



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

JUDICIAL REVIEW DIVISION

MISC APPLICATION NO. 45 OF 2018

IN THE MATTER OF: AN APPLICATION BY EDNA KHAEMBA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND MANDAMUS AGAINST THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE AND THE DIRECTOR OF PUBLIC PROSECUTION.

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010, THE NATIONAL POLICE ACT AND THE FAIR ADMINISTRATIVE ACTION ACT 2015.

AND

IN THE MATTER OF: BREACH OF ARTICLES 25, 28, 29, 31, 35, 40, 47 AND 244 OF THE CONSTITUTION OF KENYA 2010 AND THE FAIR ADMINISTRATIVE ACTION ACT 2015.

IN THE MATTER OF: UNLAWFUL, IRREGULAR AND MALICIOUS INTENDED ARREST, DETENTION AND PRETENDED PROSECUTION OF THE APPLICANT BY THE NATIONAL POLICE SERVICE.

IN THE MATTER OF: AN INTENDED ABUSE AND MISUSE OF POWER BY THE POLICE SERVICE.

BETWEEN

EDNA SUDI KHAEMBA.....APPLICANT

AND

INSPECTOR GENERAL NATIONAL POLICE SERVICE.....1ST DEFENDANT

DIRECTOR PUBLIC PROSECUTIONS.....2ND DEFENDANT

JUDGMENT

The applicant filed an application dated 13/08/2018 seeking for an order of prohibition to prohibit the respondents from arresting, detaining, arraigning in court, charging and/or prosecuting the applicant in criminal court in regard to any matters touching and/or related with legality or otherwise of titles and/or legal charges created over **LR No. Dagoreti/Riruta/2289 and 2290, L.R No. 209/2489/34 and 32, L.R No. 209/12513, L.R No. 88323, L.R No. 209/163/1/6, L.R No. 209/1817 and I.R No. 43306, L.R No. 12948/214 and Kitengela/Kajiado/4260.**

That the applicant is an advocate of the High Court who in her professional duties while acting for Glaret Kindergarten, Kinjunje Gardens Limited, Wardpa Holdings Limited, Ndonga Limited and Gep Limited witnessed various conveyancing documents in relation to legal charges created over her clients' properties. That her role was strictly limited to witnessing documents.

However, there arose a dispute over the legality of the charges created which led to institution of several suits **Nairobi ELC No. 13 of 2016, Nairobi ELC No. 93 of 2016, Nairobi ELC No. 947 of 2016 and Nairobi ELC No. 941 of 2016.** In addition, the banks procured the services of the police to arrest directors of the applicant's clients and charge them in **Criminal Case No. 1419 of 2016.**

In view of this the clients challenged the prosecution under **JR No. 429 of 2016** and on 10/10/2017, the court ordered stay of further proceedings intended for arrest of the clients in relation to matters touching on the properties. However, the respondents want to arrest and prosecute the applicant in relation to acts arising from the same transactions which were stayed.

The respondents though served did not file any response.

It was submitted that the gist of the application is that there was a judicial review order restraining the respondents from continuing criminal proceedings in criminal case No. 1419/2016. Those proceedings are similar to the intended proceedings against the applicant. That it would be selective prosecution when the High Court has restrained them.

It is further submitted that Justice Ondunga had noted that there were civil proceedings which preceded the criminal proceedings and that it was logical to stay criminal proceedings until the Civil Proceedings were determined. She urged the court to adopt the Judgment by Justice Ondunga.

It is further submitted that the intended criminal proceedings are unfair irrational, unreasonable. Malicious and amounts to selective prosecution. They go against the spirit and letter of **Fair Administration Act**.

I have considered the application. The applicant is an Advocate of the High court of Kenya who acted for Glaret Kindergarten, Kinnjunje Gardens Limited, Wardpa Holdings Limited, Ndonga Limited and Gep Limited and witnessed various conveyancing documents in relation to legal charges which I have mentioned above. Her role was strictly limited to witnessing documents.

The issue is whether the court should grant the orders. This issue of restraining the respondents has been addressed by the High Court and the Court of Appeal. I will consider the authorities.

In **Director of Public Prosecutions v Martin Maina & 4 Others [2017] eKLR**

In a similar case involving prohibition of Police from commencing, sustaining or proceeding with any criminal proceedings in connection with intended sale of the suit property, the Court of Appeal held;

There is no dispute that under Article 157(10) of the Constitution the Director of Public Prosecutions (DPP), the appellant herein, does not require the consent of any person or authority to commence of criminal proceedings and is not under the direction or control of any person or authority in the exercise of his constitutional powers or functions. The DPP is only subject to the Constitution and the law.

However, in exercising his powers, the DPP should have regard to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process. See Article 157(11) of the Constitution. In granting the order of prohibition, the learned Judge came to the conclusion that the 1st respondent's prosecution amounted to abuse of the legal process.....

In our view therefore, we are unable to find that the institution of criminal proceedings against the 1st respondent would have amounted to abuse of the court process and neither was there a legal bar against the institution of the intended criminal proceedings.

In **Ronald Leposo Musengi v Director of Public Prosecutions & 3 others [2015] eKLR**

The Court held;

“Therefore in determining whether or not to halt criminal proceedings, the Court must consider the dominant motive for bringing the criminal proceedings. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and 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.....

Where it is not the predominant purpose the Court ought not to interfere. Where the ground relied upon to halt the same is some collateral motive which on its own does not warrant the halting of the said proceedings, the Court ought not to take such exceptional step of bringing to an end criminal proceedings where there possibly exist other genuine motives.....

It is therefore clear that whereas the discretion given to the respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the Respondent is shown not to be acting independently but just reading a script prepared by someone else or that he has been pressurised to go through the motions of a trial, the Court will not hesitate to terminate the proceedings as in such circumstances, the powers being exercised by the Respondent would not be pursuant to his discretion but at the discretion of another person not empowered by law to exercise such discretion.”

The role of Judicial review is to consider the decision making process. This was held in **Meixuer & Another –v- Attorney General (2005)2 KLR 189**.

“ Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of

law. Prohibition restrains abuse or excess of power”.

In the **J.R No. 429/2016 (formerly Mombasa Judicial Review No. 54/2016) R –v- Director of Public Prosecution & others**, Justice Ondunga, which relates to the matter of LR 209/1817, LR 209/2513, 209/489/34 LR Dgoretti/Riruta/2289 where the applicant was seeking an order that –

“An order for Judicial Review of prohibition directed at the respondent staying any further investigations by its officers intended for the arrest of the applicants or their arraignment of prosecution in Criminal Courts in regard to matters touching on the legality or otherwise of titles and/or legal charges created over properties known as LR. No. 209/1817; LR No. 209/12513, LR No. 209/2489/34 and Dagoretti/Riruta/2289 all belonging to the companies in which the applicants are Directors.”

The Judge issued the following order.

“An order of prohibition will issue directed at the respondent staying any further investigations by its officers intended for the arrest of the applicants or their arraignment of prosecution in Criminal Courts in regard to matters touching on the legality or otherwise of titles and/or legal charges created over properties known as LR. No. 209/1817, LR No. 209/12513, LR No. 209/2489/34 and Dagoretti/Riruta/2289 all belonging to the companies in which the applicants are Directors pending the hearing and determination of Nairobi (Milimani) Environment & Land Court Suit No. 13 of 2016, Nairobi ELC Case No. 93 of 2016, Nairobi E.L.C No. 947 of 2016 and Nairobi ELC No. 941 of 2016.”

The matter is related to the present case as it is where the exparte applicants states that he acted for the clients by witnessing the conveyancing document in relation to the legal charges. It would seem that the Respondents have abided by the decision of Justice Ondunga. It would therefore amount to selective prosecution which is unfair. The Respondents have not denied that they intend to arrest her and arraign her in court. The Respondents should equally abide by the ruling with regard to the applicant pending the outcome of the Civil case.

The respondents failed to file a response to the application. My view is that in all fairness since there is an order of stay of further proceedings and arrest of the applicant’s clients in relation to the said properties the order should apply to the applicant. Though she was not a party In the suit before Justice Ondunga, the issue related to the transaction which the applicant witnessed. It is unfair and reasonable and this court will therefore intervene. I find that the application has merits.

I order that an order of prohibition do issue directed at the respondents prohibiting themselves, their officers and/or agents

from arresting, detaining, arraigning in court, charging and/or prosecuting the applicant in any Criminal Court in regard to any matters touching on, arising from, akin to and/or related with the legality or otherwise of titles and/or legal charges created over all those properties known as **LR No. Dagoretti/Riruta/2289, LR No. Dagoretti/Riruta/2290, LR No. 209/2489/34, LR No. 209/2489/32, LR No. 209/12513, LR No. I. R No. 88323, LR No. 209/163/1/6, LR No. 209/1817 and LR No. 12948/214 and Kitengela/Kajiado/4260** pending the hearing and determination of the pending Civil Suit being Nairobi(Milimani) Environment and Land Court Suit No. 13/2016, Nairobi ELC 947/16 and Nairobi ELC 941/2016 which are related to the properties in this case.

No orders as to costs.

Dated at Kerugoya this 1st Day of November 2018.

L. W. GITARI

JUDGE