

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILINMANI LAW COURTS
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. 621 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

AND

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

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

THE CHIEF MAGISTRATE MILIMANI LAW COURTS....3RD RESPONDENT

MINISTRY OF LANDS.....4TH RESPONDENT

MWANANCHI CREDIT LIMITED.....5TH RESPONDENT

AND

JOHN LOPEZ LUTUKA KIBWENGE.....1ST EX PARTE APPLICANT

HADIJA SHEE ABU.....2ND EX PARTE APPLICANT

RULING

1. By a Notice of Motion dated 12th October 2017, the ex parte applicants seek Leave to apply for the following Judicial Review orders:-

a. An Order of Certiorari to quash the decision of the first and second Respondents made on the 1st and 4th day of October 2017 to charge the first and second ex parte applicants on 13th October 2017 with the offences of obtaining and forgery respectively at the behest of the fourth Respondent by itself, agents and or servants howsoever.

*b. An order of **Prohibition** prohibiting the first and second Respondents from arresting, arraigning in Court and or charging the ex parte applicants on 13th October 2017 and or any other day with the offences of obtaining and forgery respectively at the behest of the fourth Respondent by itself, agents and or servants howsoever.*

*c. An order of **prohibition** prohibiting the first and second Respondents from prosecuting and or continuing with prosecuting the ex parte applicants at the Chief Magistrates Court at Nairobi and or any other Court with the offences of obtaining and forgery respectively at the behest of the fourth Respondent by itself, agents and or servants howsoever.*

*d. **That** the leave once granted do forthwith operate as a stay of the decision to arraign, charge and or prosecute the ex parte applicants with the offences of obtaining and forgery respectively at the behest of the fourth Respondent by itself, agents and or servants howsoever.*

2. The crux of the ex parte applicants case is that:-

*a. **That** the first applicant and his family are being unduly harassed by the first Respondent's officers who are abusing their powers*

and are pressurizing the first applicant to accept and consent to forced sale on his property which the fifth Respondent is holding as a security for financial assistance made to the first applicant details whereof are that the fifth Respondent advanced to the **Ksh. 11,800,000/=** in December 2014 and a further sum of **Ksh. 18,550,000/=** in April 2016 which amounts were secured by a charge over the first applicants title number **Kiambu/Municipality Block 111/231**.

b. That a consent was registered in Kiambu High Court case number **18** of 2017, but on **29th** September 2017 officers acting on behalf of the first Respondent arrested and detained the first applicant for obtaining money by false pretences, which was meant to exert pressure upon him to sell the said land, hence the arrest and decision to charge him is based on malice, intimidation and abuse of office

Second Respondents' Response.

3. **Eunice Wanja Njue**, the investigating officer swore the Replying affidavit dated **3rd** November 2017. She averred that following a complaint by the fifth Respondent, investigations revealed that the first ex parte applicant charged the above property to secure a borrowing of **Ksh. 30,350,000/=**, but he defaulted in repayment prompting the fifth Respondent to threaten to exercise its statutory power of sale.

4. She averred that before the fifth Respondent could exercise its statutory power of sale, the applicant instituted Kiambu High Court Civil Suit No. **18** of 2017 seeking orders to stop the sale, but a consent was registered in the said case on **26th** July 2017 decreeing an agreed mode of payment. Further, she averred that despite the said consent, the first applicant defaulted in payment. Also, she averred that the fifth Respondent commenced the recovery process, but the second applicant moved to court claiming to be the applicants wife seeking to stop the sale on grounds that spousal consent was never obtained as the law demands, and obtained a temporary injunction.

5. **M/s Njue** further averred that investigations revealed that there existed no legal marriage. Further, she averred that the marriage certificate relied upon by the applicants was a forgery as evidenced by the annexed report from the Registrar of marriages. Further, she averred that upon consideration of the evidence, the first Respondent submitted the file to the DPP who was satisfied that the first Respondent deceived the Court in Kiambu that there existed a marriage, hence, the DPP exercised its powers under Article **157** of the Constitution and charged the applicants in criminal case number **1737** of 2017. She also averred that the decision to charge was based on the sufficiency of the evidence, and that all the matters cited by the applicants are issues to be determined by the lower court.

6. **M/s Njue** also averred that the prosecution in question does not in any manner violate the constitutional rights of the applicants to warrant the orders sought nor has the prosecution been commenced without a factual basis nor is it an abuse of Court process. Further, she averred that existence of civil cases is not a bar to criminal proceedings

Fifth Respondents' Response.

7. **Dennis Mwangeka Mombo**, a Director of the fifth Respondent swore the Replying affidavit dated **2nd** November 2017. He averred that the prayers for prohibition have been overtaken by events in that the applicant has already been charged in Court with the offences of conspiracy to defraud contrary to section **317** of the Penal Code,^[1] making a document without authority contrary to section **357 (a)** of the Penal Code,^[2] and obtaining credit by false pretences contrary section **316 (a)** of the Penal Code.^[3]

8. He averred that the first ex parte applicant borrowed a total sum of **Ksh. 30,350,000/=** and charged his above property by way of a first charge for **Ksh. 11,800,000/=** and a further charge for **Ksh. 18,550,000/=**. He further averred that a close look at the charge and the further charge exhibited by the applicants, reveals that the ex parte applicants have removed the statutory declaration sworn by the first ex parte deposing that he was not married, hence the charged property was not matrimonial property.

9. Further, he averred that it is not true that the ex parte applicants have repaid the loan, and in the consent order referred to above, the ex parte applicant admitted being indebted to the tune of **Ksh. 60,000,000/=** but failed to honor the said consent, and instead applied to set it aside. Further, he averred that due diligence had established that the first applicant was not married.

Issues for determination.

10. The core issue for determination is whether or not the leave sought should be granted and whether if granted it shall operate as stay for the criminal proceedings.

11. At the hearing of the application, **Mr. Bosire** stated that the applicants were only seeking payer **(d)** of the application since the other prayers had been overtaken by events. He relied on the statement and annexures. **Mr. Bosire** proceeded as if leave had been granted despite the clear orders by **Aburili J.** granted on **2nd** November 2017 in which she ordered that the application for leave and stay shall be heard on **14th** December 2017 by way of oral submissions. On the said date the matter was adjourned and after several other Court attendances, the matter finally proceeded before me on **27th** June 2018.

12. **Mr. Makori**, counsel for the DPP relied on the Replying affidavit of **Eunice Wanja Njue** and urged the Court to decline the leave sought. **Mr. Kenyatta** for the fifth Respondent relied on his clients Replying affidavit.

13. The importance of obtaining leave in a judicial review application was well captured in the words of **Waki J** (as he then was) in the case of *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others*^[4] where he stated:-

“ is to eliminate at an early stage any applications for judicial review which are either *frivolous, vexatious or hopeless* and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case

for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived..”(Emphasis added)

14. In *Meixner & Another vs A.G.*,^[5] it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case.

15. This court,^[6] had an opportunity to examine a similar position and the law on grant of leave in Judicial Review proceedings. It held *inter alia* that "The leave stage is used to identify and filter out, at an early stage, claims which may be trivial or without merit. At the leave stage an applicant must show that:- (i) he/she has '**sufficient interest**' in^[7]the matter otherwise known as *locus standi*; (ii) the applicant must demonstrate that he/she is affected in some way by the decision being challenged; (iii) An applicant must also show that he/she has an arguable case and that the case has a reasonable chance of success; (iv) the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; (iv) the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function." And that "**at the leave stage, the applicant has the burden of demonstrating that the decision is illegal, unfair and irrational.**" ^[8]

16. It is clear that the purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration.^[9] Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground in seeking Judicial Review exists which merits full investigation at a full hearing.^[10]

17. The question now for consideration is whether the application for leave before me is hopeless, frivolous or vexatious and whether it raises a case fit for consideration. This is the acid test this application must be subjected to at this stage.^[11]As was held in *Meixner & Another vs A.G.*,^[12] leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case.

18. The *ex parte* applicants counsel stated that all the other prayers sought in the application were overtaken by events and informed the Court that he was only asking for prayer (d) which reads:-

d. That the leave once granted do forthwith operate as a stay of the decision to arraign, charge and or prosecute the ex parte applicants with the offences of obtaining and forgery respectively at the behest of the fourth Respondent by itself, agents and or servants howsoever.

19. Sadly, prayer (d) cannot be a standalone prayer. It can only be granted after the substantive prayers to institute Judicial Review proceedings have been granted. Thus, by admitting that the other prayers have been overtaken by events and stating that he is only pursuing the prayer for stay, counsel cut the ground upon which prayer (d) can stand. On this ground alone, this application must fail.

20. Notwithstanding my finding herein above, I will proceed to examine the facts as presented in this case and determine whether the application is frivolous or whether it discloses an arguable case to warrant the leave sought.

21. It is common ground that the first *ex parte* applicant borrowed money from the fifth Respondent. He charged is property to secure the original borrowing and a subsequent borrowing was secured by a further charge over the same property. It is common ground that he defaulted in repayment and as the law demands, the lender sought to exercise its statutory right of sale. It is also uncontested that faced with the imminent exercise of statutory power of sale, the first *ex parte* applicant moved to Court seeking to stop the sale. A consent was recorded in the said case, but the default in repayment persisted. Again, on the face of the imminent sale of the charged property pursuant the exercise of the lender's statutory power of sale, the second applicant sought and obtained injunctive orders stopping the said sale claiming to be the first *ex parte* applicants wife and stating that her consent was not sought at the time of charging the property.

22. The fifth Respondent states that at the time of executing the charge and the further charge, the first *ex parte* applicant signed a statutory declaration deposing that he was not married. In the charge and further charge documents used by the applicant in the said proceedings, the said declaration is missing. The fifth Respondent made a complaint to the police who also confirmed that the purported marriage certificate used by the *ex parte* applicants wife to obtain the injunctive orders was forged. The upon finalizing the investigations, the police forwarded the file to the DPP as the law demands who evaluated the evidence and preferred the charges in question.

23. Article 157 (10) declares that the DPP shall not require the consent of any person or authority to commence criminal proceedings. 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^[13]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.

24. 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^[14] 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.*'

25. 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." [15]

26. It is important to mention that a complaint was made to the police. They investigated the complaint as required and the DPP formed the opinion that the investigations revealed a criminal offence known to the law. A look at the issues presented in this case reveals that it has not been demonstrated on the face of it that the application presents arguable grounds that the DPP abused his powers. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*. [16] The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

- i. Where it would be impossible to give the accused a fair trial; or;
- ii. 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.

27. **Chris Corns** [17] argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories:-

- i. When the continuation of the proceedings would constitute an 'abuse of process,'
- ii. When any resultant trial would be 'unfair' to the accused, and
- iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

28. The material before me does not present arguable grounds that the DPP abused his powers. The initial consideration in the exercise of the discretion to prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. This is a decision constitutionally vested on the **DPP**. Where discretion is conferred on the decision-maker the Courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully. [18] One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

29. Further, a cursory look at the material presented before me does not show an arguable case that the DPP did not independently evaluate the evidence. The **DPP** is mandated to independently evaluate the evidence and make the decision to prosecute independently. When evaluating the evidence regard should be had to the following matters:- **(a)** Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute? **(b)** If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused? **(c)** Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable? **(d)** Does a witness have a motive for telling less than the whole truth? **(e)** Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute. **(f)** whether the alleged offence is of considerable public concern and **(g)** the necessity to maintain public confidence. As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution.

30. I find nothing to suggest that the applicant has presented an arguable case that the **DPP** did carefully analyze the evidence or acted carelessly or abused his powers. No serious material has been presented in this case to demonstrate that the decision to prosecute was influenced by irrelevant or extraneous considerations. Further, there is nothing to establish that the applicants have an arguable case that the **DPP** did not act independently in arriving at the decision to prosecute. The *ex parte* applicants have not demonstrated that there was no sufficient evidence or factual basis to justify a prosecution. This is a burden the *ex parte* applicants must discharge to qualify for the leave sought.

31. It should be recalled that it is not the function of this Court to weigh the veracity of the evidence. An *ex parte* applicant seeking leave to commence Judicial Review proceedings to stop a prosecution must present enough material to demonstrate a good case that the DPP acted without sufficient evidence. It should be recalled that 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.

32. The power to stay or prohibit criminal proceedings is meant to advance the Rule of Law and not to frustrate it. The Constitutional provision in Article 157 (10) of the Constitution 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. The material presented in support of the leave sought does not 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.

33. In view of my analysis herein above, I find and hold that the application for leave is frivolous and does not demonstrate an arguable case at all. It does not meet the threshold to warrant the granting of the leave sought. As for the stay sought, *First*, as stated earlier, having abandoned the other prayers, the prayer for stay remains hanging in the air. It cannot be granted. There would be no basis to grant it. *Second*,

granting leave is a matter of the Courts discretion. Discretion must be exercised on sound evidence and legal principles. I find no basis for the Court to exercise its discretion and grant any of the orders sought.

34. The upshot is that the *ex parte* applicants Notice of Motion dated **12th October 2017** is *totally unmerited and must fail*. I hereby dismissed it with costs to the Respondents and direct that **Nairobi Chief Magistrates Criminal Case number 1735 of 2016** proceeds to hearing and determination.

35. I further direct that a copy of this order be served upon the Chief Magistrates Court, Nairobi and the office of DPP for appropriate action.

Orders accordingly.

Signed, Dated and Delivered at Nairobi this 11th day of September 2018

John M. Mativo

Judge

[1] Cap 63, Laws of Kenya.

[2] Ibid.

[3] Ibid.

[4] Mombasa HCMISC APP No 384 of 1996.

[5]{2005} 1 KLR 189.

[6] Judicial Review Misc Ap No 533 of 2017.

[7] See *R vs Panl for Takeovers and Mergers ex p Datafin* {1987}I Q B 815.

[8] See note 3 above

[9] Ibid

[10] *R vs Legal Aid Board Ex p Hughes* {1992} Adm. L. Rep. 623}.

[11] Supra Note 3.

[12]Supra.

[13] Act No. 2 of 2013.

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

[15] See *State of West Bengal & Others vs Swapan 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.

[16] {1993}All E.R 138, 151, House of Lords.

[17]Chris Corns, *Judicial Termination of Defective Criminal Prosecutions: Stay Applications*, 76 University of Tasmania Law Review, Vol 16 No. 1, 1977.

[18] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.