



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 249 OF 2012

IN THE MATTER OF: AN APPLICATION BY VICTORY WELDING

WORKS LIMITED AND HINDUSTAN SPICE

MILLS LIMITED FOR THE JUDICIAL

REVIEW ORDER OF MANDAMUS

AND

IN THE MATTER OF: CRIMINAL CASE NO. 2228 OF 2009 AT

MAKADARA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

AND

VICTOR MAINA NGUNJIRI

GEORGE GACUMA NJOROGE

JOHN NJOROGE KINYUA

JOHN NJAU KARANJA

STEPHEN NG'ANG'A KAMAU.....INTERESTED PARTIES

EX PARTE

1. VICTORY WELDING WORKS

LIMITED.....1ST EX PARTE APPLICANT

2. HINDUSTAN SPICE MILLS

LIMITED.....2ND EXPARTE APPLICANT

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 28th June 2012, the *ex parte* applicants herein **Victory Welding Works Limited and Hindustan Spice Mills Limited**, seek the following orders:
 1. **That an order of Mandamus compelling the director of Public Prosecution to amend the charge sheet in Criminal Case No. 2228 of 2009 at Makadara in Nairobi.**
 2. **That the costs of this application be provided for.**

APPLICANTS' CASE

2. The said Motion is grounded on Statement of Facts and supported by a verifying affidavit sworn by **Kishor Lal Moennsad**, a Director of the 1st applicant herein both of which were filed on 14th June 2012.
3. According to the said affidavit, On 21st March 2009 and 25th March 2009, some persons; obviously sent by the landlord of the premises where his shop was; in an attempt to evict him, broke into his shops and stole goods valued at Kshs. 6,191,635/=. These activities, is deposed led to the proceedings in Criminal Case No. 2228 of 2009 at Makadara in Nairobi where five person namely; **Victor Maina Ngunjiri (landlord), George Gacuma Njorge, John Njoroge Kinyua, John Nyau Karanja** and **Stephen Ng'ang'a Kamau** were charged with eleven counts of criminal offences under the penal code. The deponent, together with other complainants later realized that the Charge sheet was deliberately badly drawn and cannot sustain a trial leading to a conviction in that the witnesses of the 1st accused **Victor Maina Ngunjiri** has been charged with supermarket breaking and stealing contrary to section 306 (a) of the Penal Code; and whereas he is the principle accused person having been the sole beneficiary and financier, the charge of breaking and entry cannot apply to him as he was not there personally and it was necessary to have this charge amended to reduce the aspect of conspiracy. Being dissatisfied with the way the charge sheet before the Court was drawn, they had a meeting with the police prosecutor wherein they highlighted all our perceived complaints and a new charge sheet was drawn to their satisfaction. However, on the next hearing on 17th June 2011, despite there being an amended charge sheet that adequately addresses all the potential legal issues, the prosecutor proceeded to ignore it and refused to address the Court about it and the matter, to the deponent's shock, horror and dismay proceeded based on the defective charge sheet. Despite writing several letters to various government offices including the office of the director of Public Prosecution to intervene on that matter to enable the ends of Justice be met, the Director of Public Prosecution has chosen to ignore to their detriment stating that there was nothing wrong with the charge sheet. It is contended by the deponent that his company will be highly prejudiced if leave to file the Judicial Review Application is not granted by this Honourable Court. On the other hand, no undue prejudice will be occasioned to the Respondent if the orders sought herein are granted.

RESPONDENT'S CASE

4. On behalf of the respondent, **Joseph Kiama**, a Police Constable swore a replying affidavit on 21st November 2012 in which he deposed that on 21st March 2009, the applicants herein mad ea complaint that unknown persons broke in their business premises and stole goods. Following investigations 5 accused persons were charged in court with offences arising thereto. He however denies that any meeting was held between the prosecutor and the applicants with a view to amending the charge sheet as the evidence with the police including witness statements and documentary evidence cannot support the charges as framed in the "amended charge sheet".

- According to him the charge sheet as drawn is proper and supported by the evidence on the record.
5. According to advice from the State Counsel, he believes that Article 157(6)(a) of the Constitution mandates the Director of Public Prosecutions to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed while Article 157(10) provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority hence the application ought to be dismissed with costs.

INTERESTED PARTIES' CASE

3. In opposition to the application the Interested Parties filed a replying affidavit sworn by **Viktar Maina Ngunjiri**, one of the interested parties on 24th January 2013.
4. According to the deponent, based on advice from his advocate, the grounds upon which the Judicial Review order of Mandamus is sought are based on omnibus, vague, embarrassing and an abuse of the Court process. According to him, the applicant has been a tenant in his premises and around the year 2006 he issued the Applicant a notice to vacate his premises to enable him renovate the premises. Subsequently, the Applicant moved to court vide Criminal case Number 2228 of 2009 at Makadara in Nairobi against the five Interested Parties herein namely **Viktar Maina Ngunjiri, George Gacuma Njoroge, John Njoroge Kinyua, John Njau Karanja and Stephen Ng'ang'a Kamau** where the interested parties were charged under Penal Code. According to him he never sent any person to evict the Applicants or break the Applicants' shops and the applicants have not adduced any evidence in support of the said allegations and the same cannot hold water hence the proceedings in Criminal Case No. 2228 of 2009 at Makadara against the Interested Parties was ill motivated against the Interested Parties. To him, the applicants have not demonstrated how the charge sheet was allegedly badly drawn not to sustain a trial leading to a conviction and based on the same advice it is the duty of the Prosecution once a complaint is made to investigate and frame a charge since the Constitution empowers the director of Public Prosecutions to direct Inspector general of the National Police Service to investigate any allegations of Criminal proceedings. According to him prior to charging a suspect, the police under the instructions of the Director of Public Prosecutions, conduct investigations and analyse evidence produced or collected and base the charges on the evidence and in this case, the prosecution framed the charges against the Interested Parties in respect to the evidence against them since the prosecution can only charge a suspect if in their opinion there is enough evidence against the suspect to warrant a conviction of the crime preferred against the suspect. It is averred that even with the alleged meeting between the Applicants and the Prosecution, the prosecution cannot amend a charge sheet to the satisfaction of a complainant if there is no satisfactory evidence to support the charges and can only charge a suspect when there is prima facie evidence against the suspect upon which the court is likely in the absence of any explanation convict the suspect. It is further deposed that as to count 1 and 2 of the charge sheet, evidence had already been given therefore there is no essence of amending the charge sheet. To him, the Prosecution in absence of sufficient evidence that can warrant a conviction or support a charge, the prosecution cannot amend a charge sheet to include a charge not supported by evidence hence it is unconstitutional for the prosecution to amend a charge sheet based on influence or pressure mount on him by any person as the Director of Public Prosecution, under the constitution, in exercise of his powers shall not be under the direction or control of any person or authority. It is contended that the applicants have not shown what prejudice it will suffer if the order sought is not granted. Even though the Director of Public Prosecutions is under a public duty to treat all persons fairly and communicate by responding to by the public, it is averred that he also has a constitutional obligation to have regard to the interest of the administration of justice and the need to prevent and avoid abuse of the legal process and that the applicants have not demonstrated any of the alleged negligence by the Respondent. To him, the applicants have not given any evidence to support the allegation that not all allegedly affected persons were allowed to record statements and give evidence. It is reiterated that the prosecution cannot prefer charges against a person where no evidence supports the charge or a conviction and that not all documents collected from the Applicants is supposed to be used as evidence as not all documents may be relevant and it is the

prosecution that decide what evidence is crucial to the case and what is not. To him, it is unconstitutional to compel the prosecution to amend a charge sheet where no evidence is produced to support the intended amendment hence the Applicants' application for Judicial Review Order of Mandamus is unmeritorious and ought to be dismissed with costs.

APPLICANTS' SUBMISSIONS

5. On behalf of the applicant, it was submitted that Article 47(1) of the Constitution of Kenya entitles all to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that in **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 374C, 401B**, unreasonable was defined by Lord Diplock to apply to a decision which is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it.
6. It is submitted that the amended charge sheet captured the appropriate charges against the 1st interested party who was not at the scene but could only be charged with conspiring to commit a felony. By refusing to read out the amended charges and carrying on with the 1st interested party's prosecution irrespective of the law, it is submitted that the respondent acted unreasonably. It is submitted that the current charge sheet cannot sustain a viable charge against the 1st interested party who is headed for an acquittal on technical grounds since he was not at the scene when the breakage, entry and stealing took place hence the actions of the respondent are deliberately and intended to help the 1st interested party escape the criminal liability for his actions.
7. It is the applicant's submissions that whereas the respondent is under the Constitution protected from outside influence and power, he is bound by the rules of the law and his power is settled as limited by all the applicable laws and in support of this submission the applicant relies on **Dry Associates Limited vs. Capital Markets Authority & Another [2012] eKLR**, **Ndarua vs. Republic [2002] 1 EA 205**, **Republic vs. Grays Justices [1982] 3 All ER 653**, **DPP vs. Huphreys [1976] 2 All ER 497**, **Eddah Wanjiru Mbiyu vs. Commissioner of Police and Another [2011] eKLR**.
8. Based on *Halsbury's Laws of England*, 4th Edn. Vol. 1 at page 111 paragraph 89, it is submitted that the order of mandamus should and can issue against the Director of Public Prosecutions if it can be shown that its decisions are unreasonable, in bad faith or intended to achieve ulterior motive. Relying on **Cape Holdings Limited vs. Attorney General & Another [2012] eKLR**, it is submitted that in the present case it seems that by charging **Mr Victor Maina Ngunjiri** with an offence which a reasonable person can and could say he would be acquitted can well be stated that there must be an ulterior motive meant to be attained by the charge. The cases of **R vs. Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd [1999] 1 EA 245, 249** and **R vs. Attorney General ex parte Kipngeno Arap Ngeny, High Court Miscellaneous Application No. 406 of 2001** and it is submitted that the DPP is required to act reasonably, professionally, diligently and prosecute with pure intention of serving his public duties.

RESPONDENT'S SUBMISSIONS

9. On behalf of the respondent it was submitted that judicial review is the law concerning control by the courts of the powers, functions and procedures of administrative authorities and bodies discharging public functions and that the courts do not come in to review the powers of the public bodies, or the decisions which have been made but only to review the manner in which the decisions were arrived at and reliance is placed on **Cape Holdings Limited vs. AG & 2 Others Misc Civil Application No. 240 of 2011** in which it was held that judicial review is concerned with the decision making process and not with the merits of the decision itself but with the legality of the decision. The rationale for this it is submitted is because administrative authorities and bodies discharging public functions have the discretion of exercising their authority to make the orders or decisions they deem fit as long as the said orders or decisions have been arrived at procedurally; within their powers or mandate; and in consideration of the rules of natural justice.
10. It is submitted that the order of mandamus prayed for is a command issued by the High Court to

an administrative authority directing it to perform a peremptory duty imposed on it by law and is issued when the person affected has demanded the performance of a public duty, which demand has met refusal, failure or neglect. It is submitted that in this case the applicants are seeking an order of mandamus to compel the respondent to perform its public duty which has already been done according to the evidence on record. On the authority of **R vs. Kenya National Human Rights Commission ex parte Uhuru Kenyatta Nairobi Misc 86 of 2009** and **R vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR**, it is submitted that judicial review orders are discretionary and the Court is free to exercise its discretion based on various factors and the prevailing public policy. Reliance is further placed on **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 2996**.

11. It is further submitted that the respondent is mandated under Article 157(6)(a) of the Constitution to carry out prosecutorial functions while Article 157(10) thereof require him to do so without requiring the consent of any person or authority and under no one's direction or control. It is therefore submitted that if the complaint is that the duty has been wrongly performed then mandamus is the wrong remedy to apply for because it cannot quash a decision already made hence the application ought to be dismissed.

INTERESTED PARTIES' SUBMISSIONS

12. On behalf of the interested parties, it was submitted while reiterating the contents of the replying affidavit that once the police and the prosecution have reasonably done their constitutional mandate of investigations and charging the accused, the court should be averse to intervene and in support of this submission reliance is placed on **Republic vs. Commissioner of Police and Another ex parte Michael Monari and Another [2012] eKLR**.
13. It is submitted that the Director of Public Prosecution has discretion in matters of prosecution of cases and that the law vesting discretionary powers in him contains a detailed outline of guiding principles that have to be followed. In doing so, he does not have to be influenced by anybody as to do so would be encroaching on his powers contrary to the provisions of Article 157(1) of the Constitution. It is therefore submitted that compelling the respondent to amend the charge sheet to suit the wishes of the complainant is tantamount to interfering with the Court process, or obtaining a conviction at all costs. It is contended that no law compels prosecution to prefer charges against a suspect who the prosecution in executing their constitutional mandate do not think based on the evidence before it, constitutes a treasonable cause and that once the police and the prosecution have diligently executed their duties of investigations and charging an accused, the duty of the court is to determine whether there is a prima facie case against the accused. In support of this submission **Eddaj Wanjiru Mbiyu vs. Commissioner of Police and Another [2011] eKLR is cited**.
14. Citing **R vs. Attorney General ex parte Kipngeno Arap Ngeny, High Court Misc Civil Application No. 406 of 2001** and **R vs. Attorney General ex parte JPL Nyaberi High Court Misc. Application No. 1151 of 1999**, it is submitted that prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to policy and the public interest.
15. It is therefore submitted that the order sought are unconstitutional and are unmerited and amounts to an abuse of the court process and ought to be dismissed with costs.

DETERMINATIONS

5. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural

Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479.**

6. The law is that 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 is not a ground for interfering with those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process.
7. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189**, the same Court expressed itself as hereunder:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully..... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge.”

8. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform..... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process).”

9. Article 157(10) and (11) of the Constitution of Kenya provide as follows:

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the 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.

(11) 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.

10. It follows that the office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only

subject to control by the Court based on the aforesaid principles of illegality, irrationality and procedural impropriety.

11. As rightly submitted what is being sought herein is an order of mandamus. The scope of judicial review remedy of mandamus was the subject of **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge** (supra). In the said case the Court of Appeal held *inter alia* that:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

12. The first issue for determination is therefore whether there is a duty imposed on the Director of Public Prosecutions to prefer charges in all instances where a complaint is lodged with that office. Article 157(6)(a) of the Constitution provides that the Director of Public Prosecutions (hereinafter referred to as the DPP) shall exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed. It is therefore clear that the decision whether or not to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed by the DPP is purely discretionary. Where therefore in the opinion of the DPP no offence is disclosed, the DPP cannot be compelled to institute and undertake criminal proceedings since a decision whether or not to prosecute is arrived at after assessing the merits of the case based on the evidence presented to the DPP. This is however not to say that the DPP may decide not to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction where credible allegations are made. The DPP's powers to direct the conduct of investigations are to be exercised in good faith and where the office due to some ulterior motives decides not to carry out any warranted investigations, the Court may issue appropriate orders for the same to be carried out. However once the same are conducted and a decision arrived at the Court cannot by way of mandamus compel the DPP to undertake and institute criminal proceedings contrary to the decision made by the DPP.
13. Apart from the foregoing where the DPP decides to undertake and institute criminal proceedings, since the decision to do so is an exercise of discretion, the Court cannot by way of mandamus compel him/her to do so in a certain way.

15. In the instant case the DPP has formed an opinion presumably after analysing the evidence and material before him to frame certain charges against the interested parties. In effect the DPP has

exercised his discretion in the matter. The applicants however pray that the DPP be compelled to amend the said charge sheet in order to frame certain charges which in their opinion are more appropriate or relevant. To order the DPP to do so would in my view amount to directing the DPP to exercise his discretion in a certain way. That would not only be unconstitutional but outside the ambit of judicial review relief of mandamus. In Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR it was held by the Court of Appeal that:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.”

14. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that 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 every 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 has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60*.

ORDER

15. In the premises the Notice of Motion dated 28th June 2012 lacks merit and the same is dismissed with costs.

Dated at Nairobi this 5th day of July 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Shijenje for Kilonzo Jnr for the interested parties