



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL, JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 43 OF 2014

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26

AND

IN THE MATTER OF: ORDER 53 CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: VOI RESIDENT MAGISTRATE'S COURT

AND

IN THE MATTER OF: CRIMINAL CASE NO. 605 OF 2014, VOI

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

BY

REPUBLIC.....APPLICANT

AND

1. RESIDENT MAGISTRATE'S COURT, VOI

2. DIRECTOR PUBLIC PROSECUTIONS.....RESPONDENTS

AND

HASSAN HURI.....INTERESTED PARTY

JAPHETH MWAKALA.....EX PARTE APPLICANT

RULING

1. By a Notice of Motion dated 12th September, 2014 and filed on 15th September, 2014, the ex parte Applicant, Japheth Mwakala, sought –

(1) an order of certiorari to bring up into this court for purposes of quashing the charge sheet and/or proceedings in Voi Criminal Case No. 605 of 2014;

(2) an order of prohibition to prohibit the Second Respondent, the Director of Public Prosecutions from prosecuting the Applicant in Voi Criminal Case No. 605 of 2014 instituted before the First Respondent's court;

(3) The costs of the application be provided for.

2. The Notice of Motion was grounded upon the Statutory statement, and the Affidavit Verifying the Facts sworn by the ex parte Applicant Japheth Mwakala, sworn on 23rd August, 2014, and attached to the Chamber Summons dated 23rd August, 2014, seeking leave to commence judicial review proceedings the subject of the Ruling herein.

3. In addition to those principal pleadings, the ex parte Applicant's counsel also filed on 14th November, 2014 an Affidavit sworn on the same day verifying the charge sheet. The Application was also supported by the Supplementary Affidavit of Japheth Mwakala sworn and filed on 5th November, 2015, and in response to the Replying Affidavit of the Interested Party, Hassan Huri, sworn and filed on 19th February, 2015 in opposition to the Application. The Second Respondent's Replying Affidavit sworn by Maureen Anyumba on 10th March, 2015 was filed on 11th March, 2015.

4. In support of their respective positions, counsel for the ex parte Applicant, the Respondent and Interested Party filed written submissions. The ex parte Applicant's written submissions dated 4th December, 2015 were filed on 7th December, 2015. The Second Respondent's counsel's submissions dated 2nd January, 2016 were filed on 7th March, 2016. The submissions of counsel for the Interested Party are dated and were filed on 7th March, 2016.

5. I have considered carefully the respective pleadings in the form of the Notice of Motion, the Grounds in the Statutory Statement, and the ex parte Applicant's Affidavit Verifying the Facts, and his Supplementary Affidavit. Likewise I have considered the averments in the Affidavits on behalf of the two Respondents as well as that of the Interested Party.

6. The facts are not in dispute. The Application herein arises from the pending proceedings in Voi Senior Principal Magistrate's Court, Criminal Case No. 605 of 2014 where the ex parte Applicant is charged with six offences related to forgery, which are also set out at pages 3 and 4 of the ex parte Applicant's counsel's submissions. Considering the submissions carefully, two issues clearly emerge for determination by the court –

(1) Whether there can be concurrent criminal and civil jurisdiction on the said set of facts.

(2) Whether the civil court should determine the criminal allegations.

7. For purposes of determination of the application, I will consider the above issues generally, on the **nature** of the orders of certiorari and prohibition, the criminal proceedings generally, the jurisdiction of the civil court, and the question of dual/concurrent civil and criminal jurisdiction, the duty of prosecution branch, and draw my conclusions.

THE LEGALITY OF THE APPLICANT'S CHALLENGE

8. The criminal process that the Applicant is being subjected to, and is challenging herein, is a lawful constitutional process which is being carried out in a lawful manner and with all the constitutional and

statutory safeguards in place. The offence for which the ex parte Applicant is being charged is known to the law, has been disclosed to the Applicant, and the Applicant enjoys all the constitutional safeguards enshrined under Article 50 of the Constitution of Kenya 2010.

9. In **REPUBLIC VS. COMMISSIONER OF POLICE & ANOTHER [2012] eKLR** Warsame J, (as he then was, now Judge of Appeal) cited with approval, the Australian case of **WILLIAM VS. SPAUTZ [1992] 66 NSW LR 585**, where the court stated –

“...the purpose of criminal proceedings generally speaking, is to hear and determine finally whether the accused engaged in conduct which amounts to an offence and, on that account, is deserving of punishment.”

10. The law provides for a mechanism on how the criminal proceedings should be carried or conducted. Article 157 (4) of the Constitution donates to the Director of Public Prosecutions the power to direct Police to investigate any information or allegation of a criminal conduct, and it is mandatory for the Police to comply with any such directions or instructions given by the Director of Public Prosecutions.

11. Under Article 157(10) (of the Constitution), **“the Director of Public Prosecutions shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person.”**

12. The Police have a duty to investigate any complaint once a complaint is made. The Police would be failing in their duty and constitutional mandate to detect and prevent crime, if the law were otherwise. The threshold by the Police is simple. **The Police** need only to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The primary or predominant purpose or reason for the institution of the criminal case cannot, as the ex parte Applicant contends, be said to have been vindication of the criminal justice system.

13. There cannot therefore be any procedural impropriety on the part of the Police in concluding the investigations and in framing charges. An argument that the criminal proceedings were instituted to exert pressure on the applicant to forego a disputed claim is not borne out. The criminal process is clearly aimed at proof of the alleged forgery. If proven, forgery constitutes real vice in the criminal justice system – **WILLIAM & OTHERS VS. SPAUTZ [1993] 2 LRC 659**.

THE QUESTION OF CONCURRENT JURISDICTION

14. Section 193A of the Criminal Procedure Code, (Cap 75 Laws of Kenya), provides –

“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. The above provision is one of the exceptions to the **sub judice** rule and clearly means that even though a civil suit is pending before the court, criminal proceedings may still be preferred and maintained against an applicant and neither the Police nor the Director of Public Prosecutions is in breach of the law as contended by the Applicant. Both civil and criminal proceedings regarding similar facts may be conducted concurrently and co-exist in a court of law. See the case of **WAMBUA VS. HON. ATTORNEY GENERAL & 2 OTHERS [2004] eKLR**.

CERTIORARI AND PROHIBITION

16. In **Republic vs. Anti-Counterfeit Agency & Others, ex parte Surgipharm Limited [2011]eKLR**, referring to the Halsbury’s Laws of England, 4th Edition Volume 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.”

17. The order of prohibition sought by the ex parte Applicant cannot issue. The Applicant has not demonstrated that the Respondents have acted in excess of jurisdiction, without jurisdiction or in breach of the rules of natural justice. Halsbury’s Laws of England 4th Edition Volume I page 37, paragraph 128 defines the orders of **prohibition** –

“It is an order from the High Court directed at inferior tribunal or body which forbids the tribunal or body to continue proceedings that are 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 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 merit of proceedings.”

18. I understand this passage to mean that a party cannot seek judicial review on the basis of the merits of his or a particular case. That is a preserve of the trial court. Judicial review court does not concern itself with the merits of the decision. That jurisdiction as indicated in the foregoing paragraphs is reserved to the trial court.

DISPOSITION

19. A complainant, in this case, the Interested Party, one **Hassan Huri**, like every citizen or resident or visitor in Kenya, is entitled to lodge a complaint. It is the duty of the Police to investigate whether the complaint discloses any reasonable grounds to prefer charges after recording statements from all relevant witnesses. No evidence has been shown or demonstrated in the Affidavits of the ex parte Applicant that the actions of the Respondents have been or are motivated by other than the purpose of conducting a fair process. There is no shred or iota of evidence to suggest that by preferring charges against the Applicants and others, there is gross abuse of the criminal justice process. It is trite law that court procedures and the criminal process cannot be used for ulterior motives.

20. What is clear from the pleadings by the Applicant and Interested Party, that the Interested Party **Hassan Huri**, made a complaint to the Criminal Investigation Department of the Kenya Police Service, concerning alleged impropriety in the registration of land transaction relating to LR No. 1956/348. The contention that the said **Hassan Huri** applied pressure on the prosecution to recommend that the Applicant be arrested and be charged with criminal charges is both trivial and baseless. What the pleadings disclose is that contemplated criminal charges have disclosed the offence of forgery.

21. The court is prohibited in its civil and criminal jurisdiction from issuing any of the prerogative orders of mandamus, prohibition or certiorari. I reiterate that the criminal prosecution process that the Applicant has been subjected to is a lawful constitutional process which is being carried out in a lawful manner with all constitutional and statutory safeguards in place. There is no allegation that the process has infringed the Applicant’s rights in any specific manner. The only reason given by the Applicant for seeking the judicial review orders of certiorari and prohibition is because a civil suit exists between the same parties regarding the same issues. There is no law that bars concurrent jurisdiction.

22. The Applicant has not shown that the court’s proceedings are either in excess of its jurisdiction or in contravention of any law of the land. The Applicant has instead, largely deviated into the merits of the case by unnecessary and long narrations, which can only be determined by the trial court in both the **civil** and criminal cases. **It is not the duty of the judicial review court to go into the merits and demerits**

of any intended charges preferred or to be preferred against any party. The court is prohibited in exercise of its civil or criminal jurisdiction from issuing any of the prerogative orders of mandamus, prohibition or certiorari. Judicial review jurisdiction is a jurisdiction which is *sui generis*, it is neither civil nor criminal. **COMMISSIONER OF LANDS VS. HOTEL KUNSTE KLR (E&L) 249.**

23. Innocence is presumed. Guilt can only be proved in a court of law. It is therefore incumbent upon the Applicant to wait for his day in the magistrate's court to meet and challenge the evidence (if any) in support of the charges of forgery and uttering of documents and mount a defence before the trial court. One does not run away from the process of the law.

CONCLUSION

24. For all those reasons, I find no merit in the Applicant's Notice of Motion dated 12th September, 2014, and filed on 15th September, 2015 which is hereby dismissed with costs to the Interested Party.

25. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 12th day of May, 2016.

M. J. ANYRARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Mwakisha for Applicant

Miss Lutta holding brief for Wamotsa for 2nd Respondent

Miss Lutta for 1st Respondent

Mr. S. Kaunda Court Assistant