



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NUMBER 478 of 2017

BETWEEN

HEINZ BROER.....APPLICANT.

AND

OCPD KAYOLE.....1ST RESPONDENT.

TIMOTHY G. AWUOR.....2ND RESPONDENT.

EDITH KABUTI.....3RD RESPONDENT.

PAUL KAMAGU.....4TH RESPONDENT.

RULING

1. Heinz Broer, hereafter the Applicant, appeared in person with Ms. Sigei acting for the 1st Respondent and Mr. Pala for the 2nd Respondent. The rest of the parties were not represented and did not enter appearance. The Applicant filed a Notice of Motion dated 30th August, 2017 on 7th September, 2017. The rudimentary nature of the pleading in question and the fact that English is not the Applicant's first language meant that the only relevant prayer the court could discern was that the Applicant sought to have the ruling of the trial court made on 27th July, 2017 revised.

2. The application was based on the grounds that; the learned magistrate erred in law and fact in failing to note that the doctrine of *res judicata* was not applicable to this case, the learned magistrate erred when he failed to note that the rent tribunal gave orders to the tenant and the auctioneer for the sale of a car to cover outstanding monies, the Office of the Director of Public Prosecutions was informed of the case but ignored the law, the auctioneer in the matter took his money and did not contact the police for further action, he had three(3) occurrence book reports at Kayole Police Station regarding the complaint and he served the OCPD Kayole with the application but he did not come to court. The application was further supported by an affidavit sworn by the Applicant.

3. The application was canvassed on 12th March, 2018 by way of oral submissions. The Applicant submitted that he was dissatisfied with orders given by the magistrate sitting in court number 7. He submitted that court number 8 from where the matter was transferred had allowed him to proceed with private prosecution and that court 7 could therefore not dismiss the same as both courts are of concurrent jurisdiction.

4. He informed the court that he was a landlord as he owned some rental houses and that some tenants failed to pay the rent and he filed a case with the Rent Tribunal which sanctioned auctioneers to take action. That the auctioneers impounded goods and informed the tenants not to leave. Before the set out days were over the tenants ran away. He therefore wanted to prosecute the auctioneers and the police for allowing the tenants to escape and failing to take action respectively. He urged the court to also look at his letter to the court filed on 12th March, 2018 in which he had submitted that the police were harassing him.

5. Ms. Sigei opposed the application. She submitted that the Applicant had to seek leave from court to file a private prosecution and that no leave was sought before private prosecution Case No. 1 of 2017 was filed. She submitted that the magistrate had to satisfy him/herself that; (i) an offence was committed, (ii) the police or Office of the Director of Public Prosecutions had declined to conduct criminal proceedings, (iii) no reason had been given why prosecution had not been undertaken, (iv) a failure to prosecute the suspect will lead to injustice and (v) he had suffered exceptional personal injury.

6. Miss Sigei acknowledged that the Applicant made several reports at Kayole Police Station but that they were dealt with in High Court

Criminal Revision No. 138 of 2016 where one Jeremiah Ikiayo made a report of all the complaints the Applicant had made. The report was dated 27th February, 2017. She submitted that there had been no inaction by the police and that the Applicant's case lay with the Rent Tribunal as advised by the police. She submitted that the matter was of a civil nature and should be handled in a civil court. She submitted that the Office of the Director of Public Prosecutions only handles criminal matters pursuant to Article 157 of the Constitution. She opined that the Applicant could also seek judicial review orders against a decision of the rent tribunal. She urged the court to dismiss the application.

7. Mr. Pala associated himself with the submissions of Ms. Sigei. He added that the Applicant relies on the Auctioneers Act which provides that goods once proclaimed and the tenant flees before the rent is paid, then the tenant commits an offence. He submitted that the 2nd Respondent proclaimed the goods but the tenant disappeared with the goods. He reported the matter to the police and the Applicant was asked to assist with the location of the tenant. He submitted that this was not a case amenable to private prosecution and that the only remedy available to the Applicant was to sue the tenant. He also relied on Grounds of Opposition filed on 22nd January, 2018 which were; that the application was an abuse of court process, that the application lacked merit, is frivolous and bad in law, and that the court lacks jurisdiction to entertain the application. He urged the court to dismiss the application with costs.

8. After reviewing the original court file it is clear that the court is called to revise the ruling of the trial court made on 27th July, 2017. In the ruling the court found that the Applicant had not properly sought the court's permission to commence and conduct a private prosecution. That the court could not grant the orders sought due to the failure of the Applicant to follow the procedure provided and also that the application was incompetent and an abuse of the process of the court. The matter had previously been handled by Hon. P.M. Mugure, SRM who on 27th June, 2017 urged the Applicant to file the matter before the Milimani Civil Court and in the event the police were unable to assist as alleged in the application then he could approach the criminal court under a miscellaneous application for private prosecution proceedings. She therefore closed Misc. Case 1627 of 2017. She ordered that the matter be heard on 27th July, 2017 before the duty court.

9. The Applicant submits that he was granted permission to bring the private prosecution. The same is hinged on the ruling of Hon. Mugure when she referred the matter to the duty Court. For avoidance of doubt, she delivered herself as follows

“the Applicant has a case but however, he is before the wrong forum, this is a commercial dispute which involves rent distress. The Applicant to file an application before Milimani Commercial Court in event police are unable to assist him as alleged therein, he can only come before criminal court under miscellaneous application for private prosecution. Misc. 1627 of 2017 hereby closed.”

10. In my view, the brief ruling of the learned magistrate does not amount to a grant of leave to file a private prosecution. It was only an advice to the Applicant on the redress that was available to him. When the matter next came up before her on 3rd July, 2017 she referred it to the duty court on 14th July 2017. On this date, the Applicant made submission in two sentences only as follows:

“the respondent went away with goods. I rely on the supporting affidavit there was distress. Thereafter the trial learned magistrate delivered the ruling that is subject of the instant application.”

11. In my view, the learned magistrate's finding that the application was not properly brought before the court was proper and sound; firstly, because he acknowledged that no leave/permission had been sought to commence private prosecution and secondly, the prayers in the application itself which were restated in the ruling did not disclose an application in the nature of private prosecution. The Applicant simply requested for the following;

“A. That it is ordered to track the 2 and second defendant.

B. That it is ordered that a warrant of arrest.

C. That they pay fine for this offence.

(i) That they pay me my rent and damage”

12. The court acknowledges the fact that the Applicant is a lay person and may not have worded the application as a legal mind. But however simply he expresses himself, the court should be able to discern what he seeks and the same should accord with Section 88(1) of the Criminal Procedure Code. This requirement was not met. In the circumstances, I do not find any impropriety or illegality or incorrectness in the orders of learned magistrate, Hon. K. Cheruiyot dismissing the Applicant's application dated 14th June, 2017. I add that his ruling did not amount to a revision of the order of Hon. Mugure of 14th June, 2017 because the latter had not in the first instance given leave to file private prosecution. Indeed, save for the title of the file that it is a private prosecution, the content of the application itself has nothing to do with private prosecution proceedings.

13. I add that the issues that were raised in H.C. Cr. Rev. No. 138 of 2016 do not adversely affect the Applicant's intention to file a private prosecution. The gist of that application was a request that the court compels the police to take action against his tenants. Learned Kimaru J., advised the Applicant that if he was dissatisfied with the inaction of the police, he was at liberty to institute private prosecution proceedings. That is what gave birth to private prosecution case No. 1 of 2017, the subject of the instant ruling. In fact, the matters canvassed in that application ought to constitute submission persuading a magistrate to grant leave to institute private prosecution. He shall be persuading the court that the police have refused to take action against the complaints he has filed about his tenants.

14. The totality of my observations is that this application lacks merit and the same is dismissed with no orders of costs. However, all is not lost for the Applicant because despite the lower court file being marked as a private prosecution application, no orders for leave to institute the private prosecution were sought. He can therefore approach the same court with a fresh application with specific prayers seeking leave to

institute the said proceedings. It is so ordered.

DATED and **DELIVERED** this **11th** day of **April, 2018**.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Applicant present in person*
2. *Miss M for the Respondent*