



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC CRIMINAL APPLN NO. E301 OF 2020**

SURESH MOHANLAL FATANIA.....1<sup>ST</sup> APPLICANT  
SHANTILAL KARSANDAS VARIA.....2<sup>ND</sup> APPLICANT  
AMEET DIPAK BHATTESSA.....3<sup>RD</sup> APPLICANT  
CHUNILAL SHANTILAL KHIMASIA.....4<sup>TH</sup> APPLICANT  
JAYANTILAL K. HARIA.....5<sup>TH</sup> APPLICANT  
MAHENDRA K PATHAK.....6<sup>TH</sup> APPLICANT

**VERSUS**

INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup> RESPONDENT  
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> applicants, *Suresh Mohanlal Fatania* and *Shantilal Karsandas Varia* together with four others namely *Ameet Dipak Bhattessa*, *Chunilal Shantilal Khimasia*, *Jayantilal K. Haria* and *Mahendra K Pathak* filed a Notice of Motion dated 23<sup>rd</sup> November 2020 in which they sought the following orders:

- 1. That this application be certified urgent and heard expeditiously.***
- 2. That the court, at first instance, be pleased to admit the applicants to anticipatory bail on such reasonable terms and conditions as it may deem fit.***
- 3. That the court be pleased to issue a declaration that the proposed criminal proceedings would constitute an abuse of the processes of the court.***
- 4. That the court be pleased to issue such other orders that the court may deem fair and just.***

The *Inspector General of Police* and the *Office of the Director of Public Prosecutions* were named as the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.

2. The court record shows that after the first two prayers were granted by the court, the 3<sup>rd</sup> to 6<sup>th</sup> applicants withdrew from the application through a notice of withdrawal dated 12<sup>th</sup> March 2021 filed in court on 6<sup>th</sup> April 2021. The 1<sup>st</sup> and 2<sup>nd</sup> applicants (hereinafter the applicants) chose to pursue prayer 3 of the application which is the subject of this ruling.

3. The applicants' in their supporting affidavits sworn on 23<sup>rd</sup> November 2021 and further affidavits sworn by the 1<sup>st</sup> applicant on 11<sup>th</sup> December 2020 and 31<sup>st</sup> March 2021 contend that they are former directors of a company known as *Treo Apartments Limited* and that at the behest of one of the directors of the company, one *Vijal Kumar Daralji Kanji Gohil*, the police had constantly harassed and arrested them and that they faced imminent criminal prosecution owing to false complaints made against them to the police by the said *Vijal Kumar Daralji*

4. In the further affidavits, the 1<sup>st</sup> applicant averred that both applicants were arraigned before the Chief Magistrate's Court on 4<sup>th</sup> December, 2020 and were charged in four counts with different offences in Criminal Case No. 4675 of 2020; that their prosecution was a clear abuse of the court process since it was instituted for reasons other than the pursuit of criminal justice.
5. It is the applicants' case that the prosecution was aimed at pressuring them to agree to the subdivision of the company's only asset known as LR NO. 1870/11/388 and to compromise a multiple of civil cases which had been filed against them in the High Court at Nairobi by the complainant in the criminal case. They invited the court to use its power and authority to curtail abuse of its process.
6. The application is contested by the respondents through a replying affidavit sworn by *Chief Inspector Isaac Teanai*. The crux of the respondents' opposition to the applicants' pending prayer is that the same was made in bad faith as the 3<sup>rd</sup> to 6<sup>th</sup> applicants were seeking similar orders in Constitutional and Human Rights Division Case No. E049 of 2021 and that in any case, the prayer was premature as the court cannot make a declaration in respect of non-existent proceedings; that the existence of civil proceedings between the applicants and the complainant is not a bar to the exercise of the 2<sup>nd</sup> respondent's mandate to commence criminal prosecution against the applicants.
7. By consent of the parties, the application was prosecuted by way of written submissions which the parties duly filed and which I have carefully considered together with all the authorities cited.
8. I have noted that in the written submissions filed on their behalf by the firm of *E. Kinyanjui & Company Advocates*, the applicants digressed from the application and proceeded to submit at length on issues which fell outside the ambit of prayer 3 which as stated earlier was the only prayer pending this court's determination.
9. Whereas prayer 3 only sought a blanket declaration that proposed criminal proceedings against the applicants would constitute an abuse of the court process, the applicants proceeded to submit that their prosecution in Criminal Case No. 4675 of 2020 was oppressive, vexatious and offended their rights to a fair trial and that the criminal proceedings amounted to an abuse of the court process. The applicants invited the court to declare that the said proceedings were an abuse of the court process and urged me to issue any orders I deemed fit in the interest of justice.
10. All the authorities relied upon by the applicants including the Supreme Court's decision in *Cyrus Shakhlanga Jirongo V Soy Developers Limited & 9 Others, [2021] eKLR* spoke to, *inter alia*, the limits of the 2<sup>nd</sup> respondent's constitutional mandate to institute criminal prosecutions against any person in any court in Kenya and the circumstances in which criminal proceedings can be said to constitute an abuse of the process of the court.
11. In my view, the proceedings in Criminal Case No. 4675 of 2020 were not in issue in the instant application and it would be inappropriate for this court to make any orders regarding matters which were not before it whose facts it had not had the benefit of interrogating.
12. Turning now to prayer 3, it is my finding that the prayer was inelegantly drafted in very vague and general terms as to be incapable of being granted. I agree with the respondents that the prayer was premature and misconceived. The applicants were basically asking this court to grant orders against a presumed future event which would or may not happen. My considered view is that the court cannot issue any orders on the basis of speculation and conjecture. The court can only issue orders on the basis of facts and evidence presented before it.
13. More fundamentally, it is important to note that the occupant of the 2<sup>nd</sup> respondent is clothed with a constitutional mandate enshrined in *Article 157 (6) of the Constitution* to 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. This court cannot interfere with that mandate unless it is satisfied that the Director of Public Prosecutions in executing his duties had abused his discretion or used it in a manner inconsistent with the administration of justice or the public interest. None of the above have been demonstrated by the applicants in this application.
14. In any event, if the institution of Criminal Case No. 4675 of 2020 is the proposed prosecution that the applicants had in mind when filing the instant application, it is my opinion that the institution of the said criminal case means that prayer 3 has already been overtaken by events. The applicants' remedy now lies in challenging their prosecution before the trial court in the course of the trial or in any other appropriate forum.
15. In view of my findings above, I have come to the conclusion that the application dated 23<sup>rd</sup> November 2020 lacks merit and it is accordingly dismissed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2021.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Ngunjiri Gichare holding brief for Mr. Michuki for the applicants

Ms Akunja for the respondents

Ms Karwitha: Court Assistant