



**Rono v Republic; Kwambai (Interested Party) (Miscellaneous Criminal Application E222 of 2021) [2022] KEHC 10400 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10400 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CRIMINAL APPLICATION E222 OF 2021**

**EKO OGOLA, J  
JUNE 21, 2022**

**BETWEEN**

**ALICE JEBET RONO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AND**

**MARK LAGAT KIPTOO KWAMBAI ..... INTERESTED PARTY**

**JUDGMENT**

1. This Court has been called upon to make a determination of the Application dated 9<sup>th</sup> November, 2021. However, I note from the Court file that the Interested Party filed a Preliminary Objection dated 14<sup>th</sup> April, 2022 that is yet to be prosecuted.
2. In the circumstances, the Court shall make a determination of the Preliminary Objection. In the event that the same is unsuccessful the Court shall proceed to make a determination of the Application dated 9<sup>th</sup> November, 2021.
3. The Interested Party filed a Preliminary Objection dated 14<sup>th</sup> April, 2022 on the following grounds:
  - i. That the Application is fatally defective, incompetent, incapable of obtaining orders sought and should be struck out with costs.
  - ii. That the Applicant's application seeks orders/prayers which can only be dispensed with in a constitutional petition or judicial review touching on contravention of bill of rights under the Constitution of Kenya 2010.
  - iii. That the orders sought cannot be issued in a Miscellaneous Criminal Application and in the manner sought in the application.



- iv. That the Application offences (sic) the provisions of *the Constitution* of Kenya 2010 in the manner that the rights under the bill of rights should be redressed/enforced and the Application before court is strange.
4. The Applicant and the Respondents did not respond to the aforementioned Notice of Preliminary Objection.
5. The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
6. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”
7. I note that the grounds raised in the Preliminary Objection herein do not disclose any specific pure points of law capable of disposing of the Applicant’s Application in its entirety.
8. I find that the Preliminary Objection dated 14<sup>th</sup> April, 2022 lacks merit and the same is dismissed with no orders as to costs.
9. I now turn to the Application dated 9<sup>th</sup> November, 2021 filed together with the Supporting Affidavit sworn by the Applicant wherein the following orders were sought inter alia:
  - i. Spent
  - ii. Spent
  - iii. Spent
  - iv. There be a permanent injunction restraining and/or stopping proceedings in criminal case number E743/2021 filed in the Chief Magistrates Court at Iten;
  - v. There be a permanent injunction restraining and/or stopping all subsequent arrests of the Applicant, arraigning her in Court and/or charging her for alleged additional offences of obtaining credit, obtaining by false pretence, issuing bad cheques and/or any other similar offences; and



- vi. Such other orders (s) as the Court may deem fit.
10. The application is founded on the Grounds on the face of the Application whose gist is as follows:
- i. That the Applicant has been charged with the offence of obtaining credit by false pretences contrary to Section 316 (a) of the *Penal Code* and for issuing a bad cheque contrary to Section 316A (1) (a) (4) of the Penal Code in Iten Criminal Case No. E743 of 2021.
  - ii. The Applicant received maize, beans, millet and or cereals from the Complainant in Iten Criminal Case No. E743 of 2021 but she supplied the aforementioned cereals to 410 Bridge Food Programme who are yet to honour their commitment for the provision of the aforementioned cereals.
  - iii. That the Applicant is aggrieved that charges have been preferred against her prematurely noting that wholesome investigations are yet to be conducted to establish who ultimately received and utilised the Complainant's cereals.
  - iv. That the Applicant is likely to be arrested, arraigned and charged with a criminal offence which actions would amount to a violation of the Applicant's rights as enshrined in Article 29 (a) of *the Constitution* which provides that every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; Article 39 (1) which provides that every person has the right to freedom of movement and Article 47 (1) which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  - v. That the applicant is likely to be arrested, arraigned in court and charged with the same offence as relates to her interactions with other parties.
11. The Respondent filed a Replying Affidavit by PC Joshua Ngao sworn on 24<sup>th</sup> January, 2022 in response to the Application aforementioned wherein the following issue emerged inter alia:
- i. Vide OB No. 42/15/09/2021, Mark Lagat Kiptoo Kwambai the Complainant in Iten Senior Principal Magistrate's Court Criminal Case No. E743 of 2021 alleged that on 7<sup>th</sup> July, 2021 the Applicant approached him and they entered into an Agreement for the sale of 503 bags of maize for Kshs.1,660,00 0 wherein the Applicant was to make good the payment within Three (3) weeks.
  - ii. On 4<sup>th</sup> August, 2021 the Applicant issued Two (2) bank (sic) cheques which were not honoured since the Applicant's account had been dormant (JN-2 and JN-3).
  - iii. Upon completion of the investigation, the Police File was forwarded to the Director of Public Prosecutions who recommended that the Applicant be charged with one count of obtaining by false pretences contrary to section 316 (a) of the Penal Code and two counts of issuing a bad cheque contrary to section 316A (1) (a) (4) of the Penal Code.
  - iv. If the orders sought in the Application are granted, the powers of the Director of Public Prosecution to institute criminal proceedings under Article 157(6)(a) of *the Constitution* of Kenya, 2010 will be greatly undermined.
12. The Applicant filed a Further Affidavit sworn on 8<sup>th</sup> February, 2022 in further support of the Application wherein the following pertinent issues were raised inter alia:



- i. That the Applicant's Application does not intend to deter her prosecution but it is intended to ensure that her prosecution is conducted constitutionally and as per the law and after completion of investigation.
  - ii. The Applicant averred that the Respondent has not established whether she derived any benefit from the subject cereals.
13. The Interested Party filed a Further Affidavit by Mark Lagat Kiptoo Kwambaisworn on 14<sup>th</sup> April, 2022 wherein the following issue emerged inter alia:
- i. On 11<sup>th</sup> August, 2021 the Interested Party entered into a Sale Agreement for maize with the Applicant (annexed and marked as A);
  - ii. The Interested Party averred that the Applicant is not worthy of equitable relief sought due to her conduct.
  - iii. The Applicant failed to attend Court in Iten Criminal Case No. E743 of 2021 causing the Court to issue warrants of arrest.
14. The Applicant filed a Further Affidavit dated 6<sup>th</sup> April, 2022 wherein the following issues were raised:
- i. The Applicant averred that the recognition and protection of her rights and freedoms is to preserve her dignity pursuant to Article 19 (2) of *the Constitution*.
  - ii. The Applicant stated that the Interested Party has a remedy in a civil suit.
  - iii. The Applicant made reference to her Replying Affidavit dated 21<sup>st</sup> January, 2022 and filed on January, 2022 wherein she stated in paragraph 13 and 14 that her Advocate informed the Court that her failure to attend Court was occasioned by the fact that she was indisposed but the Court proceeded to issue a warrant of arrest notwithstanding;
15. The Interested Party filed a Further Affidavit sworn on 14<sup>th</sup> April, 2022 wherein the following issues came up among others:
- i. The Applicant's Application is defective both in form and substance and the orders sought can only be dispensed with either in a Constitutional Petition or a Judicial Review since both touch on contravention of the bill of rights under *the Constitution* of Kenya, 2010.
  - ii. The Applicant has not articulated how her rights under the constitutional provisions cited in her claim have been violated.
16. The Applicant filed Submissions dated 12<sup>th</sup> April, 2022 and the Respondent filed Submissions dated 20<sup>th</sup> April, 2022.

### **Summary of the Applicant's Submissions**

17. Mr. Were learned counsel for the Applicant submitted that the applicant is entitled to an order of permanent injunction noting that the Respondent preferred criminal charges against her prematurely which action contravened her rights as provided by Article 47 (1), 29 (a), 39 (1) and 47 (1) and 19 (2) of *the Constitution*.
18. Counsel cited *Reuben Mwangi v Director of Public Prosecution & 2 Others; UAP Insurance & Another (Interested Parties)* (2021) eKLR but the facts of the aforementioned claim do not support her claim as is presented in this instance.



16. Mr. Were submitted that the Respondent has failed to justify its decision not to complete investigations fully as requested by the Applicant. The Applicant sought to rely on the decision of the Court of Appeal of Singapore in *Ramahngam Ravinthram v Attorney General* but she failed to furnish this Court with the complete reference and or a copy of the aforementioned authority for consideration.
17. Mr. Were urged the Court to grant the orders as prayed.

### **Summary of the Respondent's Submissions**

18. M/s Okok, learned prosecutor highlighted the mandate of the National Police Service as is outlined Section 24 of the *National Police Service Act*. The Respondent submitted that actions taken in furtherance of this claim were in line with the mandate aforementioned. The Respondent urged this Court to decline the invitation advanced by the Applicant that criminal liability for her actions ought to be passed on to an Organisation called 410 Bridge Food Programme since they are not parties to the criminal case.
19. M/s Okok outlined the mandate of the Director of Public Prosecutions as is provided in Article 157(6), (10) and (11). The Respondent further submitted that upon conclusion of the investigations, the Police file was forwarded to the Office of the Director of Public Prosecution in Iten where the evidence was thoroughly analysed and it was established that the same was admissible and sufficient and that it was in the public interest to conduct a prosecution.
20. Counsel submitted that the DPP has the ultimate discretion to determine which complaint should lead up to a criminal prosecution. Counsel cited *Republic v Chief Magistrate, Milimani Criminal Division & 4 Others Ex-Parte John Wachira Wambugu & Another* [2018]eKLR Misc Application 620 of 2017 where it was stated thus:

“The prosecutor has discretion to make decisions which affect the criminal process. This discretion can be exercised at specific stages of the process, for example— the decision whether or not to institute criminal proceedings against an accused person; the decision whether or not to withdraw charges or stop the prosecution; the decision whether or not to oppose an application for bail or release by an accused person who is in custody following arrest; the decision about which crimes to charge an accused person; the decision whether or not to enter into a plea or sentence agreement; the decision about which evidence to present during the trial; the decision whether or not to appeal to a higher court in connection with a question of law, an inappropriate sentence or the improper granting of bail, or to seek review of proceedings. The DPP must serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to *the Constitution* and the law. It is not for the Petitioner or even this Court to decide the sufficiency or otherwise of the evidence before the prosecution is mounted. It is for the DPP to decide independently and act accordingly. This is a constitutional imperative. It is consistent with the constitutional dictates safeguarding the independence of the DPP and fair trial process...”

21. M/s Okok submitted that the Applicant has not demonstrated that the DPP abused its power or acted maliciously to warrant the interference by the Court.
22. Counsel further submitted that since criminal proceedings against the Applicant have commenced, it is the duty of the trial Court to evaluate the weight of the evidence that the Applicant may render as relates to her interactions with 410 Bridge Food Programme.



23. Counsel submitted that the arrest of a suspect is a process provided in law and it is also a function of the Kenya Police Service. Once investigations are completed and charges approved by the Office of the Director of Public Prosecutions, then the logical step is to have a suspect arraigned in court to answer to the charges. It was submitted that the application lacks merit and should be dismissed with costs.
24. The Interested Party did not file submissions. M/s Bourness, learned counsel for the Interested Party fully relied on their replying affidavit dated 28/2/2022 and further affidavit dated 14/4/2022 in opposition to the application on the basis that the application has no merit and is based on bad faith to delay the prosecution of the criminal case.

### **Determination**

25. I have read and considered the Application herein together with the Replying Affidavits filed in response to the aforementioned Application and the Written Submissions filed by the Applicant and the Respondents and I find that the primary issue for determination by this Court is whether the Application dated 9<sup>th</sup> November, 2022 has merit.
26. Article 157 (6) of *the Constitution* vests state powers of prosecution in the Director of Public Prosecutions (DPP) as follows:

“157(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.”
27. Article 157 (10) stipulates that the DPP’s decision to institute criminal proceedings is not subject to the direction or control of any person or authority as follows:

“(10) The Director of Public Prosecutions 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 functions, shall not be under the direction or control of any person or authority.”
28. Noting that the Office of the DPP is an independent office, it means that in ordinary circumstances, Courts will not interfere with the operations of the Office of the DPP except in instances where it can be clearly discerned that the prosecutorial powers entrusted to the DPP are being used for purposes other than the genuine enforcement of law and order.
29. In *Investments & Mortgages Bank Limited (I & M) v Commissioner of Police and the Director Of Criminal Investigations Department & Dpp & 2 Others* [2013] eKLR the Court observed:

“...The office of the Director of Public Prosecutions established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what the constitutional dictates. One such dictate is that in the exercise of their powers, it is to “have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.” Article 244 enjoins the National Police Service to amongst other things “comply with constitutional standards of human rights and fundamental freedoms.”
30. This application seeks a wide range of orders;- a permanent injunction restraining the prosecution of the Applicant in Iten Senior Principal Magistrates’ Court Criminal Case No. E743 of 2021 and a



permanent injunction restraining and or stopping all subsequent arrests, arraignment in Court and or being charged with additional offences of obtaining credit, obtaining by false pretences, issuing bad cheques and or any other similar offences. Article 157 (11) of *the Constitution* places an obligation on the office of the DPP to prevent and avoid abuse of the legal process in exercising powers conferred under *the Constitution* as follows:

“157(11). In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

31. It is noteworthy that the Applicant admits that she entered into an agreement with the Interested Party herein for the sale of maize at a consideration to be paid at a future date. The Applicant further admits that she issued two cheques to the Interested Party. When the Interested Party deposited the aforesaid cheques, they were dishonoured. The Interested Party made a report to the police and was issued with OB No. 42/15/09/2021. The aforementioned occurrence book report formed a basis for the police investigation that revealed that the aforementioned cheques had been dishonoured due to lack of funds in the Applicant’s bank account. The contents of the aforementioned investigation report were forwarded to the ODPP where a decision was made to prefer charges against the Applicant. The proceedings of the criminal case against the Applicant were stayed and a temporary injunction was issued against the subsequent arrest of the applicant pending the inter partes hearing of the Application herein. The aforementioned order was issued on 30<sup>th</sup> November, 2021.
32. This Court finds that the Applicant has not sufficiently furnished it with evidence to demonstrate how her rights under Article section 29 (a), 39 (1), 47 (1) and 19 (1) have been violated due to the fact that she was charged with the offence of obtaining credit by false pretences contrary to Section 316(a) of the Penal Code and for issuing a bad cheque contrary to Section 316A(1)(a)(4) of the Penal Code in Iten Criminal Case No. E743 of 2021. In *Republic v Commissioner of Police and Another Ex Parte Michael Monari & Another* [2012] eKLR, it was observed thus:

“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...As long as the prosecution and those charged with the responsibility of making the decisions to charge or act in a reasonable manner, the High Court would be reluctant to intervene.”
33. I am persuaded that the decision to prosecute the Applicant was not arrived at arbitrarily as the same is sanctioned by the findings of the investigation conducted as is clearly outlined in the Respondent’s Affidavit sworn by Police Constable Joshua Ngao on 24<sup>th</sup> January, 2022.
34. Consequently, I find and hold that the Application dated 9<sup>th</sup> November, 2021 lacks merit and the same is dismissed with costs to the Respondent, and the Interested Party.
35. The temporary stay of proceedings in Iten Senior Principal Magistrate’s Court Criminal Case No. E743 of 2021 and the temporary injunction stopping the subsequent arrest of the Applicant are hereby vacated.

**DATED, SIGNED AND DELIVERED THIS 21<sup>ST</sup> OF JUNE 2022.**

**E. K. OGOLA**

**JUDGE**

