



Dande & 4 others v Inspector General, National Police Service & 2 others (Civil Appeal 246 of 2016) [2022] KECA 170 (KLR) (18 February 2022) (Judgment)

Neutral citation: [2022] KECA 170 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 246 OF 2016
MSA MAKHANDIA, M NGUGI & P NYAMWEYA, JJA
FEBRUARY 18, 2022**

BETWEEN

**EDWIN HAROLD DAYAN DANDE 1ST APPELLANT
ELIZABETH NAILANTEI NKUKUU 2ND APPELLANT
PATRICIA NJERI WANJAMA 3RD APPELLANT
SHIV ANOOP ARORA 4TH APPELLANT
CYTONN INVESTMENT MANAGEMENT LIMITED 5TH APPELLANT**

AND

**INSPECTOR GENERAL, NATIONAL POLICE SERVICE 1ST RESPONDENT
THE DIRECTOR, THE DIRECTORATE OF THE CRIMINAL
INVESTIGATIONS 2ND RESPONDENT
BRITISH AMERICAN ASSET MANAGERS 3RD RESPONDENT**

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Odunga J.) delivered on 14th September 2016 in Judicial Review Misc. Application No 435 of 2014)

JUDGMENT

1. Edwin Harold Dayan Dande, Elizabeth Nailantei Nkukuu, Patricia Njeri Wanjama and Shiv Anoop Arora, the 1st to 4th Appellants herein, are partners in Cytonn Investment Management Limited, the 5th Appellant company. The 1st to 4th Appellants were also previously employed by British American Asset Managers, the 3rd Respondent herein, until about September 2014, when they resigned to form the 5th Appellant.



2. The Appellants are aggrieved by the decision made by the High Court (Odunga J.) on a judicial review application they filed therein by a Notice of Motion dated 17th November 2014. They sought in the application orders of prohibition against the Inspector General of the National Police Service and the Director of the Directorate of Criminal Investigation, who are the 1st and 2nd Respondents herein, to prohibit them from arresting, harassing or in any other manner interfering with their liberty and property. The Appellants also sought orders of mandamus to compel the 1st and 2nd Respondents to return forthwith the cellphones impounded from the 2nd 3rd and 4th Appellants.
3. After considering the application in a lengthy and detailed ruling, the High Court declined to grant the orders in the manner sought by the Appellants, and instead issued an order prohibiting the 1st and 2nd Respondents from taking any action in the nature of criminal proceedings until the Director of Public Prosecutions (DPP) makes a determination on the matter.
4. The background to the said application and ruling is that the 3rd Respondent and affiliated companies filed various civil suits against the 1st to 4th Appellants after the said Appellants' resignation, with respect to investments the 3rd Respondent alleged were made by the Appellants without authority. On 7th November 2014, arising from complaints made by the 3rd Respondent, the 1st to 4th Appellants were arrested and taken to the CID Headquarters, where their cell phones were confiscated before they were released on cash bail. Further, that they recorded statements on 10th November 2014, and they were required to present themselves to the Chief Magistrate's Court at Milimani on 10th November 2014. However, that upon doing so on 11th November 2014, the Appellants were not charged with any offence as the file had been called by the DPP for review and direction.
5. The 1st and 2nd Respondents, in an affidavit sworn on 7th August 2015 by C.I.P Richard Koywer, the lead investigating officer attached to Criminal Investigations Department, explained that the acting Chief Executive Officer ("CEO") of the 3rd Respondent lodged a complaint on 16th October 2014, that the Appellants had fraudulently misappropriated funds out of the 3rd Respondent's Real Estate Fund. That after carrying out investigations, it was ascertained that various transactions had been made by the Appellants before their resignation, which the 1st and 2nd Respondents detailed. It was the 1st and 2nd Respondents' case that once a complaint is filed with the National Police Service, the Service is mandated under the Constitution and the National Police Service Act to carry out investigations, and that the Appellants failed to demonstrate that the Respondents had not acted independently or acted capriciously, in bad faith or abused the legal process.
6. Jude Brian Anyiko Oluoch, the 3rd Respondent's acting CEO, confirmed in a replying affidavit sworn on 22nd January 2015, that the 1st to 4th Appellants were previously the 3rd Respondent's employees, and that the police investigations were necessitated by various undertakings and breaches by the said Appellants which amounted to criminal conduct, which came to the fore upon their resignation. He likewise detailed the impugned transactions made by the 1st to 4th Appellants, and stated that they were arraigned in court and have not placed material in Court to interfere with the constitutional discretionary mandates of the police to investigate crimes or of the DPP to institute and undertake criminal proceedings.
7. Aggrieved with the ruling by the High Court, the Appellants lodged the present Appeal and have raised eight grounds of appeal in their Memorandum of Appeal dated 8th November 2016, which challenge the findings of the High Court on three claims. Firstly, that there was no basis for any criminal complaint since the 3rd Respondent simultaneously instituted civil proceedings against the Appellants, and it was not supported by any reasonable evidence. Secondly, that there was abuse of the Respondent's statutory powers, as their investigation and arrest was undertaken under the aegis of



the 3rd Respondent, and the criminal process was being used for the sole or predominant purpose of harassing and penalizing the Appellants. Lastly, that there was no usurpation of powers of the Director of Public Prosecutions as the High Court has express constitutional and common law powers and duty to intervene when the criminal process is being abused.

8. The appeal was heard on 6th July 2021, with learned counsel Mr. Mbaluto appearing for the Appellants, learned state counsel Ms. Magdalene Ngalyuka appearing for the 1st and 2nd Respondent and learned senior counsel Mr. Fred Ngatia S.C. appearing for the 3rd Respondent. The counsel relied on their written submissions dated 30th November 2017, 17th January 2020 and 11th January 2018 respectively.
9. Mr. Mbaluto in this regard submitted that the High Court's conclusion that there was a hasty decision to prosecute was the culmination of a hasty and flawed investigation under the aegis of the 3rd Respondent, who manipulated the criminal justice system for its own vindictive commercial interests to the prejudice of the Appellants. Further, that the criminal proceedings were instituted with a view to bringing the Appellants to submission and to have them bend to the 3rd Respondent's will in the pending civil proceedings. Reliance was placed on the decision in *Commissioner of Police and Director of Criminal Investigations Department & another vs Kenya Commercial Bank Limited & 4 others* [2013] eKLR .
10. Therefore, that it was incumbent upon the trial Judge to review the material before him to determine whether or not the 1st and 2nd Respondent had any basis for believing that a criminal offence had been committed, as held in *Republic vs Attorney General ex parte Kiggeno Arap Ngeny*, High Court Civil Application No. 406 of 2001. In addition, that the Appellant's application was neither a speculative enterprise nor seeking a usurpation of constitutional functions of the DPP or a trial Court as found by the High Court, but simply sought a discharge of the High Court's constitutional role of keeping public bodies and officers within their powers.
11. The Appellants made reference to the functions and powers of the 1st Respondent as set out in section 10 of the *National Police Service Act* No. 11A of 2011, and the decision in the case of *R vs Commissioner of Cooperatives ex parte Kirinyaga Tea Growers Cooperatives Saving and Credit Society Ltd* [1999] 1 EA 245 that statutory powers can only be exercised validly if they are exercised reasonably. Therefore, the fact that it was open to the DPP not to follow a recommendation by police to prosecute did not preclude an inquiry by the High Court as to whether or not such recommendation was as a result of abuse of power, as found in the case of *Thomas Nyakambi Maosa vs Kibera Chief Magistrate & 3 others* JR Misc. Appl. No. 303 of 2013 [2015] eKLR.
12. It was the Appellants' further submission that surrounding the investigations by the 1st and 2nd demonstrated that they were acting unreasonably, the circumstances Respondent officers in bad faith, and to achieve ulterior motives, and the investigations ought to have been quashed at the grass root level and not allowed to proceed. They stated that their application did not seek to challenge the actions of the DPP in anyway, and they were not intent on curtailing the powers bestowed on the DPP, neither was the purpose to have the judiciary substitute its opinion with that of the DPP.
13. Ms Ngalyuka on her part wholly relied on the 1st and 2nd Respondents' submissions, which made reference to Article 157 of *the Constitution* and section 6 of the *Office of the Director of Public Prosecutions Act* for the powers of the DPP to institute and undertake criminal proceedings, and submitted that the High Court correctly exercised discretion in not interfering with the decision of the Director of Public Prosecutions. Reference was made to the cases of *Joram Mwenda Guantai vs the Chief Magistrate, Nairobi* (2007) EA 170 and *Meixner & another v the Attorney General* (2005) 2 KLR 189, for the submission that judicial review ought not to interrogate the merit of the decision



but the decision making process, and for the circumstances when the High Court can interfere with the exercise of the DPP's discretion.

14. According to the 1st and 2nd Respondents, the prayers sought by the Appellants required the High Court to analyze and examine facts and evidence on the basis of which guilt, innocence or otherwise of the Appellants shall be determined and that the proper forum for consideration and resolution of the factual and evidentiary matter is the trial Court.
15. Learned senior counsel, Mr. Ngatia SC, submitted that once a formal complaint was lodged by the 3rd Respondent, the 1st and 2nd Respondents were under a duty to carry out investigations and that the 1st and 2nd Respondents indicated the basis upon which the decision to investigate was made in their replying affidavit filed in the High Court. Therefore, the High Court correctly held that it ought not to usurp the constitutional mandates of the investigative authorities in cases where there is suspicion of commission of a crime, the Appellants had not demonstrated that the investigations were carried out with ulterior motives, and that the civil actions for restitution of the 3rd Respondent's funds and/or assets were not a bar to criminal proceedings. They further submitted that no evidence had been adduced by the Appellants to show that the criminal proceedings were for the sole purpose of harassing and penalizing the Appellants.
16. The case of *Republic vs Attorney General & 4 others exparte Kenneth Kariuki Gitthii* [2014] eKLR was cited for the position that the mere fact that the facts disclosed both criminal offence as well as civil liability does not entitle the halt of criminal proceedings. Mr. Ngatia SC submitted further, while citing the decision in *Republic vs Director of Public Prosecution & 2 others Exparte Francis Njakwe Maina & Another* [2015] eKLR, that the burden of proof was in this regard upon the Appellants, and not by mere allegations but also by way of available evidence.
17. The 3rd Respondent also made reference to the case of *Alfred N. Mutua vs Ethics & Anti-Corruption Commission (EACC) & 4 others* Civil Application No. Nai 31 of 2016 for the proposition that threat of arrest or arrest is not a violation of fundamental rights and freedom so long as due process was followed, and that *the Constitution* anticipates the arrest of individuals and hence Article 49 and 50 (1). Reliance was additionally placed on the decisions in *Republic vs Commissioner of Police & another Exparte Michael Monare & Another* [2012] eKLR, *Meixner & Another vs Attorney General* (2005) 2 KLR 189 and *George James Kang'ethe & another vs Inspector General of Police & 2 others*, Misc. Criminal Application No. 298 of 2013 for the proposition that the police only need to establish reasonable suspicion before preferring charges and that the rest is left to the trial Court to determine the veracity and merit of any evidence to be tendered against an accused person. Further, that the Court cannot prevent the police or the DPP from carrying out investigations on reasonable suspicion that an offence has been committed, since they are executing their constitutional duty and obligation.
18. In conclusion, the learned senior counsel explained that upon the delivery of the judgment by the High Court that is the subject of this appeal, the 1st and 2nd Respondents concluded the investigation on the formal complaint lodged by the 3rd Respondent and charges were preferred and criminal proceedings instituted against the Appellants in Criminal Cause No. 1735 of 2016 before the Chief Magistrate's Court at Nairobi. Further, that there is a pending application by the Appellants in JR Misc. Application no 8 of 2017-Republic v Director of Public Prosecution & another, Exparte Harold Dayan Dande & 3 others seeking orders inter alia to restrain the Chief Magistrate's Court from hearing and determining Criminal Case no. 1735 of 2016, and in which the Appellants obtained an order staying the criminal proceedings. Therefore, that the present appeal is an abuse of the Court process.



19. As this is a first appeal from the decision of the High Court, we reiterate this Court’s role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & others* (1968) EA 123 where it was stated that;

“..... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”

20. We shall therefore proceed to consider the issues arising in this appeal by re-evaluating the evidence adduced in the High Court and arrive at our own conclusions of fact and law. In this regard we will only depart from the findings by the High Court if they are not based on the evidence on record, or where the said court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja* [1986] KLR 661.

21. There are two undisputed provisions of law in this appeal. First, the manner in which the office of the Inspector-General of Police is to carry out its mandate as provided for under Article 245(2)(b) and (4) of *the Constitution*, and in particular that no person may give a direction to the Inspector-General with respect to—

- a. the investigation of any particular offence or offences;
- b. the enforcement of the law against any particular person or persons; or
- c. the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.

22. The *National Police Service Act* in this respect provides for the functions and operations of the National Police Service including the Directorate of Criminal Investigations. Other applicable laws with respect to arrest and investigation powers include the provisions of Article 49 of *the Constitution* on the rights of arrested persons, and the procedures for arrest provided in the Criminal Procedure Code and other laws governing the criminal process.

23. The second undisputed legal provision is that the judicial review jurisdiction of the High Court is exercisable where there is an illegal exercise of or abuse of these powers, including by the police. In this respect, it is notable that the Respondents’ actions and decisions to arrest and investigate the Appellants were the subject of the judicial review application in the High Court, which were dismissed, since no criminal charge had been preferred against the Appellants. The legal issue before us is whether there was an abuse of the powers of the 1st and 2nd Respondents to merit the remedies sought by the Appellants.

24. The roles and functions of the police vis-a-vis the review powers of the courts were explained at length in the decision by this Court in the case of *Commissioner of Police & The Director of Criminal Investigation Department & Another v Kenya Commercial Bank Limited & 4 others* [2013] eKLR thus:

“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public



purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157 (11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v. R.* [2002] 1 EA 205. See also *Kuria & 3 Others v Attorney General* [2002] 2KLR.”

25. The Supreme Court of Kenya, while referring to the above cited decision by the Court of Appeal, further identified the guidelines for review of prosecutorial powers in *Cyrus Shakhbalanga Khwa Jirongo vs Soy Developers Ltd & 9 others* [2021] eKLR as follows:

“Furthermore, the Supreme Court of India in *R.P. Kapur v State of Punjab* AIR 1960 SC 866 laid down guidelines to be considered by the Court on when the High Court may review prosecutorial powers. They are as follows:

(I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or

(II) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or

(III) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or

(IV) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.”

26. Arising from the fact that the powers and processes of the police to arrest and investigate are regulated by the law identified hereinabove, the exercise of the said powers and processes will be found to be unlawful and illegal on review, if the applicable constitutional and legal provisions are not observed and complied with. On the application of the other grounds for review, and arising from decided cases on these grounds, including those cited by the parties herein, we posit the following guidelines.



- a. An arrest and investigation is vexatious if it is possible to demonstrate that it is unwarranted and without basis, and it would tend to or is being made with an intention to cause worry, upset, annoyance or embarrassment.
- b. It is oppressive if it can be demonstrated that it is being made because the complainant or the police have a personal issue or prejudice with the individual they are complaining about, and that they are using the criminal process to settle scores with the individual.
- c. Likewise, it is made with ulterior motives and in bad faith where it can be demonstrated that the police are being misused or manipulated to influence another process or outcome.
- d. Lastly, it is unreasonable, if a complaint is so outrageous that no reasonable person would have given credence to it or acted on it. The likelihood of an arrest or investigation not being upheld is however not a reason to consider it unreasonable.

See in this regard the grounds for judicial review set out in *Pastoli vs Kabale District Local Government Council and Others*, (2008) 2EA 300; *Associated Provincial Pictures Ltd vs Wednesbury Corporation* [1948] 1 KB 223, and *Council of Civil Service Unions vs Minister for Civil Service* [1984] 3All ER 935 .

27. In the present appeal, the basis for the arrest and investigations carried out by the Respondents was the complaint made by the 3rd Respondent. The 1st and 2nd Respondent detailed the information they gathered that gave credence to the complaint, and to demonstrate that they acted lawfully and reasonably. The Appellants on the other hand urge that the 1st and 2nd Respondents failed to inter alia verify the information from the 3rd Respondent's senior management, failed to investigate where the alleged stolen funds were or attempt to study the 3rd Respondent's audited book, which they stated ought to have been given due consideration by the High Court.
28. While this may have been relevant and pertinent information, the question that arises is whether the judicial review Court was the proper forum to determine and direct the information and evidence that was gathered during the investigations, and the manner of its collection by the 1st and 2nd Respondents. In our view, it was not, in light of the standards of review which limit a judicial review court's interventions in merit review. It was emphasized by this Court in *Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others*, (2016) KLR that while Article 47 of *the Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act* reveals an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator.
29. In addition, since no decision had at that point in time been made to charge the Appellants, any such findings by the High Court would not only have been prejudicial, but also in direct contravention of the constitutional provisions on the independence of the 1st and 2nd Respondents in the investigation of crimes.
30. The Appellants also alleged ulterior motives and bad faith on the part of the Respondents arising from the pending civil cases between the Appellants and the 3rd Respondent, and that the criminal proceedings were meant to coerce the Appellants to submit to the civil proceedings. We need to reiterate that no criminal proceedings had at that stage been commenced against the Appellants, therefore this argument was at best speculative at the time. The High Court therefore did not err when it held as follows:

“ 102. To grant the orders sought in this application in my view would be both pre-emptive and presumptuous in light of the fact that the DPP's decision on review is still unknown. This Court ordinarily does not interfere with the



exercise of constitutional and statutory power of executive authorities unless there exist grounds for doing so. I am afraid that there are no sufficient material on the basis of which I can find that upon the completion of the review by the DPP the applicants will certainly be arraigned in Court to face the various charges the subject of these proceedings.”

31. In addition, civil and criminal proceedings can arise from the same set of facts, and this Court has in the past held in Lalchand Fulchand v Investments & Mortgages Bank Limited & 5 others [2018] eKLR as follows:-

“ 47. In terms of Section 193A of the Criminal Procedure Code, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings. However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene. But this power has to be exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice.”

32. The 1st and 2nd Respondent have in this respect demonstrated and it is not disputed that they acted pursuant to a complaint received from the 3rd Respondent, and they have detailed the evidence they gathered in this respect. The basis of the complaint arose from the previous relationship between the Appellants and 3rd Respondent of employee/employer which is not disputed, and from transactions that took place during the period of such employment. The Appellants did not provide any evidence of the 3rd Respondent’s influence or control to support their claim that the 1st and 2nd Respondents acted under the aegis of the 3rd Respondent, over and above the 3rd Respondent’s action of making a complaint as an aggrieved person. We are therefore constrained to find that the arrest and investigations of the Appellants was not proved to be in abuse of power, vexatious, oppressive or motivated by ill motive in the circumstances.

33. We accordingly find no merit in the appeal herein, which is hereby dismissed with no order as to costs.

34. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

PAULINE NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true Copy of the original

Signed



DEPUTY REGISTRAR

