



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

JUDICIAL REVIEW NO. 11 OF 2018

THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 22, 23(3), 24, 38 (C), 47 AND 165(3)(a) AND (6) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP, 26 LAWS OF KENYA SECTIONS 8 AND 9

BETWEEN

PAUL MWANGI WARUTEREAPPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

INSPECTOR GENERAL OF POLICE2ND RESPONDENT

INVESTIGATING OFFICER3RD RESPONDENT

FLYING SQUAD NAIROBI AREA4TH RESPONDENT

AND

BEATRICE NYAMBURA MURIUKI1ST INTERESTED PARTY

CONSOLATA WANGARI2ND INTERESTED PARTY

ELIZABETH WANGARI KIROMO3RD INTERESTED PARTY

MARY WANGU t/a STENAR ENTERPREISES.....4TH INTERESTED PARTY

PETER MUIGU5TH INTERESTED PARTY

RULING

Introduction

The ex-parte applicant Paul Warutere and Beatrice Nyambura Muriuki, identified as a director of West Hill Ltd on diverse dates entered into a credit facilities agreement where various amounts of money was advanced to the ex-parte applicant on his own request. That the total loan amount totalled Kshs 185,845.075 overall which the ex-parte applicant has made good by paying Kshs. 89,445,730 leaving an outstanding balance for Kshs, 95,299,345.

The ex-parte applicant and Beatrice Nyambura Muriuki seems to have reached an agreement to the effect that post-dated cheques covering the debt be drawn in her favour by the ex-parte applicant as a commitment to liquidate the debt. It is purportedly stated in the claimant statement that the various cheques annexed and marked as WBC 3 – 5 were dishonoured and returned to drawer. Subsequently acting on legal advice Beatrice Nyambura Muriuki and West Hill Ltd filed a plaint at Milimani Commercial Court No. E 002 of 2018 dated 3rd April, 2018 seeking judgement in the suit of Kshs. 98,549, 345 plus costs and interest.

The Milimani suit is still pending determination on the merits. On 2nd July, 2018 one Jennifer David Mwau a worker at the farm owned by the ex-parte applicant was charged before Milimani Court with the offence of unlawfully obstructing a police officer contrary to Section 103 of the National Police act No. 2011 of the Laws of Kenya. These were some of the factors that motivated the ex-parte applicant to apply for Judicial Review in a notice of motion filed in court on 12th July, 2018.

The Judicial Review application

In the notice of motion dated 10th July, 2018 and filed in Court on 12th July, 2018 stated to be brought pursuant to Article 10, 19, 20, 21, 23, 28, 29, 31, 48, 49, 55, 60(1), 84, 157, 165, 258 and 259 of the constitution of Kenya and Section 123(3) and 124 of the Criminal Procedure Code. He makes a claim for Judicial Review against 1st to the 4th respondents and the five named interested parties that orders of prohibition, certiorari and mandamus do issue in reference to infringement and violation of his constitutional rights.

According to the notice of motion the ex-parte applicant seeks the following reliefs.

- 1. THAT this application be heard ex-parte at the first instance and it be certified as urgent.**
- 2. THAT pending the hearing and determination of this application, the Honourable Court be pleased to grant the application an order of certiorari to stop, discontinue, and terminate the entire decision by the 2nd, 3rd and 4th respondents to arrest, detain and/or apprehend him as commenced on 30th June, 2018 at his home Ngong/Ngong/91032 Ololua Close, Ngong, Kajiado.**
- 3. THAT pending the hearing and determination of this application, the Honourable Court be pleased to grant the applicant an order of prohibition directed at the 2nd respondent to restrain the 3rd and 4th respondent, its officers and/or agents from instituting criminal proceedings in the nature of failing to pay a debt owed to the 1st interested party t/a Westhill Limited against himself commenced on 30th June, 2018 at his home Ngong/Ngong/91032 Ololua close, Ngong Kajiado.**
- 4. THAT the said leave operates as stay of execution of criminal proceedings in the nature of failing to pay a debt owed to the 1st interested party t/a Westhill Limited against himself commenced on 30th June, 2018 at his home Ngong/Ngong/91032 Ololua close, Ngong, Kajiado pending the hearing and determination of this application inter-parties.**
- 5. THAT the Honourable Court be pleased to stay any intended arrest or proceedings as against the applicant pending the hearing and determination of this application inter-parties.**
- 6. THAT pending the hearing and determination of this application, interim conservatory orders do issue restraining the respondents whether by themselves, their agents, officers or employees from arresting the applicant in relation to the said debt owed by applicant to the 1st interested party t/a Westhill Limited.**
- 7. THAT a day be appointed for the applicant to appear at Flying Squad Offices Nairobi Area and/or before the Director Criminal Investigations Kiambu road, Nairobi together with his counsel to enable the police undertake their procedures including charge and cautionary statement (if necessary) without being taken into custody.**
- 8. THAT the family of Paul Mwangi Warutere forthwith be left to enjoy their matrimonial home Ngong/Ngong/91032 devoid of unnecessary police harassment.**

In addition to the grounds on the face of the motion, the ex-parte applicant deponed in various affidavits dated 10th July, 2018, 24th August 2018 and 23rd October, 2018 on the evidential material to be taken into account in support of the judicial review application.

Central to the ex-parte applicant's contention in the affidavits is the aspect of him being sought by the 2nd, 3rd and 4th respondent as a suspect in the on-going investigations of an offence of issuing bad cheques contrary to Section 316A of the Penal code. In his separate affidavits the ex-parte applicant depones that the origin of the purported criminal offence was a criminal transaction entered into with the 1st interested party as a director of Wes Hill Limited.

The ex-parte applicant specifically identified the salient issues in the contract which is away ousts the jurisdiction of the 2nd and 3rd and 4th respondent of treating the non-performance of the terms of the contract as a criminal act under the penal code. According to the ex-parte applicant since the commencement of the contracts he did make a series of payments in settlement of the debt leaving an outstanding balance of Kshs. 96,399,35. He contends that drawing of post-dated cheques is part of the commercial transactions norms and the respondents should not treat them as a criminal venture for one to face a prosecution before a court of law.

In a detailed replying affidavit by PC Busienei the investigating officer gave a summary of the case on behalf of the respondents. The respondents aver that a complaint was lodged with the 2nd and 3rd respondent by the 1st interested party regarding issuance of bad cheques of

various amounts on diverse dates by the ex-parte applicant. That the 2nd and 3rd respondent as members of the police service took action at the material time to investigate the matter. The respondents further deposes that the 1st interested party availed copies of the said cheques as evidence to support the indictment under Section 316A of the penal code. That on the alleged dates and time the employees of the 2nd, 3rd and 4th respondents acting within the scope of their employment sought to arrest the ex-parte applicant to record a statement in answer to the complaint.

In the respondents' affidavit they allege that the ex-parte applicant despite knowing that he is being looked for by the police has never surrendered nor submitted himself for interrogation on the dispute. After making various attempts to the residence of the ex-parte applicant, the respondent deposes that on 30th June, 2018 in an effort to trace him one Jefferson David Mwau refused to open the gate but instead unleashed fierce dogs against them. In the respondents' averments in the replying affidavit the circumstances under which the police investigated the criminal transaction. There is prima facie evidence that the ex-parte applicant has breached the provisions of Section 316A of the penal code. The respondent believes as pleaded in the affidavit that the ex-parte applicant claim lacks legal basis and the court should dismiss it with costs.

Submissions by the Ex-parte applicant Mr. Ongegu learned counsel for the applicant argument was anchored on the doctrine of denial of rights to a fair trial by the respondents. The background as submitted by counsel was the failure of the respondents not to summon the ex-parte applicant to record a statement on the complaint recorded in the OB/6/11/6/2018 F/SQD NRB Area.

Further counsel for the ex-parte applicant argued and submitted that the respondent's employees had no court order to visit the residence nor were any dogs unleashed upon CPL Sande, PC. Njoroge or PC Maina as alleged in the affidavit therein. On the issue of a fair trial learned counsel contended that the respondents erred in treating the ex-parte applicant as a criminal whereas he was entitled to the rights of an arrested person. Learned counsel relied on the legal proposition in the cases of *Ratram v. State of M.P*, *PHN v Respondents 2016*, *eKLR*, which he invited the court to apply to the facts of this case under Judicial Review remedies.

Respondents Submissions

Mr. Meroka for the state submitted briefly relying on the affidavit by PC William Busienei and the provisions of Section 316A of the penal code. According to Mr. Meroka contention the impression that one inevitably obtained from the facts and circumstances of the contract is that the ex-parte applicant basically issued cheques which on presentation were dishonoured. In essence Mr. Meroka submitted that the respondents cannot ignore and condone the breaches of Section 316A of the penal code arising out of the original genuine contractual obligations between the two parties. The contention of learned counsel for the respondents contended that the criminal offence should not be quashed nor writ of prohibition issued as a remedy in favour of the ex-parte applicant.

Analysis and resolutions

In short from the above background the ex-parte applicant is aggrieved with the decision by the respondents to initiate investigations on the issue of bad cheques which may lead to him being charged with the offence contrary to Section 316A of the penal code.

The substantive issue therefore is whether or not the respondents action, conduct or decision and exercise of discretion was of such a nature it resulted into grave abuse of discretion amounting to acting in excess of jurisdiction for that matter.

The bone of contention in this petition as submitted by Mr. Ongegu for the ex-parte applicant is that the evidence on record in view of the facts of the case an order of prohibition and certiorari should issue to protect the applicant from infringements and violation of his constitutional rights by the respondents.

In order to address the salient features of this petition an examination of the guiding principles and the approach taken by courts is relevant. In the case of *Kenya National Examination Council v Republic Ex-parte Geoffrey Gathenji Njoroge and others civil appeal no. 26B of 1996* where the court held:

“What does an order of prohibition do and when will it issue? It 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 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 courts, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings”

According to what the ex-parte applicant has told the court the respondents are about to close on him with a view of arraigning him before a court of law to face criminal charges in respect of the bad cheques. The respondents have submitted that their jurisdiction is conferred both by the constitution and the statute to undertake such functions aimed at the efficient and effective administration of criminal justice.

In our jurisdiction an application for judicial review for an order of certiorari, prohibition or mandamus is a residual power of the High Court only granted to deserving cases. When handling such an application Odunga J. in the case of *Eunice Khalwahi Miima v Director of Prosecutions and 2 others 2017 eKLR* articulated the points of law as follows:

“The law in these kind of matters is that it I upon the applicant to satisfy the court that the discretion given by the Director of Public Prosecutions to investigate and prosecute is being abused and ought to be interfered with and this burden and standard was further expanded in Kurea & 3 Others v. Attorney General” Where it was held:

“A prerogative order is an order of a serious nature and cannot and should not be granted lightly. It should be granted where

there is an abuse of the process of the law which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supporting that continued prosecutions of a criminal case manifests an abuse of the judicial procedure, much that the public interest could be best served by the staying of the prosecution. In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of the court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided for under Article 77 of the old constitution as promulgated under Article 50 of the constitution 2010.” Underlined emphasis mine.

In the instant application the issues raised against the respondents’ touch on their respective mandates as provided for under Article 157(6) (7) (9) (10 and (11), on the office and functions of the director of public prosecutions. The 2nd, 3rd and 4th respondents’ functions fall under Article 243 as read with Article 244 of the same constitution. In principle each organ is governed by the constitution and the enabling statute enacted by parliament.

These cases discussed herein under illustrate the position taken by the court in its supervisory jurisdiction over inferior tribunals like the respondents in the current petition.

The learned judge in **R. v Director of Public Prosecutions & three others Ex-parte, Bedan Mwangi Nduati & another** 2015 eKLR ruled correctly with respect of the article 157(6), (7) 9, 10 and 11 on the mandate of the Director of public prosecutions as follows:

“Clearly the intention under the constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the Director of Public Prosecutions of his station or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s right under the constitution or violation of the constitution itself”

On the question whether the High Court can grant a judicial review order against the office of the Director of Public Prosecutions going by the above principles the court could in a proper case not hesitate to interfere with the jurisdiction insulated under Article 157 of the constitution. The relief to be availed be availed to an aggrieved party who brings himself within the scope of the legal principles illustrative of the above authorities.

There is no exception in this regard with the National Police Service as a creature of the constitution under Article 243 and 244. To buttress this position in law the court in the case of **Enock Kibiwott & others v DPP and 2 others Judicial review application No. 89 of 2010** stated as follows:

“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 present crime. The police only need to establish reasonable suspicion before preferring charges. The test is lift to the trial court as long as the prosecution and those charged with the responsibility of making decisions to charge act in a reasonable manner, the High court could be attractive to interfere”

Some of the key features as a matter of law where the High Court has authority to review the decision of a tribunal or public body can be traced under the provisions of section 4 of the Fair Administration Action as read with Article 47 of the constitution. The substantial provisions in section 4 are that every person is entitled to an administrative action that is expeditious, effective, lawful, reasonable and procedurally fair. Further sub-section (2) states that:

“In all cases where a person’s rights or fundamental freedoms is hereby to be effected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reason for the proposed administrative action, an opportunity to be heard and to make representations. It is normally the duty of the High Court under section 7 (2) to review the administrative decision of tribunal where the administration made the decision without jurisdiction or in doing so exceeded their jurisdiction or acted pursuant to the delegated power in violation of a law prohibiting such delegation. The other grounds are well explained in section 7(2), 9(b)-(d) to include situations or non-compliance with mandatory and material procedures and conditions precedent, procedural, unfairness and errors of law, or the administrator acted with ulterior motives, calculated to prejudice the rights of the applicant, facts to take into account relevant materials or the reason was made in bad faith.”

The process on judicial review is well explained in **Susan v the Council of legal education and 2 Others Constitutional Petition No. 152 of 2011** where the court held:

“A court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purpose of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corporation..... it would not be proper or right for the court to veto powers conferred by the parliament on aw public authority or body, for the court to substitute its own view from that of the public body to which discretion was given except where the discretion has improperly exercised as enumerated in the ten situations above. In Judicial Review, the court quash decisions made by public bodies so that these same bodies remake the decisions in accordance with the law. It is not proper for the court to substitute its decision, by issuing a mandamus to compel a particular action by a public body. It is not the functions of the courts to substitute their decisions in place of those made by the targeted or challenged bodies.”

In the chronological order of events any of these errors could make the decision unlawful and a subject matter of Judicial review. It is not secret that the rule embodies a situation where the decision maker may fail to meet formal or procedural requirements such as giving notice

to the person affected by the decision including providing reasons for the decision.

In my view, the nature of the action and circumstances of each claimant application should be carefully analysed before exercising a discretely power to issue any writs of prohibition, certiorari or mandamus.

It underlines the significance and the importance of identifying the legal relationship of the public body, tribunal or person who made the decision and the rules governing their functions under the statute. The gist of this relationship is the fact that the police and the office of the DPP enjoy special constitutional and statutory protection under the Criminal Procedure Code to take cognizance of the offence, arrest, investigate and prosecute the suspect on any of the specified offences known in law. In this regard, the law allows the suspect to be arrested without a warrant or prior notice.

It may be as well be said that prosecuting the ex parte applicant in the circumstances arising from a commercial transaction would be an abuse of the process. On that basic answer to the question, it should be a matter of the criminal court to determine the sustainability of the charge or intended prosecution.

So far as this petition is concerned, the petitioner ex-parte applicant has admitted that he had entered into an agreement with the 1st interested party for the later to advance credit facilities. The ex-parte applicant has conceded the total amount acknowledged and received from the 1st interested party to be a sum of Shs. 185,845,075. The ex-parte applicant has further admitted that he has liquidated the amount to the tune of KShs, 89,445,730 leaving debit due and owing to be Shs 96,399,345.

As evidenced from the annexures in the ex-parte applicant and replying affidavits by PC Busienei for the respondents various post-dated cheques in favour WestHill Ltd were returned to drawer as dishonoured. These dishonoured cheques formed the substratum of the complaint lodged with the police by the 1st interested party. Much as the ex-parte applicant may be angered by the decision the 1st interested party took in involving the police it was not in dispute this offence on bad cheques is provided for under Article 316A of the penal code.

The basis upon which the evidence would sustain a conviction against the ex-parte applicant is matter for the trial court when that time presents itself. It is manifestly clear from the submissions by counsel for the ex-parte applicant that in his view the respondents acted unfairly and improperly investigating the case of bad cheques issued by the applicant to the 1st interested party.

He therefore brought into question the aspect of decision making process and an abuse of constitutional and legislative power by the respondents. It is necessary to state the principles of law germane for consideration in the case of *Regina v Secretary for the Home Department, ex-parte – Doody (1994) 1 A.C. 531* the house of lords addressing the facts in a criminal law context stated as follows:

“My lords, I think it necessary to refer by name or to quote from, any of the often cited authorities in which courts have explained what is essentially an initiative judgement. They are far too well known from them; I derive that:

(1) Where an act of parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type (3) the principles of fairness are not to be applied by role identically in every situation. What fairness demands is departure on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential failure of the context is statute which creates the discretion, as regards both its language and administrative system within which the decision is taken. (5) Fairness will very often required that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf earlier before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification or both (6) since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often required that he is informed of the gist of the case which he has to answer” That is the well-known doctrine of fairness.

Counsel for the applicant submitted that the decision to arrest the ex parte applicant and charge him with the offence under the penal code is an afterthought and not one taken in good faith.

Mr. Meroka for the respondent’s position was that the office of Director of Public Prosecutions at this state is limited to the recommendations and evidence from the 2nd and 3rd respondents as pertaining to the provisions of Section 316A of the code. He submitted that any prosecution in those circumstances would take into account the statement by the ex-parte applicant in answer to the allegations.

I have reviewed the affidavit of the ex-parte applicant who confesses that the impugned cheques were indeed issued by him in the course of business transactions with the 1st interested party.

Assuming that in the course of performance of a contractual obligation a party who conducts himself in a manner that his acts of omission or commission are penal in nature, does the law shut its eyes to those criminal acts?

In my view of the legal principles I do not think so.

The fact that the respondents under the relevant statutes have unequivocal evidence to prefer a criminal charge notwithstanding the contents of the original commercial contract cannot be disbarred by this court. From the threshold issue by virtue of Article 49 of the constitution the rights of an arrested persons shall apply equally to the ex-parte applicant. Opposing the arrest and prosecution of the ex-parte applicant has the effect of breaching the provisions of the same constitution under Article 27 on equality before the law.

My understanding of the office of Director of public Prosecutions duty under the constitution can be summarized on Lord Wilberforce Dicta in the case of **Goriet v Union of Post Office Workers and Others 1977 3 ALL ER 70** where he held as follows:

“Enforcement of the law means that any person who commits the relevant offence is prosecuted. So it is the duty of the Director of Public Prosecutions or of the Attorney General as the case may be to take steps to enforce the law in this way. Failure to do so, without good cause is breach of their duty. The individual in such situations who wishes to see the law enforced has a remedy of his own. It is not every arrest that would disentitle a person to seek reliefs and declarations under the constitution. The applicant has a duty to discharge the burden of proof that indeed his unlawful arrest and prosecution has infringed, threatened or violated the fundamental rights and freedoms under the constitution”

Going by these principles, it is apparent that judicial review is a remedy of the last resort unless the applicant brings himself within the ambit of the exceptions and express provisions of the law as discussed elsewhere in this decision.

From the reading of the notice of motion and the supporting affidavits allowing the orders of prohibition or certiorari would run contrary to the clear legal principles in the **Supreme Court practice 1997 volume 53/1/14/6** where it was stated inter alia:

“The court will not, however, on a judicial review application act as a court of appeal, from the body concerned, nor will the court interfere in any way with the exercise of any powers or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction or the decision is as in Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty of usurping power. Lord Bermington in chief constable of Northwales police v Evans 1982 1 WLR 1155 – 1173.”

With regard to the ex-parte applicant relief and declarations for an order of certiorari. I rely on the decision in the case of **Captain Geoffrey Kujoga Mutungi v Attorney General Misc. Application No. 295 of 1993** where the court stated:

“Certiorari deals with decisions already made. Such an order can duly be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of National Justice or Contrary to law. Thus an order of certiorari is not a restraining order”

I also find this application captures Part (111) of the Criminal Procedure Code which has various provisions on arrest, escape and retaking. As regards Section 29 a Police Officer may without an order from the magistrate and without a warrant arrest:

(a) Any person whom he suspects upon reasonable grounds of having committed a cognizable offence the breach of this provisions under the code empowers the police to investigate and arrest a suspect based on the occurrence book once a cognizable offence has been established in the evidence collected a charge is preferred by forwarding the file to the office of the director of public prosecutions to prosecute he suspect.

In all these compelling provisions on administration of justice and the fundamental rights of the suspect under the constitution courts have to construe the letter and the spirit of the constitution from the language so as not to render it inoperative.

The ex-parte applicant therefore, has not established that the respondents in their conduct have acted whimsically, capriciously or malafides or unreasonable contrary to the provisions of the constitution 2010 more especially chapter 4 on the bill of rights.

Having said all these, I am of the conceded opinion that the brief notice of motion has not demonstrated that the public powers in the nature of a trust vested in the realm of the respondents has been exercised unreasonably, maliciously resulting in an abuse of the process calling for this court to invoke judicial review jurisdiction. Secondly, there is no evidence which has been provided by the ex-parte applicant that the respondents exceeded their powers and discretion in such a manner and the breach renders actual or real risk of injustice to the applicant. I feel obliged to yield to the respondents’ contention and concurrence that the petition lacks merit and it is for dismissal with costs.

Dated, signed and delivered in open court at Kajiado this 22nd day of November, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Waiganjo for Ongegu for the applicant

Mr. Meroka for the respondents