REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(CORAM: ODUNGA, J)

CRIMINAL MISC. CAUSE NO. 88 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE

PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF ARTICLE 23(3)(F) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE PENAL CODE CAP. 63 LAWS OF KENYA

BETWEEN

STELLA RICHARD.....1ST APPLICANT

JULIUS MUTUKU.....2ND APPLICANT

JACOB MUTINDA.....3RD APPLICANT

TOM MUUMBI.....4TH APPLICANT

EDWARD MUTUA.....5TH APPLICANT

JOSEPH MUTUKU.....6TH APPLICANT

LEONARD MUSAU.....7TH APPLICANT

DOMINIC MATHEKA.....8TH APPLICANT

AUGUSTINE MUTUKU.....9TH APPLICANT

PETER KIOKO.....10TH APPLICANT

STANLEY MULWA.....11TH APPLICANT

JACKSON NDIANI.....12TH APPLICANT

PATRICK NGONZI.....13TH APPLICANT

FRANCIS MUTUA.....14TH APPLICANT

AND

THE DPP.....1ST RESPONDENT

THE OSC KILUNGU POLICE STATION.....2ND RESPONDENT

THE INSPECTOR GENERAL.....3RD RESPONDENT

AND

DANIEL KYALO LUA.....1ST INTERESTED PARTY

WAMBUA LUA.....2ND INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 14th May, 2018, the applicants herein, seeks the following orders:

> **1. AN ORDER OF CERTIORARI to remove into the Honourable Court and quash the decision of the Respondents to charge and prosecute the applicants herein in criminal case numbers 274 & 275 both of 2018 Kilungu (which files have since been transferred to Makindu).**
>
> **2. An order of CERTIORARI to remove and bring to this Honourable Court for the purpose of terminating, the prosecution of the applicants before the Senior Resident Magistrate in Kilungu Criminal cases Number 274 and 275 both of 2018 (which files have since been transferred to Makindu Law Court).**
>
> **3. THAT costs of this Application be provided for.**

Applicants' Case

2. According to the applicants, these proceedings challenge the decision of the Respondents to charge the Applicants vide two charge sheets dated 4th April 2018 in Kilungu Criminal Cases Numbers 274 and 275 both of 2018. According to the applicants, on or about 24th August 2012 the interested parties herein filed ELC Case No. 321 of 2012 at the High Court in Machakos, which suit was against **Richard Muindi**, the 1st ex parte applicant's husband. In the aforesaid ELC case, the interested party alleged that the Defendants were occupying their deceased father's land No. 12 Kilome adjudication section and thus sought eviction orders against the said **Richard Muindi,** which allegation, the ex parte applicants contended are not the case because the property in occupation is Makueni/ Kilome 2163.

3. It was averred that the said ELC matter at Machakos proceeded ex-parte and judgment was delivered whereof eviction orders were issued against the said **Richard Muindi**. Upon learning of the said judgement, the said **Richard Muindi** instructed an advocate, Nathan Mbullo $ Co. Advocates, who sought to have the ex- parte judgment set aside and also filed an application for stay of execution. Upon hearing the application for stay of execution the Judge did grant Stay orders at the first instance. However, the OCPD Kilungu and OCS Kilome refused to accept service of the orders of stay and or implement the same prompting the advocates to go back to Court vide an application dated 28th March 2018 whereof they sought Orders to have the two officers '*receive the Orders of Execution and to remove the people who had been stationed at our Gate and to also remove the padlocks put on our houses, doors and to grant access to us to our property Makueni/Kilome/2163'*. These orders were equally granted by the Court.

4. According to the applicants, on the strength of the Court orders of 27th March 2018 and 29th March 2018, the 1st applicant, her said husband and their Thirteen (13) employees gained access to the disputed property Makueni/Kilome/2163 and started working therein. However, despite full knowledge of the existence of the Court orders of 27th March, 2018 and 29th March 2018 and despite due service of the same to the OCPD Kilungu and OCS Kilome, and on the strength of a malicious complaint by the interested parties herein, the OCS Kilome arrested all the applicants herein including the 1st ex parte applicant and caused them to be arraigned and charged before the Kilungu SRM Court in C*riminal Cases Number 274 of 2018 (R. vs. Stella Richard And 2 Others) s*tealing contrary to S. 268 as read with S. 275 of the ***Penal Code*** whereof they were charged in count 1 with stealing assorted plastic chairs and tents the property of the interested parties herein. In count 2 thereof, they were charged with having or conveying the aforesaid alleged suspected stolen items, using our motor vehicles KZX 880 Isuzu Lorry and KAS 587K Canter Lorry. The ex parte applicants contended that the items the subject of these charges are their property which they were removing from the disputed property to a place where they had been hired for use and that they do not howsoever belong to

the interested parties herein. The applicants exhibited copies of Log Books for the two motor vehicles.

5. The ex parte applicants also averred that they were charged in Criminal Cases Number 275/2018 (R. Vs. Stella Richard and 14 Others) with the offence of trespass upon private land contrary to Section 3(1) as read with S. 11 of the ***Trespass Act*** Cap244 Laws of Kenya; it was alleged that they unlawfully entered the disputed land which according to the charge belonged to the interested parties herein. The 1st ex parte applicant however deposed that this is the land they have built their home and have lived in for so many years and is the subject matter in the ELC case in Machakos. In the same charge they faced count 2 which was malicious damage to property in that they jointly damaged a padlock and a chain valued at 2,000/- the property of the interested parties herein.

6. The ex parte applicants averred that on the strength of further Court orders issued by the ELC Court on 5th April 2018, on or about 6th April, 2018, their advocates on record managed to get a conditional court order in the Criminal case no. 274/2018 for the release of the said items.

7. The ex parte applicants lamented that despite the existence of all these court orders allowing them access to their property they were only able to access their property after the 16th April 2018 when the OCPD Kilungu and OCS Kilome were summoned by the ELC court pursuant to an application for contempt of court proceedings that had been filed by the 1st ex parte applicant's husband lawyers' on record. However, when they attended court on 17th April, 2018, the presiding Magistrate at Kilungu recused himself from any further hearing these matters on the grounds that the Court had received numerous and unwarranted texts from an international number accusing the Judicial officers at Kilungu of conflict of interest and possible bias and proceeded to transfer the matters to Makindu.

8. It was the applicants' position that the decision by the Respondents to charge and prosecute them in the two criminal matters was made without any legal and or factual basis since there existed clear and unambiguous Court orders allowing them access to their property and further the properties the subject matter of the criminal charges is the 1st ex parte applicant's and her husband's which they have legally acquired.

9. They therefore accused the respondents of having taken into consideration irrelevant matters in arriving at a decision to charge them hence the said decision is flawed and made in bad faith. According to the applicants, the interests of justice would be better served by the decisions being quashed and orders sought being granted.

Determination

10. I have considered the issues raised herein. These proceedings are expressed to be brought pursuant to Order 53 Rule 1(1)(2)(3) and (4) and Rule 3(1)(2)(3) and (4) of the ***Civil Procedure Rules***. They are in effect judicial review proceedings. This Court appreciates that judicial review applications are neither criminal nor civil in nature. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

11. Before dealing with the merits of the case, it is important to deal with the issue of intitulement of the application herein. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**

12. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

> **"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".**

13. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

> **"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -**
>
> **Republic……..……..……..*Applicant***
>
> **Versus**
>
> **The Electoral Commission of Kenya……Respondent.**
>
> **Ex Parte**
>
> **Jotham Mulati Welamondi**

14. In the same decision the Court set our how an application ought to be intituled as follows:

In The Matter of an Application by Jotham Welamondi for Leave to Apply for an Order of Mandamus

And

In the Matter of Alteration of the Lugari/Malava Constituencies Electoral Boundaries by The Electoral Commission of Kenya

15. It is therefore my view that judicial review applications ought not to be treated as criminal proceedings. Otherwise it would muddle up the proceedings when the same are expressed to be brought against the Director of Public Prosecutions and the Police as is the case here yet the same proceedings are expressed to be criminal proceedings. As has always been the practice, judicial review proceedings ought to be expressed to be such – Judicial Review Application just like Constitutional Petitions which are expressed to be petitions notwithstanding that the same may be seeking reliefs in respect of criminal proceedings.

16. In this case the applicant's case is in effect that the Respondents are misusing their power to give one of the party's leverage in the land dispute which dispute is still pending before the court. I agree that the powers and discretion given to the police ought to be exercised lawfully and in good faith and purely for the vindication of the commission of a criminal offence and the criminal justice system and where the same are being exercised for the achievement of some collateral purpose other than its legally recognised aim, the Court would be entitled to intervene.

17. Majanja, J in Petition No. 461 of 2012 – **Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions**, when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:

> **"It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State's coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent."**

18. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

> **"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. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious…The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer...In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute".**

20. In **Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another [2006] eKLR Nyamu, J** examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of **M. Devao vs. Department of Labour (190) in sur 464** at 481 as:

> **"The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice…the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression."**

21. The circumstances which the Court takes into consideration in deciding whether or not to halt a criminal process were set out by **Musinga, J** (as he then was) in **Paul Stuart Imison Another vs. The Attorney General & 2 Others Petition No. 57 of 2009**, in the following manner:

> **"The instances in which a court can declare a prosecution to be improper were well considered in Macharia & Another –vs- Attorney General & Another (2001) KLR 448. A prosecution is improper if:**
>
> **a. It is for a purpose other than upholding the criminal law;**
>
> **b. It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;**

c. It is an abuse of the criminal process of the court;

d. It amounts to harassment and is contrary to public policy;

e. It is in contravention of the applicant's constitutional right to freedom.

22. According to ***Bennett vs. Horseferry Magistrates' Court*** **(1993) 3 All E.R. 138, 151, HL**, an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

a. where it would be impossible to give the accused a fair trial; **or**

b. Where it would amount to a **misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.**

23. I therefore agree with **Mumbi Ngugi, J's** opinion in **Francis Anyango Juma vs. Director of Public Prosecutions & Another (2012) eKLR** that:

> **"Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution, or violation of the Constitution itself."**

24. In other words, where the constitutional right to a fair hearing as decreed under Article 50 of the Constitution is violated or threatened with violation, this Court without necessarily pronouncing itself on the innocence or otherwise of the applicant is entitled to and has a duty to step in and it does not have to wait until the applicant's rights are actually violated before doing so. Any efficient legal system must put in place a machinery where equality of arms applies to both the complainant and the accused without placing one of the parties to an unwarranted disadvantage.

25. Therefore, the people placed in charge of investigation and prosecution must in deciding whether to prefer criminal charges ask themselves whether in the circumstances, a fair trial is possible notwithstanding the material placed before them. In other words, the police and the DPP ought not to conduct themselves as if they are an appendage of the complainants. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

> **"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".**

26. It is now clear that the mere fact that the applicants will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful and unfair trial to run its course. As was appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

> **"Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case."**

27. In this case the alleged complainants have not sworn any affidavit to explain the circumstances under which the applicants are alleged to be culpable. There is simply no basis upon which the Respondents decided to prefer charges against the ex parte applicants in respect of a land dispute which is still pending before the ELC.

28. In the above case, the decision of **Kuloba, J** in the case of **Vincent Kibiego Saina vs. The Attorney General H.C Misc Appl. 839 and 1088/99** was cited with approval in holding that:

> **"So, it is not the purpose of a criminal investigation or a criminal charge or prosecution, to help individuals in the advancement of frustration of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other and ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice. No one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth."**

29. It is trite that based on **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra):

> **"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".**

30. It follows that the burden is on the prosecutor to show by way of admissible evidence that he is in possession of material that disclose the existence of a prosecutable case since as was held in **Stanley Munga Githunguri vs. R [1986] eKLR** at page 18 and 19 by a three bench High Court constituted of Ag. Chief **Justice Madan** and **Justices Aganyanya** and **Gicheru**:

> **"A prosecution is not to be made good by what it turns up. It is good or bad when it starts."**

31. It is now clear that the mere fact that the applicant will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful and unfair trial to run its course. As was appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

> **"Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case."**

The complainants themselves have not sworn affidavits to indicate the nature of the complaint which they lodged against the applicants, if any.

32. It is therefore my view that the applicant's case is merited.

Order

33. In the result I issue the following orders:

> **1. An order of certiorari removing into this Court and quashing the decision of the Respondents to charge and prosecute the applicants herein in Kilungu criminal case numbers 274 & 275 both of 2018, (which files have since been transferred to Makindu) pending determination of Machakos ELC Case No. 321 of 2012.**
>
> **2. An order of certiorari removing in to this Honourable Court and terminating, the prosecution of the applicants before the Senior Resident Magistrate in Kilungu Criminal cases Number 274 and 275 both of 2018 (which files have since been transferred to Makindu Law Court) till the determination of Machakos ELC Case No. 321 of 2012.**
>
> **3. As the application was not properly intituled there will be no order as to costs.**

34. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 23rd day of May, 2019

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Gichuki for the Applicants

CA Geoffrey