



**Republic v Director of Public Prosecutions & 3 others; Matolo
(Exparte); Maithya & 2 others (Interested Parties) (Judicial Review
E1 of 2020) [2022] KEHC 10561 (KLR) (21 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
JUDICIAL REVIEW E1 OF 2020**

GMA DULU, J

JUNE 21, 2022

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF
JUDICIAL REVIEW IN THE MATTER OF CERTIORARI**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

LAND REGISTRAR MAKUENI 2ND RESPONDENT

DEPUTY COUNTY COMMISSIONER MAKUENI 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

ROBERT MULI MATOLO EXPARTE

AND

PETER NZESYA MAITHYA INTERESTED PARTY

JOHN GABRIEL MULE INTERESTED PARTY

LAZARUS KAHINGI MUNGUTI INTERESTED PARTY



RULING

1. Before me is a Notice of Motion dated 4th December 2020 filed under Order 53(1), (2) and (3) of the Civil Procedure Rules, pursuant to leave granted on 13th November 2020, and seeks the following orders –
 1. That an order for certiorari (do issue) to quash the decision of the 1st respondent herein made on the 8th May 2019.
 2. That the leave granted by this court on 13th November 2020 do operate as a stay of the decision made on 8th May 2019 and in particular do restrain the respondents from subdividing, transferring selling or disposing the parcel of land number Makueni/Kivani/1000 pending the hearing and determination of the review herein.
 3. That the respondents herein be ordered to pay the costs of the application.
2. The application has grounds on the face of the Notice of Motion, which are that the ex-parte applicant is the legal representative of the estate of the late Philip Kilonzo Moki, and has been willing to substitute the deceased so that an appeal on a land adjudication dispute be heard. That the 2nd respondent the Land Registrar Makueni proceeded to remove the restriction on land parcel No. Makueni/Kivani/1000 based on wrong information given to him, that as a result the 5th, 6th and 7th respondents were charged in Makueni Criminal Case No. 190 of 2019 and 193 of 2019, and that in apparent abuse of the court process the 1st respondent withdrew the charges against the 5th, 6th and 7th respondents which action was meant to disinherit the applicant of the property and was also discriminatory and inconsistent with the provisions of Article 10 and 27 of the Constitution.
3. The application was filed with a verifying affidavit and supporting affidavit sworn by Robert Muli Matolo, the ex-parte applicant, on 4th May 2020. The supporting affidavit gave the facts of the matter, explaining that a decision on the subject land was made by the Land Adjudication Officer on 18th April 1989, and that therefrom the late Philip Kilonzo Muli filed an Appeal No. 87 of 1995, and that a letter dated 08/01/2013 confirmed pendency of the appeal, and that in disregard of the pending appeal the 2nd respondent removed the restriction on the parcel of land on the basis of a false report from the 5th, 6th and 7th respondent.
4. I note that initially, this matter was dismissed for non-attendance, but that dismissal order of the court was later vacated. The ex-parte applicant also filed a further affidavit he swore on 8th December 2021, in which it was deponed that the Land Dispute No.87/1995 on plot no. 1000 – Kivani Adjudication section was still pending, and attached a letter dated 06/12/2021 signed by the Deputy County Commissioner J.M Mwangala to that effect.
5. The application was opposed through replying affidavits, by the 1st Interested Party, Peter Nzesya Maithya, and the 1st respondent Director of Public Prosecutions. The affidavit of the Director of Public Prosecutions sworn by Lucas Tanui on 2nd September 2021 was to the effect that the criminal proceedings herein were properly discontinued by Nicholas Mutuku Senior Assistant Director of Public Prosecutions on 13/11/2019, due to insufficiency of evidence.
6. The application was canvassed through filing of written submissions. In this regard, the ex-parte applicant filed written submissions through counsel O.N Makau & Mulei advocates on 2nd February



2021. Counsel emphasized that the substantive order sought herein, now remained prayer (1) seeking certiorari to quash the decision of the 1st respondent made on 8th May 2019. Counsel relied on several court cases, such as the case of *R -vs- Secretary for Firearms Licensing Board – Ex-parte Johnson Muthama* [2018] eKLR, and contended that the decision to terminate the criminal case herein denied the ex-parte applicant an opportunity to be heard by the trial court, and thus should be quashed.
7. The 1st interested party on his part filed written submissions through counsel Ms. Manthi Masika & company advocates on 23rd September 2021, arguing that the application had no merits firstly, because the request for certiorari orders was time barred as it was made more than 6 months after the Director of Public Prosecutions had discontinued the proceedings on 08/05/2020. Secondly, that prayer 2 for stay of land proceedings was outside the jurisdiction of the High Court as it related to a land parcel Makueni/Kivani/1000. Thirdly, that the powers of the Director of Public Prosecutions were exclusive constitutional powers under Article 157 of *the Constitution*. Fourthly, that the decision on the subject land sought to be challenged herein, was made on 18/04/1989 and the alleged appeal No. 87/1995 was filed late and was time barred. Lastly, that the 5th, 6th and 7th respondents were arrested for allegedly forging Land Department Letters and the matter investigated by the police and ultimately the Director of Public Prosecutions found that no crime had been committed.
 8. The Assistant Director of Public Prosecutions Mr. Lucas Tanui on his part, associated himself with the submissions of the 1st interested party, and relied on the Director of Public Prosecutions replying on affidavit sworn on 2nd September 2021 by Lucas Tanui. I note that, the said replying affidavit explains how the matter was reported to the Director of Public Prosecutions, and how their office reviewed the evidence in Makueni CMCRC Case No. 193 of 2019 on allegation of making a document without authority and conspiracy to defraud, and the case ultimately withdrawn under section 87 (a) of the *Criminal Procedure Code*. The other parties did not file submissions or participate in the hearing.
 9. Having considered the application, documents filed and submissions of the parties, it is clear to me that prayer (2) seeking that the leave granted to file Judicial Review proceedings operate as a stay, and in particular restrain the respondents from subdividing, transferring, selling and or disposing the parcel land number Makueni/Kavani/1000 pending the hearing and determination of the Judicial Review herein, has been spent. This position is actually acknowledged by the applicant's counsel in the introduction part of the ex-parte applicant's submissions, item (2). Thus prayer 2 of the application has already been spent and is not for decision before this court.
 10. Thus the substantive prayer for my decision currently, is prayer (1) which is a request for issuance of certiorari orders to quash the decision of the 1st respondent (Director of Public Prosecutions) made on the 8th May 2018 to withdraw the criminal proceedings.
 11. Judicial Review orders are pegged on proof by the ex-parte applicant, against the respondent on balance of probability that the respondent has acted illegally, or acted irrationally or acted with procedural impropriety.
 12. Counsel for the ex-parte applicant has especially emphasized that principles of natural justice were not adhered to by the Director of Public Prosecutions when the criminal proceedings herein were terminated. He has cited a number of court cases, including the case of *Onyango Oloo –vs Attorney General* (1986 – 1989) E.A 456, and the case of *Republic –vs- the Hon. Chief Justice of Kenya & others – Ex-Parte Moiwo Ole Keiwua* – Nairobi HCMCA No. 1298 of 2004.
 13. Though the Ex-parte applicant has complained about not being given a chance to be heard, before termination of the criminal proceedings, he has not availed to this court, any tangible or detailed reasons why he thinks that he should have been consulted before the Director of Public Prosecutions



terminated the criminal proceedings. He has also not stated any statute, regulations or constitutional provisions which was violated by the Director of Public Prosecutions in terminating the criminal proceedings.

14. On the other hand, Article 157 of *the Constitution* of Kenya 2010 confers on the Director of Public Prosecutions independent powers to commence, take over, and discontinue criminal proceedings. It is of note that criminal proceedings can be discontinued only with the permission of the court, and such discontinuance does not require the permission or consent of any other person. In this regard, Article 157 (8) of *the Constitution* is very clear, and it provides as follows –

“ 157 (8). The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.”

15. In my view, therefore, the applicant has no legal basis for saying that he was not given a right to be heard in the criminal court, as the withdrawal of the criminal case was done within the parameters provided by *the Constitution* and the law. Since there is no allegation that the Director of Public Prosecutions discontinued the case in violation of the law or *the Constitution*, prayer (1) for certiorari cannot be granted by this court, as the applicant has not satisfied the threshold for the grant of the certiorari orders sought.
16. As regards costs, I will order that the ex-parte applicant pays the costs of the 1st interested party, who is a private citizen. I will however not award costs to the Director of Public Prosecutions, a public office.
17. Consequently, and for the above reasons, I find no merits in the Notice of Motion herein for Judicial Review. I dismiss the same and award costs to the 1st interested party (Peter Nzesya Maithya) who is a private citizen, to be paid by the ex-parte applicant.

DELIVERED, SIGNED & DATED THIS 21ST DAY OF JUNE 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

