



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**CORAM: D.S. MAJANJA J.**

**JUDICIAL REVIEW NO. 671 OF 2017**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**CHIEF MAGISTRATE CRIMINAL**

**DIVISION NAIROBI.....1<sup>ST</sup> RESPONDENT**

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

***EX PARTE***

**GRACE WAIRIMU SORORA.....APPLICANT**

**AND**

**CHAKA LIMITED.....INTERESTED PARTY**

**RULING**

1. Pursuant to leave granted on 5<sup>th</sup> January 2018, the ex-parte applicant (“the applicant”) lodged a Notice of Motion dated, 10<sup>th</sup> January 2018 seeking, the following relief:

*1. That this Honourable Court be pleased to issue an order of CERTIORARI to bring into the court in order to be quashed the charge sheet dated 1<sup>st</sup> November 2017 filed in CM’s Court Criminal case No. 825 of 2017.*

*2. That this Honourable Court be pleased to issue an order of PROHIBITION to prohibit the Chief Magistrate Milimani Law Courts or any other magistrate under him or in any other station within Nairobi or throughout the Republic of Kenya from hearing, or mentioning, taking notes or making any orders in Chief Magistrate Criminal Case No. 825 of 2017.*

2. The facts giving rise to this application are not in dispute and are set out in the face of the application, the statutory statement and verifying affidavit sworn by the applicant on 30<sup>th</sup> November 2017. The application is opposed by the 2<sup>nd</sup> respondent through the affidavit sworn on 9<sup>th</sup> February 2018 by Kennedy Lubembe, police officer with the Directorate of Criminal Investigations. There is also an affidavit sworn by a director of the interested party, Chaka Limited, David Kiprono Sudi sworn on 11<sup>th</sup> December 2017. The parties have also filed written submissions and cited various authorities.

3. The applicant is the accused person in *Milimani Chief Magistrate Criminal Case No.825 of 2017*, where she is charged with three counts of uttering false documents in a civil dispute being *Nairobi ELC No. 592 of 2010*, relating to land parcel No. 209/9749 (“the suit property”) contrary to **section 353** of the *Penal Code (Chapter 63 of the Laws of Kenya)* and another count of perjury in respect of the same matter contrary to **section 108(1)(A)** as read with **section 110** of the *Penal Code*.

4. The applicant’s case is, that the pending criminal proceedings are an abuse of the criminal law process intended to interfere with the

pending civil dispute **ELC No. 592 of 2010** and that they are commenced with the purpose of assisting David Sudi the director of Chaka Ltd to evict and dispossess her of the suit property where she runs a business known as Zam Zam Bar and Restaurant and a butchery.

5. The thrust of the applicant's case is that the trial judge in ELC 592 of 2010 was determined by a judge without jurisdiction as the Judge presiding over the matter was a High Court Judge and not Environment and Land Court Judge. It is not disputed that Nyamweya J. delivered the judgment in ELC 592 of 2010 on 2<sup>nd</sup> March 2015. The applicant appealed against the judgment to the Court of Appeal in **NRB CA Civil Appeal No. 64 of 2015**. The appeal was dismissed on 12<sup>th</sup> May 2017. The applicant contends that she had filed an application for review of the judgment delivered by the Court of Appeal on the ground that Nyamweya J., was a High Court Judge and not an ELC Judge and hence lacked jurisdiction to hear and determine the matter. The applicant has also applied for stay of execution of the judgment before the ELC.

6. The applicant contends that the criminal case is meant to intimidate and discourage her from pursuing her legal remedies against the interested party. She points to the fact that David Dudi, a director of the interested party, and his wife Eunice Chebule caused the applicant to be charged in **Criminal Case No. 252 of 2012** for the offence of forcible detainer of the suit property, but she was acquitted on 30<sup>th</sup> October 2015. Following those proceedings, the said David Sudi through **Nairobi Miscellaneous Criminal Application No. 513 of 2015** where he obtained orders by deception to the effect that the National Police Service, be directed to make a forensic examination of the letter of allotment of 22<sup>nd</sup> January 1981 and building plans dated 12<sup>th</sup> March 1998, which were subject to **ELC No. 592 of 2010**, but the orders were set aside. The interested party also filed an application for Judicial Review namely **JR No. 256 of 2016** seeking orders of mandamus to compel the Director of Public Prosecution to institute criminal proceedings against the applicant but that the application was dismissed.

7. The applicant complains that despite writing to the Director of Public Prosecutions and the Directorate of Criminal Investigations and drawing his attention to all these facts and complaining of the police persecution, at the behest of the David Sudi and his wife Eunice, for ulterior motives other than advancing criminal justice and for purposes of assisting them take over her land, the Director has failed to take any action on the matter.

8. The case by the 2<sup>nd</sup> respondent is that the applicant has not demonstrated that it acted with illegality, unreasonably, ultra vires and or contrary to natural justice. The 2<sup>nd</sup> respondent took the position that complaint having been investigated and all the evidence gathered, the accuracy and correctness of the evidence or facts gathered can only be assessed and tested by the trial court. PC Lubembe explained that following a complaint by David Sudi on behalf of Chaka Limited, investigations were commenced and statements recorded. Of particular importance were the statement by Director of Legal Affairs for Nairobi County, the statement by John Amol Ojwang', Assistant Development Control Officer, who denied having authored the documents subject of the charges against the applicant and the statement by the Chief Valuer, Nairobi County, Isaac Nyoike who confirmed that the documents did not emanate from their offices. PC Lubembe also acknowledged that the applicant's advocate wrote a letter dated 31<sup>st</sup> July 2017, alleging that the investigations were intended to achieve a collateral purpose but the 2<sup>nd</sup> respondent considered the matter and directed that the applicant be charged with the offences.

9. The interested party's case is that the issue of ownership of the suit property was pronounced by the Environment and Land Court whose decision was affirmed by the Court of Appeal. The effect of these judgments was to order the applicant vacate the suit property. The interested party complained that instead of vacating the property, the applicant continues to engage in unnecessary litigation. David Sudi pointed out that the National Land Commission had recommended removal of the applicant from the suit land and that she resisted. In addition, the court in **HCC 723 of 2008** found that the documents of ownership in her possession were forgeries and on that basis the Director of Public Prosecution recommended that she be investigated and be charged with forgery. The interested party contends that the applicant has not shown that she will not have a fair and impartial trial before a court of law and that the application is vexatious and should be dismissed.

10. From the facts which are apparent on the face of the application, question for consideration is whether this court should stop prosecution of the applicant for offences relating to perjury and uttering false documents which were subject to **Nairobi ELC No. 592 of 2010** relating to the suit property. There is no allegation that the applicant will not have a fair trial before the Chief Magistrates Criminal Court in Nairobi.

11. This application challenges the power of the Director of Public Prosecutions ("DPP") under **Article 157(10)** of the Constitution which states as follows:

*The Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.*

12. In view of the authority and independence conferred by the Constitution on the DPP, the Courts should not ordinarily interfere with his discretion in deciding whether or not to institute criminal proceedings. However, the power of the DPP is not absolute and is circumscribed by **Article 157(11)** of the Constitution which provides as follows;

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

13. In **Kenya Commercial Bank Limited & 2 Others v Commissioner of Police and Another, Nairobi Petition No. 218 of 2011 [2013]eKLR**, the court held that:

*The office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.*

14. **Article 157(11)** of the Constitution implicitly recognises that the court has inherent jurisdiction to stop abuse of its process by prohibiting criminal proceedings where the exercise of such power is found to be oppressive or otherwise an abuse of its process. However, the court must exercise its jurisdiction ever so cautiously so as not to stifle what is otherwise the lawful discharge of constitutional mandate by the DPP. That is why the court, in the *Kenya Commercial Bank Ltd case (Supra)*, observed that;

*[23] ... the High Court may stop proceedings where such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of fundamental rights and freedoms. This power though must be exercised sparingly as it is in public interest that crime is detected and those suspected of criminal conduct are brought to face the consequences the law prescribes.*

15. Have the applicants established that the prosecution is oppressive, vexatious or an abuse of the court process? I find that the applicant has not established the threshold for this court to intervene and stay proceedings. Without delving in the merits of the case against the applicant, I find that the civil cases, in the High Court and Court of Appeal have finally been determined. I would point out that the Court of Appeal, in dismissing the appeal, observed as follows:

*[32] In conclusion, as the only issue that was germane was adverse possession, we think we have said enough to demonstrate that the appellant failed to prove the claim. The documents were rightly rejected as forgeries that were merely contrived to support a claim of adverse possession that did not meet the legal threshold.*

16. The two courts having concluded that the documents subject of the case against the applicant were forgeries, the implication is that the investigation by the police was not far-fetched or even frivolous. The police carried out independent investigations and the Director of Public Prosecution decided to commence the prosecution. There was thus sufficient evidential basis to proceed with the prosecution.

17. The substantial argument made by the applicant is that Nyamweya J., being a judge of the High Court had not jurisdiction to deal with a matter concerning land as she was not appointed a judge of the Environment and Land Court. In response to this argument, I would do no better than reiterate what Aburili J., stated in the ruling granting leave and declining stay dated 5<sup>th</sup> January 2018 as follows:

*[43] Further, challenging jurisdiction of Honourable Nyamweya J to hear an Environment and Land Court matter does not change the position that documents relied on by the applicant to prove her case were forgeries, especially where the police have carried out their own independent investigations in the matter. The police have the power to carry out independent investigations to determine whether the said documents were indeed forgeries as per the court decision. It is for the trial court to then assess the evidence placed before it to determine whether the allegations by the prosecution are proved beyond reasonable doubt*

18. I would also add what the court stated in *Republic v Commissioner of Police & Another Ex-Parte Michael Monari & Another NBI HC Misc. JR No. 68 of 2011 [2012] eKLR* as follows:

*It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.*

19. The trial magistrate in the criminal court will have occasion to rule on whether the documents are forgeries and whether there was perjury and I do not find any reason to stop an otherwise lawful criminal case against the applicant.

20. For the reasons I have stated I dismiss the Notice of Motion dated 10<sup>th</sup> January 2018. I also award costs of the suit to the interested party.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day NOVEMBER 2018.**

**D. S. MAJANJA**

**JUDGE**

Mr Njiru instructed by Njiru Boniface and Company Advocates for the ex-parte applicant.

Mr Gituma instructed by Morara Onsongo and Company Advocates for the interested party.