



**Ndonga v Inspector General & 2 others; Ngotho & 2 others (Interested Parties)  
(Judicial Review E003 of 2021) [2022] KEHC 12553 (KLR) (5 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12553 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
JUDICIAL REVIEW E003 OF 2021  
MM KASANGO, J  
AUGUST 5, 2022**

**BETWEEN**

**NELLY NYAKIO NDONGA ..... APPLICANT**

**AND**

**INSPECTOR GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JAMES MURIITHI NGOTHO ..... INTERESTED PARTY**

**HANNAH WAMBUI WARUINGI ..... INTERESTED PARTY**

**PC MUTINDA ..... INTERESTED PARTY**

**RULING**

1. By chamber summons dated 1<sup>st</sup> July, 2021 Nelly Nyakio Ndonga applied for an order for leave to commence judicial review proceedings for orders of prohibition and certiorari. By this Court's order dated 5<sup>th</sup> July, 2021 the *ex parte* application was granted interim order of stay, staying proceeding of Kiambu Chief Magistrate's Court Criminal Case No. E1146 of 2021 – Republic vs. Nelly Nyakio Ndonga.
2. The criminal trial before Kiambu Chief Magistrate's Court relates to a sale transaction between *ex parte* applicant and James Muriithi Ngotho the 1<sup>st</sup> respondent.
3. The *ex parte* applicant seeks leave to commence judicial review proceedings on the grounds that she was unable to conclude the sale transaction due to restraining orders issued in a succession matter and that when that failure to conclude the transaction occurred, the 1<sup>st</sup> respondent colluded with Police Officer



PC. Mutinda and “maliciously” lodged a criminal case, aforesaid case; that in lodging that criminal case, the respondent abused the court process and abused the *ex parte* applicant’s constitutional rights. *Ex parte* applicant alleged she had been harassed by the police over the allegations made against her and that the criminal case was commenced without her being questioned by police. The application is also based on the ground that recovery of civil debt cannot be enforced through criminal proceedings.

4. Although the 1<sup>st</sup> respondent filed a detailed replying affidavit denying colluding with the police to have criminal proceedings commenced against the *ex parte* applicant; however, at the hearing of the application, 1<sup>st</sup> respondent’s learned advocate Ms. Nganga stated that, the 1<sup>st</sup> respondent does not oppose the application for leave to commence judicial review proceedings.
5. The 3<sup>rd</sup> respondent Pc. Mutinda swore a very detailed replying affidavit where he deponed that he was directed to investigate an alleged offence obtaining money by false pretences, contrary to Section 313 of the *Penal Code*. The complaint was filed by the 1<sup>st</sup> respondent. His investigation revealed the *ex parte* applicant was paid Kshs.3,250,000 for the purchase of the subject land but later the 1<sup>st</sup> respondent found out that the *ex parte* applicant was in the process of selling the subject land to a third party. The police officer’s further investigation revealed the *ex parte* applicant began sub-dividing the subject property notwithstanding having received the purchase price of that land from the 1<sup>st</sup> respondent.

### Analysis

6. Under Article 157 of the *Constitution*, the Director of Public Prosecutions (DPP) is provided with wide prosecutorial powers of criminal cases. The court should not usurp the constitutional mandate of DPP to investigate and to undertake prosecution in exercise of the power conferred to that office. If however it is demonstrated to the court that the criminal proceedings would lead to abuse of the constitutional mandate of DPP, the court will not hesitate halting such actions.
7. The *ex parte* applicant will however be reminded that it is not enough to make unsubstantiated allegations. The *ex parte* applicant was required to show abuse/violation of the process.
8. By the application before court, I am required to consider whether *Ex parte* applicant ought to be granted leave to commence judicial proceedings. It is worth considering what the court stated in the case *Republic v County Council of Kwale & another ex parte Kondo & 57 others* (1998) IKLR (EXL) as follows:-
  - “ 4. The purpose of the application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly, to ensure that the applicant is only allowed to proceed to the substantive hearing if the court is satisfied that there is a case fit for further consideration.
  5. Leave may only be granted, therefore, if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant, the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for Judicial Review. It is an exercise of the court’s discretion but as always it has to be exercised judicially.”
9. My task therefore, bearing in mind the above holding, is to determine whether the *ex parte* applicant availed to the court, evidence that there is an arguable case for relief of judicial review orders.



10. It is trite that judicial review is more concerned with the manner/process in which a decision is made than the merits of the decision. The *ex parte* applicant in presenting her application for leave has failed to show how, if at all, the decision to commence criminal proceeding against her is tainted will be an illegality or that it is irrational. The *ex parte* applicant has not shown impropriety in her being prosecuted. Also, bearing in mind Section 193A of the *Criminal Procedure* Act which allows concurrent litigation of civil and criminal proceeding, the *ex parte* applicant did not prove impropriety in her prosecution.
11. Abuse of criminal process was the subject of discussion in the case *Jerald Wachira Gichuki v G. North & Sons Limited & another* (2013) eKLR as follows:-

“... proceedings taken in bad faith or circumstances yielding an inference that they were up to no good. Criminal law is not to be used oppressively to punish acts which in truth might be technically a breach of criminal law but which contain no real vice and which can only be best handled under a process other than the criminal process namely any of the different systems of civil remedies.”...

“... the purpose of criminal proceedings generally speaking, is to hear and determine finally whether the accused engaged in conduct which amounts to an offence and, on that account, is deserving of punishment.”
12. In my view, the *ex parte* applicant in presenting the application has failed to show DPP’s action warrants intervention by this Court. This Court declines to intervene in the decision of DPP. The *ex parte* applicant’s application is without merit it is in my view frivolous and vexatious.

### **Disposition**

13. The holding of this Court in respect to the chamber summons dated 1<sup>st</sup> July, 2021 is that the application is unmerited. The application is dismissed with costs.
14. The order staying the proceedings in Kiambu Chief Magistrate’s Criminal Case No. E1146 of 2021 Republic v Nelly Nyakio Ndonga is hereby lifted and vacated. The Deputy Registrar of this Court shall avail the Ruling to the Kiambu Chief Magistrate’s Court for it to be placed in that criminal case file.

**RULING DATED AND DELIVERED AT KIAMBU THIS 5<sup>TH</sup> DAY OF AUGUST, 2022.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant : Mourice

For 1<sup>st</sup> Respondent :-

For 2<sup>nd</sup> Respondent:- No appearance

For 3<sup>rd</sup> Respondent : -

COURT

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**

