



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL MISCELLANEOUS APPLICATION CASE NO. E052 OF 2021**

**NOKIA CORPORATION.....1<sup>ST</sup> APPLICANT**

**ROSCHIER ATTONERYS LIMITED.....2<sup>ND</sup> APPLICANT**

**RAJEEV SURI..... 3<sup>RD</sup> APPLICANT**

**AAPO SAARIKIVI..... 4<sup>TH</sup> APPLICANT**

**VERSUS**

**TECHNOSERVICE LIMITED.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDET**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT**

**RULING**

The 4 applicants, Nokia Corporation, Roschier Attorneys Limited, Rajeev Suri and Aapo Saarikivi have filed this application against the 3 Respondents Technoservice Limited, the DPP and the DCI. The application is dated 22.2.2021. Prayers 2 of the application having been spent, the only substantive prayer coming up for determination is prayer 3. The same seeks that this Honourable court be pleased to set aside and or reverse the order/directions of the Hon. Learned Magistrate (Hon. D. M. Ndungi, PM) in Nairobi Criminal Case No. 171/2021, requiring the applicants to appear before him to take plea virtually and to be served with summons by electronic mail. This application is brought under section 362 and 364 of the criminal Procedure Code and also Articles 165(6) and (7) of the constitution of Kenya. Same is supported by the affidavit of the 4<sup>th</sup> applicant sworn at ESPOO, Finland on 19.2.2021.

Following the directions given by the court on 9.3.2021, all the parties filed written submissions. The parties thereafter appeared before the court on 12.3.2021 for highlighting on the said submissions.

Mr. Kuyo for the applicants submitted that following an award from an arbitration process in Finland the 1<sup>st</sup> Respondent sought to commence private prosecution against the applicants, which application was considered by the learned magistrate on 8.12.2020. The application for commencement of private prosecution against the 4 applicants was allowed.

It was submitted that all the 4 are foreigners and are not within the jurisdiction of this court. That a new file, Criminal Case No. 171/2021 has been opened and the applicants are required to appear virtually for plea. It was submitted that according to procedure, private prosecution must go through extradition process and that such extradition proceedings must be commenced first, so that they are brought within the jurisdiction of the court. That under section 362 and 364 of the Criminal Procedure Code, this ought to consider any illegality or correctness of the order of the trial court.

Counsel challenged the submissions of 1<sup>st</sup> Respondent on the law of admissibility and on the competence of the affidavit attached in support of the application. And with respect to the inclusion of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, it was submitted that the same is meant to promote prosecution.

It was also submitted that the charges intended to be preferred have also not been declared since the summons served are blank on the same. That though the effects of the Corona pandemic are appreciated, it was held that for criminal matters, the accused must be within the jurisdiction of the court. It was questioned how bond will be executed. Counsel pleaded that the directions of the lower court be altered and for the court to issue an order for extradition process to be carried out.

Counsel relied on several authorities in support of this application including:-

- i.) ***Abraham Wafula Versus Republic (2013)eKLR***, on the jurisdiction of this court over the findings, order or sentence of the lower court on issues of correctness, illegality or impropriety.
- ii.) ***Peeraj General Trading and Another Versus Mumias Sugar Company Limited (2016)eKLR***, that a stamp of a notary Public as well as the stamp of the Dubai court Notary Public were enough to show that a document had been authenticated.

Ms. Chege for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, submitted in support of his application. Counsel submitted that summons is not an instrument to be used to avail an accused to the court's jurisdiction. That there must be extradition process, which the 1<sup>st</sup> Respondent has failed to commence. She relied on Cap 76 and Legal Notice No. 51/1970, Extradition Treaty between Finland and Kenya. That the lower court ought to have attached Warrants of Arrest to the charge sheet for the foreign jurisdiction to act. Counsel questioned where the applicants would be if plea is taken virtually or how terms of bond would be met. She pleaded that these criminal proceedings in the lower court be quashed.

Mr. Ataka, acting for the 1<sup>st</sup> Respondent vigorously opposed this application. First on the grounds that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are non-suited. That this matter arises from Criminal Case No. 171/2021 in which they are not parties. Second, that the submissions based on extradition process are new issues as same never were submitted before the trial court.

Counsel went on that section 362 of the Criminal Procedure Code does not apply herein since the criminal process has not commenced. That this application is therefore premature since section 362 can only be invoked upon plea being taken. Further, that this application is based on suppositions. He also questioned the competence of the affidavit of the Applicants in as far as it was not sworn in the presence of a commissioner for oaths as set out under the Oaths and Statutory Declaration Act. He challenged the authority of a Notary Public in Finland on admission of authentic oaths in Kenya. He urges court to follow the authority in the ***Estate of Joel Mboroki (2008)eKLR***.

On the submissions based on extradition process, counsel submitted that these are only relevant in cases of involuntary attendance. In this case, the applicants have always participated in these proceedings. Further, that section 99 uses personal service but not physical attendance for plea.

Counsel cited the case of ***Aggrey Achola Versus Nationa Bank of Kenya Limited (2000)eKLR*** that attendance does not have to be physical. And the one of the ***Raphael Sauti Wanjala and 4 others (2019)eKLR***, in which an application was dismissed on grounds that the aggrieved order had not been attached.

I have considered the submissions made by the 3 learned counsel for the parties herein. To me, this is just another application brought under the revisionary powers of the court under sections 362 and 364 of the Criminal Procedure Code. the substantive plea herein is that this court be pleased to set aside and reverse the orders of the Honourable Principal Magistrate made in Nairobi Criminal Case No. 171/2021 on 8.12.2020. The same orders were to the effect that the applicants do appear before the court to take plea virtually and that be served with summons by electronic mail.

First and foremost, the one issue that came out in the submissions of the parties, and which I find necessary to be determined first is the participation of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in these proceedings. These are the Director of Public Prosecution and the Director of Criminal Investigations.

Articles 157(1) of the Constitution established the office of Director of Public Prosecution. At sub-article (6), the Constitution rests state powers of prosecuting Criminal Proceedings on the Director of Public Prosecution. The specific powers are listed thereunder as;

- 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.***
- b) To take over and continue any criminal proceedings commenced in any court (other than court Martial), that have been instituted or undertaken by another person or authority, with the permission of the person or authority, and***
- c) Subject to clauses (7) and (8) discontinue at any stage before judgment is delivered any criminal proceedings instituted by the DPP or taken over by the DPP under paragraph (b).***

The Director of Public Prosecution is therefore a Public Prosecutor in criminal proceedings initiated by him on behalf of the state or the public generally. He is not a prosecutor in any private criminal proceedings. He can only (under Article 157(6)(b) come into a private criminal proceedings, with permission. And this must be for the reason that private criminal proceedings involved and essentially are between private persons.

In our instant case, the proceedings initially commenced before the lower court as Miscellaneous Criminal Application No. 4465/2019. I have perused the considered ruling of the Honourable Learned trial magistrate issued on 8.12.2020 in detail. It is clear from the said ruling that the court issued the leave sought upon satisfying itself that the applicant had satisfied the requirements for grant of leave to institute private prosecution. The court clearly analysed the authority in the celebrated case of Floriculture International Limited and Others, ***Miscellaneous Civil Application No, 114 of 1997***, including the fact that the applicant must have exhausted the public machinery of prosecution before embarking on it himself.

Both the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were parties in the said miscellaneous application. They have however, so far not challenged that ruling and finding in that respect. It is pursuant to this order of the trial court, and the leave granted, that Criminal Case No. 171/2021 has been instituted. This is a private criminal proceeding between the 1<sup>st</sup> Respondent, as the private prosecutor on the one hand, and the 4 applicants as

the intended accused persons on the other hand. It is not a public prosecution. At the same time, the 2<sup>nd</sup> Respondent has not made any attempt at taking over this cause. I sincerely therefore, do not fathom how the 2<sup>nd</sup> and 3<sup>rd</sup> respondents being independent public offices would crawl into this matters, which is between private persons.

In the circumstances. I find merit in the objection raised by the 1<sup>st</sup> Respondent that both 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's enjoyment in these proceedings are irregular, null and void in all respects. I accordingly struck out both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from these proceedings. The pleadings filed herein by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and submissions made by counsel are similarly struck out.

The application by the applicant is brought under section 362 of the Criminal Procedure Code, this

***“The High Court may call for and examine the record of any criminal proceedings of a subordinate court for the purpose of satisfying itself as to the correctness, legality, or propriety of any finding sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”***

Section 364 of the said Act, spells out the specific orders that the High Court may issue with regard to the revision powers granted under section 362.

It is incumbent upon the applicant, coming under this court's powers of revision, to show and convince this court as to the incorrectness, illegality or impropriety of the orders of the subordinate court that it is aggrieved of. From the submissions made, the applicants are aggrieved of the orders of the trial magistrate that the applicants do take plea on the intended charges virtually and that they be served with summons by electronic mail. The said order aggrieved of has however not been exhibited by the applicant. The issue that this poses for this court is how this court would determine what exactly the court considered in issuing this order. Did the court issue this order suo moto? Or were there any presentations made leading to the issuance of these orders?

In this regard, I share in the sentiments expressed by the Hon. Justice K. W. Kiarie in the case cited by the 1<sup>st</sup> Respondent of **Raphael Sauti Wanjala and 4 others Versus Republic (2019)eKLR**, that,

***“Equally, for this court to address itself as to the issues raised, I would have expected to have a record of the proceedings that have given rise to this application. The applicant cannot expect this court to make a decision based on their supporting affidavit only. Certainly, this is a dangerous approach.....”***

The effect of the failure to show the presentations, submissions and the order itself denies this court the opportunity of considering the reasoning and the legal positions that the trial court took in issuing the orders. Under the above section 362 of the Act, this court is required to examine such records of the proceedings of the lower court before venturing into issuing the orders sought by the applicant.

The applicants in the submissions made raised a number of issues regarding the aggrieved orders. I shall deal with the same in the same sequence.

First, were the submissions that 1<sup>st</sup> Respondent ought to have first gone through extradition process so as to avail the applicants who are all in Finland, to the jurisdiction of the trial court. The 1<sup>st</sup> Respondent objected to this grounds that it is a new issue only being raised at this stage. This is an application for revision. The application as filed herein does not raise this issue of extradition proceedings. Not even in the affidavit in support of the application. It is clearly being raised at this late stage of the hearing of the application. It is noted also that the applicants have prior to this application, participated in the proceedings before the lower court. It was in my view, necessary that the applicants now seek to be extradited to the jurisdiction of the court for them to take plea. Counsel confirmed to court that he is in close contact with the applicants. The applicants therefore can readily appear online should the arrangements for plea taking in that manner be made. I say this in view of the fact that even criminal case proceedings in this country during this difficult period of the Corona Virus Pandemic have largely been executed on-line. Binding contracts have similarly been sealed in the same manner. The applicants have not shown this court any law that bars outside the jurisdiction, from subjecting themselves to the jurisdiction of Kenyan courts and specifically for taking of plea. I have, on my part, seen none at all.

The applicants have raised the issue of how the issue of bond will be processed should plea be taken virtually in this matter. With respect to those submission, this is not an issue for consideration by this court by way of this application. The issue of bail and the conditions to the same remain squarely under the grip and jurisdiction of the trial court. The applicant's would therefore be jumping the gun in arguing the alleged potential challenges that lie therein in support of this application for revision. I hold the same view with regard to the issue of mode of service to the applicants.

The other issue that the applicants have raised is that the summons served do not show the intended charges they are required to plead to. In the orders of the lower court of 8.12.2020, at number (b), the court ordered the applicant to avail to the court to draft charge sheet within 30 days. It is not shown to this court if this order has been complied with. However, the parties are agreed that summonses have issued. Again the applicants have not shown any law that requires the prosecutor to furnish the intended accused with copies of the charge sheet well in advance of the date of plea. It is obviously fair and just that the intended accused be made aware of the intended charges well in advance of the date of plea so that he may give his instructions to his advocate, who would then be in a position to offer him the requisite legal advice. However, the common practice is that the accused person is made aware of the charges he is facing upon the same being read out to him. The summons served are therefore not the charge sheet. The accused would then know of the charges when they are read out to him and he will then decide on what plea to enter. The failure to serve the charge sheet on the applicants at this stage before the taking of plea can therefore not be a good ground for revision of the order of the trial court.

The parties herein submitted on the veracity of the affidavit of the 4<sup>th</sup> Applicant attached in support of the application in term of its

commissioning. I do not want to say much on the same since no application has been filed herein seeking to have the same struck out. I only note that this is a party to those proceedings. He has always participated through learned counsel even before the trial court. And the averments on the said affidavit are in fact deponed to be legal advice from learned counsel.

I must say that the parties cited various decisions that I align myself with on general issues of revision some of the notable ones are:-

- i) Abraham Wafula Versus republic (2013)eKLR, on the powers of the court under section 364 on revision.*
- ii) Peeraj General Trading Company Versus Mumias Sugar Company, that a stamp of the notary public as well as stamp of Dubai court Notary Public were enough to show that a document had been authenticated.*
- iii) Johnstone Aggrey Ochola Versus National Bank of Kenya Limited (2000)eKLR on the issue of personal and physical attendance of court.*
- iv) Hussein Khalid And Another Versus Attorney General (2019)eKLR, on the availabilities of reasonable facilities to the accused before hearing.*
- v) Raphael S. Wanjala and Others Versus Republic (2019)eKLR, on the need to attach the proceedings and the order aggrieved of.*

Considering all the circumstances of this case, I am not convinced that the applicants have proved any incorrectness, illegality or impropriety in orders of the lower court aggrieved of as to warrant the issuance of the orders of revision prayed for in this application. I find no merit in the application of the applicant dated 22.2.2021. I dismiss the same wholly. It is so ordered.

**D. O. OGEMBO**

**JUDGE**

**18.3.2021**

**Court:**

Ruling read out in open court in the presence of Mr. Kuyo for the applicants, Mr. Ataka for 1<sup>st</sup> Respondent and Ms. Chege for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

**D. O. OGEMBO**

**JUDGE**

**18.3.2021**