



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 233 OF 2016

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 29, 31, 40, 47, 50 (4), 160 (1) AND 160 (5) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 6 OF THE JUDICATURE ACT

ZACHARIAH BARAZA T/A SIUMI TRADERS.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC

PROSECUTIONS.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS.....2ND RESPONDENT

RULING

By a petition dated 8th June 2016, the petitioner averred *inter alia* that in the course of his duties as an auctioneer he was allocated attachment warrants issued in CMCC No. 1900 of 2016 and that he executed the said warrants as required. The petitioner further states that section 6 of the Judicature Act protects an auctioneer from civil or criminal proceedings arising from execution of court orders. It is the petitioners case the police sought to arrest, detain and charge him with a criminal offence arising from the said execution, an act which amounted to a threat or violation of his constitutional rights under articles 29, 31, 40, 50 (4), 160 (5) and 169 of the constitution. The petitioner avers that the acts complained of violated the immunity provided to an auctioneer under the provisions of section 6 of the Judicature Act. The petition was accompanied by a notice of motion seeking conservatory orders staying or quashing the facts complained of.

The respondent filed grounds of objection and cited the powers vested upon the DPP under sections 157 (6), (10) of the constitution of Kenya and stated that the DPP is entitled under the law to undertake investigations and that section 6 of the Judicature Act does not grant the petitioner immunity from criminal prosecution for criminal acts of commission or omissions and that the Directorate of Criminal Investigations was acting pursuant to a lawful complaint, hence the actions complained of cannot be said to be unconstitutional.

The Respondent also cited the functions of the Directorate of the Criminal Investigation provided for under section 28 of the National Police Service Act and the provisions of Article 244 of the constitution of Kenya. The Respondents averred that the petitioner has not demonstrated that the first Respondent failed to comply with the provisions of the law and that the court will "be crossing the line into the independence of the DPP to find that the petitioner has a *prima facie* case" nor has the petitioner demonstrated that the DPP has not acted independently.

Pursuant to the orders made on 19. 12. 2016 by Onguto J, the Investigating officer attended court on 20th January 2017 and informed the court that his investigations revealed that the eviction the subject of the complaint he was investigating was pursuant to a court order issued in Civil case number 1900 of 2016, and that the police had no intention of arresting the petitioner but wanted him to record a statement from him which he subsequently self recorded. There was no mention even in the slightest manner that the said eviction order was not valid nor is there any doubt that the auctioneers role was confined to executing the court orders.

Section 6 of the Judicature Act provides that:-

"No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it."

There is nothing to show that the decree executed by the petitioner was not validly issued by a court of competent jurisdiction. No evidence was tendered to show that the decree in question was set aside, stayed, varied or even appealed against. No evidence has been submitted to show that the execution was improper.

I now turn to the crux of this application— whether or not the court can prohibit the police from conducting investigation into an alleged crime. From the provisions of the Constitution, and the National Police Service Act, as a key agency of the criminal justice administration, the police are responsible for performing multi-faceted functions such as the prevention of crime, maintenance of law and order, and conduct of investigation of crimes.

For the purpose of this application, I shall focus on the role of police in the investigation of crime and the extent, if at all, to which the court can interfere with this function bearing in mind that police efforts to investigate crime and collect evidence represent the very foundation of the criminal justice system.

Article 157 (4) and (11) of the Constitution underscores this point. It provides that:-

"4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

11. In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process." (our emphasis supplied).

Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of **Article 157 (11)** of the Constitution, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in my view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution.

An oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process.

While it is the prerogative of the Police to investigate crime, I reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. It is not in the public interest or in the interest of administration of justice to use criminal justice process to harass persons exercising lawful functions like in the present case.

In my view, it would be a travesty to justice, a sad day for justice if police investigations are allowed to be manipulated, abused and or misused. It should never be argued that because a decision to investigate a person has been arrived at, the court should simply as it were fold its arms. The intrusion of judicial review remedies in criminal proceedings have the effect of requiring a much broader approach, than envisaged in the law. Where the investigation is clearly an abuse of the law, there is no greater duty for the court than to ensure that it maintains its integrity and the integrity of the judicial process and the system of the administration of justice by staying or quashing or prohibiting such investigations or prosecutions initiated by extraneous considerations. It must be emphasised that the use of police powers for other purposes and illegally charging innocent persons in court amounts to abuse of police powers and also abuse of the court process.

I find myself in agreement with the decision in *Republic vs Attorney General ex-parte Arap Ngeny* where the court stated that “a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose. Before commencing investigations or instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. In the present case, there is no doubt that the petitioner was executing a valid court order. A prudent and cautious investigator must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal investigation and prosecution otherwise the prosecution will be malicious and actionable. However, as long as the police or prosecution and those charged with the responsibility of making the decisions to charge act in reasonable manner, the High Court will be reluctant to intervene.

D.A. Bellemare, M.S.M, Q.C put best the often difficult course for the prosecutor when he said:-

“It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach,

always guided by fairness and common sense.”

The Constitutional provision in Article **157 (10)** of the Constitution 2010 ensures that the DPP has complete independence in his decision making processes. This 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. In the words of John Kelly TD, the prosecution system “*should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so.*”

The following observations are useful to bear in mind:-

“...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice—impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one.”

The role of the prosecutor excludes any notion of winning or losing; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. It is said that the prosecutor acts in the general public interest and so it must be. That is where he prosecutor’s ultimate loyalty and responsibility lie. Mere or reasonable suspicion that the DPP did not act independently or acted on totally inadequate evidence or the police abused their investigation powers is in my view sufficient to taint the proceedings.

Also, one key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. I am not persuaded that the intended investigation or prosecution advances public interest in any manner especially so when the auctioneer acted pursuant to a valid court decree and there is no evidence that the judgment in question was set aside or varied.

Article 23 (3) of the Constitution basically affords a party to proceedings brought pursuant to Article 22, asserting violation or threat of violation of any Constitutional right or fundamental freedom, the avenue of moving the court for any relief, including temporary reliefs. The Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises.

The court should always be in a position to fashion such new relief as will be necessary to protect and enforce the Constitution, even if it is a remedy or relief which is not itemized under Article 23 (3), so long as such relief too is within the confines of the Constitution.

I have no doubt in my mind that a party may seek and the court may grant an interim order in the form of a conservatory order. Such conservatory orders are intended to help create and or maintain a given state of affairs.

All that an applicant is required to demonstrate is the existence of a *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. I have no doubt that the applicant has satisfied this test and unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

By its very nature the grant of a conservatory order involves the exercise of judicial discretion. The exercise of the court’s discretion in matters of this kind cannot be arbitrary or capricious. However, such a discretionary remedy ought to be granted on the basis of evidence and sound legal principles summarized as follows, Prima facie case with a chance of success, Existence of real danger that would prejudice the applicant if the interim conservatory orders are not granted, Public interest to grant it, Consistency with

the Constitutional values and Proportionality.

After carefully analyzing the facts before me, I am satisfied that the application satisfies the above principles. The upshot is that the applicant has satisfied the necessary considerations to warrant this court to allow the application under consideration.

Accordingly, I allow the application dated 18th June 2016 and order as follows:-

i. A conservatory order be and is hereby issued staying all police investigations, questioning, arresting, detaining, charging or prosecuting the applicant herein in connection with the applicants execution of the court order issued in Milimani CMCC No. 1900 of 2016 pending the hearing and determination of this petition.

ii. No orders as to costs

Orders accordingly

Dated at Nairobi this 24th day of January 2017

John M. Mativo

Judge