



**Republic v Director of Public Prosecutions & another; Nderitu (Exparte);
Kimundo (Interested Party) (Miscellaneous Criminal Application
28 of 2019) [2022] KEHC 10688 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CRIMINAL APPLICATION 28 OF 2019**

**M MUYA, J
JUNE 30, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

AND

PETER CHIMBA NDERITU EXPARTE

AND

JOHN MIGUNDA KIMUNDO INTERESTED PARTY

RULING

1 Before this court is an mended Notice of Motion application dated the 20th day of November 2019 which inter alia seeks the following orders:-

1. That an order of certiorari do issue to remove and quash the decision of the Respondents to arrest, incarcerate and prosecution the applicant herein.
2. That an order of prohibition directed at the respondents prohibiting them from arresting, incarcerating and prosecuting the applicant.

2 The grounds are:-

- a. That the decision of the Respondents to prefer criminal charges against the applicant for work done in his normal cause of business.



- b. The decision of the officer's of the Respondents is punitive
- c. The applicant shall be heavily prejudiced and shall be subjected to mental torture and bias if he is going to be put through a criminal hearing.
- d. That the complainant in the intended prosecution is not a beneficiary of the Estate.
- e. That even if (which is not the case) the applicant was a beneficiary the proper forum to make his claim is through the succession cause as opposed to a criminal process.
- f. That the matter herein is purely Civil in nature and therefore the police have absolutely no role to play over the Estate.

The Respondents Case

- 3 The first Respondents representative vide an affidavit sworn and dated the 11th day of September 2019 and in particular Paragraph 8 depones thus;- "That the applicant committed forgery. He was first subjected to this offence on 4th February 2012 whereby he forged a letter written by the Chief of Mahiga Location and Addressed to the Deputy Registrar of the High Court of Nyeri. The said letter was given to the accused to enable him to file a succession cause no 578 of 2012 in the estate of the late Nderitu Gitiku alias Joseph Nderitu Gitiku who was the father."
- 4 In paragraph 9 it is deponed that the said letter was filed by the applicant in court, altered and some beneficiaries were omitted and others included, thereafter the applicant was issued with certificate of confirmation of grant to manage and distribute the property.

Analysis and determination

- 5 It is Common ground that the allegations of forgery subject matter of the intended criminal proceedings arise from a succession cause No.578/012. Estate of Nderitu Gitiku alias Joseph Nderitu "Gitiku Deceased and Peter Chimba Nderitu.
- 6 Peter Chimba Nderitu had petitioned for grant of letter of administration for the aforementioned Estate. A certificate for confirmation of grant was subsequently issued on 20th February 2018.
- 7 It is this process that the intended criminal proceedings are challenging. I have perused a letter from the DC10 Nyeri South dated 30th May 2019 in which he alleges to be investigating a case of obtaining registration of documents by false pretense c/s 320 of the Penal Code in which some family members secretly filed the Succession Cause and distributed plots to themselves without the knowledge of others beneficiaries.
- 8 It is instructive to note that these other beneficiaries are not named apart from one John Mugunda Kimondowho is indicated as an interested party in the Misc. Criminal Application No.28 of 2019.
- 9 It is the contention by Peter Chimba Nderitithe applicant herein that (which is not denied) the property under administration is LR No. Mahigo/Ugachiku/8 as per the chief's letter dated 4/2/2011 and as shown in the title deed issued on the 27th Day of March 1990 but not the one referred to by John Mugunda Kimondo (The interest party) which is LR. Mahiga/Ngachiku/741 which does not form part of the Estate of the deceased.
- 10 Further that John Migunda Kimondo is not a beneficiary of the Estate of the deceased and neither have the Respondents shown in what capacity was he making a complaint if any.



- 11 Section 4 of the office of Public prosecution Act provides:- In fulfilling its mandate, the office, shall be guided by *the constitution* and the following Fundamental Principles:-
- a. The adversity of the people of Kenya,
 - b. Impartiality and gender equity
 - c. The rules of natural Justice
 - d. Promotion of Public confidence in the integrity of the office
 - e. The need to discharge the functions of the office on behalf of the people of Kenya,
 - f. The need to serve the cause of Justice, prevent abuse of the legal process and public interest,
 - g. Protection of the sovereignty of the people.
 - h. Secure the observance of democratic values and principles , and
 - i. Promotion of *the constitution*.
- 12 For the purposes of this case paragraph (f) is particularly relevant, as it is emphatic on the need to serve the cause of Justice, prevent abuse of the legal process and public interest.
- 13 Article 157 of *the Constitution* establishes the office of Director of Public Prosecutions.
- 14 Article 157 (11) provides:-“ in exercising the powers conferred by this article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process”
- 15 From the foregoing, it was incumbent upon the 1st Respondent to familiarize himself with the complaint presented before him by officers of the 2nd Respondent and advise them on issues of law governing succession causes and more so the fact that it is governed by a legal regime which offers dissatisfied parties remedies and or redress in the form of objections, Protest, revocations among others.
- 16 There is no evidence as to whether the 2nd Respondent had established that the complainant was a beneficiary of the Estate, further there is no evidence as to whether attempts were made to find out whether the property under administration was LR.NO. Mahiga/Ugachiku/8 or LR No.Mahiga/Ugachiku/741 which the complainant was referring to. In the cited Judicial Review case no.26 of 2017 in the matter of Exparte applicant Pius Kiprop Chelimo and Jonah Kiprotich Telo. It was observed:-
- 17 The High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression.
- 18 If the prosecution amounts to an abuse of process of the court and is oppressive and vexatious, the judge has the power to intervene and the court has an inherent power and duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent abuse of the process of the court.”
- 19 From a perusal of the pleadings before the court, it is quite apparent that the attempt by the Respondents to bring charges against the applicant without properly establishing the existence of material evidence for a prosecutable case exposed them to suspicions of having an ulterior motive and hence amounting to an abuse of the legal process.



Conclusion

20 The intended prosecution is an abuse of the legal process.

The Judicial Review Application has merit.

Orders of certiorari and prohibition are issued as prayed in terms of the prayers sought.

RULING DELIVERED DATED AND SIGNED AT NYERI THIS 30TH DAY OF JUNE, 2022.

HON. JUSTICE M. MUYA

JUDGE

In the presence of:

Absent: for Applicant

Mr. Mururu: for 1st Respondent

Mr. Mururu: for 2nd Respondent

Court Assistant: Kinyua

30 days Right of Appeal.

HON. JUSTICE M. MUYA

JUDGE

