



Republic v Directorate of Criminal Investigations & another; Muhindi & another (Interested Parties); Cadilla Limited & another (Exparte) (Judicial Review Miscellaneous Application E1121 of 2020) [2022] KEHC 11163 (KLR) (Judicial Review) (23 June 2022) (Judgment)

Neutral citation: [2022] KEHC 11163 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E1121 OF 2020
AK NDUNG'U, J
JUNE 23, 2022

BETWEEN

REPUBLIC APPLICANT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

AND

SADAT MACHARIA MUHINDI INTERESTED PARTY
JOSEPH MWANGI KIRIMI INTERESTED PARTY

AND

CADILLA LIMITED EXPARTE
PATEL RAVJI LALJI EXPARTE

*(Originating from Milimani Criminal Case No E4548
of 2020 [Republic v Patel Ravji & Cadilla Limited])*

JUDGMENT

1. The *ex parte* applicants (hereinafter “the applicants”) moved this court *vide* a notice of motion application dated June 8, 2021 seeking the following orders:
 1. An order of certiorarito call, remove, deliver up to this honourable court and quash the criminal proceedings against the *Ex Parte* applicants in Milimani Criminal Case No E4548



of 2020 [Republic v Patel Ravji & Cadilla Limited] instituted *vide* the charge sheet dated December 1, 2020.

2. An order of prohibition prohibiting and restraining the respondents from proceeding with the prosecution of the *Ex Parte* applicants in Milimani Criminal Case No E4548 of 2020 [Republic v Patel Ravji & Cadilla Limited] at the Chief Magistrates Court at Milimani Law Courts instituted *vide* the charge sheet dated December 1, 2020 or in any howsoever giving effect to or enforcing, in any manner of form the charge sheet dated December 1, 2020.
3. That the costs of this application be in the cause.
2. The application is founded on the grounds set out on the face therein, the amended statutory statement dated January 24, 2021 and the amended verifying affidavit sworn by Patel Ravji Lalji on even date. The applicants' case is that the 1st applicant herein, Cadilla Limited being the registered proprietor of all that property known as Land Reference Number 209/1165 (Original Number 209/11652/9) caused to be erected on the property twenty-four (24) residential maisonnettes and thereafter caused the subdivision of the same wherein the residential maisonnettes were allocated their respective titles. Subsequently, the 1st applicant sold and transferred some of the maisonnettes to third parties upon payment of valuable consideration but retained the maisonnettes registered and erected on Land Reference Numbers 209/18298, 209/18300 and 209118310 in its name and for its own benefit and use.
3. The 1st applicant variously and notoriously utilized the title comprised of numbers 209/18298, 209/18300 and 209/18310 to secure loans with financial institutions in enjoyment of its proprietary interests over the property and the titles thereof. It is however the applicants' case that the 2nd and 3rd respondents without any colour of right whatsoever, and in blatant breach of the provisions of law, instituted criminal proceedings against the applicants alleging that the applicants obtained credit by false pretences contrary to section 316(a) of the *Penal Code*. The said proceedings were instituted pursuant to a complaint by the 2nd interested party alleging that the 1st interested party sold Land Reference Number 209/18300 also known as maisonnette number 9 of the developments (hereinafter referred to as "the suit property") to him having himself allegedly purchased the suit property from the 1st applicant.
4. Upon perusal of the agreement relied on, the 1st interested party supposedly purchased the suit property on or about May 18, 2007 *vide* an agreement for sale of even date, a period of over twelve (12) years and the alleged sale agreement evinces that the 1st interested party allegedly paid the sum of Kshs 8,100,000/- to the 1st applicant. However, the 1st applicant contends that it is a stranger to the said agreement for sale as it has never sold and/or transferred the suit property. Consequently, any such allegation is baseless and fraudulent.
5. It was their contention that it is curious to note that the alleged sale took place a period of more than 12 years ago but the 1st interested party took no step to have the original title and/or secure his alleged interests over the suit property. Significant thereto, the 1st interested party has not proffered any reasonable explanation for the long and unreasonable delay in enforcing his alleged rights and interests over the suit property and under the impugned agreement for sale neither has he preferred any civil proceedings in the statutory mandated court, the Environment and Land Court, for appropriate orders in enforcing his alleged rights and/or interests over the suit property as against the applicants.
6. Further, upon perusal of the impugned agreement for sale relied upon by the 1st interested party, it is expressly provided under such agreement that any dispute emanating from the alleged transaction would be resolved through arbitration. In any event, it is uncontroverted that the interested parties



- herein are cognizant that the 1st interested party's claim is manifestly statute barred by the provisions of the Limitations of Actions Act as the 1st interested party has not sought to assert any alleged claim it has over the suit property within the period allowed by law.
7. Consequently, the criminal proceedings before the 1st respondent in Milimani Criminal Case No E4548 of 2020 and the 3rd respondent's decision to charge the applicants are actuated by malice and are manifestly an abuse of court process by the 3rd respondent as it is the Interested Parties' mode of coercing the applicants to cede to the already stale legal claim they assert over the suit property.
 8. Indeed, they contended that it is unconscionable and a travesty of justice for the agents of the 2nd respondent to be involved in the settlement of what is purely a civil dispute and it is evident that the 3rd respondent's decision to prosecute is tainted with mala fides and amounts to an abuse of prosecutorial discretion which this honourable court is enjoined to review. In their view, although the agents of the 2nd respondent have the prerogative to investigate crime, that power must be exercised reasonably, in accordance with the laws and in good faith.
 9. Pursuant to the said complaint by the interested parties and subsequent decision of the 3rd respondent, the applicants have been subjected to illegal and irregular criminal proceedings into the conduct of their affairs without any justifiable cause and their prosecution continues to occasion them grave prejudice and loss as there is no basis for such actions to be taken against them in a dispute that is purely civil in nature. Indeed, the 2nd and 3rd respondents' actions are irrational, unreasonable, contra-statute and amount to an abuse of the discretion conferred by law and are also in excess of their power and/or jurisdiction as conferred by law. Accordingly, it was urged that the application be allowed as no lawful prejudice will be visited on the parties, as the orders sought merely seek to advance the rule of law and strict compliance with the mechanisms established under the law.
 10. The applicant also filed a further affidavit sworn on November 15, 2021 and written submissions dated October 10, 2021 and supplementary submissions dated November 15, 2021 in support of the application. As a preliminary, counsel submitted that the application is undefended as the 2nd and 3rd respondents have not controverted any of the averments in the verifying affidavit sworn by the 2nd applicant in January 24, 2021. Counsel urged that the 2nd and 3rd respondents only filed grounds of opposition dated June 25, 2021 and which indicate that they are in response to the application dated January 24, 2021. Indeed, counsel urged the court to be guided by among other authorities, the Court of Appeal in Civil Appeal 95/2016, Daniel Kibet Mutai & 9 Others v Attorney General [2019]eKLR where it was stated that an affidavit is sworn evidence and occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Accordingly, counsel urged the court to find that the notice of motion before court dated June 8, 2021 as supported by the verifying affidavit and the statutory statement both dated January 24, 2021 is unopposed.
 11. On the issue whether the 3rd respondent's prosecutorial powers under article 157 of the Constitution is subject to review and/or interrogation as to its propriety by this honourable court, counsel relied on article 165(3)(b) & (d)(ii) of the Constitution and submitted that the 3rd respondent in approving arraignment and prosecution of the applicants does not enjoy a *carte blanche*. Indeed, counsel urged the court to properly scrutinize the totality of the facts and circumstances as well as evidence abounding herein as restated in the uncontroverted verifying affidavit establishes that the prosecution of the applicants is certainly in abuse of legal process and pursued for extraneous purposes.
 12. It was further submitted that the impugned proceedings in the trial court are not made in the interest of the administration of justice as they have been instituted to coerce the applicants to submit to the Interested parties' claim over the suit property, which averment has also not been uncontroverted by



the 3rd respondent. Be that as it may, counsel argued that since the parties had agreed on usage of arbitration, it would be contrary to article 159(2)(c) of the Constitution to employ criminal law.

13. Accordingly, counsel submitted that the applicants have led adequate and uncontroverted evidence against which the honourable court may scrutinize the instance of exercise of the 3rd respondent's prosecutorial power in Milimani Criminal Case E4548 of 2020 against the applicants and reach the conclusion that this is a necessary and proper case for the invocation of its jurisdiction to quash the charges against the applicants. It was therefore urged that the application be allowed.

The 2nd & 3rd Respondents' case

14. The 2nd and 3rd respondents did not file a response or submissions to the notice of motion application.

2nd Interested Parties case

15. The 2nd interested party filed a replying affidavit sworn by Joseph Mwangi Kirimi on October 25, 2021 opposing the motion. They stated that it is not in contention that the 1st applicant was registered owner of Land Reference Number 209/11652 (Original Number 209/11652/9) and that the aforesaid property was subdivided into 24 title deeds including the one which is the subject of the criminal case that is, LR No 209/ 18300 also known as maisonette number 9 hereinafter, the suit property. However, the applicants are contradicting themselves by distancing themselves from the agreement for sale dated May 18, 2007 between the 1st applicant and the 1st interested party in paragraph 7 yet in paragraph 9 they are referring to an arbitration clause which in their opinion ought to have been utilized to resolve a dispute based on an agreement they don't know exists. Further, the applicants keep on emphasizing in their application that the Interested Parties should have instituted civil proceedings instead of criminal proceedings against them which is clear they are making an admission of their liability in the matter at hand thus their preference for a civil suit.
16. Furthermore, the applicants are alleging that they were never party to the said agreement for sale yet curiously in the month of May 2007, their bank account at Guardian Bank Limited was credited with Kshs 8,190,000/- which is suspiciously similar to the purchase price of the property. It is also evident the signatures in the agreement for sale dated May 18, 2007 are similar to those in the account opening form from Guardian Bank and to be specific the signatures tally with one Varsani Hirji Viardi and Ruda Premji Rajani, both of whom were the appointed as directors of the 1st applicant on November 25, 2005.
17. Consequently, the applicants cannot hide under the provisions of the Limitations of Actions Act since the same can be extended in the event of a fraud being occasioned at which point the limitation starts at the point of discovery of the fraudulent act/omission which in this instance commenced from last year when the 2nd applicant was rightfully and lawfully prosecuted by the 2nd and 3rd respondents. Be that as it may, the 1st interested party has since been compensated for the purchase of the property by the 2nd interested party and therefore would obviously lack the motive to seek legal redress. In any event, there cannot be a civil dispute if a party has overtly used trickery and underhanded tactics to gain a financial benefit to the detriment of the interested parties.
18. It was further urged that this is not a case where the court should exercise its discretion in favour of the applicants since such orders will be detrimental to the 2nd interested party when in fact, the applicants have carefully concealed crucial information which could only have been obtained by the 2nd respondent by filing Milimani Criminal Case No E4548 of 2020. Indeed, it is the 2nd interested party's case that the applicants knowingly sold the suit property to the 1st interested party and failed to



- transfer the title to the 1st interested party thus making it difficult for the 1st interested party to transfer the suit property to the 2nd interested party despite several follow-ups by the interested parties.
19. To make it worse, the Applicants charged the said suit property to ASL Credit Limited on November 17, 2011 and obtained a loan for a sum of Kshs 60,000,000/= and later charged it again to ASL Credit Limited on September 5, 2019 and obtained a loan for a sum of Kshs 75,000,000/-. In light of the foregoing, they urged the court not to grant the orders sought as they would greatly interfere with the ability of the 2nd respondent to reveal further incriminating information about the applicants.
 20. The 2nd interested party also filed written submissions dated October 25, 2021 opposing the application. On whether the orders sought should be granted, counsel submitted that that the decision to prosecute was lawful under article 157 *Constitution* and enabling statute at section 4 & 5 and the legality of the decision is canvassed under the question revolving prosecutorial discretion. In counsel's view, the applicants are seeking to use judicial review mechanism to essentially determine their innocence outside the trial court contrary to the scope and limit of this court's jurisdiction as set out in article 165(6) of the *Constitution*.
 21. It was further submitted that the 2nd interested party asserts that there are discretionary grounds that justify the refusal of permission in the exercise of the court's discretion including the availability of an adequate alternative remedy, prematurity of a claim, and where the claim would cause great prejudice and hardship to third parties or the public interest. Indeed, counsel submitted that the grant of order for certiorari and an order for prohibition will be detrimental to their efforts to pursue justice in Criminal Case No E4548 of 2020 and the applicants' actions or omissions that are to be heard at trial on preliminary evaluation illustrates criminal conduct. Further, it is only upon investigation by law enforcement in light of the prosecution that uncovered the deceit or trickery employed by the Applicants to unsuspecting individuals.
 22. On the issue whether or not the prosecution is unfair, malicious and without any factual basis, counsel submitted that it is evident the signatures in the agreement for sale dated May 18, 2007 are similar to those in the account opening form from Guardian Bank and to be specific the signatures tally with one Varsani Hirji Viardi and Ruda Premji Rajani, both of whom were the appointed as Directors of the 1st applicant on November 25, 2005. Further, the applicants knowingly sold the suit property to the 1st interested party and failed to transfer the title to the 1st interested party.
 23. Despite the sale of the suit property to the 1st interested party, the applicants charged the suit property in favour of ASL Credit Limited on November 17, 2011 and obtained a loan for a sum of Kshs 60,000,000/= and took a further charge on the suit property to ASL Credit Limited on September 5, 2019 and obtained a loan for a sum of Kshs 75,000,000/=. There was no disclosure to the interested parties that the suit property they bought four (4) years prior has been charged for the advance of a loan neither did the applicants disclose to ASL Credit Limited that property to be charged was subject to a sale to the interested parties.
 24. Counsel further submitted that the element of fraud in relation to the sale of suit property has the effect of extending the statutory limitation of actions under section 26 of the *Limitations of Actions*. Be that as it may, counsel submitted that while this honourable court has the power to quash, stay or prohibit criminal proceedings, the applicants have not presented material evidence and sufficient grounds that are meritorious for grant an order for certiorari and an order for prohibition. In fact, counsel argued that the orders sought should be denied because the applicants have alternative remedy during the trial itself and the appellate mechanism. It was therefore urged that the application be dismissed.



Analysis and Determination

25. Having considered the pleadings as well as the submissions and the arguments advanced by the parties herein, it is my view that the of determination is:
 - a. Whether the respondents executed their mandate constitutionally and within the law in recommending prosecution of the applicants.
 - b. Whether the applicants have satisfied the law that the intended criminal proceedings ought to be halted.
 - c. Whether the applicants are entitled to orders of judicial review sought.
26. The constitutional underpinning of the vast and unfettered powers over public prosecutions vested on the 2nd respondent is found at article 157 of the *constitution*. The article provides that the 2nd respondent 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 function, shall not be under the direction or control of any person or authority. Under Sub article 11 he or she is required to have regard for the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.
27. Article 157 of the *constitution* is not, however, a *carte blanche* for the holder of the office to act illegally or unconstitutionally. Where the office acts unconstitutionally, illegally or without due process, the court will be on hand to offer a remedy. The decision to charge is by its very nature an administrative action which is subject to the supervision of this court under article 47 of the *constitution* and within the parameters in the Fair Administrative Actions Act. Where appropriate, the judicial review jurisdiction of this court can and is often resorted to for suitable remedies.
28. In the case of *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR, the Court of Appeal extensively considered in detail the applicable law and circumstances under which the court could interfere with the exercise of prosecutorial discretion by the DPP. Among the guiding principles outlined in section 4 of the *ODPP's Act* No 2 of 2013 and the national prosecution policy formulated by the DPP pursuant to section 5(1)(c) of the *ODPP Act* are that; “The decision to prosecute as a concept envisages two basic components namely; that the evidence available is admissible and sufficient and that public interest requires a prosecution to be conducted”
29. Paragraph 4 (B)(Z) of the said policy provides; “the evidence test- public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, public prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available”
30. In diamond’s case (supra), the court held in para. 42 as follows;

“The burden of proof rests with the person alleging unconstitutional power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision”
31. In para.45 the court went further to state thus;

“(45) In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which DPP’s decision is made establishes a *prima facie* case necessitating prosecution. At this stage, the courts should not hold a fully-fledged



inquiry to find if evidence would end in conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative.”

32. The jurisprudence show that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise sparingly and Lenaola J (as he then was) summed it up aptly in *Patrick Ngunjiri Muiruri v DPP* [2017] eKLR} [2017]eKLR where he stated;

“The law and practice, then, are quite clear; while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the court can review the DPP’s decisions for rationality and procedural infirmities, it cannot review them on merit.”
33. Granted in the matter before court, it is common ground that there was a sale of land transaction between the applicants and the 1st interested party. There are contested issues as between the parties as regards each parties’ specific performance of the contractual obligations. Certainly our courts at the various levels and relevant jurisdictions have the wherewithal to resolve the dispute.
34. Of concern in these proceedings is the off shoot of a trial of a criminal nature against the applicants whereby they are charged in a criminal case before the magistrates court. This is after investigations in which as per material before court fraud and trickery were uncovered and motive established. This is not the forum for any further inquiry into the matter and for that reason, it is unnecessary to go into the details of the investigations. Suffice it to note that evidence was collected and presented to the DPP who made a decision to charge the applicants in exercise of the powers under article 157 of the [constitution](#).
35. I have had due regard to the applicants’ challenge to the charges levelled against them. The applicants maintain that they were not parties to the agreement for sale dated May 18, 2007 with the 1st interested party. It is their case that the alleged sale took place a period of more than 12 years ago but the 1st interested party took no step to have the original title and/or secure his alleged interests over the suit property. Significant thereto, the 1st interested party has not proffered any reasonable explanation for the long and unreasonable delay in enforcing his alleged rights and interests over the suit property and under the impugned agreement for sale neither has he preferred any civil proceedings in the statutory mandated court, the Environment and Land Court, for appropriate orders in enforcing his alleged rights and/or interests over the suit property as against the Applicants. Furthermore, it is expressly provided under such agreement that any dispute emanating from the alleged transaction would be resolved through arbitration.
36. The 1st interested party on the other hand contended that the applicants are alleging that they were never party to the said agreement for sale yet curiously in the month of May 2007, their bank account at Guardian Bank Limited was credited with Kshs 8,190,000/- which is suspiciously similar to the purchase price of the property. It is also evident the signatures in the agreement for sale dated May 18, 2007 are similar to those in the account opening form from Guardian Bank and to be specific the signatures tally with one Varsani Hirji Viardi and Ruda Premji Rajani, both of whom were the appointed as directors of the 1st applicant on November 25, 2005. It is upon these investigations that the DPP on review of the matter agreed with the findings and recommended the charges. No doubt there exists serious issues for interrogation and the court with the latitude to interrogate the facts and make findings one way or the other is the trial court.



37. This court would fall into great error if it was to usurp the duty of the trial court by evaluating the sufficiency or otherwise of the evidence and to make a finding whether the same can sustain a conviction. The decision in *Erick Kibiwott Tarus & 2 others v Director of Public Prosecutions & 7 others* [2014] eKLR illuminates this. The court stated;

“100. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High court ought not to usurp the jurisdiction of the trial court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution’s evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the court abetting abuse of the court process by the prosecution.”

38. The burden of proof lay upon the applicants to demonstrate that the respondents, and particularly the 2nd respondent violated their constitutional rights, acted with malice or ulterior motives, acted without due regard to public interest, acted against the interest of justice or abetted abuse of the court process. From the foregoing, I am minded to find that the 2nd respondent should be permitted to carry out his task without intervention from the courts, as per his constitutional mandate. The applicants shall have their day in court to meet their accusers and their rights to a fair trial are properly secured under articles 49 and 50 of the *constitution*. They will be able to ventilate their case including the right to examine witnesses.

39. The upshot is that the applicants have fallen short of the threshold required for the exercise of this court’s powers under judicial review to quash and prohibit the prosecution herein. The notice of motion fails and is dismissed. In the circumstances of this case, I direct that each party is to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2022.

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A. K. NDUNG’U
JUDGE

