IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO 38 OF 2017

BETWEEN

FAMILY BANK LIMITED.....1ST APPELLANT

DAVID THUKU.....2ND APPELLANT

REBECCA MBITHI.....3RD APPELLANT

VERSUS

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

INSPECTOR GENERAL NATIONAL POLICE SERVICE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

(Being an Appeal from the Ruling of the High Court of Kenya (Muriithi J.)

dated 16th *December, 2016 in Constitutional Appl. No 488 of 2016)*

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JUDGMENT OF THE COURT

[1] This is an interlocutory appeal against the Ruling in which the learned trial Judge declined to exercise his discretion to grant a conservatory/or injunctive order prohibiting the prosecution of the appellants for the offences of money laundering. A brief background information regarding the matters that gave rise to the instant appeal is necessary in order to place the instant appeal in perspective. Sometimes on or about the years 2014 to 2016, huge sums of money were allegedly paid out illegally from the public coffers being the Ministry of Public Service, Youth and Gender Affairs State Department for Public Service and Youth to shadowy entities or individuals. As far as this particular matter is concerned, there were investigations conducted with regard to theft of funds amounting to Ksh 791,385,000 stolen from National Youth Service (NYS) which was transferred to bank accounts operated by one **Josephine Kabura** as the sole proprietor in the Family Bank, **(1st appellant)** as follows;-

a. Reinforced Concrete Technologies which received Ksh 320,160,000/= from National Youth Service between 5th February, 2015 and 21st January, 2015.

b. Home Builders which received Ksh 218,925,000 from National Youth Service between 22nd December, 2014 and 21st January, 2015.

c. Roof and All Trading which received Ksh 252,150,000 from National Youth Service between 5th February, 2014 and 27th March, 2015.

[2] Also large cash withdrawals were made by the said **Josephine Kabura,** the highest being Ksh 52,000,000. Other deposits were made in the same bank in accounts owned by one **John Kago Ndungú** which funds were subsequently transferred to various bank accounts. There were no explanations for the large cash transactions and it was alleged the 1st appellant and its officials failed to report the suspicious large cash transactions which in the opinion of Director of Public Prosecutions (DPP) constituted offences under the **Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)** and Central Bank of Kenya (CBK) Prudential Guidelines on Anti –Money Laundering and Combating the Financing of Terrorism (Banking (Penalties) Regulations 1999, Legal Notice No. 77 of 1999) **(Prudential Guidelines).**

[3] Investigations were carried out by the Director of Criminal Investigations sometimes in 2016, as directed by the DPP and when the report was communicated to Mr Keriako Tobiko (DPP) vide a letter dated 19th July, 2016 he sought more information which he referred to as 'professional/expert assessment from CBK regarding the following';-

"From the file, I note that there is evidence showing that Family Bank Ltd (FBL);

i. Has dismissed or retired from Bank service all the officials who played a role in the transactions under inquiry;

ii. Has fully complied with all the recommendations in the joint (FRC/CBK) Inspection Report requiring immediate corrective actions and is at various stages of implementing the long term recommendations.

iii. Has been penalized by CBK to the maximum limit (i.e. Ksh 1 million) prescribed under Prudential Guidelines.

In the circumstances, and in order to enable me arrive at a final decision on this matter, I would require a professional/expert assessment from CBK (by way of statement from the relevant officials) regarding the following aspects;-

a. The general financial status and stability of FBL as at the present.

b. The likely effect of a decision to prosecute FBL for non-compliance with reporting obligations would have on the Bank itself and/or the banking sector as a whole."

[4] In regard to the above requests or inquiries, the Governor of CBK **Dr Patrick Njoroge** responded vide a letter dated 12th August, 2016 giving the answers requested and what is relevant to this appeal is an issue touching on public interest regarding the likely prosecution of FBI. In this regard the Governor stated as follows;-

"While it cannot be stated with certainty the likely effect a decision to prosecute FBL for non-compliance with reporting obligations would have on the bank or the banking sector, we can only comment as follows;-

a. The matter of National Youth Service (NYS) scandal has been in the public domain for a while.

b. The fact that the Director of Criminal Investigations has been investigating Family

Bank and those people suspected to have been involved in the scandal is a matter of public knowledge.

c. It is also public knowledge that some people who had bank accounts in Family Bank through which NYS money was channelled have already been charged in court.

d. Given the measures already taken by Family Bank and the widespread knowledge of these issues by the public, the prosecution of Family Bank and all other related parties involved for non-compliance with reporting obligations is unlikely to have a negative impact on the bank and the financial sector. On the contrary, it will have a positive effect on the sector as it will underscore accountability and enhance compliance."

[5] On the basis of the investigations and further statements and information given by the CBK as above, the ODPP was satisfied that Family Bank Ltd, contravened the reporting obligations under **section 44** of **POCAMLA** among others and was therefore criminally culpable for the offence of failure to report suspicious or unusual transactions or activities that could constitute or be related to Money Laundering or the proceeds of crime contrary to **section 44(2)** as read with **section 5** and **16(2)** of **POCAMLA**. Recommendations were thus made to charge the responsible officials with the offences of contravening the provisions of **POCAMLA** and aiding and abetting the commission of the offence of Money Laundering through opening numerous accounts, authorizing suspicious transactions and failing to report cash transactions above US$ 10,000 contrary to **section 44 (6)** of **POCAMLA** and the suspected 7 officials of the bank were named and recommended for criminal prosecution.

[6] According to the appellants the aforesaid conclusions contravened several Articles of the Constitution, in particular **Article 25,** that provides a right to a fair trial; **Article 27 (4)** and **(5)** which provides for a right to equal protection and benefit of the law and obligates the respondent not to discriminate against the appellants, either directly or indirectly on *inter alia* the basis of ethnicity, social origin, association or trade; **Articles 47 (1)** and **(2)** entitles the appellant to a right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and to be furnished with reasons for their administrative actions that threaten the appellants' fundamental rights or freedoms; **Article 157 (6), (10)** and **(11)** which exclusively vests in the 1st respondent state prosecutorial powers in criminal cases and bars any interference, consent or direction from any person or authority for commencement of criminal proceedings and in doing so to have regard to public interest and to bring to bear the need to prevent and avoid abuse of the legal process. Finally, **Article 245 (4) (a)** requires the 2nd respondent to act independently and prohibit any person or authority from giving direction in respect of investigation of any particular offence or offences.

[7] The appellants thus filed suit by way of a Constitutional Petition before the Constitutional and Human Rights Division of the High Court seeking various declaratory orders. This was followed hot on the heels by a Notice of Motion filed under certificate of urgency on 22nd November, 2016 seeking principally a conservatory and/or injunction order to issue prohibiting the respondents from arresting, detaining, or charging the appellants with the alleged offence of failing to report suspicious transactions or money laundering contrary to the provisions of the Proceeds of Crime and Money Laundering Act 2009. This is the matter that fell for hearing before Muriithi J. As expected in a matter of this nature strong opposition was put up by the 1st, 2nd and 3rd respondents. Upon hearing all the parties and by a ruling delivered and dated the 16th December, 2016 the learned Judge dismissed the application and ordered that costs do abide the outcome of the petition.

[8] This is what the learned Judge stated in his own words;

"Prosecution of the Petitioners and the Interested Party, the charges for whose prosecution evidence is allegedly established by concluded investigations must be allowed to proceed, and the other banks and persons involved must be prosecuted when evidence on their involved (sic) is crystallized by the investigations directed by the DPP on the 21st November, 2016. It is not public interest to halt prosecution of an alleged offender, the evidence to

support whose charge is available in order to await investigations to establish evidence that may support the charge of others who are alleged, whether by the prosecutor or the alleged offender, to have been similarly involved in like offence. Where such investigations take time as in the case here where investigations commenced in 2015, it may be that the prosecution is inordinately delayed awaiting the finalization of the investigations into the involvement of other persons alleged to have separately been involved in similar crime.

ORDERS

- **For the reasons set out above, the Notice of motion dated 22nd November, 2016 filed by the Petitioners and supported by the interested party is declined.**

- **Costs in the cause"**

[9] The aforesaid orders aggrieved the appellants and they filed the instant appeal which is predicated on some ten grounds of appeal. The grounds of appeal are not only repetitive but also argumentative contrary to ***Rule 86(1)*** of the ***Court of Appeal Rules***. We will summarize them as thus; the learned Judge was faulted for erring in law and fact by holding that;-

i. Intended prosecution of the appellants did not amount to discrimination against **Article 27** of the Constitution and did not amount to selective prosecution.

ii. That the ODPP did not contravene **Article 157 (10)** of the constitution by seeking advice and relying on third parties in determining whether to prosecute the appellants in particular CBK that was not objective which was contrary to the dictates of an independent office.

iii. Failing to consider CBK had already punished the appellants who were fined Ksh 1 million under the Prudential Guidelines issued pursuant to the Banking Act.

iv. Failing to hold that it would not be in public interest to prosecute the appellant a financially stable bank which would lead to panic withdrawals and run for deposits by customers as a result of criminal charges.

v. Making conclusive findings at an interlocutory stage and thereby prejudicing the appellants and finally finding the balance of convenience tilted in favour of granting the conservatory orders sought.

[10] During the plenary hearing, Mr. Miller, learned counsel for the appellants elaborated on the above grounds by way of written submissions and some oral highlights. On discrimination, counsel submitted that there are a total of 28 banks that were involved and they all received funds directly linked to the so called **NYS** scandal. This issue of selective prosecution was raised by the Public Accounts Committee of Parliament by a letter addressed to the 1st and 2nd respondents. The Parliamentary Committee wanted to know what action or investigations were being taken against the other banks as well as the CBK while noting majority of payments originated from accounts held by the Ministry of Devolution and Planning held at CBK. Thus according to counsel, it was inappropriate and prejudicial for the respondents to seek an opinion from CBK which was also being investigated for the same allegations. Moreover seeking an opinion from CBK went afoul to the provisions of **Article 157 (10)** of the Constitution and also the dictates of a fair administrative procedure as it lacked ability to give an objective, and reasonable opinion.

[11] Submitting on the ground of appeal on double jeopardy; counsel stated that, the fact that the appellant was fined Ksh 1 million for non-compliance, which was imposed by CBK as an administrative enforcement of **Prudential Guidelines** issued under the same Act, charging the appellants with offences under **section 16(2) (b)** of **POCAMLA** is a violation of the right to a fair hearing. To reinforce that argument, counsel cited *inter alia* the case of **Jorum Mwenda Guantai vs. The Chief Magistrate** [2007] EA 170 where it was held that the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of

oppression. If the prosecution amounts to an abuse of the process of the Court and is oppressive and vexatious, a Judge has powers to intervene and secure fair treatment for all persons who are brought to courts. The maximum penalty provided under **section 16** of **POCAMLA** is a fine of ten million, nonetheless, the mere fact that the appellant was fined Ksh 1 million which was inordinately low would not justify CBK to recommend a prosecution as the appellant duly remedied its mistakes by paying the fine which was much the same as a conviction.

[12] Lastly counsel for the appellant submitted that on public interest, the learned Judge failed to consider the implications that criminal charges against senior banking officials would have to the banking sector and the depositors who might rush to withdraw their deposits. That would be contrary to the public interest. The appellant is a medium sized bank with core capital of Kenya shillings eleven billion and fifty four million and customer deposits in the sum of Kenya shillings fifty billion and nine million as at 30th June, 2016. Criminal prosecution would cause panic withdrawals by depositors and may result to total collapse of the bank thus it will be in the best public interest to allow the appeal.

[13] This appeal was opposed; Mr Mule learned counsel appeared for the 1st and 2nd respondents, while Ms Gitiri learned counsel appeared for the 3rd respondents. Both counsel filed written submissions and made some oral highlights during the hearing. Both counsel were emphatic that there was no selective prosecution as investigations on the other 27 banks were said to be at an advance stage; in any event the decision to charge the appellants was perfectly within the law and the prosecution policy does not bar the DPP from proceeding with criminal charges when investigations are completed. The ODPP does not have to wait to charge all the suspects at the same time. This policy was well articulated by this Court differently constituted in the case **of Michael Sistu Mwaura Kamau & 12 Others vs Ethics & Anti-Corruption Commission and Others** [2016] e KLR which cited with approval the United Kingdom Prosecutorial policy as a guideline stating that prosecutors must first of all be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. According to counsel, the learned Judge was spot on in arriving at the conclusion that the appellants were not subjected to any discrimination and the DPP was within his mandate to seek more information and clarification to ensure compliance with the public interest requirement.

[14] Regarding the allegation that 1st respondent sought and obtained legal advice/opinion of the Governor of CBK the 1st and 2nd respondents submitted the correspondence exchanged was within the normal procedure of carrying out investigations that were done by DCI as directed by the DPP in accordance with the law. Under **Article 157 (11),** the DPP is supposed to have regard to public interest in discharge of his functions. According to counsel for the respondents, the letter requested for information by way of a statement and it did not seek consent as contended by the appellants. The decision on whether or not to prosecute, was based on the evidence gathered and public interest test was also taken into account. On the issue that prosecution of the appellant would amount to double jeopardy, the 1st appellant having paid a fine of one million imposed by CBK, counsel submitted that this was an administrative fee chargeable in enforcement of the regulations and does not preclude criminal prosecution carried out by the DPP in discharge of the Constitutional mandate under **Article 157** of the Constitution and under **POCAMLA**.

[15] The issues raised in this appeal are threefold; that is whether the 1st respondent's decision to charge the appellants with offences against the **POCAMLA** was discriminatory and unconstitutional on grounds that it was influenced or directed by CBK an interested party; whether the prosecution of the appellants amounted to double jeopardy and a breach of their constitutional right to a fair trial; and finally whether the learned Judge failed to appreciate the balance of convenience due to the public interest nature of a possible run off by customers to withdraw their deposits would result to a closure of a bank with far reaching implications. We must state at the onset, this is an interlocutory appeal, pending the hearing of the substantive petition before the High Court, whatever we state in this appeal must not prejudice the determination of the aforesaid case and must not cause any embarrassment to the Judge who will eventually hear the substantive petition. We shall therefore stick to the narrow path of examining whether the appellants case established a prima facie case with a probability of success that the appellants fundamental rights that are guaranteed in the constitution to a fair trial would have been violated if

conservatory orders were denied.

[16] It was argued most eloquently on behalf of the appellants that the decision to charge the appellants was discriminatory, not independently made by the 1st respondent who received instructions or directions contrary to the provisions of **Article 157 (10)** and **(11)** to wit;-

> **"(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, interest of the administration of justice and the need to prevent and avoid abuse of the legal process."**

It is apparent from the record that the learned Judge not only considered the above provisions as he reproduced them in his ruling verbatim, but he also seems to have carefully analysed them against the recommendations that were made by the CBK being the institution in charge of national fiscal monetary policy and regulation of the financial sector as well as the report made by one **H.K. Mugwanja** which was prepared on behalf of the Banking Fraud Investigation Unit. The learned Judge did this so as to establish whether the DPP's decision to charge the appellants was independent.

[17] This is what the learned Judge posited in a pertinent paragraph;

> **"Moreover, without prejudice to the final findings of the Court that hears the petition, it would appear that the Governor of the Central Bank only gave his professional opinion on the effect of prosecution, whose decision lay with the DPP, would have on the banking industry and the economy. Without prejudice to the final determination of the petition, it would appear the DPP only sought the comments of the Central Bank Governor as a means of assessing the public interest consideration in the matter with respect to the risk of the Banking Industry from the intended prosecution of the petitioners. The Governor in his reply was clear that his were only comments which did not bind the decision of the Director of Public Prosecution, even though he pitched for a prosecution which, in his view, would "have a positive effect on the sector as it will underscore accountability and enhance compliance."**

On our part, we find ourselves in agreement with the above findings as we appreciate that in undertaking prosecutorial duties, the DPP is supposed to subject the material forming part of the evidence to some quasi-judicial examination before charging a person with a criminal offence. It is necessary also to recognize that the DPP relies largely on investigations carried out by the police, and in doing so, he can direct as he did in this case the police to seek clarifications, further information or comments. Seeking comments on framed up issues on account of public interest does not appear to us to have offended the Constitutional edict. If the request crossed the line (we are not convinced at this stage it did) it is perhaps a matter that requires deeper interrogation during the hearing of the petition where the authors of the letter and the report can be cross examined to find out whether there was any other intention in seeking the said information which is not apparent merely by looking at the impugned letter and report.

[18] Were the appellants subjected to differential treatment bearing in mind there were 27 other banks and also the CBK itself that were implicated in the said offences. Again we revisit the powers of the DPP under **Article 157 (6) (1)** of the Constitution that vests unfettered discretion upon the DPP to undertake criminal proceedings against any person before any court. The respondents denied there was any selective prosecution of the appellants vide the replying affidavit by **Gitonga Muranga** sworn on 23rd November, 2016 where he stated that DPP directed the police to carry out investigations on all the banks and officials of CBK implicated. Prosecution is always undertaken based on investigations and unless there is an obvious abuse of these powers the Courts are reluctant to interfere with the mandate of DPP as the jurisdiction to stay a proceeding either of civil or criminal nature before any court is always sparingly exercised. When this Court has done so, it is always in a very clear case to nip from the bud any attempt

to circumvent or use the law to harass an applicant. This was the gist in the case of; - **Githunguri v Republic (1985) KLR page 92.** Where it was held;

> **"The Attorney-General is given unfettered discretion to institute and undertake criminal proceedings by section 26 of the constitution but this discretion should be exercised in a judicious way. It should not be exercised arbitrarily, oppressively or contrary to public policy.**
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> **…**
>
> **The preferment of a charge against any person nine years after the alleged commission of the offence, six years after full inquiry in respect of it and five years after the decision of the office of the Attorney-General not to prosecute and to close the file is vexatious, harassing an abuse of the process of the court and contrary to public policy unless a good and valid reason exists for doing so, such as the discovery of important and credible evidence or the return from abroad of the person concerned."**

We are not persuaded the appellants were subjected to differential treatment as many criminal proceedings are initiated against an accused person(s) alleged to have committed an offence either alone or with others not before the court. If the proceedings are undertaken against one accused person, this cannot amount to discrimination on the grounds set out in the Constitution.

[19] 1st appellanwas fined Ksh. 1 million by the CBK for breach of Banking Regulations. Again the learned Judge fastidiously went through the principles of double jeopardy which he examined against the guaranteed rights of a fair trial under **Article 50 (2)** of the Constitution and had the following to say in conclusion;-

> **"I would agree with the contention by counsel for the respondents that the double jeopardy principle, also known as autrefois acquit, autrefois convict (previously acquitted, previously convicted), applies to judicial proceedings to halt multiple prosecution for the same offence. The Central Bank in enforcement of its Prudential Guidelines on Anti-Money Laundering and Combatting Financing of Terrorism (CBK/PG/08) penalized the bank Ksh 1,000,000/= for breach of the obligation under AML for alleged failure to report suspicious transactions between December 2014 and April 1015 and instead filling a suspicious transactions report in July 2015.**
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> **As there has not been any prosecution and conviction or acquittal, but rather an administrative penalty imposed by the industry regulator, which is itself subject to being quashed by judicial review order of certiorari, there cannot be a proper application of the principle to affect the intended criminal prosecution."**

[20] We find the learned Judge was spot on with the above analysis of what constitutes double jeopardy. The administrative fine was imposed by the regulator for breach of regulations. We are not persuaded that the administrative action acted as a bar to criminal prosecutions for offences spelt out under **sections 16, 44, 45** and **46** among others of **POCAMLA**. This statute created offences, the mandate to investigate criminal offences lie with the police and the decision to initiate criminal charges lie with the DPP who is required to observe the principles set out in the constitution. For the appellant to successfully freeze those powers they must demonstrate to the Judge that there was a blatant breach of the Constitution and statute which was not done in this case.

[21] Finally the law on this issue of exercise of judicial discretion was long settled as was held by the Court of Appeal in the oft' cited case of;- ***MBOGO –V- SHAH*, [1968] E.A. 93:**

> **"…..A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the**

case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice."

[22] In the upshot, we find no merit in this application which we order dismissed with costs to abide the outcome of the petition.

Dated and delivered at Nairobi this 19th Day January, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true Copy of the original.

DEPURY REGISTRAR