IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A)

CIVIL APPEAL NOS. 1 & 2 OF 2013 (CONSOLIDATED)

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS………..1ST APPELLANT

KENYA ANTI-CORRUPTION COMMISSION...........2ND APPELLANT

AND

CROSSLEY HOLDINGS LIMITED………………..1ST RESPONDENT

MIWANI SUGAR CO. (1989) LIMITED…………2ND RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisumu,

(Abida Ali-Aroni, J.) dated 18th May, 2010 **In MISC. APPLICATION NO. 12 OF 2010)**

JUDGMENT OF THE COURT

1. On 22nd September 2010, Crossley Holdings Limited (the 1st respondent), its directors and other persons were arraigned in **Kisumu CM Cr. Case No. 429 of 2010**, inter alia, on charges of conspiracy to defraud contrary to **Section 317** of the Penal Code and fraudulent acquisition of public property contrary to **Section 45(1)(a)** as read with **Section 48** of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. Allegedly apprehensive that given the background of the case they were not going to be accorded a fair trial, on 29th September 2010 the 1st respondent filed a judicial review application before the High Court at Kisumu and sought orders of certiorari to quash the 1st appellant's decision contained in the letter dated 9th December 2010 and the 2nd appellant's recommendation to charge them published in the Kenya Gazette of 15th January 2010. The 1st respondent also sought an order of prohibition to prohibit their prosecution on the grounds, inter alia, that the decision to prosecute was ultra vires for being perverse, irrational and an abuse of the 2nd appellant's statutory powers; it was made in breach of the rules of natural justice and on the basis of a deliberately selective analysis of pertinent facts and the relevant law; and that the prosecution related to private and not public land.

2. After hearing that application, Abida Ali-Aroni, J. granted it on 18th May 2012 by quashing both the 2nd respondent's said recommendation published in the Kenya Gazette of 15th January 2010 and the 1st appellant's decision contained in the letter dated 9th December 2010 authorizing the

prosecution of the 1st respondent, its directors and others for the offence of conspiracy to defraud and fraudulent acquisition of public property (the prosecution) prohibiting the continuation of their prosecution. This appeal by the Director of Public Prosecutions (the DPP) and the Kenya Anti-Corruption Commission (now the Ethics and Anti-Corruption Commission) (the EACC) is against that decision.

3. The substratum of the appeals is that the learned Judge: overshot the purview of the judicial review jurisdiction and went into the merits of the intended prosecution case; erred in finding that the prosecution was not only irrational but also involved private property and was intended to confer collateral advantage to the 2nd respondent; erred in failing to appreciate that, prima facie, the 1st respondent, its directors and others had indeed committed the offences they were charged with; and in erroneously finding that the offences were committed about 14 years previously.

4. In their submissions, Mr. Bundotich, for the 2nd respondent, which supports these appeals, Miss Kamau, Senior Assistant DPP for the first appellant, and Mr. Murei for the 2nd appellant, cited to us this Court's decision in **Uwe Meixner & Another v. Attorney General [2005] eKLR** and submitted that the learned Judge erred in going into the merits of the intended prosecution case, which she at any rate misapprehended, and making findings that the alleged offences were committed against a private entity as the suit land was not public land but private property. Counsel further argued that even if the suit land was private property, fraud, as defined by **Section 2** of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003, (the Act), is corruption. Under **Section 7** of the Act, the Economic and Anti-Corruption Commission (EACC) is mandated to investigate economic crimes committed even against private entities. That notwithstanding, counsel further submitted, at the heart of the prosecution in this case is the charge of conspiracy to defraud contrary to **Section 317** of the Penal Code which need not be pegged on public property.

5. Counsel also faulted the learned Judge for finding that the appellants' decision to mount the prosecution was after a period of over 14 years and therefore irrational. They argued that contrary to that finding, the offences were not committed in 1993 when one Negandra Sexana filed **Kisumu HCCC No. 225 of 1993** against Miwani Sugar Mills Ltd. The offences were committed between 2007 and 2008 when, in collusion with others, the 1st respondent and its directors, committed the offences of conspiracy, fraud and forgery in the acquisition of the public land known as **LR No. 7545/3 (IR No. 21036)** (the suit land). Unlike in the Githunguri case, there was no lull in this case. Since the offences were reported to the appellants, they have relentlessly pursued the prosecution of the 1st respondent and its confederates.

6. In response, Senior Counsel Mr. Nowrojee, teaming up with Mr. Gichaba for the first respondent, submitted that judicial review orders are discretionary. Its is settled law that for an appellate court to upset the trial court's exercise of discretion, it must be shown that the trial judge misdirected himself in some matter and as a result arrived at a wrong decision or that it is manifest from the record that the trial judge was clearly wrong. Counsel cited to us Lord Diplock's decision in **O'Reilly v. Mackman, [1982] 3 All ER 1124 at 1129** and argued that in this case, the 2nd appellant exceeded its statutory mandate when it investigated, without any complaint from the judgment debtor or creditor in the said **Kisumu HCCC No. 225 of 1993**, the auction of private land in execution of the decree in that suit.

7. Counsel accused the 2nd appellant of failure to provide the Attorney General with all the expert opinions and instead filed a scandalous affidavit full of falsehoods and fiction intended to gain unfair advantage in civil proceedings and to provide *ex post facto* justification for the prosecution. They contended that the basis of the prosecution was the 2nd appellant's false information to the Attorney General that the suit land was public property valued at Kes.2 billion. Counsel argued that these are not facts within the prerogative of the trial court only. These are the facts on which the Attorney General based his consent to prosecute which the learned Judge was entitled to consider as basing a prosecution on wrong facts is a ground for the judicial review orders of certiorari and prohibition. In support of that argument, they cited to us Michael Fordham's

Judicial Review Handbook, 5th Edition, 2008 at p. 467-474. Counsel further argued that as is clear from the independent valuation obtained by the receivers the suit property was valued at about Kes.2billion. They accused the Attorney General of dereliction of duty by accepting the 2nd appellant's said falsehood without any scrutiny and mounting the prosecution on its basis and also a charge of conspiracy under the Penal Code which the 2nd appellant had not recommended. In the circumstances, these were clearly irrational and capricious acts of bad faith that the trial Judge had no option but to quash.

8. Counsel further argued that contrary to the natural law principle that no person should be a judge in his own cause, Mr. Kipngetich Bett, whose affidavit is the fulcrum of the prosecution case, sat in the Advisory Board of the 2nd appellant. Counsel said that is clear evidence of bias in the prosecution.

9. In reply, Miss Kamau argued that the basis of the Attorney General's consent to prosecute was not raised in the judicial review proceedings.

10. Having considered the judicial review proceedings giving rise to this appeal, the appellants' memoranda of appeal and the rival submissions by counsel for the parties, we find that two broad issues arise for our determination in this appeal. They are whether or not the appellants had any legal and factual basis for mounting the prosecution of the 1st respondent, its directors and others, and whether or not, in an effort to make that determination, the learned Judge went overboard and delved into the merits of the prosecution case.

11. Before we consider those bases, we would wish, at the outset, to reiterate that the trite law that judicial review is not an appellate jurisdiction. As this Court stated in **Uwe Meixner & Another v. Attorney General** (supra) "judicial review is concerned with the decision making process and not with the merits of the decision." We therefore agree with Mr. Nowrojee that the factual and legal bases of an impugned decision are relevant factors that fall within the judicial review jurisdiction.

12. Reverting to the two issues for our determination, the starting point is whether or not the appellants had any legal basis for the prosecution. As stated, the prosecution in this case was commenced on 22nd September 2010 after the promulgation of the current Constitution. The current Constitution therefore governs the case at hand. **Article 157(6)** & **(11)** of the Constitution authorizes the 1st appellant, guided by "public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process," to prosecute criminal offences in all courts except the court martial. In doing so, the 1st appellant does not require the consent nor is he under the direction or control of any person or authority. Under **Article 157(4)** of the Constitution, the 1st appellant has also authority to *suo moto* direct the police to carry out investigations upon which he can institute a prosecution. The 1st appellant did not therefore require any report from the 2nd appellant or the parties to HCCC No. 225 of 1993 to institute the prosecution in this case. Under these provisions, we find that the Attorney General (now the 1st appellant) had a legal basis to mount the prosecution in this case.

13. The second aspect of the first issue for our determination is whether or not the 1st appellant had a factual basis for the prosecution. If he did not he would of course be abusing his powers.

14. As pointed out, in the judicial review application, the 1st respondent challenged the 1st appellant's decision to consent to the prosecution on the ground that it was premised on false information that the 2nd respondent is a public entity and that it owned the suit land. Those, however, are not the only factual bases for the prosecution. The 1st respondent pegs its ownership of the suit land on the auction sale of the suit property to it in execution of the decree in HCCC No. 225 of 1993. The appellants contended before the learned Judge that the court proceedings in that suit including the

decree, the execution of which conferred the ownership of the suit land to the 1st respondent, were a grand conspiracy by the 1st respondent, its directors and others to defraud the public. That is the basis of the first count which alleges that between 21st May 2007 and 30th January 2008, the 1st respondent and others conspired to defraud Miwani Sugar Company (1989) Ltd [In Receivership] of its property known as L.R. No. 7545/3 measuring approximately 9,394 acres and valued at Kes.2.32 billion by fraudulently causing the said property to be transferred to Crossley Holdings Ltd. As stated above, the 1st appellant could, without any complaint being made by anyone, *suo moto* cause investigations to be carried into this allegation and institute criminal proceedings.

15. On the material placed before the learned Judge, the Deputy Registrar of the High Court had no jurisdiction to re-issue the summons to enter appearance about 14 years after the institution of HCCC No. 225 of 1993. It was also alleged in the application that the decree in that suit was a forgery; that there was no auction sale as there was no consideration paid; that consent to transfer the suit land to the 1st respondent was a forgery; and that the rates clearance certificate in respect of the suit land was fraudulently obtained on payment of only Kes.90,000/= against the outstanding bill of Kes.9,266,565.45.

16. It was also alleged in the application that the Government paid off the debts of Miwani Mills Ltd and incorporated the 2nd respondent to take over its assets. Long before the prosecution was commenced, the 2nd respondent and its receivers had attempted to set aside the auction sale. The 1st respondent had filed **Nairobi HCCC No. 459 of 2008** to evict the 2nd respondent from the suit property. So these parties did not spring up after the prosecution commenced. In our view, these allegations, on their own, formed a clear factual basis for the charge of fraudulent acquisition of public or private property.

17. We agree with counsel for the appellants that under **Section 7** of the Act, the 2nd appellant has authority to investigate allegations of commission of economic crimes committed against public or private bodies and even against any person in his individual capacity. In the circumstances, whether or not the suit land was public, the 2nd appellant had a legal basis to investigate the allegation of its fraudulent acquisition.

18. The allegation in this case was that the suit land was public property. Basing her finding on the title deed for the property, the learned Judge found that the suit land was private property. With respect to the learned judge, a title deed is not the sole proof of ownership of property. In resulting trusts, a registered proprietor would be a trustee or an owner as well as a trustee of a property. In any case it was not within the purview of the limited judicial review jurisdiction to delve into evidence to determine that allegation. That is for the court trying the criminal charge.

19. We do not need to go into the rest of the factual background of the ownership of the suit land lest we prejudice the criminal trial. We think we have said enough to demonstrate that the learned Judge had no basis for quashing the appellant's decision to prosecute and/or to prohibit the prosecution of the 1st respondent, its directors and others. In the circumstances, we allow this appeal and set aside the learned Judge's said decision with costs to the appellants and the 2nd respondent against the 1st respondent.

DATED and delivered at Kisumu this 21st day of April, 2016.

D.K. MARAGA

JUDGE OF APPEAL

D.K. MUSINGA

JUDGE OF APPEAL

A. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR