



**Republic v Office of Director of Public Prosecutions; Bungoma Line Sacco & 6 others (Exparte)  
(Judicial Review E001 of 2023) [2023] KEHC 27053 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27053 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
JUDICIAL REVIEW E001 OF 2023  
WM MUSYOKA, J  
DECEMBER 20, 2023**

**BETWEEN**

**REPUBLIC ..... RESPONDENT**

**AND**

**OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS ... INTERESTED PARTY**

**AND**

**BUNGOMA LINE SACCO ..... EXPARTE**

**BENSON OMONDI ONGAR ..... EXPARTE**

**JAMES WAINAINA KAMAU ..... EXPARTE**

**AUGUSTINE MURIITHI WANGUI ..... EXPARTE**

**DAVID MUNGAI ..... EXPARTE**

**JOSEPH MWANGI WAIRIRE ..... EXPARTE**

**JULI NJERI NGUGI ..... EXPARTE**

**JUDGMENT**

1. These Judicial Review proceedings were initiated on 1<sup>st</sup> March 2023, under certificate of urgency, by way of an ex parte chamber summons, dated 1<sup>st</sup> March 2023, for leave to commence a Motion for a writ of certiorari and or prohibition, to remove into the High Court, and quash a charge sheet, in Busia CMCCRC No. E362 of 2023, and to prohibit prosecution of the ex parte applicants based on that charge sheet, as the said charges were a replica of another criminal charge, in Busia CMCCRC No. 1288 of 2022, which had been heard and determined. It was also sought that the grant of leave does operate as a stay.



2. The ex parte application was placed before Mugambi J, on 2<sup>nd</sup> March 2023, and directions were given, for its service. On 17<sup>th</sup> April 2023, the matter was placed before me, in open court, and the parties were asking me to direct that the ex parte chamber summons, dated 1<sup>st</sup> March 2023, be canvassed by written submissions. I directed that the application was ex parte, and ought to be determined in chambers. I retreated to chambers, and after considering the ex parte application on its merits, I allowed it, with the resultant effect of leave being granted, and the leave granted operating as a stay of the proceedings spelt out in the ex parte application. It was directed that the leave was for 21 days, within which the substantive Motion was to be filed and served. A formal order was extracted on 24<sup>th</sup> April 2023. That Motion was filed on 10<sup>th</sup> May 2023.
3. The Motion, dated 8<sup>th</sup> May 2023, seeks 2 principal prayers: the prohibition order, the subject of the ex parte chamber summons, dated 1<sup>st</sup> March 2023, to stop the interested party from prosecuting the charge in Busia CMCCRC No. E362 of 2023, and a mandamus order to direct the interested party to rescind its decision to prosecute the ex parte applicants in Busia CMCCRC No. E362 of 2023.
4. The principal pleading is the statutory statement. One was filed. It is dated 1<sup>st</sup> March 2023. The applicant is described as Geoffrey Njoroge, a purported general manager of the 1<sup>st</sup> ex parte applicant. The factual background is said to be that the interested party had prepared a charge sheet against the ex parte applicants, in Busia CMCCRC No. E 362 of 2023, similar to that in Busia CMCCRC No. E1228 of 2022, wherein the ex parte applicants had been heard and acquitted. It is argued that the matter is res judicata. The accused persons in Busia CMCCRC No. E362 of 2023, had been listed in Busia CMCCRC No. E1228 of 2022, as witnesses. The issues in dispute in the 2 criminal cases are the same, being motor vehicle registration mark and number KAV 839A, and the accused persons were the same. It is alleged that the accused persons had stolen the subject motor vehicle.
5. The statutory statement is verified by an affidavit, sworn by Geoffrey Njoroge, on 1<sup>st</sup> March 2023. It does not say much. It is 4 paragraphs long. It makes no reference to annexures, although a copy of a charge sheet in Busia CMCCRC No. 1228 of 2022, and a letter from the interested party, dated 23<sup>rd</sup> February 2023 are attached.
6. The interested party had filed a response to the ex parte chambers summons, after the same was erroneously served with it. Erroneously because that application was meant to be ex parte, and it should not have been served, for leave is granted or denied without hearing the parties. The procedure is set out in Order 53 Rule 1(2), which says, “An application for such leave as aforesaid shall be made ex parte to a judge in chambers...” Anyhow, the response by the interested party is vide an affidavit, sworn by Shirley Kebut Chepkonga, Principal Prosecution Counsel. She states that the interested party had made a decision to charge the 1<sup>st</sup> ex parte applicant with conspiracy, contrary to section 317 of the Penal Code, Cap 63, Laws of Kenya, in Busia CMCCRC No. 362 of 2023. She further avers that the 1<sup>st</sup> ex parte applicant had been previously tried and acquitted under section 210 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, in Busia CMCCRC No. E1228 of 2022, of stealing and forgery, and that the charge that the 1<sup>st</sup> ex parte applicant faced in Busia CMCCRC No. 388 of 2023 was separate and distinct from the one in respect of its it was tried and acquitted. She states that the rest of the ex parte applicants were not parties to the proceedings in Busia CMCCRC No. E1228 of 2022. They were supposed to be witnesses, but they failed to testify in that matter, leading to the collapse of the prosecution, and that the charges facing them in Busia CMCCRC No. E362 of 2023, were fresh. She asserts that Busia CMCCRC No. 362 of 2023 was not a replica of Busia CMCCRC No. E1228 of 2022, and that to argue that the matter was res judicata was misguided. She argues that the decision to prosecute has already been made, and the order of prohibition is not available. She states that the 2<sup>nd</sup> and 3<sup>rd</sup> ex parte applicants had already been arraigned in court, and taken plea. She asserts that illegality,



irrationality and procedural impropriety have not been demonstrated. She has attached to her affidavits documents to support her case. There are copies of the charge sheets in Busia CMCCRC No. E1228 of 2022, Busia CMCCRC No. 362 of 2023 and Busia CMCCRC No. 388 of 2023; letters to the Director of Criminal Investigations, dated 23<sup>rd</sup> February 2023 and 1<sup>st</sup> March 2023; among others.

7. Although the ex parte applicants had asked for time to file an amended application, they abandoned that quest. The interested party filed written submissions, which I have read through, and noted the arguments made. The ex parte applicants did not file written submissions, and did not express a desire to file any.
8. Let me start by stating that these proceedings are very poorly conceived. In Judicial Review proceedings, the Republic is always the applicant, never the respondent. The applicant and the ex parte applicant are different parties. The Republic is a nominal applicant, while the ex parte applicant is the real applicant, but the 2 positions ought not be mixed up, as was the case here. The ex parte applicant brings Judicial Review proceedings in the name of the Republic, which makes the Republic the principal applicant, although in a nominal sense, for the Republic plays no role at all in the proceedings. The respondent would be the party against whom the orders are sought, and who should respond in principal to the application. In this case the Director of Public Prosecutions is the party against whom the reliefs are sought, and should be the principal party, in terms of responding to the cause. The Director of Public Prosecutions ought not have been sued as an interested party, but as the respondent, being the primary party, for the orders sought in these proceedings are against that office. An interested party is a peripheral or secondary or lesser party, against whom no orders are sought, but who is likely to be affected by the final outcome, and, therefore, necessitating its joinder, to afford it an opportunity to be heard, or to participate in the proceedings, before orders, potentially adverse to it, are made. The orders in these proceedings are sought against the Director of Public Prosecutions, so the Director of Public Prosecutions is the primary party, he is not a secondary party, and he cannot possibly be an interested party in proceedings where orders are being sought against him.
9. The second issue with the proceedings is that no evidential basis has been laid for grant of the reliefs sought. The statutory statement is a pleading, which makes allegations of fact in summary form. Those statements of fact are not on oath, hence the provision for the filing of affidavits, to verify the facts averred in the statement. Order 52 Rule 1(2) states that “... shall be accompanied by a statement setting out the name and description of the applicant, and the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.” The affidavits should verify the facts pleaded in the statement, by way of giving details and particulars, and attaching annexures of any documents supporting the case.
10. There is no evidence, in the instant cause, to support the statutory statement. the affidavit that purports to verify the statement is 4 paragraphs long. It states no facts, and it makes no reference to annexures. It states nothing of any evidential value. The statement refers to 2 charge sheets, copies of which have not been annexed to the affidavit purporting to verify the statement. There is an allegation, in the statement, that the ex parte applicants had been tried and acquitted in previous proceedings. A certified copy of the proceedings, in which that trial was conducted, leading up to that acquittal, have not been exhibited, and so there is no evidence that any such trial was ever mounted, and that the ex parte applicants benefitted from an acquittal, and that the proposed trial would amount to the ex parte applicants being prosecuted for a second time on the same facts. The ex parte applicants may be tempted to argue that other than the verifying affidavit, that there is also a supporting affidavit. It is true, but that second affidavit supported the ex parte chamber summons. That ex parte chamber summons was transient. Its life was limited to grant of leave. Leave was granted, and that ex parte chamber summons was spent, together with the affidavit which supported it. Never mind that under Order 52 Rule 1(2) of the *Civil*



Procedure Rules, there is no requirement for the ex parte chamber summons for leave to be supported by any affidavit, for the material that the court should evaluate, to determine whether or not to grant leave, should be in the statement and the affidavits verifying it, and that would obviate the need to have a supporting affidavit for the ex parte chamber summons. There is, therefore, no evidential material to support the allegations made in the statutory statement, and grant of the orders sought therein, and in the Motion.

11. Thirdly, it is argued that the proceedings in Busia CMCCRC No. E362 of 2023 are res judicata, in view of the proceedings that had purportedly been conducted and concluded in Busia CMCCRC No. E1228 of 2022. With tremendous respect to the parties herein, the principle of res judicata does not apply here. These Judicial Review proceedings relate to criminal proceedings. Res judicata is a principle in civil procedure. It is provided for in section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya. The Civil Procedure Act does not govern criminal proceedings in Kenya, for the statute that applies there is the Criminal Procedure Code.
12. The equivalent of res judicata, in criminal proceedings, are the twin principles of autrefois acquit and autrefois convict. They are provided for under section 207(5)(a) of the Criminal Procedure Code, and they enable an accused person to plead that he had previously been convicted or acquitted of the same facts of the same offence. The provision is echoed in the constitutional fair trial principles, stated in Article 50(2)(o) of the Constitution. These 2 concepts fall within the general principle in criminal law known as the rule against double jeopardy. It is these principles that the ex parte applicants should have cited, instead of the civil process principle of res judicata. Autrefois acquit and autrefois convict are pleas at arraignment, so that, upon criminal charges being read out to an accused person, instead of him pleading guilty or not guilty, it should be open to him to plead autrefois acquit or autrefois convict, and the Criminal Procedure Code has a procedure for dealing with that. There is no necessity for lodging Judicial Review proceedings, pegged on autrefois acquit and autrefois convict, when the Criminal Procedure Code has a clear procedure on what should happen. The ex parte applicants should have presented themselves before the trial court, for plea taking, where they would have availed themselves of the plea and the procedure in section 207(5)(a) of the Criminal Procedure Code.
13. Section 207(5)(a) of the Criminal Procedure Code states:

“ If the accused pleads—

  - (a) that he has been previously convicted or acquitted on the same facts of the same offence; or
  - (b) ...

“ the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.”
14. Fourthly, although it is purported that there are 7 ex parte applicants, in reality there is only one ex parte applicant, Geoffrey Njoroge, going by the statement of facts, dated 1<sup>st</sup> March 2023. Under name and description of applicant, appears Geoffrey Njoroge, as 1<sup>st</sup> ex parte applicant. The rest of the ex parte applicants are not described, nor even mentioned in the said pleading. In short, they are not parties to the instant Judicial Review process, according to the pleading. Curiously, Geoffrey Njoroge, himself, is not listed in the titulum as a party, although the statutory statements defines and describes him as the 1<sup>st</sup> ex parte applicant. The said Geoffrey Njoroge, other than his filings, has not provided any



evidence that the Bungoma Line Sacco exists, and that he has anything to do with it, to purport to initiate proceedings on its behalf.

15. Fifthly, the ex parte chamber summons sought for leave to file for certiorari and prohibition. Leave was granted for those 2 reliefs. Yet, in the Motion herein, I see that the ex parte applicants have dropped the prayer for certiorari, and are praying for a mandamus order, yet leave had not been granted for mandamus. The prayers sought in the Motion must be aligned to those set out in the statutory statement, and to the prayers for which leave was granted. The statement of facts, herein, seeks certiorari and prohibition, and so did the ex parte chamber summons, and leave was granted for those 2. There was no room for praying for a mandamus order, in the Motion, herein, when leave was not sought, and obtained, for it. I reiterate, the statutory statement is the principal pleading in Judicial Review proceedings, and the court can only grant orders based on what is sought in that pleading.
16. Sixthly, I doubt whether, even if the mandamus order could be prayed for in the Motion, it would be available for granting. Mandamus, herein, is sought to direct the interested party to rescind its decision to prosecute under Busia CMCCRC No. E362 of 2023. Mandamus operates to enforce a statutory duty. There is no statutory duty for the interested party to rescind any decision. The statutory duty on it is to prosecute, and to make decisions to prosecute. Mandamus cannot issue to compel it to rescind a decision to prosecute. The appropriate remedy, where a decision to prosecute has already been made, like in the instant case, should be to quash, by way of certiorari, that decision to prosecute, rather than to compel withdrawal of the decision to prosecute, using the mandamus order. Mandamus does not work that way. Mandamus compels or coerces only in circumstances where there is a duty, usually statutory or ministerial, and it issues to have that duty enforced or performed.
17. I believe that I have said enough to demonstrate that the proceedings herein are so poorly conceived, that they cannot possibly provide any basis for grant of the reliefs sought. The interested party has done a better job, than the ex parte applicants, of placing before the court coherent facts surrounding the matter. Indeed, it is the interested party who has brought clarity to the matter. However, that has not helped the case for the ex parte applicants, it has only served to weaken it. As there is no basis for grant of the reliefs sought, I have no option, but to dismiss the Judicial Review proceedings herein, as I hereby do. The said proceedings are so woefully incompetent that I feel tempted to slap the ex parte applicants with costs. However, since the proceedings are against the State, I shall refrain from doing so. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

**Advocates**

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the ex parte applicants.

Ms. Chepkonga, instructed by the Director of Public Prosecutions, and Mr. Nyauma, instructed by the Attorney-General, for the interested party.

