



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

APPLICATION NO. 196 OF 2016

MISC. NO. 273 OF 2015

BETWEEN

LAMECK OKEYO.....1ST APPLICANT

KEZIAH MUTHONI MUGO.....2ND APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

TRUSTEES OF KENGEN

STAFF RETIREMENT BENEFITS SCHEME.....INTERESTED PARTY

RULING

1. By a Chamber Summons dated 29th April, 2016, the applicants herein, **Lameck Okeyo** and **Keziah Muthoni Mugo** sought leave of this Court to apply for certiorari to quash criminal proceedings commenced by the 1st Respondent against them. They also sought leave to apply for orders of prohibition prohibiting the respondent (sic) from taking further statement, arresting, detaining and or commencing any charges against them or their co-directors of Capitol Hill Ltd based on the same or similar set of facts. The applicants also sought, as is usually the case in such proceedings that the grant of leave ought to operate as a stay of the said criminal process.
2. On 29th April, 2016, **Lenaola, J** granted the said leave but directed, pursuant to the provisions of Order 53 rule 1(4) of the **Civil Procedure Rules**, that the limb seeking stay be heard *inter partes*. It is therefore the determination of the same that is the subject of this ruling.
3. At the hearing of the said prayer, **Mr Otieno** learned counsel for the applicants regurgitated the grounds upon which the applicants based their cause of action. According to the applicants, the main motivation for the commencement of the said criminal process is to enable the interested party herein recover the sum allegedly owed to it by the applicants. The applicants therefore

- contended that the police had allowed themselves to be used by the said interested party as debt collectors. To the applicants, the criminal process had been invoked for the purposes of achieving a collateral purpose rather than for purposes of vindication a genuine commission of a criminal offence. It was their case that in fact the parties to the case had agreed on a compromise on part of the claim while the other claim was the subject of the arbitral proceedings.
4. The applicants alleged that the police had threatened them that unless they settled the civil claim they would be arrested, incarcerated and arraigned before the Court of law with trumped up charges and would not be in a position to pay for the resultant bail. In was this apprehension that informed their decision to seek that this Court ought to stay further criminal process. In support of their case, the applicants relied on JR Misc. Civil Application No. 333 of 2014 – **David Ndolo Ngali & 2 Ors. vs. The Director, Directorate of Criminal Investigations & 2 Ors.**
 5. On the part of the Respondent, **Mr Odhiambo**, took issue with the joinder of the Attorney General to these proceedings without the Director of Public Prosecutions (the DPP) being a party hereto since ordinarily the Attorney General has no role to play in criminal proceedings. He further contended that since no decision had been made to charge the applicants, these proceedings ought not to have been instituted. He also was of the view that the applicants had not demonstrated any prejudice that they stood to suffer if the stay was not granted.
 6. He therefore opposed the prayer that the leave granted herein ought to operate as a stay.
 7. On behalf of the interested party, it was contended by **Mr Kiragu Kimani** that there are no charges preferred against the applicants. Secondly, going by their own documents, it was clear that the applicants were indebted to the interested party, though they did not explain the circumstances under which the said indebtedness arose. It was contended that although the applicants were claiming that the purpose of the criminal process was to collect debts, the replying affidavit was clear that in fact there were pending recovery proceedings in the form of arbitral process.
 8. Learned Counsel submitted that the purpose of stay is to ensure that proceedings before the Court are not rendered an academic exercise through the occurrence of some irreversible events. In the instant case, the issue revolves around investigations and based on the doctrine of separation of powers, it was submitted that the Courts, though clothed with supervisory jurisdiction, ought not to exercise their powers in a way that renders the other arms of the Government unable to carry out their respective mandates. According to learned counsel, rarely do the Courts stop investigations especially where to do so would amount to crippling investigations against persons who are not before the Court as in the instant circumstances. According to him, if the Court declines to grant the stay sought herein, the only risk the applicants would be exposed to is a recommendation to the Director of Public Prosecution to prosecute them. It was however his view that even then the applicants' rights would be protected both under Article 50 of the Constitution and the provisions of the ***Criminal Procedure Code***.
 9. To **Mr Kiragu**, the issues raised by the applicants herein are matters for their defence rather than grounds for granting stay.
 10. In support of his submissions, learned Counsel relied on **Republic vs. Kenya Anti-corruption Commission & Ors ex parte Wildlife Lodges Limited Misc. Civil Application No. 96 of 2011.**

Determination

11. I have considered the application, the affidavits filed herein and the submissions made by the parties and this is the view I form of the issues raised herein.
12. Although the 2nd Respondent raised the issue of non-joinder of the DPP, at this stage of the proceedings such non-joinder or misjoinder is not fatal though I agree that the current prosecutorial regime gives prosecutorial powers to the DPP as opposed to the Attorney General hence if the substantive motion was to be brought only against the Attorney General who ordinarily has no role in the prosecution, the applicant would be hard put to justify why the orders ought to be granted. I am however unable to disallow the prayer for stay based on such non-joinder of misjoinder of parties.
13. Leave having been granted to commence judicial review proceedings proper, this ruling is limited to the direction whether that leave ought to operate as a stay of the decision in question.
14. Order 53 Rule 1(4) of the ***Civil Procedure Rules*** provides:

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise. [Emphasis mine].

15. In my view “proceedings in question” refer to the proceedings in respect of which leave is sought. In this case prayer 4 substantially seeks the stay of criminal process commenced by the 1st Respondent against the applicants at the behest of the interested party. It is however clear from the submissions that the matter is still under investigations and no decision has been made to prosecute the applicants as the DPP is yet to recommend such prosecution. To grant stay of criminal process when no determination has been made to commence the same would in my view be speculative.
16. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review proceedings nugatory or an academic exercise that the Court is entitled to stay the said proceedings the strength or otherwise of the applicant’s case notwithstanding.
17. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability of a determination being made in the challenged proceedings, are high and that threshold cannot be said to have been met on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.
18. In this case the effect of the grant of the orders sought would be to restrain the police from undertaking their investigatory powers. In my view the decision by a Court to halt investigations from being conducted ought to be exercised very cautiously and in very clear cases where the Court is satisfied that the continued investigations are likely to render the proceedings before it an academic exercise. In other words the Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. It is upon the ex parte applicant to satisfy the Court that the discretion given to the relevant authorities to investigate allegations of commission of a criminal offence ought to be interfered with. The word “investigate” is defined in the ***Black’s Law Dictionary 9th Edition*** as: “***To inquire into a matter systematically; to make an official inquiry.***” An inquiry in my view involves a consideration of both the complainant’s version and that of the person against whom the complaint is made. Barring the existence of exceptional circumstances, the rules of natural justice dictate that the applicants herein make their statement for consideration by the investigators in order for the investigators to arrive at an informed determination.
19. It is trite that the Court ought not to usurp the Constitutional and statutory mandate of the police to investigate any matter that, in the view of the police raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the police since the purpose of a criminal investigations conducted *bona fide* is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid. It must always be noted that judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence to the complaint is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant to bring to the attention of the investigators in the course of the conduct of the investigations.
20. However, if the applicants demonstrate that the investigations that the Respondents intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are given to the Respondents.

21. The duty and mandate given to investigatory authorities was appreciated in Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR where it was held:

“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 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 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”.

22. In order for the applicant to succeed it must show that not only are the investigations which were being undertaken are laced with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. Although it was alleged that the criminal investigations have been commenced with a view to achieving collateral and extraneous purposes, that is to aid the interested party recover a civil debt, I am not satisfied based on the evidence on the record that this is so. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the *predominant* purpose is to further some other ulterior purpose and 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. Therefore whereas a matter may constitute both civil and criminal offence, the mere fact that the police intends to charge the persons against whom the complaint is made with a criminal offence notwithstanding the pendency of civil proceedings will not warrant a stay. This is the effect of section 193A of the *Criminal Procedure Code*.

23. In this case, the criminal process complained of is still in its infancy. The police are yet to complete their investigations. Even after completing the same, the decision to charge the applicants will depend on the ultimate decision of the DPP. To find that the police will carry out their threats to arraign the applicants in this case, in the circumstances would be to overlook an important stage in the prosecutorial process. Such a decision would be based on speculation and conjecture and that cannot be a basis for stalling investigations of a criminal offence. At this stage there is no evidence that at the conclusion of the said investigations the applicants will face criminal charges.

24. In addition, no one can say at this stage what the bond terms that the Court is likely to impose shall be assuming that stage is reached. Bond terms are imposed by the trial Court and not by the police hence the opinion of the police in respect thereof is immaterial. It has not been contended that the offence the subject of investigations is not bailable. In my view if the applicants were to be charged they would no doubt be entitled to release based on reasonable bail terms and I cannot state with certainty at this stage that they will be unable to meet the same.

25. On the stage of the proceedings, it cannot be successfully contended that if the applicants were to be charged in Court the proceedings before the criminal Court are likely to be determined before these proceedings are determined. Accordingly, based on the material before me the probability as opposed to the possibility of the said trial being concluded before these proceedings is rather remote.

26. The Court has also considered the fact that the prayer for stay is couched in such terms as to benefit persons described as the applicants’ co-directors of Capitol Hill Ltd whose identities are unknown to the Court and who have not invoked this Court’s jurisdiction. As was held in Republic vs. Kenya Anti-corruption Commission & Ors ex parte Wildlife Lodges Limited (supra):

“I have considered the manner in which the orders sought are crafted and I agree with the Respondents that if granted in the manner sought, it would have the effect of prohibiting not only investigations against the applicant but investigations against other people connected with the transactions between the applicant and the 2nd Respondent. In effect by granting the orders in the manner sought this Court at the behest of the ex parte applicant shall have

prohibited not only investigations of the applicant but other persons who are not parties to this application notwithstanding the merits of the said investigations.”

27. I have considered the issues raised in this application with respect to the prayer for stay and I am not satisfied that this is a proper case in which the court ought to direct that the leave granted herein ought to operate as a stay of the proceedings in question. Accordingly I decline to make such direction.

28. The costs of the application will be in the cause.

Dated at Nairobi this 5th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of

Mr Kotonya for Mr Otieno for the applicants

Mr Rapando for Mr Kiragu Kimani for the interested party

Cc Mutisya