REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

JUDICIAL REVIEW NO. 5 OF 2019

REPUBLIC...APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS............1ST RESPONDENT

THE D.C.I.O & O.C.S KARIENE POLICE STATION.....2ND RESPONDENT

THE INSPECTOR OF POLICE..3RD RESPONDENT

JAMLECK MWONGERA Alias MWANONITI................4TH RESPONDENT

ISAIAH MWUKIMI..5TH RESPONDENT

EX-PARTE ASHFORD GERRARD RIUNGU

R U L I N G

1. **Ashford Gerrard Riungu** ("the applicant"), lodged his Motion dated 27/6/2019 on 1/7/2019 seeking an Order of Certiorari to quash **Criminal Case No. 539 of 2019 and Miscellaneous Criminal Application No. 4 of 2019** both pending before the Principal Magistrate's Court at Githongo in so far as the *exparte* applicant is concerned.

2. The application was supported by the affidavit in support of the Summons for leave and the Further Affidavit sworn on 1/7/2019. The grounds were that; the criminal charges preferred against him were in respect of matters done by him in his line of duty as an advocate of the High Court of Kenya and a Commissioner for Oaths; the charges were actuated by malice on the part of the 1st to 3rd respondent with the aim of tainting and disparaging his reputation as an advocate and that they constituted an abuse of the court process.

3. He averred that he was admitted to the bar in 1991 and has been in continuous practice for 28 years. That in 2015, he attested to an application for transfer by way of transmission, a form commonly referred to as LR 7 and LR 19 made by **Malick Kaburu Mugambi** to **Jamlick Mwongera M'Nkanatha**. He also certified copies of the transferor's and transferee's Identity cards and KRA PIN certificates.

4. He was later summoned to Kariene Police Station by one **P.C. Joshua Sila** and informed of the charges. He was consequently charged in **Criminal Case No 539 of 2019** for the following offences:-

> *"COUNT 2*
>
> *FORGERY OF JUDICIAL DOCUMENT CONTRARY TO SECTION 351 OF THE PENAL CODE*
>
> *PARTICULARS OF THE OFFENCE*
>
> *MACLAS KABURU MUGAMBI 2. ASHFORD GERRARD RIUNGU.* ***On diverse dates between 6th Day of May 2015 and 19th June 2015 at unknown place within the Republic of Kenya with others not before court made succession cause 290/13, succession cause 289/2013, certificate of confirmation of grant 290/13, certificate of confirmation of grant 289/13 a judicial document purporting it to be what it was in fact not.***
>
> *COUNT SIX*
>
> *ADMINISTERING AN UNLAWFUL OATH TO COMMIT AN OFFENCE CONTRARY TO SECTION 61 (A) (II) OF THE*

PENAL CODE

PARTICULARS OF THE OFFENCE

<u>ASHFORD GERRARD RIUNGU.</u> On the 17th Day of July 2015 at Meru Town in Imenti North Sub County within Meru County was present at and consented to the administering of oath in the nature of an oath to Maclas Kaburu Mugambi purporting to bind the said Maclas Kaburu Mugambi to commit an offence of obtaining money by false pretences.

<u>COUNT SEVEN</u>

CONSPIRACY TO COMMIT A FELONY CONTRARY TO SECTION 393 OF THE PENAL CODE

PARTICULARS OF THE OFFENCE

<u>MACLAS KABURU MUGAMBI 2. ASHFORD GERRARD RIUNGU.</u> On the diverse dates between 6th Day of May 2015 and 19th June 2015 at unknown place within the Republic of Kenya jointly with others not before court conspired to commit a felony namely forgery of judicial documents".

5. As regards the case in **Miscellaneous Application No. 4 of 2019,** the applicant contended that the said application which sought to have him supply the investigating officer with the impression stamp he used during the attestation was tantamount to asking him to assist the prosecution case.

6. He finally contended that his law firm never took part in drawing the agreement for the impugned transaction or the succession matters hence he did not have any knowledge of wrongdoing by the parties to the transaction. That by the police failing to arrest, charge and prosecute the advocates who drew up the actual instruments was a clear manifestation of him being used as a scapegoat.

7. **Jamlick Mwongera alias Mwanontii** ("the interested party") responded to the application vide the replying affidavit sworn on 24/6/2019. He averred that he bought land **parcels No. Kiamuri A/1921 & Kiamuri A 1922** from **Maclas Kaburu Mugambi**. At the time of entering into the aforesaid sale agreement, **Maclas Kaburu Mugambi** had presented himself as the **legitimate** owner of the said land parcels.

8. That shortly after he obtained title to Kiamuri a/1921 & 1922, he entered into an agreement for exchange of the parcels with one **Kinyua**. The transfer of the parcels took place without a hitch. However, he was later summoned to Kariene Police Station and informed that **parcel no. Kiamuri 1921** belonged to **Isaiah Mwikumi** and that the said **Maclas Kaburu** had forged a succession cause among other documents in order to be able to sell the same to him.

9. Further investigations revealed that, **Land Parcel Kaimuri 1/1922** was also a subject of fraud having been the property of **Stephen Mwitari** to whom the purported seller had no connection whatsoever.

10. That he was never involved in the investigation process save for giving his signatures as specimen for comparison with the forged documents. Later, he learnt that the investigations resulted in the arrest of the applicant and both **Githongo Criminal Case No. 539 of 2019 and Githongo Miscellaneous Application Number 4 of 2019** were still pending.

11. The main issue for determination is whether the charges against the applicant should be halted for being abuse of powers and unwarranted.

12. In **<u>Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] Eklr</u>,** it was held: -

> ***"Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. …Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant.***
>
> ***Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if it were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.***
>
> ***Therefore, the determination of this case must be seen in light of the foregoing decisions. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with*****….."**

I reiterate the foregoing here in its totality.

13. In **<u>Justus Mwenda Kathenge vs Director of Public Prosecutions and 2 Others [2014] Eklr,</u>** the court held:-

"It is now trite law that Courts cannot interfere with the exercise of the above mandate [exercise of prosecutorial powers] unless it can be shown that under Article 157(11);

(i) he has acted without due regard to public interest,

(ii) he has acted against the interests of the administration of justice,

(iii) he has not taken account of the need to prevent and avoid abuse of Court process".

14. In **Hesbon Ongetta Momanyi t/a O H Momanyi & Co Advocates v Director of Public Prosecutions OCS [2018] Eklr,** it was stated: -

"It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the Office of the Director of Public Prosecutions Act. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. ..."

15. In **DPP vs. Maina Martin & 4 Others [2014] Eklr,** the Court of Appeal cited with approval the principles set in the **State of Maharashtra & Others vs. Arun Gulab & Others Cr. A. No. 590 of 2017** as to when criminal proceedings will be prohibited as follows: -

"1) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or the quashing of the impugned proceedings would secure the ends of justice;

2) …

3) Where the allegations in the First information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the alleged offence; and

4) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge".

16. The foregoing then are then the principle under which this court has to apply in examining the case before it.

17. In the present case, the applicant swore that while in his office, a client came and sought his services as an advocate. He offered the services by stamping the documents presented to him for purposes of registration. He also certified other documents presented to him. His duty and role was restricted to only stamping and certifying the documents presented to him. He did not prepare the said documents.

18. It was never alleged and or shown that the applicant prepared the subject documents. The applicant did not stamp the documents to signing that he had prepared them but as a normal notarial act of an advocate in the course of his work as such.

19. In **Peter Kaimba Kirimo v Director of Public Prosecutions [2019] Eklr,** it was held: -

"In the circumstances of this case, where an advocate contends that the parties came to his office in search of his legal services which fact is not denied; where the advocate vouches that he was at all times ready to co-operate and be a prosecution witness; where no evidence whatsoever has been placed before court by either the investigations officer by way of statements or the report originally made by the complainant to the police, where all the court has are bare statements from the prosecutor, can it be said that there is a probable cause for the respondent to charge the petitioner? I doubt it….."

20. Looking at the offences the applicant is charged with, they cannot stand on the face of the applicant's contention that he was only acting as an advocate. I do not think that it is part of an advocate's duty while in his office to inquire as to the authenticity of the documents presented to him to witness. All he does is to ascertain that on the date shown, the maker of the document appeared before him and executed the documents. That he attests to the fact that he saw the person named therein affix his signature on the document but not the authenticity of those documents.

21. As to whether the contents of the documents are true or authentic, that is left to the maker of the document. In this case, it will be the person who presented himself before the applicant for the latter's attestation. The best the applicant could have been is a prosecution witness and not an accused as the respondents purport to.

22. The element of malice alluded to by the applicant has also not been controverted.

23. It would be improper to subject the applicant to the proceedings in the trial court. More so given his stature in society arising from the conduct of his duties as an advocate.

24. It would be perilous and highly prejudicial to him to undergo a worthless exercise only to tell him later to sue for malicious prosecution. I therefore find that the prosecution of the applicant is devoid of merit. It is actuated by malice and is against public interest. It is in the public

interest that advocates are not harassed for doing a honest job in the line of their duty.

25. In this regard, the Motion dated 27/6/2019 is meritorious and is hereby allowed as prayed.

DATED and **DELIVERED** at Meru this 24th day of September, 2020.

A. MABEYA

JUDGE