



Compact Freight Systems Limited v Oasis Multiserve Company Limited & 6 others (Criminal Revision E943 of 2023) [2024] KEHC 13160 (KLR) (Crim) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E943 OF 2023
AM MUTETI, J
OCTOBER 31, 2024**

BETWEEN

COMPACT FREIGHT SYSTEMS LIMITED APPLICANT

AND

OASIS MULTISERVE COMPANY LIMITED 1ST RESPONDENT

MULTISERVE OASIS COMPANY LIMITED 2ND RESPONDENT

BASHIR MOHAMMED NUR 3RD RESPONDENT

AHMED MAALIM OSMAN 4TH RESPONDENT

DAHIR FARAH MOHAMMED 5TH RESPONDENT

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ... 6TH
RESPONDENT**

HON ATTORNEY GENERAL 7TH RESPONDENT

RULING

Introduction

1. The applicant by way of a notice of motion dated 23rd December 2023 has moved to this court under the provisions on Section 362 and 364 of the Criminal Procedure Code Cap 75 of the laws of Kenya as read together with Article 165 (6) and (7) of *the Constitution* of Kenya and all other enabling provisions of the law.
2. The applicant is aggrieved by a ruling delivered by the learned Honorable Martha A Nanzushi Senior Principal Magistrate delivered on 13th December 2023 in which the learned Honorable magistrate



declined to grant the applicant's application dated 16th October 2023 seeking leave to initiate private prosecution against the respondents.

3. The applicant now seeks to have this court revise the ruling of the learned Honorable magistrate and grant him leave to initiate private prosecution against the five respondents.
4. According to the applicant the five respondents ought to have been charged with the offence of forgery contrary to Section 345 as read with Section 352 (a) of the Penal Code Cap 63 of the Laws of Kenya.
5. The applicant has on the face of the motion set out the following grounds in support of the prayers he seeks:-
 - i. That the Ruling of the Hon. Learned Magistrate dated 13th December, 2023 is a grave misapplication and misapprehension of the law and deviates from the established law and is contrary to the doctrine of stare decisis.
 - ii. That the Hon. Learned Magistrate erred in both law and fact in stating that she had no territorial jurisdiction in a matter in which the Respondents are resident in Nairobi and there is as yet no determination on the place in which the forgeries complained of were carried out.
 - iii. That the Hon. Learned Magistrate gravely abdicated her role, duty and responsibility by failing to examine, prima facie, the evidence presented by the Applicant against the 5 named Respondents, and instead determining the Application based purely on alleged and misconceived questions of law.
 - iv. That the Hon. Learned Magistrate disregarded both the law and *the Constitution*, and specifically Article 159 of *the Constitution* of Kenya, by not delving into the merits of the case before her and instead basing her Decision on supposed legal technicalities.
 - v. That the Hon. Learned Magistrate grossly misdirected herself by proceeding to make a Decision without according the parties the opportunity to argue the application before her, whether orally or by way of written submissions.
 - vi. That notwithstanding the Applicant's writing to the Hon. Magistrate on 6th December, 2023, before delivery of her Ruling, and pointing out her error/ oversight in omitting the crucial step of legal submissions by counsels, the Hon. Magistrate disregarded the said concerns and proceeded to deliver her Ruling.
 - vii. That the Hon. Learned Magistrate did not give any reasons for skipping the crucial steps in the hearing of the writ of motion and the disregard of both the law and procedure renders her Decision irregular, improper, unjust and unfair and contrary to the law.
 - viii. That the deliberate failure by the Office of the Director of Public Prosecutions to serve its filed Response(s) to the Applicant, or in any other manner bring these to the notice/ attention of the Applicant was a mischievous and grave disregard of the law and a deprivation of the Applicant's right to a rejoinder/ response.
 - ix. That in totality, the Hon. Learned Magistrate conducted the proceedings in a manner alien to both law and procedure, rendering the entire process a farce.
 - x. That this Hon. Court has the power to correct this injustice by examining and revising the offensive Decision and setting this matter towards a meritorious adjudication on the matters complained of, particularly a determination on:
 - a. whether or not the documents complained about were forgeries;



- b. whether or not uttering the said documents in a Court of law was tantamount to perjury;
 - c. what sanctions/ remedies should the Court prescribe to safeguard itself from such brazen effrontery and arrogant disrespect of the law;
 - d. whether or not a crime or crimes were committed by the 5 named Respondents and what ought to be the consequential outcome of their actions; and
 - e. whether or not it is proper for miscreants to benefit from crime.
- xi. THAT no party should under any circumstances, be permitted to benefit from its crime.
 - xii. That the deliberate failure to prosecute the suspects is a vote for crime and is contrary to the principles of justice and fair-play.
 - xiii. That the failure to make a determination thus far on whether or not there was an offence or offences committed by the 5 Respondents was a failure of the legal system and a negation of one of the very crucial qualities/aspects of a functioning and efficacious legal system, to wit: there is no question that shall come before the law to which the law has no answer.
 - xiv. That denying the Applicant the opportunity to ventilate its case to its logical conclusion is a deprivation and negation of its constitutional rights as spelt out in Chapter 4 of *the Constitution* of Kenya and the numerous international Charters on human rights that Kenya is a signatory to.
 - xv. That under Article 21 of *the Constitution* of Kenya, it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
 - xvi. That the High Court sitting in Mombasa in HCCC No. 252/2010: Oasis Multiserve Company Limited V Kenya Ports Authority & Compact Freight Systems Limited had issued Conservatory Orders staying the execution of the discredited Decree pending the outcome of the criminal process against the 5 Respondents.
 - xvii. That there is now, therefore, a real danger that the 5 Respondents will seek to take advantage of the flawed Decision to seek the vacation of the existing Conservatory Orders.
 - xviii. That for the ends of justice, it is imperative that the file MCMISC No. 3508 of 2023: Compact Freight Systems Limited v Oasis Multiserve Company Limited & 6 Others be called to the High Court for examination and revision before it is misused in perpetrating a crime.

Analysis and Determination

Applicants Case

- 6. The grounds basically summarize the case of the applicant against the decision of the learned Honorable magistrate and this court shall look at each of those grounds against the replying affidavit filed by Bahir Mohammed Nur sworn on 18th January 2024 in response to the application for revision.
- 7. By way of written submissions dated 12th October 2024 the applicant has urged this court to find that the ruling by the learned Honorable magistrate declining to grant leave to institute private prosecutions is incorrect, irregular and illegal thus necessitating the intervention by this court in the applicants view the learned Honorable magistrate that she had no jurisdiction to hear the application erred in law by



proceeding to hear the application on merit and make substantive findings thereby occasioning a failure of justice.

8. Further, the applicant submitted that the learned Honorable magistrate abdicated her role, duty and responsibility by failing to examine the evidence presented by the applicant against the 1st, 2nd, 3rd, 4th & 5th respondent.
9. The applicant has also taken issue with the fact that the learned Honorable magistrate did not invite submissions by counsel before proceeding to consider the application and render a ruling thus her decision was not arrived at in a regular and procedural manner.
10. According to the applicant the material presented before the learned Honorable magistrate was sufficient to meet the two cardinal test applicable in determining whether or not to initiate a prosecution.
11. It is the applicants position that the evidence disclosed a prosecutable case with a realistic prospect of conviction thus the failure by the office of the ODPP to initiate prosecution was deliberate, mischievous and a grave disregard of the law. As a result, the applicant maintains that allowing the first to the fifth respondents to escape prosecution that would be tantamount to allowing miscreants to benefit from the commission of a crime.
12. The applicant has placed reliance on Articles 21, 50 and 159 of *the Constitution* to advance the argument that by failing to hear the parties the learned Honorable magistrate failed in her duty to ensure the observance, respect, protection and promotion of fundamental rights and freedoms under the Bill of Rights.
13. It is further argued that the learned Honorable Magistrate the applicant a fair hearing and in arriving at her decision hid behind procedural technicalities against the express provisions of Article 50 and 159 of *the Constitution*.
14. The applicant further argues that the order for filing of written submissions in the Lower court was as a result of frustrations by the Lower court.
15. In support of their argument in connection with the learned Honorable magistrate failure to invite parties to argue the matter before her, the applicant placed reliance on the case of Republic Vs Public Procurement Administrative Review Board & Another (Interested Party Optic Technologies Kenya Ltd.) Ex-Parte County Assembly of Busia [2017] eKLR ,Justice R.E Aburili pronounced herself as follows:

“Justice looks at both ways , as the rules of procedure are meant to regulate administration of justice and are meant not to assist the indolent”.

16. The applicant further submitted that the lower court failed to undertake a thorough of the material presented in support of the application for leave thus the decision by the court was not correct to the extent that the learned Honourable magistrate failed to find that the 6th respondent’s decision not to charge the 1st to the 5th respondents could not be sustained in law considering that the material disclosed sufficient evidence of forgery, fraud and falsification of documents.
17. According to the applicant, the threshold for the grant of leave to initiate private prosecution was met and therefore the court ought to have allowed the application.
18. The applicant further argued that private prosecutions are a correctible response to the reluctance or failure by the DPP to initiate prosecution and are founded on *the Constitution* thus a court should



not whimsically deny a party the right to initiate private prosecution. In support of that argument the applicant cited the case of *Albert Gacheru Kiarie t/a Wamaitu Productions v. James Maina Munene & 6 Others (Petition No. 426 of 2009)* [2016] eKLR by Hon. I. Lenaola, J (as he then was).

19. The significance and the principles governing private prosecutions in Kenya have been restated in myriad judicial authorities. The High Court of Kenya at Nairobi (Hon A. H. Simpson and S. K. Sachdeva, JJ) in *Kimani v. Kahara* [1983] eKLR (being a Appeal from the Chief Magistrate's Court at Nairobi, A Rauf Esq., in Private Prosecution Case No. 7 of 1982) restated the importance of private prosecutions a in *Gouriet v. Union of Post Office Workers* [1973] All ER, 94 (hereinafter, the *Gouriet* case).
20. In the case, Lord Diplock stressed the need for private prosecution despite its waning use as follows:

It is a right which nowadays seldom needs to be exercised by an ordinary member of the public, for since the formation of regular police forces charged with the duty in public law to prevent and detect crime and bring criminals to justice and the creation of the office of Director of Public Prosecutions, the need for prosecutions undertaken (and paid for) by private individuals has largely disappeared; but it still exists and is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law...
21. Lord Wilberforce was even more succinct in his restatement of the importance of private prosecutions in the same decision, when he opined:

“The individual, in such situations [corruption, bias, neglect, failure, political interference, refusal to prosecute etc.] who wishes to see the law enforced has a remedy of his own;” he said, “he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi) remains a valuable constitutional safeguard against inertia or partiality on the part of authority.”
22. On the strength of those submissions, the applicant has urged this court to find that he had established that he made a complaint to the police, the matter was fully investigated, sufficient evidence was gathered to establish a prosecutable case and that the Director of Public Prosecutions failed without any reasonable cause to initiate Criminal Proceedings against the 1st, 2nd, 3rd, 4th and 5th respondents. In the circumstances the applicant was compelled to seek leave to commence private prosecution.
23. The applicant therefore seeks to have this court set aside the entire ruling and substitute therefore with an order granting leave to commence private prosecution.
24. The 1st to 5th Respondents through the affidavit in reply maintain that the ruling by the learned Honorable magistrate is legally sound and should not be interfered with by this court for the following reasons:-
 - a. That the disposal of the application by way of written submissions was a matter agreed upon by counsel for both parties therefore the learned Honorable magistrate did not proceed to determine the matter without hearing the parties as alleged by the applicant.
 - b. That the allegations of fraud and forgery are absolutely false and that these allegations only came up after Eleven (11) years after the suit was first filed at the High Court.



- c. That the applicant's application is vexatious, scandalous and an attempt to defeat and delay the lawful judgements of the High Court and the Court of Appeal.
- d. The Honorable Magistrate exercised her duty of discretion judiciously by declining to grant leave to the applicant for commencement of the private prosecution against the 1st to the 5th respondents.
- e. The Honorable magistrate took into consideration the relevant law and documentary evidence on record while arriving at her decision.
- f. The Honorable magistrate had satisfied herself that there was no sufficient reasons for them to be prosecuted because the Director of Public Prosecutions had not willfully declined to prosecute.
- g. The learned Honorable magistrate had satisfied herself that there were no sufficient grounds to warrant the private prosecution and that there was no evidence to show that the Director of Public Prosecutions was unwilling to take it upon himself as his mandate under *the Constitution* and the Criminal Procedure Code to prosecute.
- h. That there was no miscarriage of justice occasioned by the Learned Honorable Magistrate in declining the applicant's application.
- i. That the applicant's application is vexatious, brought in bad faith and an abuse of the court process as the applicant had not demonstrated how the complaint met the evidential test against the 1st, 2nd, 3rd, 4th and 5th respondents to enable the 6th respondent make a decision to charge.
- j. That no evidence was laid by the applicant before the learned magistrate to show any willful refusal by the 6th Respondent to prosecute to warrant the magistrate to grant leave.
- k. The application made by the applicant is misconceived, incompetent and an abuse of the process of court since a thorough investigation was carried by the Port Police in Mombasa, which found that there was no credible evidence to prefer charges against the respondents.
- l. That the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused which the applicant herein is attempting to do.
- m. Under Article 157 (10) of *the Constitution*, the 6th respondent does not require the consent of any person or authority for the commencement of Criminal Proceedings and in the exercise of its powers or functions, cannot under the direction or control of any person or authority and that the court has no jurisdiction to determine whether or not any criminal offence was committed based on the applicant's complaint and the pleadings filed in High Court Civil Case No. 252 of 2010 at Mombasa.
- n. A Private Prosecution can only be given legitimacy and allowed by the court to be instituted if it serves as a remedy against a culpable inertia and partiality on the part of the public prosecuting authority.
- o. The applicant did not establish that the Police or the Director of Public Prosecutions acted capriciously or unreasonably in dealing with the Criminal Complaint by the applicant.
- p. The applicant pursuant to an application for review made to the Court of Appeal applied to review the Court of Appeal judgment. However, the applicant's application was heard and on 6th December, 2023 was dismissed with costs.



- q. The respondents urge this court to find that the private prosecution sought to be commenced by the applicant is aimed at achieving a collateral purpose.

Respondents' Case

25. The 1st, 2nd, 3rd, 4th and 5th respondents filed submissions dated 15th October 2024. The five respondents have distilled two issues for determination that is:-
- a) Whether the Applicant's Application has merit?
 - b) Whether the Applicant has met the threshold for Revision of the Learned Magistrates' Ruling to reject the Grant of leave to institute Private Prosecution?
26. On the two issues the respondents submitted that :
- i. By a letter dated 5th November, 2021 the Office of the Directorate of Criminal Investigation after they had carried out their investigations and taken the file to the 6th Respondent for directions, the 6th Respondent vide a letter dated 1st November, 2023 recommended that the Inquiry file to be closed with no further action.
 - ii. that investigations having been carried out, the matter was closed by both the Directorate of Criminal Investigations and the 6th Respondent herein.
 - iii. that neither the Compact Freight System Limited nor Kenya Ports Authority pleaded before the High Court of any allegation of forgery of any documents against the 1st-5th Respondents. Further, no witness from either the Compact Freight System Limited or Kenya Ports Authority raised any allegations of forgery against 1st -5th Respondents.
 - iv. that as far as the 2nd Respondent is concerned, the Applicant, Compact Freight System Limited did not plead before the high Court of any allegation of forgery of any documents. Further, no witness from the Compact Freight System Limited raised any allegations of fraudulent documents against the 2nd Respondent and the allegation that the 1st Respondent recently discovered the same is absolutely false and an afterthought.
 - v. that it is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused which the Applicant herein is attempting to do as the present Applicant's Notice of Motion dated 16th October, 2023 is an abuse of the process of the Court and is an afterthought.
 - vi. that the Respondents denied vehemently that it has been duly favoured by the Respondents as alleged or at all and in any event, it is clearly demonstrated by the Petitioner's attempt to defeat and scandalise the Judgement of the High Court in unfounded allegation that the we used fraudulent documents after Eleven (11) years since the Civil Case Number 252 of 2010 was filed.
 - vii. that the Applicant had never pleaded or raised any allegations of forgery and/or fraud in its pleadings before the trial Court.
 - viii. that the Respondents are of the considered view that no criminal investigation or criminal case was pending as claimed by the Applicant and in any event the allegations are an afterthought and merely intended to obstruct and defeat the Judgment of the trial Court.
 - ix. that the Respondents are concerned, that they were not found to have committed any forgery or fraud as alleged at all and the fact that the Applicant complained of the alleged forgery after



12 years after the judgment was delivered on 28th February, 2020 is manifestly not a bonafide claim.

- x. that the 1st to 5th Respondents did not rely on any forged document at the Trial Court and the Applicant's allegation is absolutely false and afterthought and further all the documents relied upon by us were within our possession since July, 2009 when the suit was filed at the High Court.
- xi. that the documents the Applicant purports to rely on was made on 29th June, 2021, which was Sixteen (16) months after the Judgement had been delivered and Twelve (12) years after the suit was filed at the High Court. That cannot be said to be evidence that could not have been obtained at the time of hearing at the Trial Court.
- xii. that the Court must have its sight firmly fixed on upholding the overriding objectives of the Rules of Procedure to do justice in accordance with the law and to prevent abuse of the process of the Court.
- xiii. that under Article 157 (10) of *the Constitution*, the 6th Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of its powers or functions, cannot be under the direction or control of any person or authority and that the High Court has no jurisdiction to determine whether or not any criminal offence was committed based on the Petitioner's complaint and the pleadings filed in High Court Civil Case No. 252 of 2010 at Mombasa. No evidence has been tendered to show that the 1st Respondent abused its discretion or powers under *the Constitution*.
- xiv. that the duty of the 1st Respondent is to seek justice not merely to convict or parade people in court without sufficient evidence and no material evidence has been placed to conclude that the 1st Respondent did not exercise its discretion in accordance with the law and no abuse of discretion has been established by the Applicant in the Application.
- xv. that it is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused which the Applicant herein is attempting to do so through its Application.
- xvi. that under Article 157 (11) of *the Constitution* provides that in exercising the powers conferred by this Article, the Director of Public Prosecution shall have regard to the public interest, the interests of Administration of Justice and the need to prevent and avoid abuse of the legal process.
- xvii. that there is no legitimate expectation that once complaints are investigated, they must lead to prosecution.
- xviii. that the Applicant has failed to discharge its burden of proof to show that the 6th Respondent abdicated its duty or that the decision not to charge was tainted with malice and ill will.
- xix. that the Applicant has failed to meet the threshold necessary for the grant of leave to institute private prosecution.
- xx. that the Applicant's Application is not only an abuse of the Court process but is simply contrary to Public Policy and *the Constitution* of Kenya
- xxi. The Honourable magistrate had satisfied herself that there were no sufficient reasons for the 1st to 5th Respondents to be prosecuted because the Director of Public Prosecutions had not



wilfully declined to prosecute but arrived at the decision based on the evidence presented to him.

- xxii. that for leave to commence private prosecution, the Learned Magistrate had satisfied herself that there were no sufficient grounds to warrant the private prosecution and that there was no evidence to show that the Director of Public Prosecution (DPP) was unwilling to take it upon himself as his mandate under *the Constitution* and the Criminal Procedure Code to prosecute.
- xxiii. There was also no miscarriage of justice occasioned by the Learned Magistrate in declining the applicant's application.
- xxiv. The Applicant was the 2nd defendant in the High Court Civil Case No.252 of 2010 at Mombasa and the Appellant in Civil Appeal No.E001 of 2021 and that having lost in the civil case and the court of Appeal the Applicant is now attempting to use the criminal proceedings to defeat the same.
- xxv. that the Applicant's Application is brought in bad faith and is an abuse of the court process as the Applicant had not demonstrated how the complaint met the evidential test against the 1st, 2nd, 3rd, 4th and 5th Respondents to enable the 6th Respondent make a decision to charge.
- xxvi. There is no legitimate expectation that all complaints once investigated must lead to prosecution since the decision to commence criminal proceedings does not lie with the complainant but is exercised by the Director of Public Prosecutions (DPP) according to the well laid down guidelines and the Law.
- xxvii. The Applicant has failed to discharge its burden of proof to show that the 6th Respondent abdicated its duty or that the decision not to charge was tainted with malice and/or ill will.
- xxviii. Under Article 157 (10) of *the Constitution*, the 6th Respondent does not require the consent of any person or authority for the commencement of Criminal Proceedings and in the exercise of its powers or functions, cannot be under the direction or control of any person or authority.
- xxix. Article 157 (11) of *the Constitution* provides that in exercising the powers conferred by Article 157, the Director of Public Prosecutions shall have regard to the public interest, the interests of Administration of Justice and the need to prevent and avoid abuse of the legal process.
- xxx. that conditions were set out in the case of Floriculture International Limited & Others -vs- The Attorney General Nairobi High Court Miscellaneous Civil Application No.114 of 1997 in which the court held that for a person to be granted leave to institute a Private Prosecution, he must establish that he had made a Complaint to the Police and had been accorded reasonable opportunity for the Police to investigate the case; that the Director of Public Prosecutions seized of the case had declined to institute or conduct Criminal Proceedings.
- xxxi. That a Private Prosecution can only be given legitimacy and allowed by the court to be instituted if it serves as a remedy against a culpable inertia or partiality on the part of the public prosecuting authority. The court will require that the private proceedings are necessary because the ODPP or the Police failed to act on the Complaint, and that they have declined to act or refused to take action, for culpable reasons, which is totally not the case in this matter.
- xxxii. The respondents in support of their case cited the case of Republic Vs Chief Magistrates Court At Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703 the Court stated that:-

It is not the purpose of a Criminal Investigation or a Criminal Charge or Prosecution to help individuals in the advancement of frustrations of their Civil Cases.



It is an abuse of the process of the Court. No matter how serious the Criminal Charges may be, they should not be allowed to stand if their predominant purposes is to further some other ulterior purpose.

The sole purpose of Criminal Proceedings is not for the advancement and championing of a Civil Cause of parties in a Civil Dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a Civil Case, the Court must put a halt to the Criminal Process.

No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use Criminal Proceedings to interfere with a fair civil trial.

If the object of the applicant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and that in this matter, the Applicant is more actuated by a desire to punish the 2nd Respondent or to oppress it into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public of a crime committed. The predominant purpose is to further that ulterior motive.

27. The respondents have also relied on the case of Benson Ndikwae Opwora & 2 Others V Director of Public Prosecutions; David Waula Kirimojo (interested Party) [2021] eKLR in which the Court held that with the promulgation of the 2010 Constitution, 2 other conditions must be met by the applicant as held by Kimaru J. in Victor Sambu & 5 Others Vs JSN (2020) eKLR.

Firstly, such Applicant must establish that, apart from pursuing investigation of the complaint by the Police, he has also sought the intervention of the Office of the Director of Public Prosecution and failed to obtain satisfactory resolution of his complaint, because, since the promulgation of *the Constitution*, it is only the Director of Public Prosecution who can give consent for charges to be laid in court against the accused. The Applicant will not have met the threshold if he only attempts to establish inertia or frustration to the resolution of his complaint by the Police alone. He must also establish that he sought the intervention of the Director of Public Prosecutions and got an unsatisfactory response.

It is important to note however that under the Penal Code the Director of Public Prosecutions does not have to grant any consent to file a charge for forgery.

28. The purpose of a private prosecution was stated by Achode J. in Isaac Aluoch Polo Aluochier Vs National Alliance & 440 Others (2017) eKLR where the learned Judge held;

“Private prosecution is a weighty matter that should only be allowed as a safeguard against extraordinary impropriety and capricious failure, or refusal to prosecute by the public prosecuting agencies. It is not intended to satisfy the whimsical fancy of parties who imagine that they can do the job better by taking matters into their own hands.”

The respondents centered that this is what the applicant seeks to do.



29. Further, in the case of 'Wesley Ngerechi & Another V Director of Public Prosecution & 2 Others [2021] eKLR the court held that:-

“It is clear that the Appellants were not satisfied with the decision of the 1st Respondent not to charge the 2nd and 3rd Respondents. They predicated their application on section 88 of the Criminal Procedure Code.

29. Victims of the crime have the option of instituting a private prosecution where the state declines to initiate proceedings despite there being evidence to support a prosecution. In the case of *Shamsher Kenya Limited Vs Director of Public Prosecutions & Another*(2017)eKLR, the Court held that:-

“There is no dispute that any person may be granted leave to institute private prosecution provided that such person is able to establish certain conditions precedent. These conditions were set out in the case of *Floriculture International Limited & others vs. the Attorney General Nairobi High Court Miscellaneous Civil Application No. 114 of 1997* and were reiterated with modifications in *Nairobi High Court Petition No. 339 of 2013 Isaac Oluochier vs. Stephen Kalonzo Musyoka & 217 others*. In this case, Mumbi Ngugi J citing Kuloba J (as he was then) in the *Floriculture Case* held that for a person to be granted leave to institute private prosecution he must establish that he had made a complaint to the police and had accorded reasonable opportunity for the police to investigate the case; that the Director of Public Prosecutions had been seized of the case and declined to institute or conduct criminal proceedings; that failure by the state agencies to prosecute is culpable, unreasonable and without any legally justifiable reason; that unless the suspect is prosecuted there is likelihood that there will be failure of public and private justice; that the person instituting private prosecution has suffered special, exceptional and substantial injury or damage that is personal to him and not motivated by malice, politics or some other ulterior consideration devoid of good faith and finally, that there was demonstrable ground that grave social evil will occur if the police and the Director of Public Prosecutions have acted capriciously, corruptly and in a biased manner that the only remedy is to grant leave to the aggrieved party to institute private prosecution.”

The applicant in this matter did comply with the conditions set out in this case thus the application was perused on a complete investigation.

29. The respondents further submitted that the Covering Report filed by the Police illustrated and explained the reason for not charging the 2nd and 3rd Respondents. The respondents went further to state that a reading of the Report reveals that the DPP considered the Evidential test and Public Interest test and found the evidence insufficient and the same had no realistic chance of prosecution. The applicant’s duty therefore was to persuade the Lower court that the decision by the Director of Public Prosecution could not be supported by the evidence gathered. According to the applicant the private prosecution would be commenced on the basis of a proper factual foundation.

30. In *Kuria & 3 Others Vs Attorney General* (2002) 2 KLR 69, the court held that:-

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must



be able to demonstrate that he has a reasonable and probable cause for mounting criminal prosecution otherwise the prosecution will be malicious and actionable."

29. The respondents concluded by submitting that the lower court was correct in declining to grant leave to commence private prosecution thus urged this court to dismiss Revision.
30. The Applicant has urged this court to find that the trial Magistrate went against the principles set out in *Kimani Vs Kahara* (1983) KLR 79, in determining the application for leave to initiate private prosecution.
31. The High Court in the above quoted case laid down certain rules in form of questions that a Magistrate should inquire into in determining applications for leave.

The questions to inquire into are:-

- (i) Whether the complaint has been made to the DPP, if so, what was the result" (ii) Does the party involved have locus standi"
 - (iii) Has the party suffered any injury or danger"
 - (iv) Is the party motivated, actuated, impelled by malice or political consideration"
29. To determine the instant application for revision, one needs to examine the law on Private Prosecutions in Kenya.
 30. The predominant statutory provision on private prosecution is Section 88(1) of the Criminal Procedure Code which provides :
 - (1) A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission.
 - (2) Any such person or officer shall have the same power of withdrawing from the prosecution as is provided by section 87, and the provisions of that section shall apply to withdrawal by that person or officer.
 - (3) Any person conducting the prosecution may do so personally or by an advocate.
 29. It is clear from a reading of this provision that a party who desires to commence a private prosecution has to approach the magistrates courts for leave to commence the proceedings.
 30. The learned Honorable magistrate's court by dint of this provision has the necessary subject matter jurisdiction to entertain and determine an application for leave to commence private prosecution.
 31. The applicant in this matter has taken issue with learned Honorable magistrates court's ruling in so far as the Honorable court determined that the court lacked the necessary jurisdiction to determine the application.
 32. The learned Honourable magistrate held that she did not have geographical jurisdiction to determine the matter and went ahead to find that by the filing of the application in Nairobi instead of Mombasa the appellant was engaged in forum shopping and therefore declined to allow the same.



33. In arriving at that decision the learned Honorable magistrate cited Section 72 of the Criminal Procedure Code which states:-
- “When a person is accused of the commission of an offence by reason of anything which has been done or of any consequence which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued.”
29. The learned Honorable magistrate misdirected herself by relying on the said section to find that she did not have the jurisdiction to hear an application for leave to commence private prosecution. It is important to note that Section 72 of the Criminal Procedure Code would only apply to proceedings after the person accused of the commission of a crime has been charged. The language of the Section is clear that the court alluded to in the section is the court that would undertake a formal examination of the matter in issue or the criminal cause in order to determine such an issue. Simply put, the trial court.
30. A trial by definition is the judicial examination of issues between parties whether they be issues of law or fact. The subject matter for trial in the proceedings intended to be tried would be the determination as to whether certain documents relied on by the 1st to the 5th respondent to file a civil suit were forged. The trial would involve formal examination of evidence and legal arguments by a judge to determine issues of fact and law.
31. In *Green Vs United States*, 355 US 184 (1957) the Court held that a trial is not only a determination of guilt or innocence but also includes procedural protections afforded to an accused person such as the right to confront witness and the right to a fair and impartial hearing.
32. It therefore follows that the court referred to under Section 72 of the Criminal Procedure Code would be the court before whom the trial would be undertaken. It is the view of this court that an application for leave to institute private prosecution cannot be deemed to be a trial since it is purely an invitation of the court by a complainant or victim of a crime to determine whether the court should allow the applicant to commence private prosecution following a decision by the state not to prosecute a known suspect. It does not involve the calling of witnesses but is determined on the basis of affidavit evidence.
33. It is the finding of this court therefore that a party who wishes to commence private prosecution can seek leave before any court since such an application is a procedural motion. The order by the learned Honorable magistrate refusing to grant leave on the basis of lack of geographical decision curtailed the applicants right to access the court Under Article 48 of *the Constitution* which states:- The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.
34. The role of the court under Section 88 of the Criminal Procedure Code is to facilitate access to the court and should therefore not be confused with the courts function to try the case after an accused person has been formally charged.
35. The decision of the learned Honorable magistrate therefore goes against the spirit of Article 48 and 159 (2) (d) of *the Constitution*. To invoke the provisions of Section 72 of the Criminal Procedure Code to deny an applicant leave to commence a private prosecution is to say the least resorting to undue technicalities of procedure in dispensing justice. It should be noted that in application for leave witnesses would not have to be called thus there would be no prejudice occasioned to the intended accused persons if they were to respond to the application before any court since there would be no costs that would arise from the calling of witnesses.



36. The application is determined purely on the basis of affidavit evidence thus the mischief sought to be cured under Section 72 of the CPC would not arise in any event.
37. It is my finding therefore that the court erred by declining jurisdiction hence the decision by the learned Honorable magistrate on the issue of jurisdiction was incorrect, improper and irregular.
38. Turning onto the issue that a court dealing with applications of this nature must address, this court finds that it an uncontested fact by both the applicants and the respondents that a complaint was made to the police about the alleged forgery and that the same was investigated and a decision not to prosecute made. The applicant therefore has satisfied the first pre-condition set in *Kimani Vs Kahara (1983) KLR 79*:
39. The court also finds from the material filed both in the lower court and this court that the applicant has locus standi to bring the application for leave to commence private prosecution. It is not denied that there is a civil dispute between the two parties and the documents giving rise to the criminal complaint were used by the 1st to 5th respondent in the civil matter. The applicant has therefore met the second consideration that the court must make before proceeding to grant leave to commence a private prosecution.
40. As regards injury to the applicant this court finds that judgment was secured in favor of the 1st to the 5th respondents by use of the questioned documents as evidence against the applicant therefore execution of the judgment in High Court Civil Case No. 252 of 2010 is likely to ensue thus prejudicing the applicant. The 1st to 5th respondents at paragraph 52 of their written submissions admit that the judgment in issue does exist and according to them the issue of forgery of documents relied on as evidence in the matter was raised after 12 years. The respondents thus contend that the complaint was an afterthought in their view calculated to defeat the judgment. It is thus clear the matter if left to proceed to its logical conclusion, the applicant would suffer economic loss thus he has the locus standi to institute a private prosecution.
41. The court noted that the offence of forgery which forms the basis of the intended prosecution has no statutory timeline within which it must be prosecuted and therefore it matters not the length of period that has lapsed between the date of the alleged commission of the offence and the complaint to the police and the DPP. The application for leave therefore cannot be lost on that ground. The law does not bar the institution of proceedings after 12 years as urged by the respondents.
42. In *Kimani Vs Kahara (1983) KLR 79* the court emphasized that before a court decides whether or not to grant leave to commence private prosecution it must be satisfied that the party is not motivated, actuated, impelled by malice or political consideration
43. The material before this court presented by the applicant does not suggest that the applicant sought leave out of malice or political consideration but out of desire to seek justice. In support of the application in the lower court the applicant annexed an affidavit sworn by one Emmanuel Karisa Kenga a forensic document examiner who deponed that the inescapable conclusion following his forensic analysis was that both IDFs were false documents generated solely to deceive the court and perpetrate a crime. The said examiner further stated the certificate of change of name C160145 remained a forgery.
44. He went further to find that there was never any transaction between Multiserve Oasis Limited and Zhejiang Import & Export.
45. The evidence contained in the forensic examiners affidavit clears the applicants application of any conceivable malice or political motivation and it is the type of evidence that would require to be tested and proved or disapproved before a trial court.



46. Having found that the applicant has met the 4 cardinal preconditions the issue that remains is whether in the face of the material before the learned Honorable magistrate, the applicant had established a basis for the grant of leave to initiate private prosecutions. The courts finds in the affirmative.

47. The Office of the Director of Public Prosecutions provides that :-

“S.28 ODPP Act

- 1) Notwithstanding any provisions of this Act or any other written law, any person may institute private prosecution.
- 2) Any person who institutes private prosecution shall, within 30 days of instituting such proceedings, notify the DPP in writing of such prosecution.
- 3) In accordance to Article 157 of *the Constitution* and this Act, the director may take over or discontinue any private prosecution.”

29. The Section read together with Article 157 of *the constitution* leaves no doubt that a private individual or a corporate body such as the applicant may in an appropriate case seek to commence a private prosecution where the Director of Public Prosecution fails to prefer charges against the intended accused.

30. In the case of Republic Vs Director of Public Prosecution & Another Ex-Parte Communications Commission of Kenya [2014] eKLR the learned Honorable MR. Justice W. Korir (as he then was) held:-

“Although the Court has powers to review the Respondent’s decision that power must be exercised sparingly-see the decision of the Privy Council in Sharma V Brown–antoine and Others [2006] UKPC 57. In the Kenyan context there is a strong reason why the courts should, only in very extreme cases, intervene with the decision of the Director of Public Prosecutions not to prosecute. The reason is that a complainant aggrieved by the decision of the DPP has the remedy of commencing private prosecution and that prosecution can only be taken over by the DPP with the permission of the complainant–Article 157(6) (b) of *the Constitution* (emphasis mine) . A person dissatisfied with the decision of the DPP not to prosecute is therefore not left without a remedy. However, the Court cannot altogether abdicate its supervisory powers over the exercise of the prosecutorial mandate by the Respondent. Where an applicant demonstrates that judicial review is the best remedy for checking abuse of prosecutorial powers by the Respondent, I do not see why the Court should not grant appropriate orders to such an applicant.”

29. In the instant case there is no denial by the respondents that there was a case reported by the applicant which went through the usual process culminating in the decision by the Director of Public Prosecutions not to prosecute the 1st to 5th respondents. It is the decision by the Director of Public Prosecution not to prosecute that prompted the applicant to take the initiative to file the application before the lower court. The applicant’s action was therefore in line with the law and leave ought to have been granted in the circumstance.

30. The question that therefore the court ought to have determined is whether on account of the material placed before the court the applicant was able to establish a prosecutable case with a realistic prospect of a conviction and secondly whether the intended prosecution would be in the public interest.



31. The applicant alleged that a judgment was secured through use of fraudulent means by way of forged documents that formed the basis of the Civil Suit. The applicant secured a report from a forensic examiner confirming that the documents in question were forgeries applying the evidential test to the facts of this matter. The applicant presented a case that would merit prosecution on the report by the forensic examiner has not been challenged by the respondents at all.
32. The report of Emmanuel Kenga being an expert opinion would require to be tested against other evidence of an expert for it to be disapproved. Evidence regarding expert opinion must be given orally to allow the opposing party an opportunity to test it that can only happen in the intended trial. If a party to a matter does not object to the admission of the opinion of an expert through his report the party can be said to have waived proof of it and not its relevance. See *B Poornaish V UOI*, AIR 1967 AP 338. The respondents have not challenged the report thus this court cannot ignore its contents.
33. The learned Honorable magistrate having been presented with that evidence could not shy away from addressing her mind to the evidence simply because the Director of Public Prosecution had made a decision not prosecute. It was the duty of the court to exercise its mind on the contents of the report before determining whether to grant or not grant the applicant.
34. The essence of a private prosecution is to address the grievance of a victim of a crime arising out of the decision by the state not to prosecute.
35. It cannot therefore be argued that where the DPP has made a decision of not to prosecute a victim of crime cannot seek to initiate a private prosecution.
36. In the case of *Floriculture International Limited & Others Vs The Attorney General Nairobi High Court Miscellaneous Civil Application No. 114 of 1997 Kuloba J* set down the following conditions to be considered by a court before it allows an application for leave to institute private prosecution:-
 1. That a report of the alleged offence was made to the Attorney General or the Police or other appropriate public prosecutor, to accord either of them a reasonable opportunity to commence or take over the criminal process, or to raise objection (if any) against prosecuting; that is to say, the complainant must firstly exhaust the public machinery of prosecution before embarking on it himself; and
 2. That the Attorney General or other public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings; or that he has maintained a more than usual and reasonable reticence; and either the decision or reticence must be clearly demonstrated; and
 3. That the failure or refusal by the State agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued, and 4. that unless the suspect is prosecuted and prosecuted at the given point of time, there is a clear likelihood of a failure of public and private justice; and
 5. That the basis for the locus standi, such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics, or some ulterior considerations devoid of good faith, and
 6. that demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous Attorney General or police force guilty of a capricious, corrupt or biased failure to prosecute, and that the private prosecution is an



initiative to counter act the culpable refusal or failure to prosecute or to neutralize the attempts of crooked people to stifle criminal justice.

29. The applicant in this case has satisfied the conditions and in the circumstances ought to have been allowed to commence the intended Private prosecution. In *Gouriet v. Union of Post Office Workers* [1973] All ER, 94 (hereinafter, the *Gouriet* case). In the case, Lord Diplock stressed the need for private prosecutions despite its waning use as follows:

“It is a right which nowadays seldom needs to be exercised by an ordinary member of the public, for since the formation of regular police forces charged with the duty in public law to prevent and detect crime and bring criminals to justice and the creation of the office of Director of Public Prosecutions, the need for prosecutions undertaken (and paid for) by private individuals has largely disappeared; but it still exists and is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law...

Lord Wilberforce was even more succinct in his restatement of the importance of private prosecutions in the same decision, when he opined:

The individual, in such situations [corruption, bias, neglect, failure, political interference, refusal to prosecute etc.] who wishes to see the law enforced has a remedy of his own;” he said, “he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a *nolle prosequi*) remains a valuable constitutional safeguard against inertia or partiality on the part of authority.(emphasis mine).” The position taken by Lord Wilberforce remains very relevant to our circumstances under Constitution of Kenya 2010 Article 157 (6).

29. Article 157 (6) of *the Constitution* of Kenya envisages the right of private citizens to initiate private prosecutions. The Article protects such prosecutions from takeover and termination by the DPP in order to ensure that the interests of justice are protected at all times whenever a party initiates a private prosecution. The Article sought to cure the mischief of the state moving in to takeover prosecutions with the sole aim of terminating them soon thereafter.
30. It therefore follows where a private citizen demonstrates that he has a case that meets the evidential and public interest test such an individual or body corporate should not be whimsically be denied leave to commence private prosecution where the state has opted not to prosecute.
31. The allegations raised by the applicant in this matter are of a grave nature and touch on the core of the administration of justice. The allegation that the 1st to the 5th respondents may have forged documents and went ahead to use them to secure a judgment is such a grave matter that in the public interest a prosecution ought to have been allowed more so where as demonstrated by the applicant there was a forensic document examiners report affirming the fact of forgery .
32. The need to protect the administration of justice from litigants who may be bent on presenting forged documents as evidence is a matter of great public interest. The courts should therefore be prepared to exercise their discretion in favour of an applicant who brings such matters to the courts attention for remedial action.
33. The fact of the 1st to the 5th respondents having a judgment in their favor should not by itself operate as bar to any prosecution arising in connection with the proceedings giving rise to the judgment. Section



193 (a) of Criminal Procedure Code does allow the pursuit of both civil and criminal proceedings by a party. In any case the penal code Under Section 113 makes the fabrication of evidence an offence. The offence would thus be prosecuted as and when the fact is discovered. The penalty of 7 years provided for under Section 113 of the Penal Code underscores the gravity of the offence.

34. The legislature in its wisdom enacted the provision in order to allow a parallel process that parties can utilize to address their grievances since the remedies available Under Civil Proceedings may not satisfy any breaches of the criminal law.

Conclusion

29. In the circumstances I find that the applicant has satisfied this court that Under Section 364 of the Criminal Procedure Code that the decision by the learned Honorable magistrate is irregular, incorrect, illegal and improper therefore the same is hereby quashed and in substitution therefore the applicant is hereby granted leave to commence private prosecution before a court of competent jurisdiction other than Hon Martha A Nanzushi SPM
30. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 31ST DAY OF OCTOBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Mutuku for the Applicant

Lakicha for 1st to 5th Respondent

Chebii for the 6th & 7th Respondent

