



Republic v Kitui & another; Kitheka (Exparte Applicant) (Judicial Review Application E001 of 2022) [2023] KEHC 19963 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
JUDICIAL REVIEW APPLICATION E001 OF 2022
RK LIMO, J
JUNE 29, 2023
IN THE MATTER OF ORDER 53 RULE 1 OF THE
CIVIL PROCEDURE ACT PF THE LAWS OF KENYA
IN THE MATTER OF LAW REFORMS CAP 26 OF THE LAWS OF KENYA
AND
IN THE MATTER OF AN APPLICATION OF WRIT PROHIBITION**

BETWEEN

REPUBLIC APPLICANT

AND

CHIEF MAGISTRATE KITUI 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

AND

AXENDER MATUVI KITHEKA EXPARTE APPLICANT

JUDGMENT

1. Alexander Matuvi Kitheka (the exparte applicant herein) has lodged this Judicial Review dated 2.03.2022 to challenge the decision by Director of Public Prosecution, the 2nd Respondent herein, to prosecute him over allegations of fraud. The applicant has invoked the Provisions of Order 53 Rule 3(1) in seeking the following reliefs: -
 - i. That a judicial review order of prohibition does issue directed to the Respondents and any other authority, prohibiting them from proceedings with Kitui Chief Magistrate's Criminal Case No. E029 of 2022, the Republic vs Alexander Matuvi Kitheka pending before the said court.



- ii. That costs of this application be provided for.
2. This substantive motion (Judicial Review) is supported by grounds set out in the Statutory Statement of facts and the Verifying Affidavit sworn by the applicant on 2nd March, 2022 in the application for leave dated 2nd March, 2022. The grounds are as follows: -
 - a. The decision to prefer charges against the accused person 48 years after the alleged commission of the offence and 6 years after a full inquiry and a decision not to prosecute and to close the police file is vexatious, harassment, an abuse of the process of the court and contrary to Public Policy.
 - b. The hearing of the case against the accused person will not be within a reasonable time and the accused would not be afforded a fair trial as so many years have passed.
 3. In his written submissions dated 22nd November 2022 done through learned Counsel Kalili advocate, the applicant insists that there can be no other reason in preferring charges for an offence committed 48 years ago and on a file closed 6 years ago after a full inquiry and a decision made not to prosecute, other than to harass, and abuse the court process which he opines is vexatious and contrary to public policy.
 4. He contends that the Office of the Director of Public Prosecution on 14th November, 2016 upon perusal of police file ordered the Police to close the file with no further action adding that the decision was made when the complainant was still alive. He faults the administrator of the estate the interested party herein, for reviving the case with sole intention of gaining an upper hand in the civil proceedings now pending at the Court of Appeal. He points out that he succeeded in the trial court and the appellate court and the complainant escalated the matter to the Court of Appeal and went back to revive the Criminal proceedings with ulterior motive.
 5. The ex-parte applicant has cited the following cases in support of his case;
 - a. Stanely Munga Githunguri vs R (1986) eKLR where the court answered the question whether a court could legitimately halt intended prosecution where such prosecution becomes an abuse of court process, oppressive and vexatious. In the matter, the applicant had been charged with four counts alleging contraventions of the Exchange Control Act (Cap 113). Two of the offences were alleged to have been committed in 1976, and the third in 1979. The fourth count was an alternative to the third count. The Attorney General declared publicly that the office of the AG did not prefer charges against the applicant. Four years later, his successor instituted charges against the applicant and the court, held that, charging the applicant four years after the Attorney General had decided not to prosecute and without a claim that fresh evidence had come light was an abuse of the court process. The three judge bench proceeded to allow the prayer for an order of prohibition.
 - b. On the court's power to halt proceedings instigated for purposes of championing civil disputes, the applicant has cited two decisions being first, Republic vs The Chief Magistrate Court Mombasa exparte Ganjee & Anor (2002) eKLR. In this matter the court granted an order of prohibition and observed that the interested party was more interested in punishing the applicant under criminal law for a dispute that arose from a civil arrangement between the parties. The court while quoting Kuloba J. stated;

“So, it is not the purpose of a criminal investigation or a criminal charge or prosecution, to help individuals in the advancement of frustration of their civil cases. That 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



purpose is to further some other and ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest.”

6. The applicant has also cited the case of *Pastoli vs Kabale District Local Government Council & Others* (2008) 2. E.A. In that matter, the court stipulated considerations to be taken into account in judicial review application. The court held that an applicant has to show that the impugned decision or act complained of is tainted with illegality, irrationality and procedural impropriety. In the matter, the court dismissed an application seeking orders of prohibition for failing to meet the aforementioned principles

7. The 2nd Respondent’s Case

The 2nd Respondents opposed this application vide Grounds of Opposition dated 25th October, 2022 where they raise the following objections namely: -

- a. That the application is incompetent bad in law and lacking in merits and otherwise an abuse of the due process of the court
- b. That the application/petition herein has not stated the rights of the Applicant that have been violated and infringed and further does not specify the nature of such rights
- c. That the 1st Respondent under Article 157(1) of *the Constitution* of Kenya 2010 does not require the consent of any person or Authority for the commencement of criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
- d. That the Applicant/Petitioner has not demonstrated any issues of determination by this Honourable Court
- e. That under the provisions of Section 5(4)(e) of the *Office of the Director of Public Prosecutions Act* No. 2 of 2013, the Director has powers to review a decision to prosecute or not to prosecute, any criminal offence so long as it does not offend the provisions of Articles 157 and 47 of *the Constitution* of Kenya.
- f. That the remedy sought under Article 23(3) of *the Constitution* of Kenya, 2010 an order of Judicial Review, could have come into play without direction or control of any person or authority, hence order of Mandamus to compel the Director of Public Prosecutions to perform his lawful duties if at all a complaint and investigations thereto do not reflect sufficiency of credible and admissible evidence and Public Interest considerations.
- g. That this application is frivolous and vexatious and it is only meant to paint a bad picture of the Director of Public Prosecutions and the Court where the proceedings are conducted.
- h. That the Applicant/Petitioner does not deserve an order in writ petition prayed or at all hence should be dismissed with costs.

8. The 2nd Respondent relied on written submissions dated 20th January, 2023 and filed on the same day. The prosecution has defended its decision to institute the present charges after initially closing the file for lack of evidence stating that an opinion was made upon a review of the same file and it was concluded that a charge was to be preferred. The Office of the Director of Public Prosecution has placed reliance on Section 5 (4) (e) of the Office of the Director of Public Prosecution Act which grants the director power to review the decision to prosecute or not to prosecute any criminal offence.



9. The Office of the Director of Public Prosecution contends that its decision to prosecute was done in good faith upon reviewing the initial recommendations that it had made not to prosecute. The State has not revealed what it informed its change of heart but insists that civil proceedings and criminal proceedings are two separate systems used to dispense justice adding that either of them can be applied depending on the nature of claim or offence. It submits that it has a case on forgery and believes that the only avenue to afford justice is through the criminal proceedings it has initiated against the applicant vide Kitui Chief Magistrate's Court Criminal Case No. E029 of 2022.
10. The State asserts that the trial court should be allowed to proceed with the case to its logical end and determine the case on merit.
11. The interested party's Case
12. The Interested Party has also opposed this application vide a Replying Affidavit sworn by Stephen Mutia Ngulungu on 11th July 2022. The interested party who is the son of the complainant (now deceased) defends the prosecution's decision to charge the applicant citing that although the office of the Office of the Director of Public Prosecution had marked the matter as closed in 2016, subsequent proceedings from the High Court in Environment and Land Case of Appeal No. 2 of 2018 reached the determination that the agreement in dispute dated 29th August, 1974 was in-deed a forgery.
13. The Interested party contends that the ex-parte applicant will have a chance to challenge the basis of his prosecution at the Criminal Trial. He submits that exparte applicant is charged with a criminal offence defined in law as forgery Contrary to Section 345 as read with Section 349 of the Penal Code adding that a criminal charge cannot be time barred in law.
14. This court has considered the applicant's case and the rebuttal by both the State through the Office of the Director of Public Prosecution and the Interested Party. The main issue before this court is whether the 2nd Respondent in its decision to prefer Criminal Charges has infringed on its Constitutional Powers to prosecute and thereby infringing on the ex parte applicant's rights.
15. The background of this matter is that the Applicant was involved in a land dispute with his brother, the complainant who is now deceased over land parcels number Matinyani/Matulu/475 and 476. At the civil trial court, the complainant averred that he was the registered owner of parcel number Matinyani/Matulu/475 which he bought in 1975 but his brother, the Applicant trespassed on the property in 1998 and sought for his eviction.
16. On his part however, the complainant averred that the agreement was a forgery and had made a complaint to the Office of the Director of Public Prosecution office stating as such. Through a letter dated 14th November 2016, the Office of the Director of Public Prosecution sent communication to its office in Machakos stating that there wasn't sufficient evidence in its file to warrant the prosecution of the Applicant. The Office of the Director of Public Prosecution further directed closure of the file with no further police action.
17. The Interested Party herein, who is the son of the deceased complainant, undeterred by the decision made by the Director of Public Prosecutions, pushed for further Investigations through the office of Commission on administrative justice (ombudsman) who obliged and asked the Office of the Director of Public Prosecution to relook or review its earlier decision declining to prosecute the exparte applicant.



18. In the meantime, an appeal from the trial court was proceeding at the Environment and Land Case Court Machakos and in its judgment dated 15th August 2019, the Environment and Land Case court on appeal held inter alia as follows;
- “The fact that indeed the Appellant bought parcel number 476 in 1984 is inconsistent with the Respondent’s assertion that parcel numbers 476 and 475 were one parcel of land which was sub-divided into two as at the time of buying it. Indeed, the purported handwritten Agreement between the Appellant and the Respondent dated 29th August, 1974 in which they purportedly agreed to share parcels of land numbers 475 and 476 “in future” is a forgery.”
19. The decisions by the Environment and Land Court at Appellate stage at Machakos coupled with the recommendation by the Office of the ombudsman, appears to have triggered the Office of the Director of Public Prosecution’s decision to review its earlier stand and it decided to prefer charges against the exparte applicant on forgery contrary to Section 345 as read with Section 349 of the Penal Code. It also preferred a 2nd Count of uttering a false document contrary to Section 353 of the Penal Code. The particulars of the offence as per the charge sheet presented to the criminal trial court indicates that the offence was committed on 29th August, 1974 at unknown place.
20. The applicant is now before the court citing that that decision to prosecute him is vexatious, harassment, an abuse of the process of the court and contrary to public policy. Secondly, the applicant is faulting the decision to prosecute him on the basis that a lot of time has lapsed as the alleged forgery occurred 48 years ago in 1974 whilst the decision not to prosecute him was arrived at by the Office of the Director of Public Prosecution six years ago in 2016.
21. The Law provides that the director of public prosecutions shall exercise state powers of prosecution and may do the following:-
- a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the director of public prosecutions or taken over by the director of public prosecutions under paragraph (b) Subsections 10 and 11 of Article 157 also provides;
10. The director of public prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”
22. The above provisions clearly show that the Office of the Director of Public Prosecution is required to act independently and without undue influence from any quarter and the reason is fairly simple. The Office of Director of Public Prosecution is shielded by the new constitutional dispensation with a view to protecting it from external forces that can misuse the powers for ulterior motives. That is why under Sub-section 11 of the Article 157, the Office of the Director of Public Prosecution is required to act in public interest and in the interest of administration of justice.



23. I have closely perused through the letter dated 11th April, 2017 from the office of Ombudsman and I find it quite explicit in fact at the bottom corner of the letter there is handwritten suggestions of which charges to prefer against the ex parte applicant. This poses the question whether the Office of the Director of Public Prosecution can act on the directions or directives from another office or anyone. The answer to that question obviously is in the negative given the above cited Constitution provision.
24. There is also a pertinent question posed by the ex parte applicant which is why the Director of Public Prosecution decided to charge him for an offence alleged to have been committed almost 47 years ago.
25. While it is true as pointed out by the Interest Party that criminal proceedings are not time bound by law, a decision reached by Office of the Director of Public Prosecution to prosecute someone after such lengthy period of time as in this instance must pass the test of law.
26. The test to be applied to any impugned act or decision is legality, rationality and procedural propriety. This was well illustrated in the celebrated Ugandan decision in the case of Pastoli versus Kabale District Local Government Council and Others [2008]2EA 300 where Kasule J. had this to say:-

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety:

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.”

27. There is no question that the charges preferred by the Office of the Director of Public Prosecution in this instance are offences known in law and well defined by statute as shown above.

The first test of legality of the charge is passed. Now turning to the question of rationality, it's apparent that the Office of the Director of Public Prosecution has made no attempt to give an explanation as to what prevented it from preferring charges 47 years ago when the offence was committed. It has also not explained what made it in the first place to decide that there was no basis for prosecution and what it informed a change of heart particularly in light of Article 157(10) of *the Constitution* of Kenya.
28. It is also apparent that the decision by the 2nd respondent to prefer charge was partly informed by the existence of a civil suit between the ex parte applicant and the father of the Interested Party herein and in particular the outcome and the sentiments expressed by the court in the Environment and Land Case matter. This can only mean that if there was no pending civil matter between the Applicant and the Interested Party, the Criminal charges which are a subject of this Judicial Review could certainly have not arisen.
29. Flowing from the above, the third test of propriety of the charge comes into play. While it is premature and improper at this stage for this court to go into the merits of the evidence to be presented to the trial court in the criminal case for want of jurisdiction, it is difficult to disregard the collateral effect of the criminal charges particularly in view of the inordinate delay to prefer the charges. So, while it is perfectly in order for a complainant to pursue both civil and criminal proceedings simultaneously



going by Section 193A of the Criminal Procedure Code, that right to pursue Criminal proceedings should not be used to gain an upper hand in a civil suit pending in court.

In the case of Commission of Police and the Driver of Criminal Investigation Department and another versus Kenya Commercial Bank & 4 Others [2013] eKLR, the Court of Appeal stated as follows: -

“Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.”

30. In situations where it is obvious that the apparent intention to prefer criminal charges is to achieve a collateral purpose, as it is apparent in this instance, a court through Judicial Review to intervene with a view can intervene with a view to stop abuse or misuse of Court processes.
31. The decision by the Director of Public Prosecution to charge or not to charge should be made independently and be driven by Public interests and the interests of administration of justice. The decision should not be whimsical unilateral or aimed at achieving self or private interests. This Court does not see any Public interest in reviving a case after 47 years and after the issue had been sealed and buried by the same office seven years ago.
32. The direction taken by this court in that regard is guided by the decision in Githunguri -versus- Republic (1986) eKLR where the Court observed as follows: -

“In this instance the delay is said to have been nine years, six years and four years. The court has not been told why these offences have been unearthed after they remained buried for so long. What caused turning up the soil! It is too long, too much of delay. The Attorney-General is not bound to tell the court the reason but it would have made us knowledgeable if told. We are of the opinion that to charge the applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the court will be within a reasonable time as required by Section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the chambers of the attorney-general. it was a case which had received notable publicity, and the matter was considered important enough to be raised in the national assembly. We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. First



as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in Section 77(1) of *the Constitution*. This prosecution will therefore be an abuse of the process of the court, oppressive and vexatious.”

33. This Court is alive to the direction that a Court in Judicial Review should proceed with caution in order to avoid getting into the arena reserved for the discretion by the Office of the Director of Public Prosecution. It is however imperative at the same time to note that the exercise of the discretion by the Office of the Director of Public Prosecution is not absolute but limited under Article 157 (II) of *the Constitution* of Kenya.

34. In the case of George Joshua Ikungu & Another versus The CM’s Court Anti -Corruption Court at Nairobi [2015] eKLR, the Court addressed this issue extremely and inter alia held as follows: -

“Where the delay (read in preferring criminal charges) was occasioned by deliberate inaction on the part of a complainant with the intent of getting a suspect to force the suspect’s head in say a different transaction.....or use the complainant to force settlement in ongoing civil proceedings then the High Court as a court for instance must step in because the intended prosecution is tainted with malice and not the otherwise unassailable intent to punish criminal wrong doing promptly.....”

35. The same court in the above decision further cited with approval the decision in Kuria & 3 Others versus Attorney General [2002] 2eKLR 69 where it was observed in part;

“The Court has power and indeed the duty to prohibit the Continuation of Criminal Prosecution if extraneous matters divorced from the goals of justice guide their litigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score settling or vilification on issues not pertaining to that which the system was even formed to perform.....”

36. This court finds that to the extent that the intention to prefer charges against the ex parte applicant was belatedly pushed by the interested party herein and the office of Ombudsman (which itself was also moved by the Interested party herein and who obviously intends to achieve a collateral purpose is to gain an upper hand in the appeal reportedly pending in the Court of Appeal), I find that there is sufficient reason by this court to intervene and halt the criminal proceedings. The charges are tainted by malice because the Director of Public Prosecution has not given reasons why they were revived after a lull of 47 years from when it was reportedly committed.

The long and short of this is that this court finds merit in the motion dated 2nd March, 2022 and the same is allowed in terms of prayer (i) thereof cost to the ex parte applicant by the 2nd Respondent.

DATED, SIGNED AND DELIVERED AT KITUI THIS 29TH DAY OF JUNE, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

