



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPLICATION NO. 83 OF 2017**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PRINCIPAL MAGISTRATE, KITUI LAW COURTS.....1<sup>ST</sup> RESPONDENT**

**THE O.C.S., KITUI POLICE STATION.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**PETER CATUTU NGUTHU.....INTERESTED PARTY**

**PETER PATRICK KITHIKII.....EXPARTE APPLICANT**

**RULING**

1. By virtue of leave granted on the 23<sup>rd</sup> July, 2012, **Peter Patrick Kithikii**, the Ex Parte Applicant by way of Notice of Motion seeks an order of prohibition to issue prohibiting the Prosecution, trial and/or proceedings before the Principal Magistrate's Court, Kitui in **Criminal Case No. 792 of 2011, Republic versus Peter Patrick Kithikii**, a charge under **Section 91** of the **Penal Code, Cap 63**, for **Forcible Detainer**; and an order of certiorari to remove to the High Court for purposes of being quashed the records of **Criminal Case No. 792 of 2011**, in the **Principal Magistrate's Court at Kitui Law Courts, Republic vs. Patrick Kithikii**.

2. In the statement in support of the Application the Ex Parte Applicant avers that though he is charged with the offence of **Forcible Detainer** contrary to **Section 91** of the **Penal Code**, the land he is alleged to be in possession of number **Matinyani/Kalindilo/118** alleged to belong to **Peter Nguthu** comprises of the assets in the Estate of **Kinga Muthonga**, his grandfather. That the Complainant in the Criminal Case, **Peter Catutu Nguthu** in collusion with some of the Administrators of the Estate and a son of the family of the other beneficiaries purported to sell the parcel of land to the Complainant fraudulently, secretly and without knowledge of all the beneficiaries and family members of the Deceased. That the Ex Parte Applicant's father, one of the beneficiaries entitled in priority as the Administrator of the Estate, upon discovering that the land the Ex Parte Applicant occupied and used all along with the consent of the family members applied for annulment/revocation of the grant in **High Court Cause No. 25 of 2012** that was pending hearing and that the title obtained by the Complainant that he has used to have the Ex Parte Applicant charged was obtained fraudulently.

3. The Attorney General, 3<sup>rd</sup> Respondent filed grounds of opposition where he stated that the Ex Parte Applicant had not made out a case for Judicial Review as the orders sought cannot be granted in light of **Article 245** and **157** of the **Constitution**. That the Application is fatally defective as it calls upon the Court to evaluate matters of fact which calls for witnesses and document examination, which process is not amenable to Judicial Review; and it is brought malafides and is nuanced by falsehoods, material nondisclosure which is misleading and an abuse of the process of the Court.

4. It was submitted by the Ex Parte Applicant that possession of the land by the Ex Parte Applicant could not be said to be without colour of right as envisaged by **Section 91** of the **Penal Code** and no notice of the fraudulent sale of the land was brought to his notice. That the police under the Director of Public Prosecutions (DPP) acted and are perpetrating a violation of the provisions of **Article 157(ii)** of the **Constitution** which is an abuse of legal process and police powers. In this regard he called upon the Court to exercise supervisory jurisdiction pursuant to **Article 165(6)** of the **Constitution** by calling for the records of the **Criminal Case No. 742 of 2011** and the proceedings of the Court under **Article 167(7)** of the **Constitution** and the powers conferred to the National Police Service do not override the sovereignty of the people and are not above the sovereign powers of people.

5. In response the Attorney General urged that the Application does not raise issues that can be resolved in a Judicial Review Court as the issues raised are a concern of a Criminal Court. That the charges facing the Applicant are recognized in law and he should therefore not use the Court to defeat justice. That the constitution provides for the rights of an Accused person and a fair trial therefore the allegation of being exposed to an unfair just, hard and/or prejudicial criminal justice system cannot be a ground for Judicial Review and cannot suffice grant of Judicial Review orders. That the Judicial Review Court does not deal with the merits of the Court as stated in the case of **Republic vs. A.G. & 4 Others Ex Parte Diamand Hashim Lalji and Ahmed Hasham Halji (2004) eKLR** where the Court stated thus:

*“The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. Section 193A of the Criminal Procedure Code on this issue provides: Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”*

6. That the Court should desist from issuing orders that could unnecessarily interfere with the working of the Office of DPP as an independent office.

7. This was a case filed at Machakos High Court in 2012 where the Judge seized of the matter declined to grant an order of stay of the criminal proceedings. Subsequently the case was transferred to this Court (Kitui High Court) on the **31<sup>st</sup> October, 2017**, by then a ruling had been delivered on **24<sup>th</sup> February, 2016** in the Application for revocation of grant. Therefore, the Ex Parte Applicant in his submissions in reply stated that the police ought to have discovered that the title held by the Complainant was obtained fraudulently and therefore investigations carried out were unlikely to succeed before any Court of law.

8. I have duly considered rival submissions of both parties. The principles of granting Judicial Review Orders were enunciated in the case of **Mbogo vs. Shah (1968) EA 93**, it was stated that Judicial Review Orders are discretionary and the Court will not interfere with the exercise of judicial discretion unless the Judge misdirects himself in some matter and as a result arrives at a wrong decision.

9. In the case of **Maharashtra & Others vs. Aron Gulab Gawali & Others Criminal Appeal No. 590 of 2007 (27<sup>th</sup> August, 2010)** it was stated that:

*“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest cases and the court cannot be justified in embarking upon the enquiry as to the reliability or genuineness or otherwise of allegations made in the complaint, unless allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion ... the court, under its inherent powers, can neither intervene at an uncalled for stage nor it can ‘soft pedal the course of justice’ at a crucial stage of investigations/proceedings ... The power of judicial review is discretionary, however, it must be exercised to prevent a miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure...”*

10. Prosecutorial powers lie with the DPP who derives the same from **Article 157 of the Constitution, 2010**. He has the power to institute and undertake criminal proceedings against any person following allegations of an offence having been committed and he can also discontinue proceedings if necessary.

11. In seeking prerogative orders herein the Ex Parte Applicant argues that the matter pending in Court is meant to force, coerce and threaten him to surrender the land in issue. It was urged that the Ex Parte Applicant is in possession of the land with the consent of other beneficiaries of the Estate therefore he cannot be alleged to have trespassed on it. What in fact the Court is being asked is to enquire into the merits of the criminal case and make a decision as to whether or not it should proceed.

12. As clearly enunciated in authorities cited, Judicial Review Applications deal with the process and not merits of a matter. The DPP seized with the ruling in the succession matter should decide whether or not to continue with the criminal matter.

13. The instant Application does not warrant issuance of orders sought. Consequently, it is dismissed with costs to the 3<sup>rd</sup> Respondent.

14. It is so ordered.

**Dated, Signed and Delivered at Kitui this 29<sup>th</sup> day of April, 2019.**

**L. N. MUTENDE**

**JUDGE**