IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 201 OF 2014

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS ……...……APPELLANT

AND

JUSTUS MWENDWA KATHENGE……...…….1ST RESPONDENT

THE ATTORNEY GENERAL ……..…….……2ND RESPONDENT

THE CHIEF MAGISTRATE'S COURT ……...……..…..3RD RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Lenaola, J.) dated 21st March, 2014,

in

PETITION NO.372 of 2013)

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JUDGMENT OF THE COURT

A recent article in one of the daily newspapers in the country carried a headline that read **"COURT INJUNCTIONS SLOW PROGRESS OF MEGA PROJECTS"** and listed recent court orders ranging from stopping the transfer of police officers, construction of multimillion projects to prosecution of corruption and other high profile cases, to demonstrate how such orders are potential impediments to economic growth. The appeal before us does not *per se* relate to orders of injunction but the relevance of this will shortly become clear.

On 14th June, 2011 a six storey building under construction in Pipeline Estate, within Embakasi, Nairobi, collapsed causing the death of four casual workers while others suffered grievous injuries. It became apparent that the construction was being undertaken in violation of the law. Consequently, Bernard Gakobo Karungu who was the developer, Justus Mwendwa Kathenge, the 1strespondent, and three others were charged in the Magistrate's Court Criminal Case No. 2450 of 2013 with four counts of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code and four counts of negligent act causing harm contrary to **section 244** of the Penal Code.

The 1st respondent, who was, at the time material to the matters under consideration, the Enforcement Officer with the then Nairobi City Council (the Council), petitioned the High Court upon being arraigned in court, alleging that his rights and fundamental freedoms under the Constitution were being violated. He prayed for a declaration that he was not responsible for the alleged offence; that the decision of the Director of Public Prosecutions, the appellant (the D.P.P) to prefer charges against him were null and void, an order of prohibition against the appellant, the Attorney General and the trial court from presenting any charges relating to the alleged manslaughter and negligence before the court or requiring him to take plea or to stand trial. He further prayed, *inter alia* that the trial court be prohibited from receiving evidence and/or continuing with the trial in relation to the collapsed building.

The petition was premised on the fact that, pursuant to the powers vested in the Council by the Physical Planning Act, the 1st respondent inspected the building in question, among others in the area, and upon coming to the conclusion that it was erected illegally, without the requisite permission of the Council as required by **section 30(1)** of the Act, and because of the dangers it posed, he issued an enforcement notice requiring the developer to cease further construction and to remove the development within seven days, failing which the Council would demolish it. He further explained that upon issuing this notice, the developer and others moved to the High Court in Civil Case No.155 of 2009 and obtained *ex parte* orders against the 1st respondent, and others, restraining them from interfering with the construction of the building; that subsequently the officials of the Council were cited and committed to civil jail for a period of 21 days for being in contempt of court over the foregoing restraining orders, although the committal orders were stayed. While the restraining and committal orders were pending, the building collapsed with the said catastrophic and fatal consequences.

The investigating officer Cpl. Patrick Muraguri, swore an affidavit in opposition to the petition in which he blamed the 1st respondent for failing to coordinate the enforcement of the building by-laws through surveillance, issuance of the necessary enforcement notices, stoppage or demolition of the building and arrest of and preference of charges against the developer. The deponent emphasized that in matters of investigations and prosecution of criminal cases by dint of **Article 157** of the Constitution, the appellant exercises unfettered discretion, and does not require the consent or authority of anyone to commence criminal proceedings; that the appellant does not act under the direction or control of any person or authority.

Lenaola, J., as he then was, considered the petition and the response, from which he framed one broad question, whether the appellant acted within his constitutional mandate when he commenced the prosecution of the 1st respondent. In providing the answer to that question, the learned Judge made reference to the provisions of **Article 157** of the Constitution under which the office of the D.P.P is established and powers and tenure provided. In exercise of the State powers of prosecution, the appellant has the sole mandate and discretion to institute, undertake and terminate any criminal proceedings before any court. In carrying out these functions, the appellant does not require consent of any person or be under the direction or control of any person or authority. The learned Judge, however, noted that, in terms of **Article 157(11)** the courts can interfere with those powers if they are exercised without regard to the public interest, or against the interest of the administration of justice, or where the power is exercised in violation or abuse of the court process. The learned Judge relied on the following decisions ,**Githunguri** v **R**,(1986) KLR 1, **Gulam & Another** v **Chief Magistrate's Court & Another** Nairobi H.C. Misc. Application No. 367 of 2005, **Peter D'Costa** v **AG & Another**, H. C. Petition No. 83 of 2010 and **Michael Monari & Another** v **Commissioner of Police & 3 Others**, H. C. Misc. Application No. 68 of 2011, to emphasize the point that prosecutorial powers must not be oppressive, vexatious, frivolous, *malafides,* or used to abuse the court process or for improper purpose, for instance to harass a party or to secure private vengeance; that before the power is resorted to, there must be material evidence on which a probable conviction may be found; that a court of law is enjoined by the law to summarily prevent its process from being used as a means of oppressing and violating the rights and fundamental freedoms of citizens.

On the basis of these principles the learned Judge concluded that the interim order of injunction and the committal order for contempt of court had the effect of stalling the enforcement of the notice issued by

the Council under the Physical Planning Act which was intended to stop further construction and to force the developer to demolish or in default, the Council to demolish the offending buildings. In the learned Judge's view the particulars of some of the charges against the 1st respondent, were misplaced, ridiculous and demonstrated bad faith. For instance, although the 1st respondent's capacity was clear and obvious, he was accused of **"unlawfully constructing a building without meeting the required standard."**

According to the learned Judge the 1st respondent as a public officer, protected by Article 236 of the Constitution, had nothing to do with these particulars; and that the appellant was engaged in the abuse of the court process.

Accordingly, the court allowed the petition with no orders as to costs, declared the appellant's decision to charge the 1st respondent in Kibera Chief Magistrate's Criminal Case No. 2450 of 2013 to be unjust, null and void, stopped the Magistrate's court by an order prohibiting it from entertaining the criminal charges.

The appellant with a whopping 20 grounds of appeal has challenged before us that decision, arguing, *inter alia,* that it was in error for the learned Judge to interrogate the decision of the appellant to charge the 1st respondent; that there was no proof of violation of the 1st respondent's rights; that the learned Judge failed to appreciate that the jurisdiction of a court in a constitutional matter is limited to inquiry of violations of rights and fundamental freedoms; that the learned Judge went into the merits or demerits of the charges that were yet to be proved in a trial; and that the court granted prayers not sought.

These grounds were reiterated in oral arguments before us by Mr. Ashimosi, learned counsel for the appellant, who prayed that we allow the appeal with costs and set aside the impugned judgment of 21st March, 2014. Although the Attorney General was joined in the proceedings and was infact represented in this appeal by Miss. Wambui, he had no role whatsoever in the matters the subject of this appeal.

Opposing the appeal Mr. Omogeni, S.C condensed his submissions into two, whether the 1st respondent's enforcement notice was stopped by an injunction issued by a court of competent jurisdiction in H.C.C.C NO.155 of 2009 and whether by the provisions of **Article 236** of the Constitution the 1st respondent, a public officer could be victimized for performing, in accordance with the law, the functions of his office. Learned Senior Counsel argued that the 1st respondent, as a law abiding citizen could not go against the decision of a competent court, a fact that was reiterated by the advocates for the Council, Messrs Masire & Mogusu Advocates, in their letter to the Town Clerk warning that should the Council disregard the restraining order and proceed to execute the enforcement order it would be in contempt of court. Regarding **Article 236** it was contended that the 1st respondent as a public officer acting in good faith could not be accused and charged with a criminal offence for discharging his functions.

Learned Senior Counsel took issue with the manner the D.P.P. exercises the powers vested in that office by **Article 157(11)** of the Constitution; that it is erroneous for the office to purport to be gods unto themselves, with powers that they believe cannot be questioned or interrogated, even where they are blatantly abused. That abuse according to counsel was demonstrated by the strange charges preferred against the 1st respondent, namely, that he and others, **"unlawfully constructed a building without meeting the required standard…..,"** yet it was the 1st respondent who had issue the enforcement notice. The appellant's powers, which are described in **Article 157** as State powers of prosecution, include institution, undertaking, taking over, continuing and discontinuing all criminal prosecutions.

We have considered the grounds of appeal, the response and the authorities cited. We are required as the first appellate court by **rule 29** of the Court of Appeal Rules, to re-appraise the evidence and to draw inferences before coming to our own independent conclusion. See **Selle & Another** v **Associated Motor Boat Co. Ltd & Others** (1968) EA 123.

In the exercise of the enormous powers under **Article 157,** the Constitution commands that the D.P.P. shall be free from interference or direction of any person or authority, having regard only to;

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

This independence is similarly restated in **section 7** of the Office of the Director of Public Prosecutions Act, which adds that the D.P.P is only subject to the Constitution and the law. He is protected from personal liability if he acts in good faith in the execution of the functions, powers and duties of that office.

From the days of **Githunguri** (supra), the prosecutorial powers, then exercised by the Attorney General, was held to have limits; that it must never be abused, never exercised oppressively, maliciously or against the public interest. The Court in that decision emphasized that, where it was clear that the power to prosecute was being misused, the court, under its inherent jurisdiction would stop such prosecution as it would amount to an abuse of the process of the court. This holding has since been consistently followed. See also **Mohammed Gulam Hussein Fazal & another** v **The Chief Magistrate Court, Nairobi & another** H.C. Misc Application No 367 of 2005, and **Peter George Antony D'costa** v **A.G & Another**, Petition No. 83 of 2010.

As is always almost the norm whenever in this country we experience catastrophes, natural or man-made, floods, accidents, terror attacks, the relevant public offices are only fired into action by knee-jerk, and impulsive reaction. Actions in such circumstances are taken without regard to the process or ramifications, simply for scape-goating. This case is a good example.

Pursuant to the provisions of the Physical Planning Act and the Council's own by-laws, the 1st respondent on behalf of the Council, inspected the construction and noting, first, that it had not been licensed and seeing its condition, issued an enforcement notice for its demolition so as to avert a calamity. The developer was given seven days from 19th April, 2011, the date of the enforcement notice within which to demolish the building. Because the enforcement notice affected other buildings in the City of Nairobi, fifteen people, on behalf of over 100 developers, including the owner of the building in question instituted an action, as explained earlier, contending that they had invested heavily in putting up residential structures which were threatened with demolition by the council and 4 other persons. They sought that the Council and its officers be restrained from evicting them or demolishing their buildings.

The application was placed before **Dulu, J.,** who, due to its urgency certified it as such and went ahead to grant *ex parte* injunction pending the hearing of the application *inter partes*. From the record we cannot say when the *inter partes* hearing was held, but is not in dispute that when the Council insisted on proceeding with the execution of the enforcement notice, it was cited for contempt and on 25th November, 2010 **Sitati, J.,** in fact ordered for the arrest and committal to civil jail of the Clerk of the Council and four other officers. The orders were apparently stayed and to this day we cannot say whether or not H.C.C.C NO. 155 of 2009 was finally determined. All we know is that while the injunction was still in force the building collapsed.

Enforcement notices are issued under **section 38** of the Physical Planning Act, where developments are being carried out without permission. If within the period specified in the notice, any measures required to be taken have not been taken, the Council may take the action itself and the owner of the development condemned to reimburse any expense reasonably incurred.

The Council, following the law issued the requisite notice whose enforcement was frustrated by the court issuing an injunction. From **Hadkinson** v **Hadkinson** (1952) ALL ER 567 to several local decisions, there can be no debate that it is plain and unqualified obligation of everyone against, or in respect of whom an order has been made by a court of competent jurisdiction, to obey it unless and until it is discharged, as disobedience of an order will, as a general rule, attract contempt proceedings.

Traditionally the basis of application of the equitable remedy of injunction has been **section 63** of the Civil Procedure Act and **Order 40** (previously 39) of the Civil Procedure Rules. Today **Article 23** of the Constitution specifically identifies an order of injunction as one of the reliefs that a court can grant if it is satisfied that a person's right or fundamental freedom under the bill of rights has been denied, violated or infringed or is threatened. Needless to emphasize, the remedy of temporary injunction is a vital tool intended to preserve the property in a dispute until legal rights and conflicting claims are established, so as to prevent the ends of justice from being defeated. **Order 40** recognizes that a temporary injunction will be sought where a property in dispute is in danger of being wasted, damaged, or alienated, or wrongfully sold in execution of a decree, or where a party threatens or intends to remove or dispose of the property in order to defeat any execution that may ultimately be passed. An injunction may also be applied for to restrain a party from committing a breach of contract or other injury. It is equally settled that a temporary injunction cannot be claimed as a matter of right, neither can it be denied arbitrarily by the court.

Because of its importance and susceptibility to abuse certain guidelines have been developed while considering an application for temporary injunction. The three well- known tests enunciated in **Giella** v **Cassman Brown** (1973) EA 358 are to the effect that a party seeking a temporary injunction has to establish a *prima facie* case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.

In 2010 the Rules Committee being conscious of the susceptibility to abuse of the remedy of temporary injunction introduced in the Civil Procedure Rules certain strictures in **Order 40 rule 4**, intended to obviate those abuses. The first condition is that where the court is satisfied that the object of granting the injunction would be defeated by the delay, it may hear the application *ex parte.* Secondly, an *ex parte* injunction may be granted only once for not more than 14 days, which in turn cannot be extended thereafter, except once by consent of the parties or by order of the court for a period not in excess of 14 days. Thirdly, where an *ex parte* injunction has been granted, the application, pleading and the order must be served on the other side within 3 days of the date of issue of the *ex parte* order and in default, the injunction would automatically lapse. The fourth condition is that, all applications for injunction must be heard expeditiously and in any event within 60 days from the date of filing unless for good reason time is extended by the court. The next requirement is that after *inter partes* hearing the ruling has to be delivered either at once or within 30 days of the conclusion of the hearing. Finally, where a suit in respect of which an interlocutory injunction has been granted is not determined within 12 months from the date of the grant, the injunction is to lapse unless for some sufficient reason.

We have gone into these details to remind the superior courts below and the other trial courts of the importance of adhering to these strictures, which are rarely complied with, with the result that, like in the matter under consideration, a suit filed in 2009 specifically for injunction was still pending determination in 2011 when the tragic accident occurred. It is not for nothing that the rules and general principles governing the grant of interlocutory injunction have been scrupulously developed. It is, for instance, critical for courts to remember the sequence of consideration of the **Giella** (supra) principles, that even where *prima facie* case is established, an injunction will not be granted if the injury or damage to be suffered is not irreparable or is capable of compensation. The timelines for each stage need to be complied with. The deaths of innocent Kenyans could have been averted if the guidelines in **Giella** (supra) and the principles in order 40 were followed. We do not therefore hesitate here to declare that people lost lives and others suffered grave injuries as a direct consequence of the court order.

With respect, we are in agreement with the learned Judge that it was an abuse of prosecutorial powers for the appellant to have charged the 1st respondent. His prosecution was clearly in violation of **Article 157 (11).**

The duty to enforce building regulations was, at the time vested in Council, whose chief officer was the Clerk.

In any event it was demonstrated that it was the Council that had taken lawful steps of averting a calamity when it was stopped by an injunction and its chief officers threatened with civil jail.

For these reasons we find no substance in this appeal. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 25th day of November 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

……...…..……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR