



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC CRIM APPLICATION NO. 43 OF 2019

PAUL KIMUTAI LANGAT.....1ST APPLICANT

RICHARD KIPNGENO LANGAT..... 2ND APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

CHIEF MAGISTRATE COURT, NAKURU.... 2ND RESPONDENT

AND

JOSIAH NJOROGE NJUGUNA.....1ST INTERESTED PARTY

S.L.M H MUHIAH.....2ND INTERESTED PARTY

JUDGMENT

1. The Applicants were arraigned before the Chief Magistrate's Court at Nakuru charged with six counts as follows:

Count I Making a False Document Contrary to Section 347(a) as read with Section 349 of the Penal Code.

Particulars: On or about the 12th day of October, 2010 at unknown place within the Republic of Kenya jointly with others not before Court and with intent to defraud, made a certain document namely a family agreement dated 12th October, 2010 by purporting that the document was made and signed by the family members of Chepchilat Arap Rotich a fact you knew to be false.

Count II: Making a False Document contrary to Section 347(a) as read with Section 349 of the Penal Code.

Particulars: On or about the 14th November, 2012 at unknown place within the Republic of Kenya with others not before Court, with intent to defraud Josiah Njoroge Njuguna of his parcel of land No. Miti Mingi/Mbaruk Block 4/37 (Ingobor) Measuring about 6.60Ha made a certain document namely a title deed in the name of Paul Kimutai Langat and Richard Kipngeno Langat dated 14th November, 2012 purporting it to be a genuine Title deed signed and issued by D. K. Nyantika a Lands Registrar based at Nakuru Lands office a fact you knew to be false.

Count III: Making a False Document Contrary to section 347(a) as read with Section 349 of the Penal Code.

Particulars: On or about the 14th November, 2012 at unknown place within the Republic of Kenya with others not before court, made a document namely a Green Card in respect to parcel No. Miti Mingi/Mbaruk Block 4/37 (Ingobor) purportedly opened on 7/6/1990 purporting it to be genuine green card opened at Nakuru Land Registry signed by both Harry Kipsuto and D. K. Nyantika land registrars based at Nakuru Lands Office a fact you knew to be false.

Count IV: Obtaining Registration of Land by False presences contrary to Section 320 of the Penal Code.

Particulars: On or about the 14th September, 2012 at Nakuru District Lands Office Nakuru County within the Republic of Kenya with others not before Court with intent to defraud Josiah Njoroge Njuguna of his Land Parcel No. Miti Mingi/Mbaruk Block 4/37

(Ingobor) falsely obtained the registration of the said land in the names of Paul Kimutai Langat and Richard Kipngeno Langat the property valued at Ksh 30 million a fact you knew to be false.

Count V: *Giving false information to a person employed in the public service contrary to section 128(b) of the Penal Code*

Particulars: *On the 11th day of April, 2017 at Nakuru police station within the Republic of Kenya vide OB 42/11/4/2017 reported to PC Omutelema that he is the owner of a parcel of land No. Miti Mingo/Mbaruk Block 4/37 which information led to the arrest of Advocates S. L. M H. Muhia and subsequently charged before Nakuru Chief Magistrate Court a fact you knew to be false.*

Count VI: *Giving false information to a person employed in the public service contrary to section 129(b) of the Penal Code.*

Particulars: *On diverse dated between the 12th April, 2014 and 14th April, 2014 through your various statement to PC Omutelema of CCIO's Office Nakuru, you informed the officer that you were the owners of parcel of land No. Miti Mingo/Mbaruk Block 4/37 (Ingobor) which came into your possession through a family meeting held on the 12th October, 2010 and that you were brothers being sons of Chepchilat Arap Rotich a fact you knew to be false.*

2. As is readily obvious from the text of the charges and the particulars, all the counts are related to a parcel of land known as LR No. Miti Mingo/Mbaruk Block 4/37. The Applicants want this Court to issue an order of prohibition against the Magistrate's Court from hearing the criminal trial emanating from these charges. Indeed, they want the charge sheet quashed altogether. The specific prayers the Applicants have prepared are the following:

1) That this Honourable Court may be pleased to issue an Order of Prohibition against the Chief Magistrate Nakuru Courts and any other Court proceeding, hearing, determining or in any other way whatsoever dealing with Nakuru Chief Magistrates Court Criminal Case No. 2998 of 2017 (Republic Vs Paul Kimutai Langat & Richard Kipngeno Langat) Or any variation thereof or any changes or substitution thereof akin to the same.

*2) That this Honourable court be pleased to issue an order of **Certiorari** to bring before it and quash the charge sheet dated 8th day of December, 2017 and the Court proceedings thereto in Nakuru Chief Magistrate's Court Criminal Case No. 2998 of 2017 (Republic Vs Paul Kimutai Langat & Richard Kipngeno Langat) and an Order directed upon the Office of Director of Public Prosecution barring the Nakuru Chief Magistrate's Court Criminal Case No. 2998 of 2017 (Republic Vs Paul Kimutai Langat & Richard Kipngeno Langat).*

3. The story emerging from the Applicants' filed affidavits seem to be as below.

4. The Applicants claim to be owners of the Subject Property. They claim that their neighbour thereat is the 1st Interested Party. They further claim that the 1st Interested Party, through the 2nd Interested Party, attempted to buy the Subject Property from them but that the agreement fell through.

5. The Applicants claim that one reason the agreement fell through – though it is hard to get the connection – is that they discovered that the 1st Interested Party had forged the title to the neighbouring title. The Applicants, apparently, made a complaint to the Directorate of Criminal Investigations and, as a result, criminal charges were opened against the 2nd Interested Party – S.L.M. Muhia, Advocate. However, the Applicants say that the criminal case – Nakuru Chief Magistrates Court Criminal Case No. 1464 of 2017 – was mysteriously terminated.

6. In its place, the DCI recommended that the Applicants be charged with the six counts reproduced above.

7. The Applicants believe that the decision to charge them is malicious and is an abuse of the powers of the Respondents. They are persuaded that the DPP has abused his constitutional powers vested in Article 157 of the Constitution because he has not deployed his prosecutorial powers in a fair and just manner. The Applicants say that they are inclined to believe this because the “institution mandated by under the Lands Act among other laws of Kenya did make a decision to the Director of Criminal Investigations Headquarters on the issues in the charge sheet....which decision was overlooked (sic).”

8. It would appear that the Applicants' argument is that there is an “institution” under the Lands Act which is vested with the authority to investigate fraudulent dealing with land; and that that “institution” gave advice which was overlooked. It is not readily clear which “institution” the Applicants have in mind.

9. However, looking at the charges the Applicants face, they range from forgery to giving false information to public officers. It is true that it seems clear from the charges that they all relate to the Subject Property. However, from the narrative given by the Applicants, even if, arguendo, we presume it to be true, one is hard pressed to see any tell-tale signs of bad faith, ill motive or malice in the decision of the DPP to charge the Applicants.

10. The Office of the Director of Public Prosecutions (ODPP) is established under Article 157 of the 2010 Constitution as an independent office with the monopoly of prosecutorial powers (complete with the power to direct the Inspector General of Police to do investigations) and the only person with the authority to exercise State powers of prosecution – including the power to:

i. 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;

ii. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or

undertaken by another person or authority, with the permission of the person or authority; and

iii. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

11. The Constitution also requires that “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.”

12. However, the Applicant is also correct when he points out that while our Courts now recognize the express powers and authority of the DPP as enshrined in the Constitution and the fact that the DPP must exercise those powers independent of any individual or institution including the Courts, like all other constitutional authority, our Courts have equally recognized that the authority must be exercised in an accountable way tethered to the precepts of “public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.” (Article 157(11) of the Constitution).

13. In this regard our decisional law is now clear that the Courts have the ultimate duty to ensure that the DPP exercises his discretion in accordance with the constitutional mandate. As our case law has now firmly established, “the Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation.” (**Kuria & 3 Others v Attorney General [2002] 2KLR 69.**) Indeed, this position, although now expressly scripted into our Constitution is of vintage judicial ancestry in Kenya. As early as 2001, the High Court had expressed this view which is now scripted in our Constitution in the following iconic words:

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.

14. Similarly, in the more recent **R v Director of Public Prosecutions & 2 Others Ex Parte Praxidis Nomoni Saisi [2016] eKLR**, Justice Odunga, after analysing a long history of similar cases concluded that “where it is clear that the [prosecutorial] discretion is being exercised with a view to achieving certain extraneous goals other than those recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would...constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion.”

15. Indeed, in this and other cases, Justice Odunga, with whom I entirely agree, located the duty and authority of the Court in reviewing the exercise of the unfettered discretion of the DPP in the same mould as the exercise of any other executive discretionary power to which Judicial review is available. Hence, Justice Odunga states:

It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive, the Court may interfere. The Court can only intervene in the following situations:

- i. Where there is an abuse of discretion;*
- ii. Where the decision-maker exercises discretion for an improper purpose;*
- iii. Where the decision-maker is in breach of the duty to act fairly;*
- iv. Where the decision-maker has failed to exercise statutory discretion reasonably;*
- v. where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;*
- vi. where the decision-maker fetters the discretion given;*
- vii. where the decision-maker fails to exercise discretion;*
- viii. where the decision-maker is irrational and unreasonable.*

16. Consequently, our decisional law has now laid out the role of the Court in policing the exercise of the DPP’s constitutional authority: the Court has the duty and authority to review the charging decisions of the DPP. However, what also emerges from our decisional law is that the Court is extremely cautious in performing that duty. Hence in the **Kuria Case (supra)**, the Court expressed itself thus:

There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.

17. Similarly, in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** the Court held:

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. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

18. In similar vein, this Court remarked in **Patrick Ngunjiri Muiruri v DPP [2017] eKLR** as follows:

The law and practice, then, are quite clear: while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the Court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the Court can review the DPP's decisions for rationality and procedural infirmities, it cannot review them on merit.

19. The question presented in the present Application, therefore, is whether it can be said that the DPP's decision to charge the Applicants is irrational, un-procedural, informed by ill or ulterior motives or unduly fettered. I have found no evidence in the narration and documents provided by the Applicants that there is any such improper use of the Criminal Justice System. It would seem that after due investigations, the DCI concluded that the Applicants had given wrong information which led to the charging of S.M.L. Muhia, Advocate; and that it was, in fact, the Applicants who had committed forgery – both of the title and purported family meeting minutes in order to dispose off the Subject Property. The Applicants will have an opportunity to challenge this theory and mount their defence in the criminal trial. It is not possible to say at this point and on the basis of the material before the Court that the criminal trial is wholly without basis and that the High Court should quash it.

20. In the end, therefore, I see no merit whatsoever in the Applicants' prayers that the criminal trial be prohibited or the charge sheet quashed. I therefore dismiss wholly the Application. Since neither the DPP nor the Interested Parties filed any documents in the case, there will be no order as to costs.

21. Orders accordingly.

Dated and delivered at Nakuru this 20th day of February, 2020

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JOEL NGUGI

JUDGE