



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**JUDICIAL REVIEW DIVISION**  
**JUDICIAL REVIEW CASE NO. 16 OF 2016**

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLES 47 AND 157

AND

IN THE MATTER OF: THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT,  
2012

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT CAP, 21 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION TO BRING JUDICIAL REVIEW PROCEEDINGS  
AGAINST THE DIRECTOR OF PUBLIC PROSECUTION'S DECISION COMMUNICATED ON  
16<sup>TH</sup> FEBRAURY, 2016 BY WAY OF ORDERS OF CERTIORARI AND PROHIBITION

**BETWEEN**

HILLARY KIPRUTO BETT.....APPLICANT

VERSUS

1. DIRECTOR OF PUBLIC PROSECUTIONS
2. INSPECTOR GENERAL OF POLICE
3. KENYA REVENUE AUTHORITY.....RESPONDENTS

**RULING**

1. In the Notice of Motion dated and filed on 24<sup>th</sup> February, 2016, the ex parte Applicant, Hillary Kipruto Bett sought two orders -

**(1) an order of certiorari to bring to this court and quash the decision of the First Respondent communicated on 16<sup>th</sup> February, 2016 recommending the prosecution of the Applicant;**

**(2) an order of prohibition prohibiting the Respondents from either jointly and/or severally commencing, sustaining or proceeding with any criminal proceedings against the Applicant in any court herein with respect to customs Entry Number 2015/MSA/5793134 and Manifest Number 2015/MSA/121405;**

**(3) the costs of this Application.**

2. The Notice of Motion (the Application) was grounded upon the Statutory Statement dated 15<sup>th</sup> February, 2016, the Affidavit Verifying the Facts sworn on 18<sup>th</sup> February, 2016, and filed pursuant to leave granted at Nairobi in JR Case No. 81 of 2016, by G.V. Odunga J, on the said 18<sup>th</sup> February, 2016. The Application was also supported by the Applicant's Further Affidavit sworn and filed on 21<sup>st</sup> March, 2016.

3. The Applicant admits that he is a Customs (Verification) Officer with the 3<sup>rd</sup> Respondent. He also admits that in the course of his employment and while discharging his duties, he verified 5 containers per Entry Number 2015/MSA/5793134 and Manifest Number 2015/MSA/121405 as having been cleared in so far as tax payments are concerned, and that the process was yet to be completed because the consignment was still within the Customs Area in the custody of the Third Respondent.

4. The Applicant admits that consignment was cleared as base oil because the consignment was labelled as **"flammable"**, and that in any event his immediate supervisor came to the same conclusion. However, the Applicant admits, that the consignment was **"indeed Ethanol and not base oil as declared"**. The Applicant however concluded that in the circumstances it was **unlawful, unreasonable, unfair and discriminatory**, and that by reason thereof, the court should intervene and quash the charge sheet and prohibit the First Respondent from prosecuting him.

5. The application was however opposed by the Respondents, first through the Replying Affidavit of CIP James Githinji sworn and filed on 21<sup>st</sup> March, 2016, and the Replying Affidavit of CIP Mary W. Kamau. The substance of both Replying Affidavits is that following investigations into the importation of 64 containers of Ethanol, 39 containers of sugar and 5 Range Rovers in transit to Uganda, it was established that various offences including concealment, misdeclaration, abandonment among others were committed by the Importers/Suspects.

6. These deponents say that a multi-agency task force, comprising officers from the Kenya Revenue Authority (KRA), the National Intelligence Service (NIS), the Ethics and Anti-Corruption Commission (EACC), Directorate of Criminal Investigation (DCI) and the Director of Public Prosecutions (DPP) was formed on 22<sup>nd</sup> January, 2016.

7. Following investigation of the task force the Applicant was charged with conspiracy to conceal 800 drums of ethanol laden 5x20ft container Numbers (1) TEMU 4420840, (2) PCIU 1085506, (3) PCIU 2789958, (4) FCIU 3416218 and TRHU1864697, which fraudulently read as drums of base oil. The fraud would have caused a loss of Kshs. 7.3 million in government revenue in contravention of Section 193 of the East African Community Customs Management Act 2004. It also emerged that the Applicant was a verification officer within the Customs Department of the KRA, and that his duties were to perform physical verification of the goods due for Customs Clearance. The Applicant is charged with the offence of false declaration of imports contrary to Section 203(a) of the East African Community Customs and Management Act.

8. Despite these unflattering and uncontroverted accusations, the Applicant's counsel persisted in his submissions that the orders sought should be granted on the grounds first above referred to, that the decision to prosecute the Applicant is **unlawful, unreasonable, unfair and discriminatory**, and that on these grounds the Director of Public Prosecutions should be stopped by orders of prohibition from prosecuting the Applicant, and that the charge sheet should be quashed by orders of certiorari. Counsel also contends that the power of the Director of Public Prosecutions under Article 157 of the Constitution are not absolute. The powers must be exercised in accordance with the provisions of Section 4 of the Fair

Administration Act. The Director of Public Prosecutions must take into account all relevant factors before deciding to prosecute any person.

9. In this case, counsel argued, the Director of Public Prosecutions should have taken into account the role of the Applicant, and the provisions of Section 16 EACCMA as well as the **Manual on Procedure for Physical Examination of Imported Cargo** (dated 13/09/2010), showing the roles of the various officers in the chain of command, and that there was no evidence the goods were ethanol, that there was no means of checking s0, and that consequently the decision to charge him was premature.

10. Besides, the Applicant's counsel urged, the prosecution of the Applicant was selective and discriminatory as the Head of Verification was not charged, and should have been charged. Counsel relied on the case of **REPUBLIC VS. DIRECTOR OF PUBLIC PROSECUTIONS & 2 OTHERS [2015]eKLR** in which the court granted orders of certiorari and prohibition against the prosecution of the Applicant therein on the ground that there was no evidence to connect the Applicant with the commission of the offence.

### **DETERMINATION**

9. The starting point in determining this application lies in restating the principles of judicial review. I will do so by making reference to the decision of Lord Diplock in the case of the **CIVIL SERVANTS UNION VS. THE MINISTER FOR CIVIL SERVICE [1985]AC** where the Judge said –

**“Judicial review has, I think developed to a stage today when one can conveniently classify into three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality” the second, “irrationality”, and the third procedural “impropriety”. By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.... By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness”. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. I have described the third as “procedural impropriety”, rather than failure to observe rules of natural justice or failure to act with procedural fairness towards the person affected by the decision.”**

10. There are many other cases in the Kenya Law Reports on this subject. I will in this instance make reference to the decision of the Court of Appeal in **REPUBLIC VS. KENYA REVENUE AUTHORITY, ex parte YAYA TOWERS LIMITED [2008] eKLR**, where the court said –

**“... the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or that of individual judges for that of the authority constituted by law to decide the matter in question.”**

11. As stated in the decision in **Civil Servants Union vs. The Minister for Service** (supra), the remedy of judicial review and in particular, the remedy of **certiorari**, is founded upon the three “I’s”, “illegality”, “irrationality” and “procedural impropriety”, all summed in the doctrine of **Ultra vires**, and is intended and meant to correct the various improprieties which may be committed by those entrusted with the exercise of public authority. The **Yaya Centre** case (supra) expanded the Lord Diplock three “I’s” into –

- (i) abuse of discretion;
- (ii) irrationality;

- (iii) excess of jurisdiction;
- (iv) improper motives;
- (v) failure to exercise discretion;
- (vi) abuse of the rules of natural justice;
- (vii) fettering discretion;
- (viii) error of law.

12. In **REPUBLIC VS. ANTI-COUNTERFEIT AGENCY & 2 OTHERS, ex parte SURGIPHARM LIMITED [2011] eKLR** referring to Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. III paragraph 12 at page 270, the court said –

**“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus) ... are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.”**

13. The Applicant's complaint here is basically that he did his duty as a Verification Officer, and committed no offence. The Applicant also complains that his superior and other officers who confirmed the Verification of the goods imported have not been charged, and his prosecution is selective and discriminatory. Those are valid arguments on the merits of the case, but those matters can only be answered by the Director of Public Prosecutions whose office is established under Article 157 of the Constitution. In exercise of his powers under Article 157(6), the Director is insulated by Article 157(10) from requiring the consent of any person or authority for the commencement of criminal proceedings and the exercise of his or her powers of functions, shall not be under the direction or control of any person or authority. On the contrary, 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.

14. I understand the Applicant's case to be that in exercising his powers in prosecuting the Applicant, the Director of Public Prosecutions is abusing its powers, that the prosecution failed to take into account all the relevant factors and circumstances surrounding the decision to prosecute the Applicant.

15. It is however clear to me that from the Affidavits of CIP James Githinji and CIP Mary W. Kamau, officers who work with the Applicant that the First Respondent had sufficient reason for exercising his powers under Article 157(6) and there are no grounds to fault that decision. Insufficiency of evidence is a matter for the trial court, and not a ground for the judicial review court to stop a prosecution. It is a good ground for finding no case to answer, and therefore discharging him, or where there is a case to answer, full rebuttal of the prosecution's case, and acquitting the accused.

16. I therefore find and hold that there are no grounds for granting the orders of certiorari, or prohibition. The Notice of Motion dated and filed on 24<sup>th</sup> February, 2016 is therefore dismissed with no order as to costs, and a further direction that the trial before the lower court do proceed with expedition.

17. There shall be no order as to costs.

**Dated, Signed and Delivered in Mombasa this 12<sup>th</sup> day of May, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Mr. Chabala holding brief Mukule for Applicant

Mr. Chabala holding brief Miss Lavana for 3<sup>rd</sup> Respondent

Mr. Wamotsa for 2<sup>nd</sup> & 1<sup>st</sup> Respondent

Mr. S. Kaunda Court Assistant