REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

J.R. MISC. APPLICATION NO. 166 OF 2015

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

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMANTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF THE ETHICS AND ANTI-CORRUPTION COMMISSION

BETWEEN

IRENE KAPCHEBAI MBITO……..APPLICANT

VERSUS

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

DIRECTOR OF PUBLIC PROSECUTIONS…...……2ND RESPONDENT

ETHICS AND ANTI-CORRUPTION

COMMISSION…….3RD RESPONDENT

AND

KENYA MEAT COMMISSION……...…….….INTERESTED PARTY

RULING

1. By a Chamber Summons dated 26th May, 2015, the applicant herein, **Irene Kapchebai Mbito**, the General Manager, Legal & Administration of the Interested Party herein, **Kenya Meat Commission**, seeks the following orders:
2. According to the applicant, on 18th December, 2013, she accompanied the Managing Commissioner, one **Mr Haji** and the Chief Accountant, one **Mr Bikundo** to Kenya Commercial Bank, Kitengela Branch to transfer funds to M/s Kadima & Co. Advocates being security of costs ordered by the Court. While there, she was informed by the said persons that they needed to

urgently withdraw Kshs 3,000,000/= for Angola Meat Supply contract and on the instructions of the said Managing Director, she signed the mandate to withdraw the said funds which was picked by the said Managing Commissioner in presence of the Chief Accountant.

3. In her view the funds were utilised for the purpose for which they were drawn. It was her view that she expected the auditors to account for the funds since she was not involved in the purchase of livestock as her role was just a signatory to the account. It was therefore her contention that it was unfair for her to be asked to account for the money despite the availability of the documentation. Since no money was lost, she contended that the intention to charge her was mala fide.
4. The applicant disclosed that the irregular and unprofessional handling of financial procedures wrongly implicated her in financial mismanagement, a fact which led to her resignation as Company Secretary and General Manager, Legal, Corporate Affairs and Communication Division to pave way for further investigations into the matter. It is these facts, she averred, that gave rise to the intention to arrest, charge and prosecute her yet there was no cognisable offence.
5. The applicant asserted that she did not breach any policy with the Interested Party to warrant criminal or administrative sanctions and no money was lost as the money was used to perform the Interested Party's core mandate the purchase of animals. As at the time of her resignation, she had neither been sanctioned nor were any specific allegations made that she had taken the money for her personal use.
6. The applicant disclosed that due to the nature of the Interested Party's business, cash payments were common and no query was ever raised thereon. She therefore sought that this Curt grants the orders sought.
7. In his submissions, **Mr Gitonga Mureithi**, learned counsel for the applicant averred that this Court has jurisdiction to grant the orders sought s the substratum of the application was to prevent the arrest, charge and prosecution of the applicant. It was his case that the applicant had been an advocate of the High Court of Kenya for 20 years with an impeccable record both in private and public practice and that to charge her with criminal offence would severely dent her professional reputation and chances of gainful employment apart from threatening her right to freedom
8. It was submitted that the grant of leave and stay would sustain the substratum of the application since a formal charge without hearing the applicant would render the application academic.
9. On her part, **Miss Nyamweya**, learned counsel for the 1st and 2nd Respondents while not seriously opposing the grant of leave, submitted that from the material on record there was no evidence that there was an intention to charge the applicant since the documents filed did not disclose the stage at which the matter was. In her view the orders sought can always be granted at any time in the proceedings hence there was no need to grant the stay sought.
10. The 3rd Respondent, in opposition to the application filed the following grounds of opposition:
11. In her submissions, **Miss Jemutai**, learned counsel for the 3rd Respondent averred that section 35 of the ***Ethics and Anti-Corruption Commission Act*** empowered the 3rd Respondent to forward its recommendation to the Director of Public Prosecution to exercise its prosecutorial mandate. It was her view that the complaints raised by the applicant amounted to a challenge on the merits of the decision rather than the process.
12. Learned Counsel disclosed that 3 people had been charged in court from the same transaction in criminal case no. 182 of 2015 at Kajiado Law Courts and that warrants of arrest had been issued for the applicant herein who was still at large. She therefore urged the Court not to grant the stay sought.
13. The Interested Party on its part informed the Court through its learned counsel **Mr Bundi**, that it was not opposing the application.

Determinations

14. 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.
15. After hearing the parties and considering the allegation by the applicant that no cognisable offence was disclosed, and as the respondents and the interested party did not seriously oppose the leave, I granted the leave. Accordingly, this ruling is limited to the direction whether that leave ought to operate as a stay of the decision in question.

16. The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously.
17. As was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995**, in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review.
18. **Mr Mureithi** submitted that it would be absurd for the Court to grant leave and decline to stay the proceedings in question. With due respect, the mere fact that the application discloses a *prima facie* case does not necessarily qualify the matter to a grant of stay. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.
19. 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 such probability cannot be said to have been achieved 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.
20. In this case it is contended that the applicant's reputation is at risk and that once she is charged in Court, these proceedings would be rendered an academic exercise.
21. With respect to reputation, I am in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

"Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs."

22. As was held in **Jago vs. District Court (NSW) 106**:

"..it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."

23. Accordingly the mere fact that the criminal trial may attract some adverse publicity to the applicant does not necessarily warrant the stay of criminal proceedings.
24. Whereas the Court appreciates that the applicant is an advocate of long standing, that factor alone cannot be the basis for the grant of the stay sought. To base a stay on the status of the applicant would be contrary to Article 27(4) of the Constitution provides:

The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. [Underlining mine].

25. In this case, the applicant is yet to be arrested, leave alone being arraigned in Court. It cannot be said with certainty at this stage that the determination of the said criminal case is likely to be made before these proceedings are heard and determined. Whereas, it is true that if the applicant is charged in Court the prayers seeking to prohibit her arrest and charge in Court may well be superfluous, the applicant is also seeking an order prohibiting her prosecution which order is

capable of being granted at any stage in the proceedings. In other words the denial of the stay cannot render the whole application superfluous

26. The power to halt criminal proceedings ought to be exercised very sparingly. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process 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 in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.
27. The burden however is upon the applicant to satisfy the Court that the intended criminal proceedings ought to be halted. This burden and standard was expounded in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** where it was held:

"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution...It is not enough to simply state that...the entire criminal proceedings... are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

28. Apart from the allegations that the applicant's reputation is likely to be tarnished, no other basis has been advanced to justify the halting of the criminal proceedings which it seems have already been put into motion.
29. It was contended that the applicant is likely to loose her freedom. That possibility may only come to pass either if the applicant is unable to secure a bond or on conviction. The possibility of the latter occurrence is still very remote at this stage while there is no contention that the applicant will be denied a bond. If the terms of the same are found to be onerous there are alternative legal remedies available to deal with the same rather than by halting the prosecution.
30. I am further alive to the fact that an application for stay may be made at any time in the proceedings as and when the occasion arises. In this case there is no immediate threat of imprisonment of the applicant as yet. The hearing of the case is yet to commence as far as the material disclosed before the Court is concerned. I am therefore not prepared to hold that at this

stage the applicant is in danger of losing her freedom or liberty.

31. On the issue of the applicant being wrongly implicated, that is an issue which cannot be determined at this stage of the proceedings.

32. I have said enough to show that the order sought in the Chamber Summons dated 26th May, 2015 in so far as it seeks directions that the grant of leave herein operate as a stay of the proceedings in question is unmerited.

Order

33. In the result the said prayer fails and is dismissed. The costs will be in the cause.

34. It is so ordered.

Dated at Nairobi this day 3rd day of June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mungai for Mr Murithi for the ex parte applicant

Miss Nyamweya for 1st and 2nd Respondents

Miss Jemutai for 3rd Respondent

Mr Masivo for Interested Party