



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1 of 2012

**PARBAT SIYANI CONSTRUCTION LTD & PARBAT SIYANI & 2
OTHERS.....APPLICANTS**

VERSUS

DIRECTOR OF PUBLIC PROSECUTION1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

SAMSON WANJALA MATETE.....1ST INTERESTED PARTY

GEOFFREY ONGESA MANONO.....2ND INTERESTED PARTY

JUDGMENT

The applicants are Parbat Siyani Construction Limited, Parbat Siyani, Mukesh Halai and Nitin Dabasia Valji. The Respondents are the Director of Public Prosecutions and the Attorney General. The Interested Parties are Samson Wanjala Matete and Geoffrey Ongesa Manono.

The Claimants filed a chamber summons on 30th August, 2012 seeking leave to file an application for Judicial Review orders. The leave was granted by the court and the applicants filed the Notice of Motion on 7th September, 2012 through Kelvin Mogeni Advocates. The application was served upon all the parties and it came up for hearing on 5th November 2012. The respondents and the interested parties did not file any opposing affidavits and did not attend the hearing despite having been served to attend.

The applicants have prayed for reliefs thus:

1. an order of PROHIBITION do issue to prohibit the Respondents from acting on in any manner dealing with the demand notices dated 22nd August, 2012 to prosecute or authorize a private prosecution of the applicants either themselves or through the intended Interested Parties.
2. An order of PROHIBITION to prohibit the Respondents and the Interested Parties from prosecuting the applicants on the allegations under the Employment Act unless and until the matter is investigated by the Commissioner of Labour and or the District Labour Office as required under the said Act and statues.
3. Costs and incidentals of the application be provided for.

4. Such further and other reliefs that the Honourable court may deem just and expedient to grant.

The application was based on the statement of facts and the verifying affidavit of Mukesh Halai sworn on 30th August, 2012 and the annexures thereto.

The facts of the case are as follows. The first applicant Parbat Siyani Construction Limited is engaged in the construction business and has its offices in Westlands and a yard at Mlolongo in Nairobi. The company employs staff including casual, permanent and seasonal workers depending on the nature of the work. On 19th August, 2012 the security agents of the company arrested one Geoffrey Ongesa Manono, the 2nd Interested Party. Instead of preferring criminal prosecution, the company decided to summarily dismiss the 2nd Interested Party. The ground for the summary dismissal was gross misconduct being theft of the company's electricity socket. As per annexure 1 on the replying affidavit, the 2nd Interested Party endorsed his hand to confirm the misconduct and undertook that he would not demand anything from the company in terms of salary and benefits.

Following the summary dismissal, the 2nd Interested Party engaged the 1st Interested Party through Janja Investigations who wrote to the Director of Public Prosecutions citing an alleged violation of provisions of Section 29 – 34 of the Employment Act, 2007 and intention to initiate private prosecutions. The letter being annexure 3 on the verifying affidavit was dated 22nd August, 2012 and was addressed to the Director of Public Prosecution as follows:

“Dear Sir

RE: VIOLATION OF PROVISIONS OF EMPLOYMENT ACT – 2007 SECTION 29, 30, 31, AND 34 BY

1. NITIN DABASIA VALJI

2. PARBAT SIYAN

3. MUGESH

4. PARBAT SIYAN CONSTRUCTION LTD

FOR

FAILING TO PROVIDE HOUSE ALLOWANCE TOWARDS GEOFFREY ONGESA MANANO PLUS 10 OTHERS

In accordance to Section 88 of the Criminal Procedure Act Cap 75 of the Laws of Kenya, we have instructions from the above Geoffrey Ongesa Manono plus others to start to institute the private Quasi Criminal Prosecution charges against the said Nitin Dabasia Valji plus three others for having failed to comply with employment act and turn against the Kenya Laws, by deliberately failing to provide house allowances contrary to the above section.

Notice for intend to sue had earliest been issued upon them requesting them to comply and pay house allowance but the contrary have defied our request.

Therefore since the draft private sheet are ready we wish to seek your consent to start filing quasi-criminal prosecution charge sheet before the Chief Magistrate Court at Makadara Law Courts to enable Court issue summons/warrants to compel their arrest and stand the preferred charges.

After expiring of seven (7) days we shall assume the consent is granted and we shall immediately proceed to file the same.

*Yours faithfully,
Samson Wanjala Matete*

Chief Investigator/Intended Private Prosecutor

SIGNED

Geoffrey Ong'esa Manono

Co-Intended Private Prosecutor

Cc: 1. HON. ATTORNEY GENERAL

NAIROBI

2. HON. CHIEF JUSTICE

WILLY MUTUNGA

THE PRESIDENT OF THE SUPREME COURT

NAIROBI

3. THE COMMISSIONER OF POLICE

NAIROBI

On 24th August, 2012 the Advocates for the applicants wrote the letter being annexure 4 on the verifying affidavit informing the Interested Parties that the matter was not criminal and that under the Employment Act the Industrial Court had jurisdiction in view of the provisions of Articles 162 (2) and 165 (5) (b) of the Constitution. That the interested parties had failed to invoke the jurisdiction of the relevant labour institutions including the Labour Officer and the Minister for Labour as prescribed in law.

It was submitted for the applicants that the 1st interested party acted ultra vires the Employment Act and the matter was not a criminal case to be prosecuted as intended. Further that under Section 35 (1) of the Labour Institutions Act 2007 the labour officer is the one who is vested with the power to investigate alleged crime in the employment relationships and to institute proceedings in respect of any contravention of the law or offences committed by an employer. Further, it was submitted that under Section 87 of the Employment Act, it was the Industrial Court that exercises jurisdiction in employment disputes so that it was an abuse of the due process of justice for the interested parties to invoke criminal jurisdiction of the Magistrate's Court.

The court agrees with the submissions made for the applicants. The court finds that it would be an abuse of the due process of justice if clear employment disputes within the court's jurisdiction were to be subjected to criminal proceedings by way of private prosecution founded on a constructive consent of the Director of Public Prosecutions as is the circumstance in the instant case. The statutory provisions have elaborate dispute resolution institutional framework and parties to the employment contract should not circumvent these provisions in unjustified manner.

The court has considered the reliefs prayed for. The applicants are seeking judicial review orders of prohibition against the respondents who are public officers holding state offices and also against the Interested Parties who are private individual citizens.

Judicial Review orders were issued against public bodies or authorities and Counsel for the applicants did not argue justification for shifting from that position that has, before the current Constitutional dispensation under the Constitution of Kenya 2010, been well settled. The court has on its own considered that point.

Article 22 (1) of the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed,

or is threatened. The proceedings are to be commenced and continued in accordance with the rules made by the Chief Justice under Article 22 (3) of the Constitution. In considering such proceedings, Article 23(3) provides that a court may grant appropriate relief including-

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.

The court finds that in cases of enforcement of fundamental human rights, the barriers between judicial review proceedings and other proceedings has been broken. In view of the cited Constitutional provisions, a litigant whose rights and freedoms have been infringed need not file separate proceedings for judicial review order and for other remedies.

Nevertheless, the main simmering issue is whether judicial review remedies would be available against litigants other than public or government bodies or authorities. That issue may come to boil in an appropriate case when the court shall decide one way or the other. In the instant case, the court has considered the pleadings, evidence and the submissions and enters judgment for the applicants against the respondents for orders of-

- (a) Prohibition to issue to prohibit the Respondents from acting or in any manner dealing with the demand notices dated 22nd August 2012, to prosecute or authorize a private prosecution of the Applicants either themselves or through consent for interested parties to prosecute;
- (b) Prohibition to prohibit the Respondents from granting consent to interested parties prosecuting the applicants on allegations under the Employment Act unless and until the matter is investigated by the Commissioner of Labour or the District Labour Officer; and
- (c) The respondents to pay the applicants costs of the application.

Signed, dated and delivered in court at Nairobi this 16th day of November, 2012.

BYRAM ONGAYA

JUDGE