



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

JUDICIAL REVIEW NO. 1 OF 2017

(FORMERLY NAIROBI HIGH COURT JUDICIAL REVIEW 65 OF 2017)

**IN THE MATTER OF AN APPLICATION BY KEPHA MOMANYI & LEWIS ONGERI &
GLOBAL EMPOWERMENT (AFRICA) LIMITED FOR LEAVE TO APPLY FOR AN ORDER
OF MANDAMUS**

AND

**IN THE MATTER OF: ARTICLES 23, 25, 27, 40, 47, 49, 50, 157 AND 165 OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTIONS 4 & 5 OF THE OFFICE OF THE DIRECTORS OF PUBLIC
PROSECUTIONS**

AND

**IN THE MATTER OF: SECTIONS 4 & 6 OF THE FAIR ADMINISTRATION ACTION ACT,
2010**

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, MANDAMUS AND PROHIBITION DIRECTED TO THE OFFICE OF THE
DIRECTOR OF PUBLIC PROSECUTION**

BETWEEN

KEPHA MOMANYI.....1ST APPLICANT

LEWIS ONGERI.....2ND APPLICANT

GLOBAL EMPOWERMENT (AFRICA) LIMITED.....3RD APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE2ND RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATION3RD RESPONDENT

THE CHIEF MAGISTRATE, NAIVASHA LAW COURTS4TH RESPONDENT

AND

HYUNDAI ENGINEERING COMPANY LIMITED.....INTERESTED PARTY

RULING

1. **Kepha Momanyi, Lewis Onger** and **Global Empowerment (Africa) Limited** are the *Exparte* Applicants herein. These proceedings were prompted by the arrest of the 1st and 2nd *Exparte* Applicants on 19th January 2017, and their subsequent arraignment before the Chief Magistrate’s Court at Naivasha on 31st January 2017, for the offence of Attempted Stealing contrary to Section 389 as read with Section 278 (a) of the Penal Code.

2. The affidavit in support of the Motion seeking leave is sworn by **Kepha Momanyi** who states in paragraph 1 that:

“I am a Kenyan adult of sound mind and the Applicant herein with the authority of other Applicants to swear this affidavit.”

He thereafter proceeds to narrate the “chronology of events” relating to the matter.

3. The gist of the depositions in the affidavit is that in 2013 the *Exparte* Applicants purchased five Hyundai Motor vehicles, **namely KBS 058W, KBT 127D, KBT 126D, KBS 738W and KBT 635B** from **Hyundai Engineering Company**. The alleged purchasers received the respective vehicle logbooks but agreed to allow the said vendor company to retain and use the vehicles until the completion of the vendors then ongoing project, whereupon possession would be granted to the Purchasers. That despite the subsequent transfer of the said vehicles to the *Exparte* Applicants, the possession was delayed. This and the discovery that that vehicles had been transferred to the purchasers’ name compelled the *Exparte* Applicants to file a suit in Chief Magistrate’s Court Naivasha on 15/11/2016 with a view to enforcing the sale agreement.

4. In the suit, **CMCC 1015 of 2016 Global Empowerment (Africa) Limited -Vs- Hyundai Engineering Company Limited**, the *Exparte* Applicants/Plaintiffs obtained *exparte* orders of injunction against the Defendant, prohibiting their adverse use, transfer and/or disposal of the vehicles in question . The deponent further states in paragraph 4 (i):

“THAT on Thursday 19th January 2017, the Applicants sought to serve the orders of the Honourable Court on the Engineering Company Limited and have them (vehicles) placed in safe custody because the vehicles had been wasting away at Masada Restaurant in Naivasha town.”

5. They were then arrested at that point and released on bond on 21st January 2017 after interrogation. Eventually the 1st and 2nd *Exparte* Applicants were charged in Chief Magistrate’s **Criminal Case No. 164 of 2014 Republic -Vs- Kepha Momanyi & Another**.

6. This version of events is disputed by Hyundai Engineering Company Limited, the Interested Party herein, and the Director of Public Prosecutions (DPP) the latter sued as the 1st Respondent, and also

representing the Inspector General of Police, the Directorate of Criminal Investigation, sued herein as the 2nd to 3rd Respondents, respectively. Although the Chief Magistrate Naivasha is sued as the 4th Respondent, it is not clear whether the Honourable Attorney General was served.

7. The substance of the Replying affidavit of **Stephen Chege**, the Head Accountant of the Interested Party is as follows. In 2015 the Interested Party discovered that the subject vehicles which allegedly have always belonged to the Interested Party had been transferred to the 3rd *Exparte* Applicant, then allegedly unknown to Interested Party. A report was made to the Registrar of Motor vehicles and to police who commenced investigations, which *inter alia* revealed the directors of the 3rd *Exparte* Applicant to be **Ibrahim Kiage Oenga** and **Esther Kerubo Oenga**.

8. The Interested Party believes, pursuant to the said investigations, that the original logbooks of the subject vehicles were stolen by an insider from the custody of the Interested Party, and substituted with fake copies, and that the subsequent transfers to the 3rd *Exparte* Applicant are fraudulent. It is asserted that the 1st and 2nd *Exparte* Applicants were arrested while attempting to perfect the fraud by taking away the vehicles stated in the charge, by use of the Court Order obtained in the Chief Magistrate's Civil Suit. The Interested Party denies having sold the vehicles in question to the 3rd *Exparte* Applicant. The DPP filed grounds opposing the Chamber Summons stating *inter alia* that it fails the requisite threshold.

9. By their Chamber Summons, the *Exparte* Applicants seek leave to apply for the following orders: an order of certiorari to quash the criminal proceedings pending in the Chief Magistrate's court, an order of prohibition against the Respondents in respect of the impugned prosecution, and an order of prohibition to prohibit the arrest, detention or prosecution of the *Exparte* Applicants in connection with the pending civil suit. And finally, that the leave thus granted does operate as a stay of the Respondent's decision to prosecute the *Exparte* Applicants on any charges arising in connection with the subject vehicles and the civil suit in the Chief Magistrate's Court.

10. This court directed that the prayer for leave be argued *inter partes*. Pursuant to the directions, parties filed submissions which on the whole delve into some matters of fact and law that properly belong to the substantive application, when eventually made.

11. At this moment, all that the *Exparte* Applicants need to demonstrate is that they are entitled to leave and the stay order sought. As **Odunga J** stated in **Lady Justice Joyce N. Khaminwa -Vs- Judicial Service Commission & Another [2014] eKLR**, the requirement that leave be obtained is intended to give opportunity to the court to filter out frivolous and vexatious applications which appear to constitute an abuse of the process of court. The court need only be assured that there is a patently arguable case, based on the material availed by the *Exparte* Applicants.

12. Secondly, and related to the above, the court must be satisfied that there is a justiciable complaint before it, as stated in **Mirugi Kariuki -Vs- Attorney General Civil Appeal No. 70 of 1991 [1990 – 1994] EA 156:-**

“The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power..... the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.... It is not the absoluteness of the discretion not the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review.”

13. As I understand the *Exparte* Applicants' complaint, in the instant case, it is that the 1st to the 3rd Respondents' decision to arrest and prosecute the 1st and 2nd *Exparte* Applicants is motivated by ulterior

motives, namely, the forced settlement of the existing dispute over the ownership of the subject vehicles, between the parties in the civil suit now pending in the Chief Magistrate's Court. In the *Exparte* Applicants' view, the material placed before the court satisfies the requirements for leave.

14. Not so, the Interested Party and the 1st to 3rd Respondents assert. According to them the application is frivolous and ignores the provisions of Section 193A of the Criminal Procedure Code which states:-

“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.”

15. In this regard, the Respondents and Interested Party emphasise that the *Exparte* Applicants were arrested pursuant to a report made by the Interested Party to the police and that the *Exparte* Applicants were at “*the centre of a fraudulent attemptto unlawfully transfer ownership*” of the subject vehicles using stolen log books, but were caught in their tracks. In their view the *Exparte* Applicant's Civil Suit and orders were part of the fraudulent scheme.

16. I have duly considered the material canvassed before me. It is not desirable at this stage to delve in depth into the material or to make any final conclusions thereon. Suffice to say that, based on the available material presented on both sides, and the admitted parts of the background to this dispute, I am inclined to grant leave as sought by the Applicants in prayer 2 to 4.

17. I feel duty bound however, in light of the nature of the material before me that in the interest of justice and in order to safeguard the integrity of the court process, to make the following directions in respect of the intended Substantive Motion. The 1st and 2nd *Exparte* Applicants are hereby directed to each to swear individual and separate affidavits in support of the intended Substantive Motion.

18. Further, I direct that to each such respective affidavit, in addition to other material the said *Exparte* Applicants may deem necessary, the following material shall be attached as annexures:-

- a. Recent evidence obtained from the Registrar of Companies to confirm incorporation of Global Empowerment (Africa) Limited.
- b. Particulars of current directors of Global Empowerment (Africa) Limited as recently obtained from the Registrar of Companies.
- c. Evidence of authority by Global Empowerment (Africa) Limited to commence the Substantive Motion through and jointly with the 1st and 2nd *Exparte* Applicants.

19. Additionally, by virtue of the fact that the Chief Magistrate Naivasha is named as the 4th Respondent, the Attorney General is a necessary party to the proceedings and must be enjoined in the Substantive Application.

20. Regarding prayer 5 of the *Exparte* Applicant's Chamber Summons filed on 17th February 2017, I am not persuaded at this stage of the proceedings and in light of the emergent issues, that it is prudent to issue the orders sought therein. The prayer is therefore rejected. Costs will abide the outcome of the substantive proceedings.

Delivered and signed at Naivasha, this 2nd day of June, 2017.

In the presence of:-

No Appearance for the *Exparte* Applicants

Mr. Koima holding brief for Mr. Mutinda for the Respondents for 1st to 3rd Respondents

No appearance for Interested Party

Court Assistant - Barasa

C. MEOLI

JUDGE