IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 87 OF 2011

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEV PROCEEDINGS IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO.26 OF 2005 REPUBLIC VS. MANOAH KIPYEGON KILASH, JEREMIAH NJIIRI KARANJA, PAUL MUREITHI THEURI AND MOSES CHERUIYOT RUTO

BETWEEN

MANOAH KIPYEGON KILACH.....1ST APPLICANT

JEREMIAH NJIIRI KARANJA.....2ND APPLICANT

PAUL MUREITHI THEURI.....3RD APPLICANT

MOSES CHERUIYOT RUTO.....4TH APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

COMMISSIONER OF POLICE.....2ND RESPONDENT

CHIEF MAGISTRATE, NAKURU LAW COURTS.....3RD RESPONDENT

AND

EGERTON UNIVERSITY.....INTERESTED PARTY

RULING

Pursuant to leave granted on 17th August, 2012 allowing the *ex-parte* applicants to commence these Judicial Review proceedings, the *ex-parte* applicants filed the notice of motion dated 2nd August, 2012 seeking an order of prohibition to prohibit and/or stop the 1st and 2nd respondents from prosecuting or continuing with the prosecution of the applicants and to prohibit the 3rd respondent from proceeding and/or continuing with the trial of the applicants in Nakuru Chief Magistrate Court's Criminal Case No.26 of 2005. The applicants also seek an order of certiorari to bring to this court for purposes of quashing the proceedings in that case.

The application is premised on the grounds found in the statement of facts and verifying affidavit both dated 27/7/2011; that the applicants are facing trial in Nakuru Chief Magistrate Court's Criminal Case No. 26 of 2005; that the charges in that case arose from alleged fraud and manipulation of accounts at the Interested Party; that the prosecution of the applicants, who were employees of the Interested Party at the time, is based on the statements of senior staff of the Interested Party and that the High Court in JR 102 of 2009 ordered for fresh investigations into the alleged fraud; that the people that the court ordered to be investigated are among the witnesses lined up by the respondents in the Criminal case.

Apprehensive that a trial based on the statements of those suspects will be highly prejudicial to them, the applicants contend that the trial is unreasonable, against the rules of natural justice and an abuse of the due process of the law and the court.

In the verifying affidavit sworn by Jeremiah Njiiri Karanja, the applicants have deposed that the investigations that led to their arrest and subsequent charging were instigated by their workmates at the Interested Party's institution; that the workmates (hereinafter called “whistle blowers” instituted Nakuru High Court JR 102 of 2009 to compel the Kenya Anti Corruption Commission (KACC) to investigate their complaints on what they termed, suspected corruption, economic crimes and abuse of office offences at the Interested Party's institution; and that the outcome of the suit was that the Director of KACC was ordered to carry fresh investigations into the complaints.

The applicants have averred that contrary to their expectation, the persons the court ordered to be investigated are among the witnesses lined up by the respondents in the criminal case. They argue that their prosecution on the basis of the evidence of such suspects will be highly prejudicial to them as they do not expect a fair trial. The applicants contend that they were merely sacrificial lambs and that the charges were meant to cover up the misdeeds of the top management of the Interested Party.

For the foregoing reasons, the applicants contend that the trial is against their legitimate expectation, the rules of natural justice and an abuse of the due process of the law.

In the reply, Prof. J. K. Tuitoek, the Vice Chancellor of the Interested Party has deposed:-

1. That the application is an abuse of the court process as the the applicants had previously sought leave to apply for prohibition and *certiorari* but leave was denied;
2. That the applicants having initially been denied leave to apply for *certiorari* and prohibition by a competent court of law the instant application is *res judicata*;
3. That the applicants have acknowledged that the offences in respect of which they are charged were committed while they were still in charge of the affected departments;

4. That the right of the applicants to be heard has not been infringed upon;
5. That through the criminal case herein, the applicants shall have adequate time and forum to address the court and challenge any evidence brought against them as envisaged by law;
6. That the on going trial does not infringe on the applicants’ expectation of a just and fair administrative action as it is only through the court that fair administration of justice can be achieved;
7. That the trial process would, for in stance, accord the applicants’ ample opportunity to discredit the statements of the witnesses through cross-examination.
8. That the Interested Party has ample evidence to support its claim against the applicants; and
9. That it would be unfair to stop the trial indefinitely.

Regarding the order for fresh investigations it is contended that the order does not mean or imply that the case against the applicants should be stopped but rather that, if any other suspects are found liable, they should be held accountable and charged separately; that while issuing the order for investigations, the court was aware of the ongoing criminal case yet it did not find it necessary to stay the criminal case; and that the main purpose of the investigations was to find out if there were more suspects than the ones charged with a view of bringing them to book. Further, that the investigations that were to be carried out after the order of the court were meant to supplement the ones that had been carried out by KACC and

the police and that as the investigations did not implicate the witnesses, the applicants' claim that their prosecution is meant to cover up for the real suspects is without basis.

In countering the applicants' contention that the witness statements were made by senior staff of the Interested Party only, the Interested Party has deposed that a forensic audit was carried by an external auditor's firm and thorough investigations undertaken by KACC where by the applicants were found to be suspects.

On the submissions that the application is pre-mature and unreasonable, the IP urged that the trial of the applicants expeditiously would lead to fair administration of justice and the innocence or otherwise of the applicants would be determined. Further, that stopping the case indefinitely will be unfair to all parties as it will amount to usurping the mandate of the trial court and that of the prosecutor to carry out criminal prosecutions in Kenya.

It is also contended that granting the orders sought would be arbitrary and tantamount to confiscating the Interested Party's Constitutional right to a fair hearing. Further that as the Interested Party has a very strong case against the applicants, it would be unjust and against the principle of natural justice for the court to deny it an opportunity to call its witnesses and have the case heard and determined without unwarranted delay.

Finally, it is deposed that the issue of credibility of witnesses and determination of innocence or guilt of the applicants are important issues which the trial court will have to consider and determine.

ISSUES:

1. Whether the application is res judicata;
2. Whether this application is properly before the trial court;
3. Whether the prosecution is in breach of the applicants' legitimate expectation to fair trial;
4. Whether the prosecution offends the rules of natural justice;
5. Whether the prosecution is prejudicial to the applicants;
6. Whether the criminal trail is premature;
7. Whether the applicants are entitled to the judicial review orders sought.

1. Whether the proceedings are res judicata:

The Interested Party blames the applicants for failing to disclose to the court that they had previously sought leave to commence similar proceeding. Pointing out that the applicants' initial application for leave was refused for failing to make up a case for judicial review, the Interested Party has submitted that the current application is *res judicata* and an afterthought. It is also submitted that the applicants having been denied leave in JR No.5 of 2010, they ought to have appealed or sought review of the decision of the court rather than bringing a fresh application for leave to apply for the same orders.

Arguing that full disclosure of all the material facts is necessary to enable the court make a just ruling on an application for leave to commence judicial review, the Interested Party has maintained that if the court was made aware of the previous application and its outcome, probably it would not have granted the applicants leave to commence the current application. In this regard reference is made to the observation of Latham J., in **R** V. **Leeds City Council Ex Parte Handy** Admn LR 444D which is quoted with approval in **R** V. **Kenya National Federation of Cooperatives Ltd Ex parte Communication Commission of Kenya** (2005) 1KLR thus:-

"It is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the claimant...this is a case which I can properly use in order to send a message to those who are making applications to this court reminding them of their obligations to make full disclosure: failure to do so will result in appropriate cases in the discretion of the court, being exercised against (a claimant) in relation to the grant of the remedy."

From the record before me, I do note that the chamber summons dated 27/7/2011, was argued inter partes following an order of the court. The Interested Party had raised the same issue but the court declined to declare the application *res judicata* noting:-

"The argument that the instant application is res judicata because of the ruling in JR 5/2010 does not arise. Evan if one were to argue that both this application and JR 5/2010 are Judicial Review applications, the issues are not similar. In JR 5/2010, the applicants wanted the charges levelled against them in CRC 26/05 quashed on grounds that the charges were malicious and an abuse of the court process. In this case, the applicants seek to have the court order issued in JR 102/09 complied with or the court quash proceedings in CRC 26/05."

After the above observation, the court granted leave to the applicants to commence these JR proceedings. From the foregoing, it is clear that in granting the leave hereto, the court was fully aware of the fact that the applicants had sought leave to commence proceedings of similar nature but based on different grounds. That being the case, in the spirit of the Interested Party's own authority, the court exercised its discretion in favour of the applicants and granted them leave to institute the instant application. Besides, if the Interested Party was unhappy with the decision of this court granting the applicants leave, it ought to have applied for an order of review or setting aside of the order instead of challenging the substantive motion. See **Grain Bulk Handlers Ltd v. J.B Maina & Co. Ltd and 2 Others (2006)eKLR** where the Court of Appeal observed:-

"**The appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of the court, to the judge who granted leave, to set aside such leave"**

2. Of legitimate expectation:

The applicants are apprehensive that their legitimate expectation that they will get a fair trial will be thwarted because the other persons allegedly involved in the commission of the offence have not been investigated as ordered by the court and hence their right to equality before the law guaranteed under **Article 27** of the **Constitution** will be violated. The IP on the other hand also claims to have a legitimate expectation that it will be protected through the legal process in recovery of its money which was stolen. Legitimate expectation is all about fairness, that the expectation of the parties will not be thwarted. The principle was considered in the English case of **Council of Civil Service Unions v Minister for Civil Service (1995) AC 374** (CCU case) and was cited with approval in **Rep v KRA** ex-parte. **Aberdare Freight Services Ltd & 2 Others (2004)2 KLR 544**. In the **CCU** case, J. Diplock defined the principle as follows:-

"For a legitimate expectation to arise –

'the decision must affect the other person by depriving him of some benefit or advantage which either:-

i. **he had in the past been permitted by the decision maker to enjoy and which can legitimately expect to be permitted to continue to do until there has been committed to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or;**
ii. **he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advance reasons for contending that they should not be withdrawn."**

In the instant case the applicants are facing charges before a qualified, competent and independent magistrate who is able to weigh the strengths of the evidence through hearing, seeing and cross examination of the prosecution witnesses, will have an opportunity to test the accuracy, veracity or credibility of the witnesses when before the trial court. The applicants can also have the opportunity to apply to the trial court to have evidence which is prejudicial to them excluded. The trial court is alive to the provisions of Article 27 and 50 on the right to equality before the law and fair hearing, once the police have established the culpability of the applicants. There is no good reason to stop the proceedings just because there are ongoing investigations to nab other suspects. If for example a crime is committed and some of the suspects abscond, the hearing proceeds in respect of the arrested person and when the one who had absconded is arrested, then he is tried. I hasten to point out that in many criminal cases proceeding in the courts, only the perpetrators who were **'unlucky'** to have been caught are actually tried wile many are on the loose. If the courts were to stop all proceedings just because an accomplice is yet to be arrested, many law breakers would never be arrested and many cases would remain pending. In this case, both parties have a legitimate expectation that fairness will prevail and there is to my mind, no reason for the applicants to fear that their legitimate expectation will be breached.

3. Whether the rules of natural justice will be breached:

Rules of natural justice are all about fair hearing which is anchored in Article 50 of the Constitution. The right to fair hearing includes the right to be heard, the right to contract court the allegations leveled against one, the right to counsel, the right to cross examine witnesses etc and that generally, fairness will prevail during a trial. Generally, the requirements of fairness depend on the nature of each case. In the case of **Lloyd v MAC Mahon (HL) 1987**, Lord Bridge said:-

> **"what the requirement of fairness demand, depends on the character of the decision making body; the kind of decision it has to make and the statutory or other framework in which it operates."**

The applicants appeared before the trial court, the charges were read to them, they understood them and were given a chance to plead to them. They will be availed an opportunity to cross examine witnesses and call evidence in support of their defence.

So far, the applicants have not demonstrated that either the prosecution or the trial court is in breach or threatens the breach any of the rules relating to fair hearing. Faced with a case of this nature, J Lenaola in **Rep v Chief Magistrates' Court at Meru CRC 271/2002** said as follows:-

> **"…the applicant has the opportunity to say all that he has said here in the trial court. If he is stopped by the court for doing so, or the court for some reason, I cannot fathom how does something so outrageous as to necessitate judicial review proceedings, then the applicant may come back to this court. Other matters may well be handled on appeal in the event of the trial coming to conclusion in whichever terms."**

The complaints that the applicants are raising before this court can be aptly dealt with in the trial court and only if the trial court fails to address them would they come back to this court or court of appeal.

4. Whether the proceedings are properly before the trial court:

Article 157(4) of the **Constitution** of Kenya 2010 grants the 1st respondent (DPP) power to direct the 2nd respondent, Inspector General of National Police Service, to investigate any information or allegation of criminal conduct and the 2nd respondent is obligated to comply with such direction. Under **Article 157(6)** the 1st respondent has the mandate to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of an offence alleged to have been committed. Under sub **Article (9)** the power of the 1st respondent may be exercised in person or by subordinate officers acting in accordance with general or specific instructions. Such officers include the police. **Sub article (10)** thereof provides:-

> "**The Director of Public Prosecutions shall not require the consent of any person or authority for commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."**

It is clear from the above provisions what the powers of the 1st respondent are and how he may exercise such powers. **Article 157(11)** provides that in exercising the said power, the 1st respondent is obligated to have regard to the public interest, the interest of the administration of justice and need to prevent and avoid abuse of the legal process, if it therefore is demonstrated that the intended prosecution will offend the aforementioned Constitutional principles. The impugned proceedings were instituted following a complaint by workmates of the applicants who had reason to believe that the applicants or others who have not been charged committed criminal offences at their work place. Investigations were undertaken by the 1st respondent as a result of which the applicants were charged the 1st respondent having found reason to believe that the offences were committed and therefore acted within his mandate.

5. Whether the orders made in JR 102/09 stayed the criminal proceedings in CRC 26/2005.

These proceedings were prompted by the order of J Maraga dated 13/4/2011, in JR 102/2009, which had been filed by the applicants and the judge stated as follows:-

> **"In this case, I am satisfied that the Commission did not have good reason for referring such mega scam to the police who have gone for the minnows leaving the sharks roaming free. How can anyone expect the country to believe that such scam could go on for such long time without the knowledge of the Chief Accountant, the Finance Officer, the Internal Auditor and the DVC (Administration and Finance)? If they did not know of it then they should have been charged with neglect of duty.....In the circumstances I allow this application and order that an order of mandamus do issue as prayed. I direct that this ruling be served upon the Director KACC to cause fresh investigations to be carried out in the matter by officers who have not been involved in the matter before and appropriate action taken against all those found to be involved in the scam."**

He granted an order of mandamus directing the Director of KACC to cause fresh investigations to be carried out in relation to all officers involved in the theft at the IPs institution.

It is common ground that offences complained of and which are the subject of the charges in CRC 26/05 occurred. The dispute is whether the offences were committed by the applicants or other senior staff at the IP Institution or other people all together. Having read the ruling by J Maraga, there is no suggestion by the judge that the order of mandamus issued in that case acted as a stay in the criminal proceedings in CRC 26/05 against the applicants to await fresh investigations. What if the investigations revealed nothing, would CRC 26/65 be stayed forever? If the intention was to stay the proceedings, the judge would have explicitly stated it.

6. Whether the orders sought can issue.

The applicants seek the orders of certiorari to quash the decision to prosecute them and an order of prohibition to stop the prosecution. The remedy of JR is concerned not with private rights or the merits of a decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the body to which he has been subjected (**Rep v Secretary of State for Education and Science ex-party Avon County Council (1991)1 ALL ER 282**). An order of certiorari lies to quash a decision of a statutory body which is made without jurisdiction or in excess of jurisdiction or where the body has failed to comply with the rules of natural justice, or where the decision is unreasonable. I have already found that the 1st respondent and 2nd respondent have acted within their powers and there is no accusation leveled against the 3rd respondent so far. I have also observed above and found that neither the applicants' legitimate expectation nor have the rules of natural justice been breached by the respondents.

As to whether the decision is unreasonable; the test of reasonableness was enumiciated. In the celebrated case of **Associated Provincial Picture House v Wednesbury Corporation (1948)1 KB 223**, where Lord Green M.R. said:-

> **"decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by appropriate order of judicial review proceedings where the court concludes that the decision is such that no person or body properly directing itself on the relevant law and acting reasonably could have reached that decision."**

The decision to charge the applicants without the **'alleged suspects'** is not so unreasonable that no authority can come to it. For all the above reasons, in my view, an order of certiorari cannot issue to quash the charges. The trial court will hear the evidence before it and decide on whether or not the applicants had any role to play in the theft at the IP's Institution because it is only the trial court which can determine the merits of a case once evidence is laid before it.

An order of prohibition issues to prevent the making of a contemplated decision by a public body from acting in excess or without jurisdiction. (See CA 266/1999, **Kenya National Examination council v Rep ex-party Godfrey Githinji).** Where a decision has already been made, the remedy is inapplicable. In **Republic** V. **Chief Magistrate's Court at Nairobi, Misc. Application No.271 of 2002** (supra) it was observed:-

> **"31. In this case, I am being asked to prohibit the hearing and determination of Criminal Case No. 2183 of 2001. I am also being asked to prohibit further prosecution or preferring a prosecution in the said criminal case in its present form, "in any intended variation thereof akin to the charges" in that case.**
>
> **32.These words have been used carefully by the applicant to escape the futuristic demands of prohibition yet although so carefully crafted, the import and meaning is that the decision to prosecute and to begin to hear the case should be prohibited. The determination cannot possibly be prohibited once prosecution and hearing has come to an end as the avenue would properly be an appeal or where there are compelling reasons to apply other limbs of judicial review.**
>
> **33.Nethertheless, the decision to authorize prosecution of the applicant has been taken and this is what the applicant could have sought prohibition of. It would not do to compartmentalize prosecution and hearing of the case..."**

The applicants have already been charged and the prosecution had commenced. As observed in the above cited decision, once prosecution was authorized, the process of prosecution commenced and it cannot be stopped by an order of prohibition unless it is shown that the Chief Magistrate's Court is acting in excess of its jurisdiction or in breach of rules of natural justice. The Interested Party averred that there is forensic evidence linking the applicants to the offence and it is the trial court to determine the sufficiency or otherwise of the available evidence. If the evidence is insufficient because the suspects are not charged then the court will decide accordingly. It is my view that an order of prohibition is not merited in the circumstances as the court will be usurping the mandate of the 1st respondent.

For all the reasons stated in this judgment, I am persuaded that the applicants are not deserving of the grant of the JR orders sought. In the end, I dismiss the application with costs to the Interested Party.

DATED and DELIVERED this 7th day of March, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Kilach for the applicants

N/A for the respondents

Mr. Kisila for the Interested Party

Kennedy – Court Assistant