 2nd Interested Party as it was getting late and he said he was on his way back to Malindi. Afterwards, the 2nd Interested Party sent a text message saying that he was unwell and he gave the contact of the person with whom he had left the motor vehicle with and thereafter he switched off his phone. The 1st Interested Party avers that upon calling the contact she had been given, the lady who picked the call confirmed that the 2nd Interested Party had left the motor vehicle with her but she thought it had belonged to him, before switching off her phone as well.

24. It is alleged that on the evening of 21st September, 2016 the 2nd Interested Party called the 1st interested party's husband and informed him he had no fuel, the husband sent him Kshs. 500/- through M-pesa for fuel but he never returned the Motor Vehicle.

25. Upon failure by the 2nd Interested Party to return the said Motor vehicle, the 1st interested party avers that she recorded a statement with the Malindi Police station on the 22nd September 2016, under Occurrence Book as entry number OB No. 23/22/09/2016.

26. The Ex-parte Applicant and the 2nd Interested Party were subsequently arrested and charged before a Court of law for the charge of stealing a motor vehicle contrary to section 278A of the Penal Code of Kenya. Which arrests the 1st interested party avers was done as provided by the law. She contends that the Ex-parte Applicant has not demonstrated how the Respondents violated her Constitutional Rights or acted ultra vires in so doing.

27. According to the 1st interested party, the Ex-parte Applicant's Notice of Motion dated 29th August, 2018 does not meet the requirements to seek for a judicial review order, is bereft of merit and ought to be dismissed.

The Law, Analysis and Determinations

28. I have scrutinised the application in its entirety, the evidence on the record as well as arguments advanced by the contesting parties represented by Mr. Otara for the Ex-parte Applicant, Ms. Sombo for the 1st Respondent, Mr. Munga for the 2nd Respondent and Mr. Gicharu for the 1st Interested Party. I undertake to make reference to Counsels' submissions in my analysis and inferences. From where I stand, the only question this court ought to answer is whether the Ex-Parte applicant is entitled to the order of prohibition sought.

29. The instant application questions the authority of the Respondents' to investigate, arrest, prosecute and make a determination on the guilt of the applicant. In the simplest of terms, the Ex-parte applicant seeks an order halting her prosecution by the 1st Respondent. Regarding an application seeking orders in the nature described by the applicant, the law, as correctly submitted by Mr. Munga and Mr. Gicharu for the 2nd Respondent and 1st Interested party respectively, is to be found under **Article 157 of the Constitution of Kenya, 2010, the National Police Service Act No. 11 of 2011** and the **Magistrate's Courts Act No. 26 of 2015**.

30. The powers of the Director of Public Prosecutions are contemplated under the constitution and **Article 157(4)** provides:

"(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction."

31. **Article 157 (6)** states that:

"(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-

(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed,

32. **Article 157(11)** stipulates that:

"(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."

33. The investigatory powers of the Police are well provisioned for under **Section 24(e)** of the **National Police Service Act No. 11 of 2011** which contemplates investigation of crime as one of the functions of the police force.

34. Section 6 of the Magistrates Courts Act No. 26 of 2015 confers jurisdiction on Magistrates Courts in Criminal Proceedings.

35. Courts have long since settled the circumstances under which a court may halt a prosecution. Mr. Munga for the 2nd Respondent quoted the Court of Appeal in **Director of Public Prosecutions vs Martin Maina & 4 others (2017) eKLR** where grounds upon which orders prohibiting criminal prosecution may be granted were outlined. Mr. Gicheru on the same issue cited **Republic v Director Public Prosecutions & another ex-parte Justus Ongera [2019] eKLR** for the basis upon which a Court may interfere with the constitutional duties of the 1st Respondent. On my part, I entirely associate with and replicate hereunder the decision in **Kenneth Kanyarati & 2 others v Inspector General of Police Director of Criminal Investigations Department & 2 others [2015] eKLR** where the court held:

“For starters, the 1st and 2nd Respondents have powers to investigate alleged criminal offences. Such powers are obtained under the Constitution and in particular Articles 157(4) and 245(4) of the Constitution. The powers to investigate may also be said to be obtain under Article 252(1) (a) of the Constitution, which is to the effect inter alia, that each holder of an independent office may conduct investigation of its own initiative or on a complaint made by a member of the public. There is no doubt that the offices of the Director of Public Prosecutions as well as of the Inspector General of Police are Independent offices outlined in and protected by constitutional provisions.

Further, the National Police Service which consists of the Kenya Police Service and the Administration Police Service: See Article 243(2) of the Constitution is under the independent command of the 1st Respondent. Pursuant to the provisions of Article 243 (4), the National Police Service Act (Cap 84) has been legislated and the statute has under Section 24, detailed the various functions of the Kenya Police Service. The functions include but are not limited to maintenance of law and order, protection of life and property, investigation of crimes, collection of criminal intelligence, prevention and detection of crime as well as apprehension of offenders. Consequently, investigation of crime is one of the key functions of the 1st Respondent both under the Constitution and the relevant statute.

The Office of Director of Public Prosecutions Act, No. 2 of 2013 on the other hand too, and in furtherance of Article 157 (12) of the Constitution, has clearly spelt out the powers of the 2nd Respondent in investigating any allegation of criminal conduct. The 2nd Respondent also exercises independently the state powers of prosecution: See Article 157(6) of the Constitution.

A closer reading of both the National Police Service Act as well as the Office of the Director of Public Prosecutions Act and Articles 157 and 245 of the Constitution would reveal that the Kenya Police Force and by extension the 1st Respondent have the mandate to investigate criminal activities or conduct. Such investigations are to be undertaken under no other persons directions save for the Director of Public Prosecutions who may issue directions: see Article 157(4). Such investigations may be voluntarily initiated by the police force or upon prompting by a member of the public through a complaint or a report but must not be influenced in any manner. Such investigation too must be undertaken within the confines of the Constitution as well as with statutory provisions and limitations: see for example Article 244 (c) of the Constitution and generally Part VII of the National Police Service Act (Cap 84).

36. 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.”

37. For circumstances under which the court may review prosecutorial powers, the Court of Appeal in **DPP vs Martin Maina & 4 others (supra)** quoted with approval the Supreme Court of India in the case of **State of Maharashtra & others v Arun Gulab Gawali & others Criminal Appeal No. 590 of 2007 (27 August, 2010)** where these instances were outlined as below:

“(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.”

38. This court is cautious when called upon to intervene when a constitutional office is conducting its duty in accordance with the powers donated to it. In this application, the ex-parte applicant seeks the court’s aid to achieve two ends. One is to stop the Respondent’s from

repossessing the motor vehicle registration no. KJC 785D and the other to preclude the 1st Respondent or its agent from prosecuting her in Malindi CMC Criminal Case No. 310 of 2017. She makes the case that the basis of the investigation and charges is civil in nature. That she advanced a Ksh. 360,000/- loan facility to the interested parties, who according to her are in cahoots, and received the subject motor vehicle KCJ 785D as well as its registration documents as security for the loan. However, from the documents she presented in support of her contentions, only the loan agreement is available, there is no trace of the ownership documents she claimed to have been deposited with her as security.

39. On the other side of the aisle is the 1st interested party who makes the case that her motor vehicle was stolen by the 2nd interested party and given to the ex-parte applicant. In support of this version of events are the Respondents who aver that upon receiving a complaint from the 1st interested party as regards the loss of her vehicle, investigations were launched which led to the arrest of the ex-parte applicant and finally the 2nd interested party. It is further posited that the 2nd interested party's admission of guilt is a clear pointer as to the culpability of the ex-parte applicant for the offence which she has been charged.

40. As I see it, an appreciation of the evidence adduced leads me to the inescapable conclusion that the Respondents have acted within their mandate. The Ex-parte Applicant's averments, I am afraid, do not meet the threshold that would warrant the court's interference. I am reluctant to find fault in the manner in which the Respondents have expressed their mandate. The Respondents investigated a valid complaint made by the 1st interested party and found enough evidence to warrant the charges levelled against the Ex-parte applicant. Further illuminating is the fact that the 2nd interested party has entered into a prima facie valid plea agreement admitting to the offence. I stand guided by the court's words in **R Vs. Commissioner of Police and Another Ex parte Michael Monari & Another (2012) eKLR**

"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."

41. Although it may be true that the ex-parte applicant has a valid civil claim against the interested parties, the same cannot come to her aid in a judicial review application. While her claim may be a competent defence in the criminal case against her, in this application, the court only concerns itself with the propriety of the decision making process that resulted in Malindi CMC Criminal Case No. 310 of 2017. It is therefore not the concern of this court that the prosecution's case in the criminal matter may well fail. All that matters is that the Respondents did not act with ulterior motives or without basis in preferring the charges against the ex-parte applicant. I resonate with the decision in **Republic v County Labour Commissioner Nairobi & 3 others Ex-parte Sichuan Huashi Enterprises Corporation East Africa Limited [2016] eKLR** where it was held:

"The Court ought not to usurp the mandate of the Prosecution agencies 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."

42. Going by the celebrated decision in **Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & 9 Other [1997] eKLR** an Order of Prohibition 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 which in my view is what the ex-parte seeks to do. I take the view that if at all the ex-parte applicant is apprehensive, she need not worry as **Article 50 of the Constitution of Kenya** clothes her with the safeguards required to ensure her trial in the subordinate court is conducted in accordance with the law. I find and hold that the ex-parte Applicant has not presented anything to this court that would warrant it to halt the prosecution of Malindi CMC Criminal Case No. 310 of 2017.

43. In the upshot, the application dated 29th August 2018 is devoid of merit and is hereby dismissed with costs.

44. It is so ordered.

DATED SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER 2019

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R NYAKUNDI

JUDGE

In the presence of:

1. Ms. Wagila for Gicharu for the 1st Interested party
2. Ms. Mathangani for Sombo for the Respondent and also holding brief for Lutta for the AG - Present