



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**MISC CIVIL APPLICATION NO. 30 OF 2018**

**(JUDICIAL REVIEW DIVISION)**

**IN THE MATTER OF AN APPLICATION BY PETER MUNGAI KIRERA AND MOSES NDUNGU**

**KIRERA FOR ORDERS OF JUDICIAL REVIEW BY WAY OF CERTIORARI ND PROHIBITION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, THE CIVIL PROCEDURE ACT,**

**CAP. 21 OF THE LAWS OF KENYA AND THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015.**

**AND**

**IN THE MATTER OF PETER MUNGAI KIRERA AND MOSES NDUNGU KIRERA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

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

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**CHIEF MAGISTRATE'S COURT AT CHUKA.....3<sup>RD</sup> RESPONDENT**

**AND**

**PATRICK GITONGA HARUN.....1<sup>ST</sup> INTERESTED PARTY**

**MICHAEL NJUE NJOKA.....2<sup>ND</sup> INTERESTED PARTY**

**J U D G E M E N T**

1. **PETER MUNGAI KIRERA** and **MOSES NDUNGU KIRERA**, the ex parte Applicants has brought a substantive motion dated 7<sup>th</sup> June 2019 against the Inspector General (1<sup>st</sup> Respondent), the Director of Public Prosecution (2<sup>nd</sup> Respondent) and Chief Magistrate's Court Chuka (3<sup>rd</sup> Respondent) challenging the decision to charge them in court with the offence of destroying crops contrary to **Section 334(a)** of the **Penal Code** vide ***Chuka Chief Magistrate's Court Criminal Case No. 291 of 2018***.

2. The ex parte Applicants have sued the 1<sup>st</sup> Respondent as the head and in charge of the National Police Service under which several departments fall including the Directorate of Criminal Investigations (DCI).

3. The 2<sup>nd</sup> Respondent, an Independent officer created under **Article 157** of the **Constitution of Kenya** and is sued because he is in charge of Public Prosecutions in Kenya.

4. The 3<sup>rd</sup> Respondent is the Chief Magistrate's court at Chuka established under **Article 169** of the **Constitution of Kenya** and **Section 5 Magistrate's Court Act** with territorial jurisdiction over Tharaka Nithi County. It is also where the Criminal Case No.291 of 2018 has been filed.

5. The ex parte Applicants are seeking the following reliefs from this court namely:-

**1. That the Honourable court be pleased to issue orders of certiorari quashing the decision made by the IG of Police and the DPP the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein to prosecute the Applicants and quash any charge sheet registered against the Applicants before the said court and quash any criminal proceedings commenced pursuant thereto.**

**2. That the Honourable court be pleased to issue orders of prohibition to prohibit the Respondents and any persons on their behalf or authorised by them, from initiating and prosecuting any criminal proceedings whatsoever instituted in the Republic of Kenya against the Applicants in Chuka Criminal case no 291 of 2018, Republic v Peter Mungai Kirera and another.**

**3. That an order that the respondents do pay costs of these proceedings.**

**4. That the Honourable court be pleased to give further orders and directions as it may deem fit and just to grant.**

6. The grounds upon which the ex parte applicants have sought for the above reliefs are listed as follows

a) That 2<sup>nd</sup> respondent, acting on request of the 1<sup>st</sup> respondent has recommended the prosecution of the Applicants on various charges and the respondents have registered a charge sheet under Chuka Criminal Case Number 291 of 2018 preferring a charge of destroying crops of cultivating farm produce contrary to section 334(a) of the Penal Code.

b) That the applicants are being prosecuted in abuse of the legal process, in abuse of powers conferred to the respondent and to the criminal justice system because the intended prosecution is intended to punish the Applicant for the dismissal of the 1<sup>st</sup> IP's case at Embu HCCC 6 of 2016. The same issues raised in the criminal matter were raised in the HC and the suit was dismissed for intermeddling with a deceased's property.

c) That charge sheet as drafted has deliberately omitted the real bone of contention which is that the suit property belonged to Shadrack Njoka Kirera who is deceased and administration is yet to be concluded.

d) That prosecution is intended to achieve extraneous collateral purposes alien to the legal deployment of the criminal justice system as it is aimed at giving advantage or punishment to a party who lost a suit at the High Court.

e) That impartial and objective assessment and analysis of the prosecution's evidence leads to the inescapable conclusion that no competent, independent, professional prosecutor acting impartially and within constitutional bounds could have reached the decision to prosecute the applicants. The decision had an ulterior motive and was in bad faith, is unfair and violates the legitimate expectations of the ex partes Applicant.

f) The applicants will be subjected to an unlawful criminal process despite the clear manifest abuse of process by the interested parties and the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

### **The ex parte Applicant's case**

The 1<sup>st</sup> ex parte Applicant Peter Mungai Kirera vide a Supporting Affidavit sworn on 7<sup>th</sup> June 2019 has deposed as follows:-

i) That he has authority to show on behalf of the 2<sup>nd</sup> ex parte Applicant

ii) The 1<sup>st</sup> ex parte Applicant has deposed that L.R No. Magumoni/Itugururu/244 is registered in the name of the late Shadrack Njoka Kirera (deceased) whose estate, the 1st ex parte Applicant is one of the administrators and has exhibited a copy of a grant issued vide Nairobi High Court Succession Case No.3129 of 2014 to demonstrate the fact.

iii) The ex parte Applicants have faulted the 1<sup>st</sup> Interested Party (Patrick Gitonga Harun) for entering into an agreement with 2<sup>nd</sup> Interested Party (Michael Njue Njoka) over lease of 13 acres out of the estate of Shadrack Njoka when they lacked capacity to deal with the estate. They claim that the lease agreement was null and void and amounted to intermeddling with an estate of a deceased person contrary to Section 45 of Law of Succession Act.

iv) The ex parte Applicants aver that the 1<sup>st</sup> Interested Party was charged in Chief Magistrate's Court Chuka Criminal No. 1151 of 2013 with the offence of forcible detainer and cutting down trees contrary to Section 333(c) of the Penal Code. In both counts the 1st ex parte applicant states that he was listed as the complainant.

v) The ex parte Applicants aver that the 1<sup>st</sup> Interested Party was acquitted due to a technicality owing to the fact that the 1<sup>st</sup> ex parte Applicant had no locus because he had not taken out letters of administration of the estate of Shadrack Njoka Kirera.

vi) That after acquittal, the 1<sup>st</sup> Interested Party filed a civil claim vide Embu Civil case No 6 of 2016 seeking damages for malicious

prosecution and loss of tobacco valued at kshs.8,666,670/- but the case was struck out.

vii) The Exparte Applicants aver that the Interested Party was unhappy with the failure of his civil suit in Embu and out of anger he conspired with the Respondent to prefer criminal charges in order to settle scores.

viii) The ex -parte Applicants insists that they are being prosecuted in manifest abuse of legal process and powers conferred upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondent contrary to the provisions of Article 157 (11) of the Constitution of Kenya 2020.

ix) The ex parte Applicant aver that the real bone of contention is the administration of the estate of the late Shadrack Njoka Kirera. They have faulted their prosecution stating that the same is designed, calculated and intended to achieve extraneous and collateral purposes aimed at giving advantage to a party who lost a civil suit.

x) The ex parte Applicant contend that a decision to prosecute them at the Chief Magistrate's Court in Chuka was taken with an ulterior motive or purpose to prejudice the legal rights of the exparte Applicants and that the same is an abuse of the powers conferred upon the Respondents.

xi) The exparte Applicants have deposed that they stand to suffer irreparable loss and harm if the Respondents proceed to prosecute them in circumstances that demonstrate abuse of the powers conferred upon them.

It is contended that the 1<sup>st</sup> Interested Party is the complainant in **Chuka Chief Magistrate's Court Criminal No. 291 of 2018** and that the 2<sup>nd</sup> Interested Party is one of the beneficiaries of the estate of Shadrack Njoka Kirera and a prosecution witness in **Chuka Chief Magistrate's Court Criminal Case No.291 of 2018**.

7 The ex parte Applicants claim that the estate of the late Shadrack Njoka Kirera comprising the parcel of land known as L.R. MAGUMONI/ITUGURURU/244 is valued at over Kshs.100 million and that the 1<sup>st</sup> Interested Party has profited from illegal tobacco farming in 13 acres in the estate to the time of Kshs.30 million.

8. The ex parte Applicants contend that the Interested Parties herein have intermeddled with the estate and that the same was the subject matter in **Chuka Chief Magistrate's Court Criminal Case No.1151 of 2013**.

9. The ex parte Applicants contend that their prosecution in **Chuka Chief Magistrate's Court Criminal Case No.291 of 2018** is malicious and that looking at the case in totality one can only conclude that no competent independent professional prosecutor acting impartially could have proceeded to give consent to such prosecution.

10. In their written submissions done through Nyakundi and Co- Advocate, the ex parte applicants have reiterated that the lease agreement between the interested parties herein was illegal *ab initio* and so to the cultivation of the same land which in their view amounted to intermeddling with the estate of the late Shadrack Njoka Kirera (deceased).

11. They contend that the 1<sup>st</sup> Interested Party's suit against them in Embu in regard to destruction of property and malicious prosecution was dismissed because it lacked basis. They submit that their prosecution arose out of action of a sore loser intent at abusing court process. They have expressed their grievances using unkind words against the investigating officer who they view as being out of line in swearing an affidavit in support of the prosecution by Office of the Director of Public Prosecution despite the independence of the latter.

12. They submit that the correspondence on record indicates a conspiracy between the DCIO, and Office of Director of Public Prosecution to prosecute the applicants. They state that the prosecution counsel ignored a decision of the HC at Embu which deemed the lease illegal to them there was no legal basis to prefer charges against them.

They rely on the case of **Estate of Veronica Njoki Wakagoto (deceased) [2013] eKLR** which stated that property of a deceased person cannot be dealt with without authority of a grant of representation and anyone who would do so would be guilty of intermeddling.

They also rely on the case of **Five Forty Aviation Limited v Richard Olona (2015)eklr** where the court stated that no person can claim any right or remedy whatsoever under an illegal transaction in which it participated. The court added that it is bound to veto a contract once it knows that it is illegal even if that knowledge comes from outside sources. The applicants therefore state that the decision to prosecute constitutes gross contempt of both those decisions cited by the court in Embu and that out of nothing, nothing comes. They further state that the police did not find merit in the claim by the 1<sup>st</sup> Interested Party when he first reported the matter. They aver that the 1<sup>st</sup> Interested Party must have mounted framed up charges with a team to settle old scores.

13. The ex parte Applicants have relied on the decision of **Heptulla -vs- Noor Mohammed (1984) KLR 580**, where it was held *inter alia* that a tenant could not rely on his long illegal occupation of a premise against eviction because no court can enforce an illegal contract where the person invoking the aid of such contract is himself implicated in the illegality.

14. The ex parte Applicant's contend that the estate of the deceased Shadrack Njoka Kirera comprising L.R. Magumoni/Itugururu/244 is yet to be distributed as per the provisions of the Law of Succession Act. In their view the lease agreement entered between the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties over the said estate is futile, null void and nothing would flow from it. They have expressed surprise that a decision to charge them emanated from an illegality and outright disregard of the law.

#### **1<sup>st</sup> and 2<sup>nd</sup> Respondent's case**

15. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent have opposed this suit and have relied on a Replying Affidavit sworn by PC George Rutere (investigating officer) on 4<sup>th</sup> November 2019. The investigating officer has deposed that they acted on a formal complaint made to Chuka Police Station on 12<sup>th</sup> November 2013 to the effect that the ex parte Applicants went into a leased 16 acre piece of land on 11<sup>th</sup> November 2013 and wantonly destroyed crop belonging to the 1<sup>st</sup> Interested Party.

16. The investigating officer contends that the 1<sup>st</sup> Interested Party had a right to complain and to have his complaint investigated and action taken. He avers that the 1<sup>st</sup> Interested Party had lawfully leased land from 2<sup>nd</sup> Interested Party for the period starting from 2011 to 31<sup>st</sup> August 2014. The investigating officer avers that when he concluded the investigations, he forwarded the file to Office of Director of Public Prosecution who formed an opinion that there was sufficient evidence to prefer charges against the ex parte Applicants to wit the offence of destroying crops of cultivated produce contrary to **Section 334(a)** of the **Penal Code**. The particulars of the offence were that on diverse dates between 9<sup>th</sup> and 11<sup>th</sup> November 2013 at Kangu village, the Applicants jointly willfully and unlawfully uprooted tobacco crops valued at Kshs.8,666,670/- belonging to the 1<sup>st</sup> Interested Party.

17. The investigating officer avers that his investigations revealed that the land belonged to the 2<sup>nd</sup> Interested Party who leased it to the 1<sup>st</sup> Interested Party who paid a deposit of Kshs.48,000/- to 2<sup>nd</sup> ex parte Applicant and Kshs.144,000 to the 2<sup>nd</sup> Interested Party.

18. The Respondents aver that the decision to charge the ex parte Applicants was arrived at independently because they tried to remove the 1<sup>st</sup> Interested Party from a portion he had leased and destroyed his crops. According to him, the decision to prefer the charges against the Applicants was to ensure that justice is served.

19. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that under Article 157 (10) of Constitution of Kenya 2010 the Director of Public Prosecution does not require consent of any person or authority to commence criminal proceedings and shall not be under direction or control of any person or authority in exercise of that duty.

20. They insist that there is no nexus between the prosecution of the ex parte Applicants and the **High Court Case in Embu High Court Civil Case No.6 of 2016** and that in any event the ex parte Applicants were not absolved of destruction of 1<sup>st</sup> Interested Party's property. They claim that only criminal trial can do so.

21. The Respondents contend that ownership of land is not an ingredient in the offence the ex parte Applicants are charged with and that the main ingredients in their view is willful and unlawful destruction of property. They accuse the ex parte Applicants of trying to shield themselves from crime by use of Law of Succession Act.

22. The Respondents insist that the Applicants have not demonstrated that they have no other remedy than Judicial Review remedy arguing that they will have an opportunity to defend themselves during the criminal trial.

23. In their written submissions the respondents have reiterated the above contentions. They submit that the Applicants have not demonstrated that they have a case worthy of Judicial intervention through Judicial Review.

They rely on the case of **R -v- NEMA and 3 others ex parte Middle East Consultancy Services Limited (2018)eklr** where the court re-stated that the scope of judicial review applies on the lawfulness of the process and not the merit of the decision and that a court should not attempt to act in an appellate manner. They submit that the applicants have not demonstrated any fundamental flaws in the decision making process to warrant the orders sought but are challenging the merits in being charged, which in their view is outside the ambit of Judicial review. They submit that a complaint was made and the 1<sup>st</sup> Interested Party had a legitimate reason to have the same investigated and in their view the investigations revealed that a crime had been committed.

They submit that the applicants have not contested that they committed the offence but they rely on the argument that the 1<sup>st</sup> Interested Party was an intermeddler in the estate, an issue they had not raised initially when they saw him enter the property. They contend that the applicants should not invite the court to enter into evaluation of sufficiency of evidence which should be dealt with at the trial court.

They rely on the case of **DPP v Martin Maina and 4 others(2017)eklr** where the court quoted the Supreme Court of India observed that the power to quash criminal proceedings should be used rarely and exercised in a very sparingly.

The 1<sup>st</sup> and 2<sup>nd</sup> respondent submit that the applicants were charged with an offence known in law, which they had committed and they should have followed legal process to remove the intermeddler if they were offended by his presence on the suit land. They submit that *mens rea* has been proved as it is not denied that crops were destroyed and that the applicants destroyed the crop.

#### **Interested Parties case:**

24. The 1<sup>st</sup> Interested Party has also opposed this motion vide a Replying Affidavit sworn on 15<sup>th</sup> August 2019. He deposes that the ex parte applicants and the 2<sup>nd</sup> Interested Party are beneficiaries to the estate of Shadrack Njoka Kirera (deceased) and that all of them have been utilizing L.R. No. Magumoni/Itugururu/244.

25. The 1<sup>st</sup> Interested Party further adds that he entered into a lease agreement with 2<sup>nd</sup> Interested Party with full knowledge and consent of the ex parte Applicants who did not take action against him for intermeddling with the estate of the deceased.

26. He has faulted the ex parte Applicants for taking the law into their hands by destroying his crops. He claims that he reported the incident

to the OCS who failed to act and that action was only taken when he went to the DCI.

27. He claims that he was maliciously charged himself over the same dispute but says the issue should not be used by ex parte Applicants to avoid facing the laws. for destroying his crops. He contends that he never colluded with anyone and does not know what transpired during the arrest and arraignment of the ex parte Applicants.

28. According to the 1<sup>st</sup> Interested Party the Director of Public Prosecution has powers to prosecute and the ex parte Applicants have not demonstrated how those powers were abused. He contends that he has sufficient evidence to show that his crops were illegally destroyed and that he would suffer loss if the prosecution of the ex parte Applicants is terminated.

**Analysis and determination:**

29. This court has considered this application for Judicial Review of the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to prosecute the ex parte Applicants for the alleged offence. I have considered the response made by the Respondents and the interested parties who have insisted that they have basis to charge and proceed with the prosecution of the ex parte Applicants. The main issues have is whether the power to prosecute someone by the Office of the Director of Public Prosecution is absolute or not and whether the basis for prosecution was well grounded and in good faith.

**(i) Whether the power donated to Office of Director of Public Prosecution to prosecute is absolute.**

30. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent has contended that under the law the Director of Public Prosecution does not require the consent of any person or authority for the commencement of criminal proceedings against anyone and have cited the provisions of **Article 157(10)** to buttress their contention. The provisions, of **Article 157 (6)** gives power to the office of Director of Public Prosecution to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. That is undeniable position of law. It is also true and correct that under **Article 157(10)** of the **Constitution of Kenya 2010**, the Director of Public Prosecution does not require consent from any person or authority to commence criminal proceedings and is not under any directions or control of any person or authority in exercise of those powers. However there is a limit to the exercise of those powers because under **Sub-Article(11)** the Constitution provides:-

***" In exercising the powers conferred by this Article, the Director of Public Prosecution shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. "***

31. The above in my view means that the powers to prosecute by the office of Director of Public Prosecution are not absolute because they must be exercised in the manner provided above. This also means that any person charged with a criminal offence is actually at liberty to challenge the basis of his/her prosecution if he/she has reasons to demonstrate that her/his prosecution is not driven by public interest or is in the interest of justice. The exercise of powers to prosecute by the Director of Public Prosecution is therefore amenable to Judicial Review proceedings or any other redress provided by the constitution or a statute. The big question here is whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's reasons to prefer charges were based on public interest/interest of justice.

**(ii) Whether the decision to charge and prosecute the ex parte Applicants was well grounded in law.**

32. The ex- parte Applicants have insisted that the purpose of their prosecution was to achieve a collateral purpose which they claim was to give undue advantage to the 1<sup>st</sup> Interested Party in the civil feuds they have been having. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the other have averred that the decision to charge them was arrived at fairly and was aimed at ensuring that justice is served and to them there were no extraneous factors considered in their decision.

33. It is clear from the pleadings that the ex parte Applicants and the Interested Parties have had long standing disputes over the parcel of land known as L.R. No./ MAGUMONI/ ITUGURURU/244 which parcel is registered in the name of the late Shadrack Njoka Kirera. The ex parte Applicants and the 2<sup>nd</sup> Interested Party are beneficiaries of that estate by virtue of being children of the deceased. The estate is now the subject of succession proceedings filed in Nairobi vide Succession cause No.3129 of 2014. The parties in these proceedings did not avail information to this court regarding the status of the cause in Nairobi High Court but from the copy of the grant exhibited by the ex parte Applicants, the court in Nairobi on 5<sup>th</sup> July 2018 appointed the following administrators and administratrix respectively:-

- i) Peter Mungai Kirera (1<sup>st</sup> ex parte Applicant)
- ii) Moses Ndungu Kirera and
- iii) Milka Wamaitha Kirera

This means that in law the 3 are required to carry out the administration of the estate including applying to the court that issued the grant for confirmation of grant after the statutory period (6 months).

34. The genesis of the dispute/feuds between the ex parte Applicants on one hand and the Interested Parties on the other appears to be a lease agreement dated 1<sup>st</sup> August 2011 entered between Patrick Harun Gitonga, the 1<sup>st</sup> Interested Party and Michael Njue Njoka and the 2<sup>nd</sup> Interested Party. The copy of that agreement exhibited by the P.C George Rutere, the investigating officer in his affidavit sworn on 4<sup>th</sup> November 2019 indicates that Michael Njue Njoka was leasing 16 acres of land to Patrick Harun Gitonga at Kshs.2000/- per acre for 3 years

beginning from 1<sup>st</sup> August 2011 to 31<sup>st</sup> August 2014.

35. The exhibits tendered by the ex parte Applicants and which have not been disputed indicates that the same parties have filed civil claims in different courts over the same property (estate) which is the subject matter in the criminal charge now facing the ex parte Applicants. This court has noted that there was a suit No. Embu HCCC NO. 20 of 2013 between Patrick Gitonga Harun (1<sup>st</sup> Interested Party herein) as the Plaintiff -vs- Peter Mungai Kirera (1<sup>st</sup> ex parte Applicant), Moses Ndungu Kirera (2nd Ex parte Applicant and Michael Njue Kirera (2nd Interested Party. The suit was based on destruction of Tobacco crop worth Kshs.8,66,670/- and malicious prosecution. The 1<sup>st</sup> Interested Party complained that the defendants had fraudulently held themselves as having authority to lease him 13 acres.

36. This court was not supplied with details on what transpired in that suit. The only details supplied is in regard to another suit, Embu HCCC No.6 of 2016 which was determined on 4<sup>th</sup> November 2016 when the court dismissed the suit holding that the lease agreement relied by 1<sup>st</sup> Interested Party (who was the Plaintiff in that suit) was void *ab initio* because the contracting parties lacked capacity to deal with estate of a deceased persons.

37. The 1<sup>st</sup> Interested Party Patrick Gitonga Harun was himself charged through **Chuka Chief Magistrate's Court Criminal Case No.1151OF 2013** with the following counts:-

(i) Forcible detainer contrary to **Section 91** of the **Penal Code** with particulars that between 2011 and 2013 he had unlawfully taken possession of L.R Magumoni/Itugururu/244.

(ii) Cutting trees contrary to **Section 334(c)** of the **Penal Code**. The particulars are that the 1st Interested Party cut unlawful trees valued at Kshs.190, 050/- belonging to Peter Mungai Kirera (the 1<sup>st</sup> Exparte Applicant. The proceedings exhibited by the ex parte Applicants indicates that the 1<sup>st</sup> Interested Party herein was acquitted on the said Criminal charges because the complainant did not establish that he then had capacity over the estate of Shadrack Njoka Kirera the registered owner of Magumoni/Itugururu/244. The 1st Interested Party was later acquitted because the trial court found that the complainant (the 1<sup>st</sup> Applicant herein had no *locus* to lodge the complaint.)

38. From the above cases, it is quite apparent from the above that the ex parte Applicants and the 1<sup>st</sup> Interested Party has had a long running battles which in my view will only be resolved through the succession cause pending in Nairobi and not the other forums. It is quite clear in my view that the 1<sup>st</sup> Interested Party took up the criminal action after failing to make any headway in the civil actions he took. The question posed in my view is if the decision of the **High Court in Embu HCCC NO.6 of 2016** found that the transaction relied by the 1<sup>st</sup> Interested Party and exhibited by investigating office in the criminal matter was illegal null and void *ab initio*, can anything flow from the same? The answer in my view is in the negative. No cause of action can be founded on an illegality. When something has been found void *ab initio* it remains void. That void can never be a subject of a civil or criminal proceedings. The criminal charges against the ex parte applicants are tainted with illegality. In the case of **Republic -vs- Director of Public Prosecution and 2 others Ex parte Steven Waweru Gikonyo & Another [2017] eKLR** Odunga J made the following observations;

***" In order to succeed in an application for Judicial Review the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision- making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultravires, or contrary to the provisions of a law or its principles are instances of illegality....."***

39. It is my considered view that the criminal charge against the ex parte Applicants is founded on an illegality. The reason why I say so is that the lease agreement touching on L.R MAGUMONI/ITUGURURU/244 is illegal. The provisions of **Section 55(1)** and **82(b) (ii)** clearly state that unless one has a confirmed grant, he/she cannot transfer or dispose of any asset comprising an estate of a deceased person and transaction done without a confirmed grant certainly is nullity and void in law. Secondly a court of law as observed above rendered the transaction between the 1<sup>st</sup> Interested Party and 2<sup>nd</sup> Interested Party illegal, null and void *ab initio*. The 1<sup>st</sup> Interested Party did not appeal against that decision, which means that the decision stands.

40. The other fundamental flaw in the decision to charge the ex parte Applicants in the existence of another criminal case (**Chuka Chief Magistrate's Court Criminal Case No.1151 of 2013**) that really is similar in character with the present case with the only difference being that the party who was the complainant is now the accused person while the accused person is accused person in the former case is now the complainant in the present criminal case (**Chuka Chief Magistrate's Court Criminal Case BNo.291 of 2013**) now being challenged herein.

In both the criminal cases the complainant is hinged on L.R MAGUMONI/ITUGURURU/244 and the transaction on agreement between the 1<sup>st</sup> Interested Party and the 2<sup>nd</sup>

Interested Party. The former criminal case No.291 of 2013 was dismissed on the basis of the illegality of the agreement/transaction between the 1<sup>st</sup> Interested Party and 2<sup>nd</sup> Interested Party. The dismissal raises the question about rationality by the Director of Public Prosecution to prefer charges against the ex parte Applicant based on what a civil and criminal court has found flawed and illegal. The decision by the DCI and Office of the Director of Public Prosecution to prefer fresh charges against the ex parte Applicants in 2018 for alleged acts done in 2011 is also tainted with irrationality when viewed against the background of the fact that 2 civil cases and one criminal case have been filed in court over the same issue of destroying crops and the finding of the courts have been the same. The transaction was anullity in law.

41. This court finds that the ex parte Applicants have sufficiently demonstrated that the decision by the Director of Public Prosecution to prefer charges was not only ill advised in view of the history of the matter but also tainted with illegality and irrationality which are two crucial components that Applicant must show before succeeding in application for Judicial Review.

In the end, for the reasons advanced this court finds merit in the Notice of Motion dated 7<sup>th</sup> June 2019. The same is allowed in the following terms:-

i) An order of certiorari is hereby issued to quash which I hereby do the decision made by Inspector General of Police and the Director of Public Prosecution to prosecute the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties herein.

ii) The charge registered under **Chuka Chief Magistrate's Criminal case No. 291 of 2018** is hereby quashed and the proceedings thereon are hereby terminated forthwith.

iii) There shall be no order as to costs. Each party to pay own costs.

**Dated, signed and delivered at Chuka this 30<sup>th</sup> day of June 2020.**

**R. K. LIMO**

**JUDGE**

**30/6/2020**

Judgment signed, dated and delivered in the open court in presence of Nyakundi for exparte Applicant and Momanyi for Respondent and in presence of Beyo via zoom for Interested Party.

**R.K. LIMO**

**JUDGE**

**30/6/2020**