



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 270 OF 2015

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

MARTIN MAINA.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR CRIMINAL

INVESTIGATIONS DEPARTMENT.....3RD RESPONDENT

STEPHEN OYUGI OKERO.....4TH RESPONDENT

RIGHT END PROPERTIES LIMITED.....5TH RESPONDENT

(Being an appeal from the Judgment and Orders of the High Court

of Kenya at Nairobi (Weldon Korir, J.) delivered on 10th June, 2015

in

Judicial Review Case No. 91 of 2014)

JUDGMENT OF THE COURT

1. By an application dated 19th March, 2014, Martin Maina, the 1st respondent, sought an order of prohibition to prohibit the Director of Public Prosecutions, (the appellant) and the Inspector General of Police, (the 2nd respondent) from commencing or proceeding with any criminal proceedings against him in respect of any dealings relating to the property known as **L.R. No. 1870/X/24** situate in Nairobi, hereinafter referred to as **“the suit property”**.

2. The 1st respondent is an advocate of the High Court of Kenya. In his affidavit in support of the

applicant, the 1st respondent stated that in June 2005 he was retained in his official capacity to represent one Salim Hussein Dungarwalla (now deceased) in an intended purchase of the suit property, which was being sold by Uzima Press Limited, also referred to as Uzima Publishing House (the vendor).

3. By an agreement dated 23rd June, 2005, the vendor agreed to sell the suit property to Dungarwalla for Kshs.27,000,000/=; 10% of the said purchase price was to be paid to the vendor's advocate to hold as stakeholders on or before the execution of the agreement, and the balance was to be paid within sixty days of the execution of the agreement.

4. Subsequent to the signing of the sale agreement and payment of the said deposit, Dungarwalla the purchaser was approached by Right End Properties Limited (the 5th respondent), who were interested in the suit property, and Dungarwalla agreed to assign it to the 5th respondent at a consideration of Kshs.47,000,000/-.

5. Before completion of the first transaction, the 1st respondent stated, the 5th respondent approached the vendor and offered to purchase the suit property at Kshs.40,000,000/=, which the vendor accepted. The essence of that subsequent agreement was that the vendor would breach the first sale agreement.

6. The 1st respondent alleged that **“to enable the vitiation of the earlier Agreement on the grounds of fraud, a forged version of the earlier agreement was drawn which indicated that the purchase price was 37,000,000/= and not 27,000,000/= as agreed”**.

7. Upon discovering what was happening, the 1st respondent on behalf of Dungarwalla, lodged a caveat at the Lands Registry. The same was registered on 25th May, 2005. He also filed ENVIRONMENT & LAND CASE NO. 2315 OF 2007 seeking an injunction and specific performance against the vendor. Interlocutory orders of injunction were granted as sought. Dungarwalla testified in the said suit but shortly thereafter passed on.

8. On 17th February, 2011 while the 1st respondent was attending to other matters at the Lands Office, Nairobi, he came across a notice of withdrawal of the caveat he had lodged. The notice was allegedly signed by him. He also came across a purported transfer of the suit property in favour of the 5th respondent; a forged court order issued on 16th February, 2011 allegedly lifting the injunction granted in ELC No. 2315 of 2007; and the original title deed bearing all the above endorsements.

9. All the above documents had been lodged by one Stephen Oyugi Okelo, an advocate at Oyugi & Company Advocates.

10. The 1st respondent alerted the Registrar of Titles that the signature on the notice of withdrawal of caveat was not his and was therefore a forgery; that no order had been made by any court lifting the interlocutory injunction restraining transfer of title to the suit property. The Registrar of Titles cancelled all the endorsements as stated above.

11. On the same day, that is 17th February, 2011, the 1st respondent filed a complaint at the CID Headquarters and recorded a statement. Later on Dungarwalla also recorded his statement.

12. Prior to Dungarwalla's demise on 30th July, 2011, the 1st respondent and Dungarwalla had made several visits to the offices of the investigating officers and written letters to the Attorney General, Director of Public Prosecutions and the Provincial Criminal Investigations Officer, but no action had been taken in respect of the complaints.

13. Consequently, the 1st respondent instituted private prosecution proceedings against Mr. Ashraf Savani and Mr. Madatali Chatur, the directors of the 5th respondent; and Mr. Stephen Oyugi Okelo advocate. The charges against them were of forgery, conspiracy to defraud, conspiracy to defeat justice and uttering a

false document.

14. Ashraf Savani and Madatali Chatur commenced Judicial Review proceedings to quash warrants of arrest that had been issued against them and the court granted the orders sought on the ground that the 1st respondent had no *locus standi* to commence the proceedings.

15. On 7th October, 2013 and 21st January, 2014 the 1st respondent wrote to the appellant, asking him to act on the complaints that he had raised. By a letter dated 6th February, 2014, the appellant indicated that he had earlier directed the police to charge several people, including the 1st respondent, with fraud related offences; that the appellant had recalled the police file for a review and a decision thereon would be made.

16. After sometime, the police arrested Stephen Oyugi Okelo and charged him with fraud in **Criminal Case No. 138 of 2014**.

17. When the 1st respondent learnt that the police were also seeking his arrest and prosecution on similar charges, he moved to the High Court and filed the Judicial Review proceedings that gave rise to this appeal; alleging that the intended arrest and prosecution was fraught with impropriety and malice and was calculated to embarrass, vex and humiliate him. He further alleged that the intended prosecution was intended to coerce him to abandon the proceedings in ELC No. 2315 of 2007, which was the only hindrance to the 5th respondent's to transfer of the suit property to themselves.

18. The High Court (Korir, J.) in granting the orders sought by the 1st respondent, found that there was a forensic examiner's report showing that the signature and the stamp on the sale agreement which the directors of Uzima Press Limited (Uzima Publishing House) claimed was forged by the 1st respondent did not belong to him.

19. Secondly, there was a letter dated 4th July, 2014 from Mr. Ndegwa Muhoro, the Director of Criminal Investigations, addressed to the appellant, advising that it was not prudent to charge the 1st respondent as there was no evidence to sustain a charge of forgery against him.

20. Being aggrieved by the High Court's decision, the appellant preferred this appeal. In his memorandum of appeal, the appellant faulted the learned Judge for, *inter alia*, restraining him from discharging his constitutional mandate; for failing to appreciate that the accuracy, correctness or otherwise of the evidence against the 1st respondent could only be assessed and evaluated by the trial court in criminal proceedings; for failing to appreciate and apply precedent as regards the limited jurisdiction of a judicial review court in such proceedings, and in failing to uphold the appellant's independence as per **Article 157(10)** of the **Constitution**.

21. When the appeal came up for hearing, **Mr. Mule, Assistant Director of Public Prosecutions**, withdrew the appeal against the 2nd and 3rd respondents. The 4th respondent, though served with a hearing notice, did not attend Court.

22. The appeal was disposed of by way of written submissions, with **Mr. Mule** appearing for the appellant, while **Miss Maitai and Mr. Mulanya** appeared for the 1st and 5th respondents respectively. Mr. Mulanya supported the appeal while Miss Maitai opposed it.

23. The first cluster of the appellant's grounds of appeal relates to the constitutional and statutory mandate of the appellant. It was submitted that the Constitution establishes the office of the Director of Public Prosecutions and stipulates the scope of his mandate.

24. **Article 157(6)** states that:

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-

(a) 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;

Article 157(4) provides that:

“(4) The Director of Public Prosecutions shall have power 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.

Article 157(11) stipulates that:

“(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.”

25. The appellant submitted that the decision to prefer criminal charges against the 1st respondent was *intra vires* and consistent with the provisions of **Article 157** of the **Constitution**, the **Office of the Director of Public Prosecutions Act No. 2 of 2013** and the **National Police Service Act No. 11A of 2011**. He added that State powers of prosecution vests in him and in the exercise of that power he is not subject to the direction and control of anybody or authority.

26. The appellant added that he is not bound by recommendations made by investigative agencies, being an independent constitutional office, and is only subject to control of the Court based on the principles of illegality, irrationality and procedural impropriety. He cited **JOHN SWAKA v THE DPP & 2 OTHERS [2013] eKLR** where the High Court cited its earlier decision in **FRANCIS ANYANGO JUMA v DPP & ANOTHER, Petition No. 160 of 2012**, where it was held:

“Clearly the intention under the Constitution was to enable the DPP to carry out its constitutional mandate without any interference from any party. This Court cannot direct or interfere with the exercise of the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate unless there was clear evidence of violation of a party’s right under the Constitution, or violation of the Constitution itself.”

27. In the second cluster of grounds of appeal it was argued that the requisite grounds upon which an order of prohibition could be granted were not satisfied. The appellant cited this Court’s decision in **KENYA NATIONAL EXAMINATION COUNCIL v REPUBLIC ex parte GEOFFREY GATHENJI NJOROGE & 9 OTHERS [1997] eKLR**, where the Court stated the grounds upon which such an order may issue as hereunder:

“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4th Edition, Vol.1 at pg. 37 paragraph 128.”

28. Thirdly, it was argued that the High Court erred in law for evaluating the sufficiency of evidence in the envisaged criminal proceedings and for making a finding on contested issues with regard to evidence. That can only be done by a trial court in criminal proceedings, the appellant stated, not by a court in Judicial Review proceedings.

29. In support of that submission, the appellant cited the case of **STATE OF MAHARASHTRA & OTHERS v ARUN GULAB & OTHERS, Criminal Appeal No. 590 of 2007**, where the Supreme Court of India stated:

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it „soft-pedal the course of justice? at a crucial stage of investigation/proceedings.”

The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as „Cr.P.C.?) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.”

30. Lastly, the appellant argued that the learned Judge failed to address the grounds that had been set out by the 1st respondent in his application. The 1st respondent had contended that the appellant’s decision to charge him was in breach of the principle of legitimate expectation; unreasonable and irrational and was based on wrong exercise of discretion.

31. The 1st respondent had told the High Court that the appellant’s failure to notify him of the outcome of the independent review that it was undertaking was a breach of his legitimate expectation that the DPP would inform him of the outcome prior to taking any further action, and that he would be afforded a fair administrative action.

32. The appellant countered that argument by saying that it was within his discretion, based on the available evidence, public interest and the need to avoid abuse of the criminal justice process, to charge the 1st respondent.

The appellant submitted that he acted reasonably, fairly and rationally.

33. The 1st respondent’s submissions in response to the aforesaid grounds of appeal were fairly brief and were as follows. Firstly, that Judicial Review orders are in their nature discretionary and it is trite law that an appellate court should not interfere with the exercise of the discretion of a single Judge unless “it is satisfied that the Judge in exercising his 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 that as a result there has been misjustice” See **MBOGO & ANOTHER v SHAH [1968] E.A. 93.**

The appellant had not demonstrated that the learned Judge exercised his discretion wrongly, the 1st respondent contended.

34. Secondly, he submitted that the learned Judge appreciated that the Court’s power to interfere with the appellant’s constitutional mandate in Judicial Review proceedings was in very rare and exceptional circumstances. But having so observed, went ahead to grant the orders sought because he was satisfied that there were compelling reasons for so doing.

35. Lastly, the 1st respondent submitted that an order of prohibition can be issued even when a decision has already been made. He cited **KURIA & 3 OTHERS v ATTORNEY-GENERAL [2002] 2 KLR 69,** where the High Court held:

“11. It does not matter whether the decision has been made or not, what matters is the

objectives for which the court procedures are being utilized. Once it is decided that the process is an abuse, it matters not that it has been commenced or whether there was acquiescence by all parties. The duty of the court in such instances is to purge itself of such proceedings. Thus whereas the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued prosecution be stayed. An order of prohibition can be issued to prohibit the continued hearing.

16. An order of prohibition should be granted where there is an abuse of the process of the court, which will have the effect of stopping the prosecution already commenced. A prerogative order is an order of a serious nature and cannot and should not be granted lightly. There should be concrete grounds for supposing that continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest could be best served by the staying of the prosecution.”

36. On those submissions, the 1st respondent urged the Court to dismiss the appeal.

37. We have carefully perused the record of appeal as well as the submissions filed by the parties. The 1st respondent’s application before the High Court was for an order of prohibition to prohibit the appellant, the Inspector General of Police, as well as the Director of Criminal Investigations from commencing, sustaining or proceeding with any criminal proceedings against him in connection with the intended sale of the suit property. The orders sought having been granted, the role of this Court as the first appellate Court is to re-evaluate the arguments that were advanced by both parties before the High Court and come to our own conclusion as to whether the grant of the orders was justified in law.

38. There is no dispute that under **Article 157(10)** of the **Constitution** the Director of Public Prosecutions (DPP), the appellant herein, does not require the consent of any person or authority to commence of criminal proceedings and is not under the direction or control of any person or authority in the exercise of his constitutional powers or functions. The DPP is only subject to the Constitution and the law.

39. However, in exercising his powers, the DPP should have regard to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process. See **Article 157(11)** of the **Constitution**. In granting the order of prohibition, the learned Judge came to the conclusion that the 1st respondent’s prosecution amounted to abuse of the legal process.

40. The learned Judge was alive to the fact that the judicial power of quashing criminal proceedings has to be exercised very sparingly, as held by the Supreme Court of India in **STATE OF MAHARASTRA & OTHERS v ARUN GULAB GAWALI & OTHERS** (supra). In the same matter the Court outlined grounds upon which orders prohibiting criminal prosecution may be granted. 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;

(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;

(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; and

(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.”

41. Did the 1st respondent’s application attain the above threshold? It is necessary that we consider what the Directorate of Criminal Investigations Department and the 5th respondent told the Court regarding the allegations made by the 1st respondent.

42. In his replying affidavit, Police Constable Isaac Ogutu, attached to the Directorate of Criminal Investigations Department, stated that there were two complaints relating to forgery. The first one was by the 1st respondent as earlier stated. The second one was by the directors of Uzima Publishing House against Dungarwalla and the 1st respondent, alleging that the purchase price on the sale agreement had been altered to read Kshs.37,000,000/= instead of Kshs.27,000,000/= and that in the disputed sale agreement their signatures had been forged.

43. Forensic examination confirmed that indeed the signatures of the directors of Uzima Publishing House and Mr. Isaac Ongayo Advocate, who was alleged to have witnessed the signing of the sale agreement had been forged.

44. Further investigations showed that the 1st respondent and Dungarwalla had committed a criminal offence in connection with the complaint against them, P.C. Ogutu stated, and that the appellant had directed that the two be arrested and charged accordingly.

45. Madatali Chatur, a director of the 5th respondent, stated that in April 2007 they were approached by Dungarwalla, who told them that he had a prime property for sale in Westlands; that he was in the process of purchasing it at Kshs.37,000,000/=; that he was willing to assign all his rights to the property at a consideration of Kshs.10,000,000/= since he was unable to raise the balance of the purchase price; that Dungarwalla gave him a copy of the sale agreement that was signed by him and the directors of Uzima Publishing House and witnessed by the 1st respondent.

46. The 1st respondent's firm wrote to the 5th respondent forwarding for their signature a Deed of Assignment drawn by his firm; that the 5th respondent's advocates, Kipkenda, Lilan & Company, advised them to deal directly with the registered proprietor of the suit land; they further proposed rescission of the sale agreement between Dungarwalla and Uzima Publishing House and the execution of a new agreement between the vendor and the 5th respondent, and the sum of Kshs.10,000,000/= to be held in an escrow account for the benefit of Dungarwalla.

47. It later turned out that Dungarwalla had defaulted in payment of the balance of purchase price and the vendor had rescinded the sale agreement; that the vendor had agreed to sell the property at a sum of Kshs.27,000,000/= and not Kshs.37,000,000/=; that page 2 of the agreement had been altered for the sole purpose of duping the 5th respondent into purchasing the suit property at a much higher price than the actual one.

48. Chatur further stated that the 5th respondent had nothing to do with the withdrawal of the caveat that had been filed by Dungarwalla on the strength of the fake court order, saying that he and his co-director were investigated by the Criminal Investigations Department and absolved of any wrong doing.

49. Chatur added that the 1st respondent, having prepared the Deed of Assignment which indicated that the purchase price of the suit property between the vendor and his client, Dungarwalla, was Kshs.37,000,000/=, it is apparent that he had full knowledge and/or was complicit in the drafting of the forged sale agreement.

50. In his judgment, the learned Judge held that “**there is no iota of evidence that connects the Applicant with the forgery of a sale agreement.**” That finding was based upon the forensic examiner's report that exonerated the 1st respondent. He also cited the letter dated 4th July, 2014 from the Director of Criminal Investigations advising the DPP that it was not prudent to charge the 1st respondent.

51. With respect, the learned Judge misdirected himself in his interpretation and application of the forensic examiner's report. It is trite law that the opinion of an expert is not binding on a court, it should be considered together with other relevant facts in reaching a final decision. See KIMATU MBUVI T/A KIMATU MBUVI & BROTHERS v AUGUSTINE MUNYAO KIOKO [2007] 1 E.A. 139; TITUS MUTUKU KASUVE v MWAANI INVESTMENTS LIMITED [2004] eKLR.

52. The learned Judge ought to have considered the forensic examiner's report alongside all the other relevant evidence, for example, the fact that it was the 1st respondent who prepared the Deed of Assignment indicating that the purchase price of the suit property was Kshs.37,000,000/=, having earlier drawn and witnessed execution of the sale agreement that reflected the purchase price for the suit property as Kshs.27,000,000/=. In our view, this was a pointer to the fact that there was need to allow the criminal proceedings to continue so that evidence could be tendered to determine whether the 1st respondent was culpable in respect of the complaint reported to the police by the vendor of the suit property.

53. As regards the recommendation by the Director of Criminal Investigations Department, we agree that the appellant was not bound by it. Under **Article 157(10)** of the **Constitution**, the DPP does not act under the direction or control of any person or authority. In the exercise of his constitutional mandate, the DPP had decided to institute criminal charges against the 1st respondent. The recommendation by the Director of Criminal Investigations per se could not be a sufficient reason to enable the High Court prohibit the 1st respondent's prosecution.

54. In our view therefore, we are unable to find that the institution of criminal proceedings against the 1st respondent would have amounted to abuse of the court process and neither was there a legal bar against the institution of the intended criminal proceedings.

55. As to whether the allegations made against the 1st respondent, taken at their face value, could constitute the offence alleged, we can only express a qualified opinion that, yes, it could, given the role played by the 1st respondent in the failed transaction. We must, however, hasten to point out that it was not the duty of the High Court in Judicial Review proceedings to evaluate the sufficiency of the evidence in the envisaged criminal proceedings, that is the function of the trial Court or the High Court in a criminal appeal. A Judicial Review Court should not usurp the functions of a trial court, except in the clearest of the cases. In **MEIXNER & ANOTHER v ATTORNEY GENERAL [2005] 2 KLR 189**, this Court held, *inter alia*, that:

“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.”

56. All in all, based on the material that was placed before the trial court, we are satisfied that the appellant demonstrated that the learned Judge misdirected himself in arriving at the decision to issue the order of prohibition. Consequently, we are inclined to interfere with the exercise of his discretion and hereby allow this appeal and set aside the High Court judgment.

The 1st respondent shall bear the costs of the appeal as well as the costs of the High Court proceedings.

Dated and Delivered at Nairobi this 15th day of December, 2017.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR