



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC MISCELLANEOUS NO. 6 OF 2016

BETWEEN

ALOIS S.K. KALAA.....APPLICANT

VERSUS

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

MARTIN VOSKAMP.....2ND RESPONDENT

HILTON HOTELS CORPORATION.....3RD RESPONDENT

MR. OMARI KEMAL AMIN.....4TH RESPONDENT

HILTON NAIROBI.....5TH RESPONDENT

PROF. MUSILI WAMBUA & CO ADVOCATES.....6TH RESPONDENT

PROF MUSILI WAMBUA.....7TH RESPONDENT

HON CECILIA W. GITHUA.....8TH RESPONDENT

HON DOREEN N. MULEKYO.....9TH RESPONDENT

HON PETER M. NDWIGA.....10TH RESPONDENT

LEO INVESTMENTS.....11TH RESPONDENT

MR MADATALI CHATUR.....12TH RESPONDENT

MR RAHIM CHATUR.....13TH RESPONDENT

MR AHMED A. RAHIM.....14TH RESPONDENT

(PO) NICHOLAS KISAVI (No CID 71327).....15TH RESPONDENT

KAHUTHU & KAHUTHU ADVOCATES.....16TH RESPONDENT

MR JAMES G. KAHUTHU.....17TH RESPONDENT

TAIPAN VACATIONAL & TRAVEL.....18TH RESPONDENT

MR KANTILAL GUDKHA.....19TH RESPONDENT

LIMBANI MOTORS LTD.....	20 TH RESPONDENT
MR HITEN K. LIMBANI.....	21 ST RESPONDENT
HON. W.N. KABERIA (SRM).....	22 ND RESPONDENT
MADAM JACKLINE ABUGA.....	23 RD RESPONDENT
HON. MADAM J.W. LESIIT.....	24 TH RESPONDENT
THE INSPECTOR GENERAL OF POLICE.....	25 TH RESPONDENT
THE DIRECTOR OF ETHICS & ECONOMIC CRIME..	26 TH RESPONDENT
THE ATTORNEY GENERAL.....	27 TH RESPONDENT
MRS SUGURA BEGUM RAHIM–ENJOINED AS THE..	28 TH RESPONDENT
HON. KERIAKO TOBIKO.....	29 TH RESPONDENT
MS. RUTH KAMOLI KITHOME.....	30 TH RESPONDENT
MR NGAU aliasi ODINGA KITHOME.....	31 ST RESPONDENT
MR PIUS MICHAEL KILONZI KITHOME.....	32 ND RESPONDENT
MR JACKSON LOLEMODON.....	33 RD RESPONDENT
MR MUSYOKA MASUMBA.....	34 TH RESPONDENT
MR JAPHETH KITEME MWALIMU.....	35 TH RESPONDENT
MR MULINGE KITHOME.....	36 TH RESPONDENT
MS KANZA MUSHYOKA.....	37 TH RESPONDENT
MR MASINE NGAU.....	38 TH RESPONDENT
CHIEF LAND REGISTRAR.....	39 TH RESPONDENT
THE DISTRICT COMMISSIONER MUTOMO.....	40 TH RESPONDENT
THE CHIEF MAGISTRATE – KITUI.....	41 ST RESPONDENT
TAUSI ASSURANCE COMPANY LTD.....	42 ND RESPONDENT
RITA THATTHI (MRS).....	43 RD RESPONDENT
DINESH KAPILA.....	4 TH RESPONDENT
DILESH SOMCHAND BID.....	45 TH RESPONDENT
AMAR RASIKLAL KANTARIA.....	46 TH RESPONDENT
SHANTILAL KIMJI SHAH.....	47 TH RESPONDENT
RASIK CHOTALAL KANTARIA.....	48 TH RESPONDENT

1. **Alois K. Kalaa** the Applicant filed a Notice of Motion dated 27th May 2016 seeking leave to prosecute twenty six (26) Respondents for various offences. The intended charges ranged from offences under the Anti-Corruption and Economic Crimes Act (ACECA), Employment Act, Penal code, Traffic Act, Advocates Act among others.

2. On 27th July 2016 he filed an application to enjoin the Hon A.G. as the 27th Respondent following the court directions of 31st May 2016.

3. On 24th January 2017 it was observed by the Counsel representing a good number of the Respondents that the Applicant had filed several matters in various courts seeking similar orders e.g Misc. Cr. Application No 202/12, Petition No 84/15 struck out by Lenaola J (as he then was); HCCC No 10/10 Petition No 11/08; Private prosecution No 1/07 among others. An order was made by this court directing the counsel present to prepare a comprehensive list of all matters filed by the Applicant(both pending and determined) to enable the court peruse them before issuing any directions.

4. Only a few files were traced for perusal after so much delay. The Court then directed the Respondents to file their responses to this application.

5. Meanwhile the Applicant continued filing documents/letters in this file some of which do not make any sense. He has even made murder claims against some of the Respondents. He has filed claims on behalf of persons without their authority which is wrong.

6. On 27th May 2016 he filed more claims and increased the number of Respondents to forty one (41). By 14th November 2018 the number of Respondents had reached forty eight (48).

7. Some of the Respondents filed replying affidavits while others filed grounds of opposition. On 5th December 2018 the matter came for hearing and the court proceeded to hearing the parties present.

8. In his submissions the Applicant asked the court to enjoin the DPP as a party herein and that all the 48 Respondents should appear in court. Mr Ngumbi for the 25th and 27th Respondents submitted that the Applicant never lodged a complaint with the police and/or DPP. Further that the Applicant sought to prosecute Government officers/offices for official duties undertaken yet criminal liability was personal and not attached to an office. He submitted that this court lacked jurisdiction as the acts complained of were criminal in nature. Counsel doubted the Applicant's mental capacity.

9. M/s Ocharo for the 26th Respondent relied on their filed grounds of opposition. She submitted that the application is procedurally and legally defective, and this court lacked jurisdiction to hear it. She also doubted the Applicant's mental capacity.

10. Mr K. Mwangi for 11th-13th Respondents also relied on their grounds of opposition and supported the submissions by those who had submitted earlier. He contended that no reasonable cause had been shown for the orders sought to be issued.

11. Mr E. Mwangi for the 42nd and 43rd Respondents echoed the submissions by his colleagues who had addressed the Court. He argued that the application should have been made in the magistrate's court. That the prayers were in respect of persons who are not parties in this matter. He cited Magistrates/Judges who have immunity while doing their work yet had been sued by the Applicant. He termed the proceedings as being unfair.

12. M/s Wambua for 2nd, 3rd, 5th-7th Respondents in asking for dismissal of the matter submitted that the Applicant had a similar matter before the City court.

13. In rebuttal the Applicant contended that the EACC enjoined itself in this case and it can't wriggle out of it.

14. The Applicant filed this Application seeking leave to file a private prosecution against forty eight (48) respondents. What is a private prosecution? Black's Law Dictionary defines it at page 1416 as:

“A criminal prosecution initiated by a privately employed attorney or by a lay person or private organization rather than a district attorney or other government employed prosecutor.”

15. Section 88 Criminal Procedure code provides:

(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.

(2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.

(3) complaint may be made orally or in writing, but,if made orally, shall be reduced to writing by themagistrate, and, in either case, shall be signed by the complainant and the magistrate.

16. It therefore follows that a person cannot just wake up one morning and decide to file a criminal case against another person. An application has to be made before the magistrate's court seized with jurisdiction to handle the matter. The person applying must follow laid down procedures in lodging his/her application.

17. The Applicant must satisfy the trial magistrate that there has been failure by State authorities to act in accordance with their constitutional and statutory mandate. It must be shown that the bodies charged with receiving complaints, carrying out investigations and conducting prosecution have failed in their duty of so acting.

18. Retired Justice Richard Kuloba in the case of **Floriculture International Ltd and Others High Court Misc. Civil Application No 114 of 1997** set out the requirements for one to carry out a private prosecution. They are as follows:

“For all these reasons criminal proceedings at the instance of a private person shall be allowed to start or to be maintained to the end only where it is shown by the private prosecutor:

(1) that a report of the alleged offence was made to the A.G. or the Police or other appropriate public prosecutor, to accord either of them a reasonable opportunity to commence or take over the criminal process, or to raise objection(if any) against prosecuting; that is to say, the complainant must firstly exhaust the public machinery of prosecuting before embarking on it himself; and

(2) that the A.G. or other public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings; or that he has maintained a more than usual and reasonable reticence; and either the decision or reticence must be clearly demonstrated; and

(3) that the failure or refusal by the State agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued; and

(4) that unless the suspect is prosecuted and prosecuted at the given point of time there is a clear likelihood of a failure of public and private justice; and

(5) the basis for the locus standi such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics or some ulterior considerations devoid of good faith; and

(6) that demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous A.G. or Police Force guilty of capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counter act the culpable refusal or failure to prosecute to neutralize the attempts of crooked people to stifle criminal justice”

19. A perusal of all these principles clearly confirms that the Applicant herein has not satisfied any single one of them. If at all he was wronged he did not raise any complaint with the Police, Director of Public Prosecution, Directorate of Criminal Investigations, Ethics and Anti-Corruption Commission, Judicial Service Commission, Public Service Commission etc. The pattern flowing from the documents/letters filed herein is one of vengeance/vendetta. Any person/officer who crossed his path in the course of the discharge of his/her duty has his/her name added to the list of Respondents in this matter.

20. This amounts to maligning of names of persons who have not wronged him but are simply carrying out their official duty. As has been alluded to by the observation by some of the Counsel in this matter, none of us is certain about the Applicant’s mental capacity. I cannot order for his mental assessment since he is not facing any criminal charges before this court. All in all I find no substance in this application which was also filed before the wrong court. I hereby dismiss it.

21. A copy of this Ruling must be filed in any other similar matter filed by the Applicant in this Division for record purposes. Due to the unique circumstances of this case I will order that each party bears his/her own costs.

Orders accordingly.

Delivered, dated and signed this 30th day of January 2019 in open court at Nairobi.

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HEDWIG I. ONG’UDI

JUDGE