



**Chumo v Boit & 4 others (Judicial Review 5 of 2022)  
[2023] KEHC 25693 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25693 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
JUDICIAL REVIEW 5 OF 2022  
SM GITHINJI, J  
NOVEMBER 23, 2023**

**BETWEEN**

**MIRIAM JEROP CHUMO ..... APPLICANT**

**AND**

**SARAH CHELEL BOIT ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY COMMANDER KILIFI ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY CRIMINAL INVESTIGATING OFFICER KILIFI .. 3<sup>RD</sup> RESPONDENT**

**OCS KILIFI POLICE STATION ..... 4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. Pursuant to leave granted by this court on 14<sup>th</sup> December 2022, the Applicant brought an application for judicial review evenly dated and filed on 16<sup>th</sup> December 2022 seeking an order of prohibition against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents prohibiting them from summoning, arresting and charging the Applicant.
2. The application was brought under the provisions of Order 53 Rule 1 and 2 of the Civil Procedure Rules, 2010 and Section 8 & 9 of the *Law Reform Act* and supported by the statement of facts dated 14<sup>th</sup> December 2022 and the Applicant's verifying affidavit.
3. It is the Applicant's case that on 8<sup>th</sup> December 2022, she was summoned by the 3<sup>rd</sup> Respondent on investigations over allegations of acquiring property by false pretense contrary to section 320 of the Penal Code. The said property being a parcel of land identified as LR No. 2096 (CR No. 14325) Malindi. The Applicant pleaded that the said summons were issued maliciously since the 1<sup>st</sup> Respondent had previously sued the Applicant over the same property in Malindi ELC Suit No. 47 of 2015. The Applicant averred that the said civil suit was eventually dismissed for want of prosecution.



She annexed a copy of the dismissal order dated 18<sup>th</sup> February 2019. The Applicant added that the intended prosecution amounts to double jeopardy considering the 1<sup>st</sup> Respondent's conduct. The Applicant was apprehensive that the Respondents' actions were foul of Article 50 of the Constitution as she is not guaranteed a fair trial or hearing.

4. Through a Replying Affidavit deposed by the 1<sup>st</sup> Respondent on 14<sup>th</sup> March 2023 and filed on 15<sup>th</sup> March 2023, the 1<sup>st</sup> Respondent opposed the application. She averred that the motion is based on misrepresentation and material non-disclosure of facts. That the said civil suit was never determined on merit and the question of ownership of the land is still pending. To the 1<sup>st</sup> Respondent, the summons issued by the 3<sup>rd</sup> Respondent was not a witch hunt as claimed by the Applicant but an intent to conduct investigations based on her complaint. She added that the Applicant has failed to demonstrate how the process of the court is being abused.
5. Similarly, the 5<sup>th</sup> Respondent opposed the application. They filed grounds of opposition dated 18<sup>th</sup> October 2023 outlined as follows; -
  1. That the prayers sought cannot be granted as they are in contravention of Article 157 (4) and 157 (10) of the Constitution.
  2. That the application is an abuse of the court process as the issues sought cannot be determined by this court.
  3. That the applicant has failed to demonstrate how her right to a fair trial as envisaged in Article 50 of the Constitution of Kenya has been infringed to give life to this application.
  4. That the application offends section 193A of the Criminal Procedure Code.
  5. That this application is premature as investigations are still ongoing and the office of the Director of Public Prosecutions is yet to make a decision to charge and prosecute the Applicant.
6. Parties agreed to canvass the application by way of written submissions.

### **The Applicant's Submissions**

7. Counsel for the Applicant submitted that as per Article 157 (10) of the Constitution, the director of public prosecution (DPP) does not require the consent of any person to commence criminal proceedings and that in doing so, the DPP should not act under the direction of any person or authority. This, he argued was reinstated in the case of Republic v Chief Magistrate, DPP & 2 others (interested parties); ex-parte applicant; pravin Galot [2002] eKLR.
8. To counsel, the intended prosecution against the Applicant is malicious and that the 4<sup>th</sup> and 5<sup>th</sup> Respondent are not acting independently as they should. Counsel relied on the case of Republic v William Macharia Murathe [2016] eKLR. Counsel argued that the intended prosecution is an afterthought, malicious, personal score-settling and abuse of the court process as it does not disclose any known offence in law.

### **1<sup>st</sup> Respondent's Submissions**

9. Counsel for the 1<sup>st</sup> Respondent identified four issues for determination, firstly, whether civil and criminal matters can run concurrently. It is counsel's submission that by dint of section 193A of the Civil Procedure Rules, there is nothing that bars criminal and civil proceedings to run concurrently



- where the matters in issue are the same. Counsel added that where there exists concurrent criminal and civil proceedings based on similar set of facts, the criminal case ought to proceed unless it is shown that prosecution of the criminal case will result to infringement of the accused person's rights or contravention of the Constitution.
10. Counsel argued that in the present case, the applicant has neither been arrested nor is there any threat of a looming arrest. The Applicant has therefore failed to demonstrate that there has been a violation of, or a clear threat thereof, of her rights. Counsel cited the case of *Mutuku Mwanza v Inspector General of Police & 3 others* [2021] eKLR.
  11. Counsel added that in issuing conservatory orders as those sought herein, the court ought to proceed with caution as it was explained by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR; and *Wilson Kaberia Nkunja v The Magistrates and Judges Vetting Board and another* [2016] eKLR.
  12. The second issue is whether courts have power to prohibit a police investigation. Counsel was affirmative that while the court has powers to prohibit police investigations, the same should be exercised cautiously. The circumstances of the present case do not warrant the court to exercise such powers.
  13. Counsel argued that the Applicant was only summoned to record a statement regarding a complaint filed and the police were only acting within their mandate enshrined under section 24, 35 and 52 (1) and (4) of the National Police Service Act, 2011. He added that the powers of the police to investigate cannot ordinarily be challenged unless it is demonstrated that such investigations are malicious or an abuse of power, which to him is not the case herein. The application as filed is therefore premature. To buttress this issue, counsel relied on the cases of *Daniel Ogwoka Manduku v DPP and 2 others* [2019] eKLR; *Republic v Service & 2 others*; *Resilient Investment Limited & 3 others (interested party); Limited (ex-parte)* (JR Application E037 of 2021) [2022] KEHC 43 (KLR).
  14. Thirdly, on whether a dismissal for want of prosecution discharges a suit, counsel submitted that where a suit is dismissed for want of prosecution, a court has discretion to reinstate the same at the instant of an applicant as substantive justice was not served as stipulated under Article 50 (1) and 159 (2) (d) of the Constitution. That for the reason the civil suit has since been reinstated before the Environment and Land Court.
  15. Counsel urged the court to dismiss the application with costs as the same is unnecessary, misguided and brought in bad faith.

### **The 5<sup>th</sup> Respondent's Submissions**

16. State counsel, Ms. Ochola submitted that the application is premature since no decision to charge or not has been made. That the effect of the prayers as framed permanently stops the police from performing their duties as envisioned in Article 245 of the Constitution in the matter. Counsel was guided by the decision in *Lameck Okeyo & another v Inspector General of Police & 2 others* [2016] eKLR.
17. Counsel challenged the Applicant's allegation of double jeopardy stating that section 193 A of the Criminal Procedure Code provides that nothing prohibits criminal proceedings where the same issues are subject in any pending civil proceedings.
18. Counsel added that there was no time limitation to file a criminal complaint as provided in section 42 (1) (a) of the Limitation of Actions Act and as was held in *R v Commissioner of Police and another, ex-parte Michael Monari & Another* [2012] eKLR.



19. To counsel, the Applicant has failed to demonstrate why the police should be stopped from performing their duties and how her rights under Article 50 of the Constitution have been violated by the 2<sup>nd</sup>- 5<sup>th</sup> Respondents. Counsel urged the court to dismiss the application. This she argued, was the position taken by Odunga J in Paul Ole Kuyana & another v DPP & 2 others [2021] eKLR.
20. Counsel further submitted that the court could only interfere with the constitutional mandate of the 5<sup>th</sup> Respondent if the Applicant had demonstrated that the 5<sup>th</sup> Respondent had failed to adhere to the provisions of Article 157 (11) of the Constitution of Kenya.

### **Analysis and Determination**

21. I have carefully considered the application for judicial review orders, the responses thereto, submissions and authorities cited. The issues for consideration are; -
  - i. Whether the police acted illegally or irrationally by summoning the Applicant to question her after a complaint was lodged against her.
  - ii. Whether the application is merited.
22. The Applicant’s case is that she has been summoned to the police station following an alleged complaint against her by the 1<sup>st</sup> Respondent. She argues that the decision to summon her is malicious and improper because it amounts to double jeopardy. The Applicant is also apprehensive that her right to a fair hearing is not guaranteed.
23. Mativo J in Republic v Director of Public Prosecutions & another; John Ngugi Kabogo (Interested Party) Ex parte Harrison Wangoro Mwangi & another [2020] eKLR extensively discussed the powers of this court to intervene in such circumstances. The learned judge explained as follows: -
  16. The objective of Judicial intervention is to ensure that the agency remained within the area assigned to it by Parliament. If the agency was within its assigned area then it was prima facie performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision. A decision, which falls outside that area, can therefore be described, interchangeably, as: - a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances...
  17. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground for the court to intervene. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a ground for the court to intervene has been established.
  18. The exercise of public power is only legitimate when lawful. [8] A body exercising public power has to act within the powers lawfully conferred upon it. Decision-makers should not pursue ends which are outside the objects and purposes of the statute. Power should not be “exceeded” or that the purposes pursued by the decision-maker should not be “improper,” “ulterior,” or “extraneous” to those required by the statute in question. It is also said that “irrelevant considerations” should not be taken into account in reaching at a decision.
  19. As was held in International Trade Administration Commission v SCAW South Africa (Pty) Ltd [9] as follows: -



“[95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.”

20. So long as a statutory functionary remains within the powers conferred upon it by Parliament, a Judicial Review court will not intervene.” (Emphasis mine)
24. The functions of the police are established under section 24 of the National Police Service Act as follows:  
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- (a) provision of assistance to the public when in need;
  - (b) maintenance of law and order;
  - (c) preservation of peace;
  - (d) protection of life and property;
  - (e) investigation of crimes;
  - (f) collection of criminal intelligence;
  - (g) prevention and detection of crime;
  - (h) apprehension of offenders;
  - (i) enforcement of all laws and regulations with which it is charged; and
  - (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.
25. It is also settled that the Constitution guarantees the independence of the office of the Inspector General of Police and that of the Director of Public Prosecution (See Articles 245 (4) (a) and 157 (10) of the Constitution of Kenya, 2010).
26. Mativo J in the aforementioned case further explained: -
- “ 22. A fair and effective investigation is essential to a properly functioning criminal justice system and to the maintenance of law and order. Individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to investigate a complaint once made, and in the outcome of the investigation. A wrong decision to investigate and prosecute or, conversely, a wrong decision not to investigate or prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to investigate or prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the decision receives careful consideration.



23. It is a fundamental principle of law that it is not for this court to determine the veracity or to weigh the strength of the complaint or accused persons defence. This court can only intervene if there are cogent allegations of violation of the *Constitution* or the law or in clear circumstances where it is evident that a citizen is being interrogated for a non-existent offence or an offence unknown to the law. The court can also intervene where it is clear the police have abused their powers. The inherent jurisdiction of the court to stop police investigations or a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.
24. The high court will only prohibit or quash or stop arrest or investigations or prosecutions in cases where it would be impossible to give the accused a fair trial or where the investigations is illegal; or where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.
25. A police investigation or a criminal prosecution can be stopped if it was commenced in the absence of proper factual foundation. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial or a police investigation to be initiated or conducted. [13] Fair investigations or fair trial entails the interests of the accused and the victim and of the society. As was held in *Republic v Commissioner of Police and Another Exparte Michael Monari & Another*: -

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

27. The High Court's inherent powers to quash, stay or prohibit criminal proceedings, police investigations are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of police investigations and trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India[15] revisited the law on the issue and held that ‘these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.’ The Supreme Court of India in the said case delineated the law in the following terms: -

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in



the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings... The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers.”

28. As stated above, the power to quash police investigations is immense since it amounts to exonerating a suspect before conclusion of investigations, the decision to prosecute and even before trial. Such power must be exercised with extreme care and caution. It is a power which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution.”
27. In the present case, there is no doubt that there are unresolved issues between the Applicant and the 1<sup>st</sup> Respondent regarding the subject land. Indeed, parties agreed that the civil suit filed to determine the issue of ownership was not determined on merit. That notwithstanding, the 1<sup>st</sup> Respondent stated that she has successfully sought the reinstatement of the civil suit, an allegation which was not rebutted by the Applicant. It follows that upon a complaint of criminal nature being filed by the 1<sup>st</sup> Respondent, the police are under an obligation to exercise their statutory mandate to investigate, irrespective of whether there is a civil matters pending involving the same issue, or not. Criminal and civil matter can run concurrently as in law they have different process and purpose.
28. The applicant wants this court to prohibit the questioning, investigations, and her imminent arrest and prosecution. Section 24 of the [National Police Service Act](#) is clear that the mandate of the police includes investigating crimes. I have carefully considered the Applicant’s application and there is nothing to suggest that the police acted maliciously or abused their powers. It has not been demonstrated that the decision to summon the applicant to investigate the complaint was influenced by irrelevant or unnecessary issues. Neither is there evidence that the police did not act independently when they decided to summon the Applicant. The facts presented before this court, in my view, are sufficient to justify the summons issued by the police, notwithstanding that there is a pending civil suit on the same issues. This is so as criminal proceedings can in law justifiably run concurrently with civil proceedings even where the facts in issue are one.
29. The Applicant argued that the actions by the police amount to a violation of her right to a fair hearing. Respectfully, I find no basis in this argument. Before a decision to charge is reached the police have a duty to conduct investigations. Such investigations where all relevant parties factual positions are considered cannot be said to be a violation of the right to a fair hearing. In any event, it was not demonstrated that the investigations would be conducted in an unfair manner, not prescribed by the law. The allegations raised by the Applicant can be presented to the police during investigations and sufficiently be weighed in the trial if the matter gets to that level. To ask the court at this stage to interfere with the statutory mandate of the Respondents for no justifiable cause, is in my view an effort to steal a march against the complainant of which is unwarranted and premature.



- 30. The Applicant prays for an order of prohibition. An order of prohibition as explained by Mativo J. arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation.
- 31. Therefore, having shown that the Applicant failed to demonstrate that the 2<sup>nd</sup>-5<sup>th</sup> Respondents acted illegally, irrationally or in excess of their powers, or that they failed to act independently, I find no legal basis to grant the orders sought.
- 32. The outcome is that the notice of motion dated 14<sup>th</sup> December 2022 lacks merit. It is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

**JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**

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**S.M. GITHINJI**  
**JUDGE**

In the Presence of; -

- 1. Mr Mwango holding brief for Wayua for the 1<sup>st</sup> Respondent
- 2. Mr Mutua for the 5<sup>th</sup> Respondent
- 3. Other parties absent. They be notified.

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**S.M. GITHINJI**  
**JUDGE**

