



**Republic v Director of Public Prosecution & 3 others; CWW & another (Exparte)  
(Judicial Review E001 of 2020) [2021] KEHC 372 (KLR) (29 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 372 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
JUDICIAL REVIEW E001 OF 2020**

**A MSHILA, J**

**NOVEMBER 29, 2021**

**IN THE MATTER OF: AN APPLICATION BY CWW AND ANOTHER TO COMMENCE**

**JUDICIAL REVIEW PROCEEDINGS AGAINST THE  
DIRECTOR OF PUBLIC PROSECUTIONS THE NATIONAL  
POLICE SERVICE AND THE CHIEF MAGISTRATES COURT  
NYERI FOR ORDERS OF PROHIBITION AND CERTIORARI  
IN THE MATTER OF: ARTICLES 21, 22, 23,27(1), 41, 157  
AND 166(6) OF THE CONSTITUTION OF KENYA, 2010  
IN THE MATTER OF: SECTIONS 4, 7, 8 AND 11 OF THE FAIR  
ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW  
REFORM ACT**

**AND**

**IN THE MATTER OF: THE PENAL CODE CAP 65 LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE CAP  
75 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE  
RULES**

**AND**



**IN THE MATTER OF CRIMINAL CASE NO.1639 OF 2020 IN  
THE CHIEF MAGISTRATES COURT AT NYERI**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL POLICE SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF MAGISTRATE, NYERI ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**CWW ..... EXPARTE**

**LWC ..... EXPARTE**

**RULING**

1. The Ex-parte Applicants, CWW and LWC instituted the Notice of Motion dated the 3<sup>rd</sup> February, 2021 pursuant to leave granted by this court on the like date seeking the orders set out hereunder against the Respondents inter alia;
  - (i) A Judicial Review order of Certiorari be and is hereby issued to remove and to bring before the High Court for the purposes of quashing and to quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to charge and prosecute the ex-parte applicants in Nyeri CMCRC No.1639 of 2020;
  - (ii) A Judicial Review order of Prohibition be and is hereby issued directed to the Respondents prohibiting any further proceedings in Nyeri CMCRC No.1639 of 2020 and further prohibiting the respondents from instituting any further charges against the ex-parte applicants based on the complaint, facts and circumstances the subject of the criminal charge in the said case or similar complaints whose determination ruling and pronouncements have already been made by the High Court and the Court of Appeal.
2. The ex-parte applicants relied on the grounds on the face of the application, the Statutory Statement and the Verifying Affidavit made by the 1<sup>st</sup> ex-parte applicant; in opposing the application the respondents relied on the Replying Affidavit made by Gilbert Okello (No.81416) a police officer attached to the Directorate of Criminal Investigation Headquarters, Land Fraud Investigation Unit and one of the officers investigating the matter.
3. The parties were directed to canvass the application by filing and exchanging written submissions; the ex-parte applicants' advocates B.M.Musyoki & Co. filed written submissions and further written submissions dated 21/04/2021 and 17/05/2021 respectively whereas the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents' written submissions dated 6/05/2021 were filed by the 1<sup>st</sup> respondent herein; hereunder is a summary of the respective parties submissions.



#### The Ex Parte Applicant's case

4. The ex-parte applicants' main contention is that the decision to charge them is an abuse of prosecutorial powers; they also contend that the purpose for the initiation of Nyeri CMCRC No.1639 of 2020 was to pressurize them into resolving the pending appeal; to also frustrate the outcome of the civil dispute; to prejudice the 1<sup>st</sup> ex-parte applicant and to re-litigate matters that had already been decided; case law relied on *Diamond Hasham Lalji & anor vs Attorney General & 4 others [2018] eKLR* and *Commissioner of Police & the Director of Criminal Investigation Department & Another vs Kenya Commercial Bank Limited & 4 Others[2013] eKLR*.
5. The ex-parte applicants assert that the issues, the contents and particulars of the charges in Nyeri CMCRC No. 1639 of 2020 have been dealt with by the High Court and the Court of Appeal and the 1<sup>st</sup> and 2<sup>nd</sup> respondents are aware of the said decisions; the High Court had already pronounced itself with regard to whether the applicant gave false information and obtained registration by stating that he was born on 6/12/1968; moreover, the additional evidence the subject of Counts I and II of Nyeri CMCRC No.1639 of 2020 were sought to be introduced as additional evidence before the Court of Appeal in CA No.259 of 2012 by an application dated 24/01/2020.
6. The ex-parte applicants claim that following the demise of the late Wathuku Ngure on 6/09/1996, Adriano Ngure Gachima and others started interfering with the deceased's estate and abused the court process by instituting various criminal cases with a view to disinherit the 1<sup>st</sup> ex-parte applicant and preventing him from applying for a Grant of Letters of Administration.
7. The applicants also pointed out that in the said Succession Cause it was an undisputed fact that there were attempts by the complainants to bribe the 1<sup>st</sup> ex-parte applicant to drop his claim to the estate; the criminal process was used by the same persons to arrest, lock up and oppress the 1<sup>st</sup> ex-parte applicant which acts led to several criminal cases including a Habeas Corpus application in HCMisc App No.75 of 1996, CMCRC No.21156 of 1996, MCCC No.2806 of 1996, 158 of 1997, 310 of 1999 and 405 of 1999 all touching on the succession dispute and the estate of Wathiku Ngure.
8. They submitted that prosecutorial powers are limited under Article 157 (11) of the *Constitution* and that the court has a duty to prevent the misuse of the court's criminal justice processes for the improper purpose of settling scores and/or civil disputes; the applicants position is that the issue of whether the 1<sup>st</sup> ex-parte applicant was the biological son of the deceased initially emerged in Nyeri CMCC No.496 of 1996 where the parties consented to the conducting of a DNA test; the 1<sup>st</sup> ex-parte applicant claims that although he availed himself for the DNA testing the other objectors did not appear; in a subsequent application for a DNA test, the Court of Appeal found that the complainants had an opportunity to obtain the evidence in both the Chief Magistrates Court and the High Court but failed to do so.
9. The ex-parte applicants relied on the case of *Republic vs Director of Public Prosecution & 3 others ex-parte applicant: Peter Mutua Mutiso [2021] eKLR* where the court quashed a decision to charge and criminal case where the case was brought to court after a party failed to achieve the desired result in civil litigation; citing the case of *Kuria & 3 others vs AG [2002] eKLR*, the ex-parte applicants propounded that the machinery of criminal justice is not to be allowed to become a pawn in personal feuds and individual vendetta;
10. The case of *Republic vs Chief Magistrates Court at Mombasa ex parte Ganijee & Another [2012] eKLR* was also cited for the proposition that it is not the purpose of criminal investigation or a criminal charge or criminal prosecution to help individuals in the advancement or frustration of their civil cases; for the submission that a criminal prosecution being stayed if the accused would be subjected to unfair trial or



if the criminal prosecution is an abuse of the process of the court, in that the criminal case is initiated for an improper purpose, the Australian case of *William vs Spautz [1993] 2LRC 659* was cited.

11. On inordinate delay; the applicants submitted that there was inordinate delay as the charges initiated in November, 2020 relate to the 1<sup>st</sup> ex parte applicants birth on 6/12/1968 at Kehunyo and the affidavit sworn by the late Wathuku Ngure in support of the 1<sup>st</sup> ex parte applicant's application for change of name in 1992; the delay has not been explained and the witnesses who gave viva voce evidence in Nyeri High Court Succession Cause 60 of 1997 who at that time were of old age were either deceased, or their memory had lapsed, or their physical condition deteriorated, or their whereabouts are unknown, or are not likely to be found or unwilling to testify again; hence the continued prosecution of the ex parte applicants is likely to cause injustice unless quashed by this court;
12. Counsel submitted that it was trite law that where there is inordinate delay in initiating a case, the delay must be justified or well explained, failure to which the delay is considered an abuse of process; case law relied on *Diamond Hasham Lalji & Another vs Attorney General & 4 Others; Republic vs Pattni HCCC No. 299 of 2003; Joseph Njeru Muthuku vs DPP [2017] eKLR; Republic vs DPP & 3 Others ex parte Mansukhlal Shantital Patel & 2 Others; Tuffplas Manufacturers Limited (Interested Party) [2021] eKLR.*
13. In urging the court to grant the orders sought the applicants relied on *Kenya National Examinations Council vs Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No.266 of 1996 and Patrick Gachoka Mwangi.*

The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondent's case

14. In response the respondents opposed the application and submitted that the case Nyeri CMCC No.1639 of 2020 was not instituted in bad faith, nor maliciously nor was it an abuse of due process; during the investigations it was established that there existed two separate birth certificates, one was issued on or about 6/12/1968 and another was issued on 26<sup>th</sup> December, 1965 with the first certificate giving no indication of the father while on the second birth certificate the name of the father was indicated as Wathuku Ngure; the two birth certificates show contradicting dates of birth for the same person; documents obtained from Kimathi Institute of Technology, that is his school leaving certificate and the application used to admit him, indicate that year of birth as 196.;
15. The respondents deponed that even though the 1<sup>st</sup> ex parte applicant had an ID the investigations revealed that the change of name on his ID to reflect the name of the father from Josiah Chomba to Wathuku Ngure was done sometimes in the year 1995 and there were irregularities in the process; the alleged affidavit of Wathuku Ngure dated 28/12/1992 was forwarded to the document examiner and the results of the report confirm that the same is unverifiable.
16. Further averments of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents case was that the 1<sup>st</sup> ex parte applicant's brother Peter Muriithi Chomba swore an affidavit in Nyeri Court of Appeal, Civil Appeal No. 259 of 2002 stating clearly that he was born in the year 1965 and that his father was Josiah Chomba Karoki whilst during the proceedings in the Succession Cause the 2<sup>nd</sup> ex parte applicant alleged that she met Wathuku Ngure in the year 1967; in the same cause she mentioned that the father of Peter Muriithi was Waibochi and not Chomba; making it clear that before she met Chomba in 1965 she already had another child out of wedlock in the name of Peter Muriithi with a different person called Waibochi.
17. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' contend that these inconsistencies were meant to mislead the court into getting the grant to administer the estate of the late Wathuku Ngure; that the only documents the court ought to rely on are the documents collected during the investigations; the 2<sup>nd</sup> respondent carried out his statutory duty to investigate the matter and its role ended when it forwarded the file to



the DPP whereas the DPP exercised its power of prosecution which must be independent as provided under Article 157 (10) of the Constitution; case law relied on *Thuita Mwangi & Anor vs The Ethics and Anti Corruption Commission & 3 Others*; also cited was the Ugandan case of *Uganda vs Jackline Uwera Nsenga*.

18. Despite the 1<sup>st</sup> applicant's success in the previous litigation matters, the mere fact that the intended or ongoing criminal proceedings are likely to fail is not a ground to halt the proceedings case law relied on *Erick Kibowot & 2 Others vs DPP & 2 others [2014] eKLR*; *Paul Stuart Imison & Another vs The Attorney General & 2 Others*; *Bennet vs Horseferry Magistrates Court [1993] All ER 138* where the circumstances in which the court can declare a prosecution to be improper were highlighted.

#### ISSUES FOR DETERMINATION

19. After taking into consideration the pleadings and the submissions made by the respective parties, this court has framed two issues for determination;
- (i) Whether the ongoing criminal proceedings are an abuse of the due process of the court;
  - (ii) Whether the Ex-parte Applicants application for the grant of the Judicial Review Orders for Certiorari and Prohibition are merited.

#### ANALYSIS

Whether the ongoing criminal proceedings are an abuse of the due process of the court;

20. In criminal proceedings the principles for consideration such applications was aptly captured in the case of *Johnson Kamau Njuguna & Another vs Director of Public Prosecutions [2018] eKLR* as follows;

‘40. Several principles are applicable as follows; the court is not permitted to delve into the merits or otherwise of a criminal process as that would amount to unnecessary trespassing into the arena specially reserved for the criminal trial and ought not to usurp the constitutional or statutory mandate of the respondents (R vs CS In Charge of Internal Security & 3 Others Ex parte Jean Margiris Otto supra); the court should not act as if it were the Court of Appeal which would involve going to the merits of the decision itself as to whether or not there was sufficient evidence to support the decision (Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civil Appeal No.185 of 2001) even where an applicant has a seemingly plausible comeback to each of the charges made against him and that they may be persuasive, it is the factual disputes in the case that necessitate a rational actor to conclude that there is sufficient evidence to take the case to trial in a criminal case. (see Patrick Ngunjiri Maina vs DPP & 2 Others [2017] eKLR).’

21. Other principles are set out in the case of *Republic vs Chief Magistrates Court at Milimani Law Courts; DPP & 2 Others (Interested Parties) Ex parte Applicant; Pravin Galot [2020] eKLR* which are summarized as follows;

‘86.....A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused.

87.....the decision as to whether there is a reasonable prospect of a conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competency and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence.



90.....(e) Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute.

As a matter of practical reality the proper decision in most cases will be proceed with a prosecution if there is sufficient evidence available to justify a prosecution.’

22. Guided by the forgoing it is evident that the prosecution of the ex parte applicants is premised on a long standing dispute between them and the complainants dating back to 1996. It is also evident that the issues regarding whether the 1<sup>st</sup> ex parte applicant was the son of the late Wathuku Ngure was determined by the Nyeri High Court in Succession Cause No 60 of 1997. The court also analyzed the affidavit sworn by the late Wathuku Ngure in support of the 1<sup>st</sup> ex parte applicants’ application for a change of name; the complainants have lodged an appeal in the Court of Appeal challenging the High Court’s findings on the said issues and had also filed numerous applications thereat one being an application seeking DNA testing on the 1<sup>st</sup> ex parte applicant and another seeking the introduction of new evidence; both applications were dismissed and the Court of Appeal observed that there was inordinate delay in both instances and that the ends of justice would not be served if the applications were allowed.
23. In addition to the foregoing it is clear that the complainants had previously instigated criminal prosecution of the 1<sup>st</sup> ex parte applicant numerous for one offence or another. In considering whether the instant prosecution is an abuse of the process of the court this court also makes reference to the case of *Satya Bhama Gandhi vs DPP & 3 Others [2018]eKLR* where Hon.Mativo J made the statement that reads as follows;
- ‘12. It is trite law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party may be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of law suits between the parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.’
24. It is apparent that the complainants are on a fishing expedition as the issues raised in the criminal proceedings in Nyeri CMCRC No.1639 of 2020 are substantially the same as those determined in the Succession Cause and also in the Court of Appeal; It is clear that after losing in the succession cause and the subsequent appeal the complainants are now challenging the same issues on the same subject matter against the same opponent through criminal proceedings; this court is satisfied that the criminal proceedings are a clear abuse of court process; the abuse being the multiplicity of actions on the same subject matter between the same parties with the intention of harassing irritating and annoying the same opponent being the 1<sup>st</sup> ex parte applicant and with questionable motives of obtaining a victory in one of the processes.

Whether the Ex-parte Applicants application for the grant of the Judicial Review Orders for Certiorari and Prohibition are merited.

25. In addressing whether the Judicial Review Orders sought by the ex parte applicants are merited this court makes reference to the renowned case of *Kuria & 3 Others vs The Attorney General [2002] eKLR* wherein the court observed as follows;

‘The court has power and indeed the duty to prohibit the continuation of the of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is the duty of the court to ensure that its process does not degenerate into tools for personal



score settling or vilification on issues not pertaining to that which the system was formed to perform.....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and or where the proceedings are oppressive or vexatious. The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the courts) independence and impartiality.....The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped.....It would be a travesty to justice, a sad day for justice should the procedures or the process of the court be allowed to be manipulated, abused and or misused, all in the name that the court simply has no say in the matter because the decision to so utilize the procedure has been made. It has never been argued that because a decision has already been made to charge the accused person, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after at every available opportunity until the determination of one of them.....In this instance, where the prosecution is an abuse of the process of court, as alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and or prohibiting prosecutions brought to not only for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its process and therefore the use of court procedures which is diametrically opposite to the duty of the court; It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilized. Because the nature of the judicial proceedings is concerned with the manner and not the merits of any decision making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all parties. The duty of the court in such instances is to purge itself of such proceedings. Thus, where the court cannot order that the prosecution be not commenced, because already it has, it can order that the continued implementation of that decision be stayed .....There is nothing which can stop the court from prohibiting further hearings and or prosecution of a criminal case, where the decision to charge and or admit the charges as they were have already been made..'

26. This court reiterates that the motives of the complainants are questionable and there is also the issue of inordinate delay and there is a possibility that some of the relevant witnesses in the succession cause may not be available to give evidence leading to a likelihood that the prosecution may be unfair; having satisfied itself on the issue of abuse of due process this court is also satisfied that the criminal case was initiated for an improper purpose and 'the machinery of criminal justice is not to be allowed to become a pawn in personal feuds and individual vendetta'; and reiterates the observation in the case of *Kuria vs AG* (supra)

'It would be a travesty to justice, a sad day for justice should the procedures or the process of the court be allowed to be manipulated, abused and or misused, all in the name that the court simply has no say in the matter because the decision to so utilize the procedure has been made.



There is nothing which can stop the court from prohibiting further hearings and or prosecution of a criminal case, where the decision to charge and or admit the charges as they have already been made...’

27. From the circumstances of the case and the material placed before this court it is satisfied that the application meets the threshold for granting of the Judicial Review Orders of Certiorari and Prohibition.

#### FINDINGS AND DETERMINATION

28. For those reasons this court makes the following findings and determinations;

- (i) This court finds that the ongoing criminal proceedings are an abuse of the due process of the court.
- (ii) This court finds that the ex-parte applicants application for the grant of the orders of Certiorari and Prohibition is merited.
- (iii) An Order of Certiorari be and is hereby issued to bring before this court for the purposes of quashing the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to charge and prosecute the ex-parte applicants in Nyeri CMCRC No.1639 of 2020;
- (iv) An order of Prohibition be and is hereby issued directed to the Respondents prohibiting any further proceedings in Nyeri CMCRC No.1639 of 2020 and further prohibiting the respondents from instituting any further charges against the ex-parte applicants based on the complaint, facts and circumstances the subject of the criminal charge, or similar complaints whose determination ruling and pronouncements have already been made by the High Court and the Court of Appeal in Nyeri High Court Succession Cause No 60 of 1997;
- (v) Each party shall bear their own costs

**IT IS SO ORDERED.**

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**HON.A.MSHILA**

**JUDGE**

