



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

JUDICIAL REVIEW APPLICATION NO. 13 OF 2017

CORAM: D. S. MAJANJA J.

BETWEEN

REPUBLIC.....APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION

COMMISSION.....2ND RESPONDENT

EX-PARTE

GODANA ADHI DOYO

RULING

1. Following the grant of leave, the *ex- parte* applicant (“the applicant”), Godana Adhi Doyo, filed the Notice of Motion dated 23rd November 2017 seeking an order of *certiorari* to remove into the High Court and quash the charges against him and the accompanying charge sheet. He also seeks an order of prohibition prohibiting the respondents from proceeding with criminal charges against him in respect of matters arising from the employment of county employees during his tenure as Governor of Isiolo County or in matters related therewith in respect of the charges against him.

2. The application is supported by the applicant’s verifying affidavit sworn on 5th November 2017. The charge sheet he complains about is annexed to verifying affidavit and it shows that he is charged with several counts of abuse of office contrary to **section 46** as read with **section 48(1)(a)** of the *Anti-Corruption and Economic Crimes Act (“ACECA”)*. The gravamen of those charges, is that on diverse dates, as the Governor of Isiolo County, he improperly appointed certain persons without obtaining the consent of the Isiolo County Public Service Board contrary to **section 74** of the *County Governments Act*.

3. The grounds upon which the applicant challenges the criminal proceedings against him are rather prolix. However, in the verifying affidavit he states that the respondents initiated a plethora of charges against him from the time he was elected as Governor of Isiolo but these were stayed by the courts. He contended that these charges were initiated with ulterior motives and were meant to punish him and cause him unnecessary hardship.

4. The applicant stated that at the outset of devolution it was common practice among county governments that the governor would appoint person in various position but where they were found unsuitable, the County Public Service Board would revoke appointments or set in motion the process of verifying the appointments. He deponed that the Isiolo County Public Service Board ratified the appointments complained of as shown in the letter dated 21st October 2014 addressed to the Isiolo County Public Service Board by the County Secretary/County Head of the Public Service.

5. The applicant also argued that the respondents have failed to investigate the matter fully. He maintained that the recruitments were administrative matters and if there were any errors in the process, internal remedies exist for correction of such errors. He complained that recruitment of employees by governors in the manner alluded existed in other counties and it is inexplicable why he was selected for prosecution.

6. The application is opposed by the 2nd respondent through the affidavit of David N. Sangula, the investigating officer in the matter, sworn

on 27th January 2017. He has outlined the fact that he investigated the matter and concluded that there was sufficient evidence to charge the applicant.

7. This application implicates the power of the Director of Prosecutions (“DPP”) to prosecute criminal cases. **Article 157(10)** of the Constitution protects the independence of the office on the following terms:

The Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

8. In view of the authority and independence conferred by the Constitution on the DPP, the Courts should not ordinarily interfere with his discretion in deciding whether or not to institute criminal proceedings. However, the power of the DPP is not absolute and is circumscribed by **Article 157(11)** of the Constitution which provides 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.

9. In **Kenya Commercial Bank Limited & 2 Others v Commissioner of Police and Another, Nairobi Petition No. 218 of 2011 [2013]eKLR**, the court held that:

The office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.

10. **Article 157(11)** of the Constitution implicitly recognises that the court has inherent jurisdiction to stop abuse of its process by prohibiting criminal proceedings where the exercise of such power is found to be oppressive or otherwise an abuse of its process. However, the court must exercise its jurisdiction ever so cautiously so as not to stifle what is otherwise the lawful discharge of constitutional mandate by the DPP. That is why the court, in the **Kenya Commercial Bank Ltd case (Supra)**, observed that;

[23] ... the High Court may stop proceedings where such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of fundamental rights and freedoms. This power though must be exercised sparingly as it is in public interest that crime is detected and those suspected of criminal conduct are brought to face the consequences the law prescribes.

11. The issue in this case is whether I should stop the 1st respondent from prosecuting the applicant for offences under the **ACECA**. I have considered the factual material placed before me in light of the principles I have set out. The applicant urged that decision to prosecute the him was motivated by ulterior motives. He referred to some cases that had stayed criminal proceedings against him but the nature and tenor of those proceedings was not shown to this court through any affidavit. In the circumstances I do not find any factual evidence of bias, malafides or improper motives proved against the DPP.

12. On the other hand, the only evidence placed before me is a copy of the letter dated 21st October 2014 from the County Secretary to the County Public Service Board and some minutes attached thereto which are illegible. I hold that the trial court would be well placed to evaluate this evidence and any other material that is available and has not been shown to this court. In **Meixner & Another v Attorney General [2005]2 KLR** it was held in part that;

It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.

13. The applicant suggested that the issues concerning employment within the County Government were internal administrative matters for which internal remedies were available for correction of any errors that may have occurred. I find nothing in **section 74** of the **County Governments Act** that excludes the operation of **ACECA** where the DPP is satisfied that there are sufficient facts that justify a prosecution for abuse of office.

14. For the reasons I have set out above, the ex-parte applicant has not made out a case to warrant the orders sought in the Notice of Motion dated 23rd November 2017. It is dismissed with costs.

DATED and DELIVERED at MERU this 5th day of June 2018.

D. S. MAJANJA

JUDGE

Ms Kiome instructed by Kithi and Company Advocates for the ex-parte applicant.

Mr Kieti instructed by the Office of the Director of the Public Prosecutions,

Ms Kilimo, Advocate for the Ethics and Anti-Corruption Commission.