REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 44 OF 2017

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

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT , 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1st RESPONDENT

OCS MUTHANGARI POLICE STATION.....2ND RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS

MUTHANGARI POLICE STATION.....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

JACINTA NJOKI KIRUTHI.....INTERESTED PARTY

EX PARTE

EWART FREY SALINS

JUDGMENT

The Application

1. The Ex-parte Applicant (hereinafter "the Applicant") and the Interested Party are husband and wife. The 1st, 2nd and 3rd Respondents are offices in the Kenya Police Service, while the 4th Respondent is the Director of Public Prosecutions, who has the Constitutional mandate of instituting and commencing criminal proceedings.

2. The Applicant, through a Notice of Motion dated 15th May 2017, is seeking the following orders from this Court:

> **a) That the Ex-parte Applicant be granted orders of prohibition to prohibit or restrain the Respondents, their servants, agents, or any one acting under their instructions from instituting criminal charges against him and prosecuting him in relation to a complaint lodged at Muthangari Police Station by the Interested Party.**

b) That the Applicant be at liberty to apply to the Court for all necessary and or consequential orders that the Honourable court may deem fit to grant.

c) That the costs of this application be provided for.

3. The Application was supported by the Chamber Summons application for leave dated 7th February 2017, the statement of facts and the verifying affidavit of the Applicant sworn on the same date, and the annexures thereto.

4. The Applicant contends that on 16th January 2016, the Interested Party reported a complaint to Muthangari Police Station that the Applicant had assaulted her; and the same was entered in the observations book as OB no 70/16/01/2017. The Applicant was consequently arrested and detained in the police station, and the 2nd Respondent then called the Interested Party through all her phone numbers to come to the station, but the calls were not answered. The Applicant was subsequently released on free bond on condition that he appears at the said police station on the 20th January 2017, when the Interested Party was also expected to be present to deliberate on the issues surrounding her complaint.

5. That the Applicant appeared on that date as was required but the complainant was not present, and the meeting was rescheduled to 2nd February 2017, when he again appeared, but the Interested Party was absent and was called by the 2nd Respondent, but refused to come to the police station claiming that the Applicant is a dangerous person,. The Applicant stated that on that particular day he was released on a Ksh 10,000/= cash bail, with instructions to appear on the 7th February 2017 for the purpose of his finger prints being taken to be charged with assault.

6. The Applicant explained that prior to the reporting of the complaint at the police station, he had a disagreement with the Interested Party, as to where there first born son should go to school, and that on the 16th January 2017, he came home to find his study had been trashed, and books, magazines and clothing had all been removed and thrown on the floor. That he approached the Interested Party while she was lying in bed, and held her hand firmly to restrain her from hitting him which she had done in the past. This was before asking her the reasons for the mess which she declined to explain. That upon releasing her, the Interested Party left and went to the police station to report that she had been assaulted, whereupon the police came and arrested him.

7. The Applicant alleged that the police who came to arrest him saw all the mess in the house, and despite his explanation they still proceeded to arrest him, and intend to take his finger prints on the 7th February 2017 and process him for arraignment in Court on the 8th February 2017 to be charged with assault. The Applicant averred that it was not the 1st time the Interested Party was causing a mess, as she had done so previously including attacking him on a number of occasions, slapping him in front of their children, and sending him abusive text messages. He cited various incidents in this regard, and stated that he had not reported the incidents to the police for the sake of his family.

8. According to the Applicant, the complaint by the Interested Party was being used as a tool for personal score settling and individual vendetta. Further, that criminal prosecution should not be used as a tool for personal scores, or allowed to become a pawn in personal civil feuds and individual ulterior motives.

9. The Applicant further averred that the decision of the Respondent to take his finger prints and to proceed to institute criminal charges against him and prosecute him following the complaint lodged against him, breached a wide spectrum of the judicial review grounds. These are namely, that it was motivated by ulterior motives, he was denied the right to fair hearing; the Respondents failed to take into account relevant considerations; it is not proportionate to his interests or rights affected; and it violates his legitimate expectation.

10. In closing, the Applicant averred that he stands to suffer irreparable harm if charged with the offence as he would be interdicted in his place of work something that the Interested Party desires, he would have to resign his directorships in many companies; and that he is the sole bread winner in his family which includes the Interested Party and their three children.

The Response

11. A response was filed by the Interested Party, by way of Grounds of Opposition dated 10th July 2018, and a replying affidavit opposing the application that she swore on the same date. She admitted having made a complaint against her husband as he had assaulted her. She contended that this was not the first time the Applicant had assaulted her, and that she had previously made several complaints at the same and in different police stations. She refuted the assertion that she had been called through her three mobile numbers by the 1st Respondent and refused to pick them, and stated that the Applicant is a very dangerous person who has battered her on several occasions.

12. The Interested Party denied the allegations levelled by the Applicant against her; and alleged that he is a manipulative person willing to do anything to subvert the course of justice. She contended that the 4th Respondent has the constitutional and statutory powers to initiate and proceed with prosecutions, in exercise of his discretion without any direction from any person; and that the 1st ,2nd and 3rd Respondents functions include maintenance of rule of law and order, preservation of peace, protection of life and property, investigation of crime and apprehension of offenders.

13. Furthermore, that there has not been any breach of judicial review grounds as alleged, as judicial review is concerned with the decision making process and not the merits of the decision.

14. The Respondents did not file any responses to the application.

The Determination

15. The application was canvassed by way of written submissions. Nyiha Mukoma & Company Advocates filed submissions dated 25th July 2018 for the Applicant, wherein they elaborated on the judicial review grounds they claim have been breached by the decision of the Respondents to take the Applicant's finger prints and to proceed to institute criminal charges against him and prosecute him, following the complaint lodged against him by the Interested Party.

16. These grounds were first, that despite the Applicant appearing in Muthangari Police Station several times as directed, the Interested Party who lodged the complaint never did and no action was taken against her. However, that without listening to both sides, the Respondents have reached a decision to take the finger prints of the Applicant and institute criminal proceedings, which he claims is motivated by ulterior motives.

17. Second, that the Applicant has been denied the right to be heard with regard to the complaint, in that the complainant has failed to show up on several occasions at the police station in order to ascertain the veracity of her complaint, and in order to make an informed decision as to the decision to charge the Applicant.

18. Third, that in arriving at the decision to prosecute him, the Respondents failed to take into account relevant considerations to the effect that they failed to hear his side of the story and refused to take his statement, despite the fact that he has had to put up with domestic abuse. Fourth, that the decision to take the Applicant's finger prints and institute criminal proceedings is not proportionate to the interests or rights affected, as the Applicant is the sole bread winner, and the Respondents would be aiding then ulterior motives of the Interested Party.

19. Further, that he stands to suffer irreparably as he would be interdicted from his place of work which is what the Interested Party desires; that he would have to resign his various directorships in many companies in which he is a director. Lastly, that the decision was unfair and violated his legitimate expectation that a thorough investigation would be done.

20. The Applicant relied on section 7(1) & (2) of the Fair Administrative Action Act for the position that any person aggrieved by an administrative action may apply for review of the same to a court or at a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Further, that a court under section 11 may grant the appropriate order, and should prohibit the respondent form instituting Criminal proceedings.

21. They Applicant also relied on the decisions in **Republic vs Chief Magistrates Court at Mombasa Exp arte Ganijee & Another, (2002) 2 KLR 703, Githunguri v Republic,(1986) KLR 1,** and K**uria & Others vs Attorney General, (2002) KLR 69** for the proposition that no matter how serious the criminal charges may be, they should not be allowed to stand if there predominant purpose is to further some ulterior motives.

22. Cliff Oduk Advocate, the Advocate for the Interested Party, filed submissions dated 20th August 2018, wherein it was urged that the Applicant has not proved its case to warrant the grant of the orders of judicial review, and relied on the case of **Republic vs Kenya Revenue Authority Ex-parte Yaya Towers Ltd, (2008) e KLR** that for one to succeed in an application for judicial review, one has to show that the decision is tainted with illegality, irrationality and procedural impropriety. Reliance was also placed on the decision in **Municipal Council of Mombasa vs Republic and Another, (2002) eKLR 223** for the proposition that judicial review is concerned with the decision making process and not the merits of the decision.

23. The 4th Respondent's constitutional and statutory powers over prosecutions pursuant to Article 157(6) of the Constitution was cited, and the Interested Party submitted that in making the decision to prosecute, the 1st, 2nd , 3rd and 4th Respondents act independently, and relied on Article 157(10) and section 6 of the Office of the Director of Public Prosecutions Act, to the effect that the 4th Respondent shall not require consent or authority of any person for the commencement of criminal prosecutions.

24. Further, that if it turns out that the proceedings were unwarranted, there exists an avenue for compensation for malicious prosecution and that because of this the power of quashing or prohibiting is used sparingly. Therefore, that the Court in judicial review cannot convert itself as a trial court and determine the merit of the intended or continuing criminal trial or prosecution. It was the Interested Party's submission in this regard that it is the trial court with the mandate to determine the sufficiency of a charge or otherwise, and is the correct court to do so.

25. The Interested Party further pointed out that the fact that a matter is substantially in issue in civil proceedings is not a ground for any stay, prohibition or delay of the criminal proceeding. She submitted that the allegation by the Applicant that they are using the criminal justice system for ulterior motives is false and no evidence has been produced. That harassment and oppression are key characteristics of bad faith which must be dominant in order for the court to intervene on this ground. They relied on the case of **R vs Director of Public Prosecution & Another ex parte Chamanlal Vrajlal Kamani & 2 others (2015) e KLR** for the contextualization of this dominant factor principle.

26. According to the Interested Party, the principle of legitimate expectation does not apply in this case, as a legitimate expectation has to be made within the confines of the law, and the 4th Respondent cannot make a promise not to prosecute a person.

27. Various decisions including **Frederick Masaghwe Mukasa vs Director of Public Prosecutions & 3 Others, (2016) e KLR, Republic vs. Chief Magistrate Criminal Division & Another Ex-parte Mildred Mbuya Joel (2014) e KLR** and **Republic vs Attorney General & 4 others Ex-parte Kenneth Kariuki Githii (2002) e KLR** were cited by the Interested Party for the position that the threshold for the grant of the orders sought had not been met.

28. I have considered the arguments made by the Applicant and Interested Party, and find it necessary at the outset to set out the parameters of judicial review. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is**

tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."

29. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows**:

"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

30. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.**

31. Therefore, in order to be amenable to judicial review, the decision or action sought to be reviewed ought to be unlawful or likely to be unlawful, or the Applicant needs to demonstrate that there is failure to act in on the part of the Respondents in the exercise of a public function. In addition, the purpose of a prohibiting order as is sought by the Applicant, is to restrain threatened or impending unlawful conduct.

32. The Court of Appeal discussed the nature of the remedy of prohibition at length in its decision in in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** in which the said Court held *inter alia* as follows:

" . 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 course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition..."

33. In this respect, under Article 157(4) of the Constitution, the Director of Public Prosecutions, who is the 4th Respondent herein, has the power to direct the Inspector General of Police which include the offices of the 1st, 2nd and 3rd Respondents, to investigate any information or allegation of criminal conduct. The inspector General of Police is required to comply. Further, the power of prosecution under Article 157(6) of the Constitution rests with the 4th Respondent, and under Article 157(10), he does not require the consent of any person to commence prosecution, and shall be independent in the execution of his or her duties.

34. It is a settled position that Courts ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution, unless there is clear evidence that he has acted in abuse of process. The Applicant has in this regard not provided any evidence of abuse of process in the present application, save to allege that the Interested Party made a complaint to the Respondents, which is under investigation.

35. In the case of **Republic V Commissioner of Police & Another Ex-Parte Michael Monari & Another, (2012) e KLR** Warsame J. (as he then was) observed as follows in this regard:

> **"It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed 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. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. 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."**

36. As long as the action of the police to investigate an offence is within reasonable bounds, then this Court will be reluctant to intervene. It is also not the duty of the judicial review Court to engage on an examination of the merit or otherwise of the charges to be preferred. The sufficiency or otherwise of the charges or evidence is left to the trial Court if the same does reach there.

37. The Applicant also impugns the decision of the Respondent to take his finger prints, and to proceed to institute criminal charges against him and prosecute him. No such decision or charge was however exhibited by the Applicant. In the case of **Republic vs Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) (2013) eKLR** the Court of Appeal observed that failure to exhibit the decision complained off is fatal to one's application and in effect means that the Court would be engaging in speculation. The application before Court can in this respect therefore be said to have been taken prematurely.

38. For the same reason, this Court is not in a position to interrogate the Applicant's claims that the decision to arrest him was not fair, or that it failed to take into account relevant considerations, as no evidence of the decision making process in this regard was annexed. In addition, the Applicant did not elaborate or point out what relevant consideration the police ought to have taken into account before deciding to proffer as he says charges on him, particularly in light of the above-cited provisions of the Constitution and law that regulate the Respondents' duties of investigation and prosecution of criminal cases.

39. On the ground raised that the Applicant's legitimate expectation was breached, the said principle cannot oust clear provisions of the law as held by the Supreme Court in **Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR** . This Court has in this regard referred to the functions and responsibilities of the Respondents as provided for in the Constitution, which are the ones being exercised by the Respondents in the impugned decisions and actions.

40. The Applicant also argues that the Respondents' decision is laced with ulterior motives, and is aimed at settling personal scores. In the case of **R vs. Attorney General Ex Parte Kipgneno Arap Ngeny, High Court Misc. Civil Application No.406 of 2001**, the Court observed as follows on this ground:

> **"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."**

41. I note that the allegations of ulterior motive made against the Respondents by the Applicant arise from the domestic differences he has with the Interested Party, and that the Applicant and Interested Party also made allegations of domestic abuse and violence against each other. No evidence was however brought to show the Respondents' involvement in these differences.

42. Furthermore, it is the position that facts constituting the basis of a civil suit may similarly be a basis for criminal offence and proceedings, and is not ground for staying the criminal process. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court, unless the commencement of the criminal proceedings is meant to force an applicant to submit to the civil claim. Section 193A of the *Criminal Procedure Code* provides as follows in this respect:

> ***"Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."***

43. The long and short of the foregoing is that I find that no grounds have been established for the order of prohibition sought by the Applicant, as the Respondents cannot be restrained from undertaking their Constitutional and statutory duties. The Applicants' Notice of Motion dated 15th May 2017 is therefore not merited, and is dismissed with no order as to costs.

44. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2018

P. NYAMWEYA

JUDGE