



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

REVISION NO. 82 OF 2014

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE (CAP 75)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF CRIMINAL CASE NO. 111 OF 2013: REPUBLIC VERSUS GEORGE PETER KALUMA AT MILIMANI
CHIEF MAGISTRATES COURT AT NAIROBI**

AND

**IN THE MATTER OF AN APPLICATION BY GEORGE PETER KALUMA FOR REVISION OF DECISIONS BY
HONOURABLE H. NDUNGU (CM)**

RULING

Background

1. By an application dated 29th January, 2015 and filed on the same day, the applicant sought a total of 8 orders. However, the first four which were interlocutory in nature intended to be in force pending the determination of this application are spent. The prayers now for consideration are: **THAT-**

- a) **this Honourable Court to reverse the decision and orders by the Hon. H. Ndungu made on 4th August, 2014 and order termination of Milimani Criminal Case No. 111 of 2013 pursuant to the provisions of Article 50(2) (b) of the Constitution as read together with Sections 134 and 89(5) of the Criminal Procedure Code;**
- b) **absent prayer (5) above, this Honourable Court issues an order to reverse the decision and orders by Hon. H. Ndungu made on 18th December, 2014 consolidating Milimani Criminal Case No. 111 of 2013: Republic v George Peter Kaluma with Criminal Case No. 1134 of 2012 Republic v Florence Seyanoi Kibera and John Wamiti Njagi (consolidated with Milimani Criminal Case No. 1133 of 2012: Republic v Florence Seyanoi Kibera) and order that the two cases proceed separately before another court other than the Honourable H. Ndungu, CM;**
- c) **absent prayer (5) above and in order to stop abuse of the court process, this Honourable Court do stay proceedings in Milimani Criminal Case No. 111 of 2013 Republic v George Peter Kaluma, Criminal Case No. 1134 of 2012 consolidated with Criminal Case No. 1133 of 2012 pending the hearing and determination of High Court Civil Case No. 340 of 2012: Constantine George Sphikas v Florence Seyanoi Moschion and High Court Civil Case No. 567 of 2013: Deborah Achieng Aduda v Florence Seyanoi Moschion; and**
- d) **the costs of this application be provided for.**

2. The application is supported by applicant's affidavit sworn on 29th January, 2015. The applicant, an advocate of the High Court, is the accused person in the lower court **Criminal Case No. 111 of 2013: George Peter Kaluma v Republic**. This case was subsequently consolidated with two other criminal cases: Criminal Case No. 1134 of 2012 Republic v Florence Seyanoi Kibera and John Wamiti Njagi and Milimani Criminal Case No. 1133 of 2012: Republic v Florence Seyanoi Kibera. Florence Seyanoi Kibera, John Wamiti and the applicant are the 1st, 2nd and 3rd accused respectively. There are also two civil cases pending in the High Court also related to the same subject matter: **High Court Civil Case No. 340 of 2012: Constantine George Sphikas v Florence Seyanoi Moschion and High Court**

Civil Case No. 567 of 2013: Deborah Achieng Aduda v Florence Seyanoi Moschion. Also related to this case is a judicial review application by the applicant, JR No. 34 of 2013 Republic v Director of Public Prosecution & 3 Others ex parte George Peter Opondo Kaluma, which has been concluded.

3. The applicant has been charged with three counts of conspiracy to defraud, one count of selling a mortgaged property and one count of obtaining money by false pretences contrary to Sections 317, 318 (a) and (b) and 313 of the Penal Code. He has moved this court to challenge two decisions of the lower court made on 4th August, 2014 and 18th December, 2014. The third prayer seeks an order to stay two civil cases that are currently pending in the High Court: **High Court Civil Case No. 340 of 2012: Constantine George Sphikas v Florence Seyanoi Moschion** and **High Court Civil Case No. 567 of 2013: Deborah Achieng Aduda v Florence Seyanoi Moschion** whose subject matter is related to the criminal case.

4. The ruling made on 4th August, 2014 was in respect to a preliminary objection raised by the applicant on 31st July, 2014. The applicant alleged that the charge sheet was fatally defective for failing to disclose material facts. He contended that the charges as drawn lack sufficient and necessary details to enable him to plead and defend himself. In the counts charging him with conspiracy to commit fraud, he is accused of ‘*offering*’ to subdivide and sell land no. 5892/22. However, this charge does not disclose how the offer was made, whether orally or in writing and this omission makes him unable to adequately answer to the charges. Under the third count he has been accused of ‘*falsely pretending*’ that he was in a position to finalise processing and registration/recording at the Lands Ministry a lease agreement capable of being registered and which was not encumbered by any mortgage in regard to plot no. 5892/22. However it is not disclosed in the charges that he is a practicing advocate of the High Court. He cannot be accused of falsely pretending that he was in a position to act as counsel unless it can be proved that in fact at the time, he was not qualified to act as such and he maintains that he was duly qualified.

5. He argued that his involvement in the transactions, if at all, was in his capacity as counsel for his client. The offers to sell or lease the property were made on behalf of his client and any monies received in the transactions were utilized to pay stamp duty and settle legal fees owing to him. Indeed none of the witnesses implicate him in the transactions. He has only been charged because he represented his client in the land transactions.

6. The second order for revision is one dated 18th December, 2014 by which the lower court consolidated the applicant’s criminal case No. 111 of 2013 with two other criminal cases: Criminal Case No. 1133 and 1134 of 2012. The applicant contended that the lower court erred in failing to consider his objections and in particular the need to secure expeditious trial of the cases.

7. In the same ruling, the court also addressed an application to recuse herself from hearing the matter. The applicant has made extensive arguments challenging the competence of the trial magistrate to hear the matter against him arguing that she was openly biased and discriminated against him and made remarks that led him to question her impartiality. He asked that should this court decline to quash the charges he is facing it should direct that the matter be heard by another magistrate. However, he abandoned this point in his submissions on the ground that the trial court has since been transferred and would therefore not be dealing with the matter. This issue is now moot and will not be considered in this ruling.

8. The applicant relied on his submissions dated 20th February, 2018. He submitted that by withholding material and necessary facts, the prosecution contravened his right to a fair trial under Article 50 (2) (b) of the Constitution which provides for the right to be informed of the charge with sufficient detail and the evidence that the prosecution intends to rely on in advance. It was also in contravention of Section 134 of the Criminal Procedure Code which requires every charge or information to state the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. The magistrate should have refused to admit the charges under Section 89 (5) of the Criminal Procedure Code because the charges as drawn do not disclose an offence known in law and they are irreconcilable with his position as an advocate.

9. He further submitted that the lower court erred when it consolidated the applicant’s criminal case with Criminal Case No. 1134 of 2012 (already consolidated with Criminal Case No. 1133 of 2012). The consolidation substantially prejudices all the accused persons because Criminal cases No. 1134 and 1133 of 2012 have proceeded considerably and are close to conclusion. The consolidation now necessitates a fresh hearing which prejudiced the accused persons as their defences have already been exposed. Thus, consolidation will now give the prosecution an opportunity to fix any loopholes that emerged during the trial. Further he argued that he is representing one of the co-accused and consolidation of the cases would infringe on her right to be represented by the counsel of her choice.

10. It was the applicant’s submission that his trial is an abuse of the court process intended to embarrass and intimidate him into settling the civil disputes pending in the High Court.

11. The prosecution did not file any response to the application. They however filed written submissions which will be considered on matters of law. The prosecution’s submissions were that the charge sheet does comply with Section 134 of the Criminal Procedure Code as the three counts do contain sufficient information on the particulars of the charge to enable the applicant plead and defend himself. In any event the prosecution has a right to amend the charge sheet at any time before the defence case and it may exercise this right if the need arises.

12. Counsel submitted that the application is premature, frivolous and an abuse of the court process. The applicant should raise the issues during his defence. They are not amenable to this court’s powers of revision under Section 362 of the Criminal Procedure Code as they are not incorrect, illegal, improper or irregular. The court has been asked to analyse the evidence contained in the witness statements. If it accedes to this request it will be usurping the prosecutor’s power to analyse the evidence before instituting the charges and the magistrate’s role to hear the evidence and make its judgment. Prosecution counsel submitted that this issue was substantively addressed in **Republic v Director of Public Prosecutions & 3 Others Ex-parte George Peter Opondo Kaluma [2015] eKLR** where the court refused to grant the order of prohibition sought by the applicant to restrain the Office of the Director of Public Prosecutions from prosecuting him.

13. It was prosecution counsel’s submission that the application lacks merit and should be dismissed.

Analysis and Determination

14. The court exercises its revisionary powers under Sections 362 to 364 of the *Criminal Procedure Code*. Section 362 specifically provides that:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

15. There are three issues for consideration in this review: (i) whether the charge sheet is fatally defective for failing to disclose material particulars, (ii) whether the lower court erred in consolidating criminal case no. 111 of 2013 with criminal case 1134 of 2012 and if the criminal cases should be stayed pending the hearing of the civil cases in the High Court.

Whether the charge sheet was defective

16. Under the first issue, the order for revision was that made on 4th August, 2014 in respect of a preliminary objection to the charges on the ground that they did not contain sufficient information to enable the applicant take plea.

17. Article 50 (2) (b) of the Constitution guarantees the right to a fair hearing by providing for the right to be informed of the charge with sufficient detail. Section 134 of the *Criminal Procedure Code* gives effect to this right by providing that every charge or information must state specific facts and particulars in the following terms-

“Every charge or information shall contain and be sufficient if it contains a statement of the specific offence or offences with which the accused is charged, together with particulars as to giving reasonable information as to the nature of the offence charged.”

18. The purpose of the requirements as to drafting of charges is to enable an accused person understand the nature of the offence with which he has been accused. A properly framed charge should contain all the ingredients of the offence and should elicit the accused’s actions that constitute both the *actus reus* and *mens rea*. Then the accused person is able to know what he has been accused of and the provision of the law contravened in a manner that enables him to plead to the charges and prepare his defence. See **Sigilani v Republic (2004) 2 KLR, 480** where it was held that:-

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

19. In **Yosefu and Another v Uganda (1960)E.A. 236** the court held that the charge is fatally defective if it does not allege an essential ingredient of the offence.

20. The offence of conspiracy to defraud is provided by Section 317 of the Penal Code as follows-

“Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanor and is liable to imprisonment for three years.”

21. The particulars of the first count in the consolidated charge sheet state-

“On diverse dates between 16th January and 29th February of 2012 at an unknown place within Nairobi County, jointly conspired with intent to defraud by offering to subdivide and sell by registration/recordation of an agreement of sale at the Lands Ministry, a one acre portion of land Parcel No. 5891/22 situated at Ololua Ridge, Karen to Deborah Achieng Aduda and Rene Johny Dierkx, facts which you knew to be false.”

22. The same format is repeated in counts 2 and 5 premised on the same offence of conspiracy to defraud save for the dates and the complainants. The offence of obtaining money by false pretences is established by Section 313 of the Penal Code as under-

“Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”

23. The particulars of this offence constituting Count 4 are stated in the charge sheet as follows-

“On diverse dates between 29th February, 2012 and 17th April, 2012 at an unknown place within Nairobi County, with intent to defraud, obtained three hundred and thirteen thousand Kenya shillings (313,000/= Ksh) from Constantine George Sphikas, by falsely pretending that you were in a position to finalise processing and registration/recordation at the Lands Ministry a lease agreement capable of registration/recordation for the lease of Land Parcel No. 5892/22, not encumbered by any mortgage, situated at Ololua Ridge, Karen a fact which you knew to be false.”

24. My analysis of the above is that the charges contain all the material ingredients of the offences. The matters which the applicant alleges are not disclosed are not material for purposes of enabling him in understanding the charges. In his submissions in the lower court he faulted the charge sheet for failing to disclose the owner of the property and that he is an advocate of the High Court. This is information that has been expressly stated by statute to be unnecessary and does not invalidate a charge unless it is shown that it constitutes an intrinsic ingredient of the offence. Furthermore, the issue of the applicant's profession is immaterial as, once charged the portfolio of the accused does not matter unless it is essential to the commission of the offence. This equally applies to the value of the subject matter in the particulars of the offence.

25. The lower court rightly dismissed these assertions and relied on Section 137 (c) (i) of the Criminal Procedure Code which provides on description of property-

“The description of property in a charge or information shall be in ordinary language, and shall indicate with reasonable clearness the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property.”

26. Section 137 (d) of the Criminal Procedure Code provides on description or designation of a person-

“The description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, a description or designation shall be given as is reasonably practicable in the circumstances, or the person may be described as “a person unknown”.

27. From the arguments advanced, the designation is not material for purposes of understanding the nature of the offences but because it exonerates him of the offences. The applicant argued that he is an advocate and his involvement in the transactions was in his capacity as such. Any offer was advanced at the behest of his client and any monies received were utilized to pay stamp duty and to settle legal fees for the transactions. He does further argue that none of the witnesses have implicated him in the offences.

28. These are matters of evidence which have no bearing on the legality of the charges as stated. The information is not intended to be a statement of evidence from which guilt or innocence can be adjudged. Such matters are determined from the evidence that is adduced in court by the prosecution. It is within the ambit of the trial court to determine the role the applicant played in the transactions in issue after analyzing the evidence adduced in totality. This court cannot during the revision, when the trial is yet to commence synthesis the evidence because then it will be usurping the powers of the trial court.

29. In addition, the fact that the applicant is an advocate does not exclude him from prosecution for a criminal offence. His argument that any conduct committed in the transaction can only be tried by the Law Society of Kenya lacks basis. If he committed an offence contrary to law, it amounts to a criminal act that is triable by a criminal court conferred with the proper jurisdiction. I find that this ground has no merit and accordingly dismiss it.

Whether the consolidation of the cases was proper

30. The second ground concerns consolidation of criminal case no. 111 of 2013 two other related to other cases: Criminal Case No. 1134 of 2012 and Criminal Case No. 1133 of 2012 (consolidated) by a ruling delivered on 18th December, 2014. In the affidavit supporting this Motion, the applicant faulted the lower court for failing to consider his objections to consolidation.

31. From the material presented before the court, it is discernible that the three cases are founded on transactions relating to the sale and lease of the parcel of land known as 5892/22 which is situated at Ololua Ridge in Karen. Therefore, consolidation of the three cases not only resulted in creation of one charge sheet containing twelve charges but eases the trial process especially where accused acted jointly, for instance in the charge of conspiracy to defraud contrary to Section 317 of the Penal Code. The applicant was included as a conspirator with the two accused persons in criminal case No. 1134 of 2012 in regard to the sale or lease as the case may be of the said parcel of land. The charge of obtaining by false pretence against Section 313 of the Penal Code is on the basis that the applicant falsely pretended that he was in a position to finalise processing and registration of the lease of the same parcel of land, a fact he knew to be false.

32. The particulars of the charges as stated in the charge sheet show that the offences are based on the same facts or were committed in the course of the same transaction thus falling within the ambit of the offences contemplated by Sections 135 and 136 (a) and (d) of the Criminal Procedure Code. In addition, the applicant's objections to the consolidation of the cases indicate that any possible prejudice would be suffered by his co-accused and not himself. His submissions on this ground were that his co-accused will be prejudiced because their trials have already progressed too far along and their conclusion will be derailed by the inevitable recalling of witnesses. He also argues that they have already disclosed their defence and the consolidation will afford the prosecution a chance to seal any loopholes that emerged during the trial. Thirdly he argues that the right to representation by counsel of her choice of one of the co-accused will be infringed.

33. However, these persons who stood to be aggrieved have not applied for revision or appealed against the ruling to consolidate. Accordingly, it can rightly be inferred that they are satisfied with the same and do not feel that any inconveniences will prejudice their right to a fair trial. In any event having looked at the charge sheet, the charges as drawn and the particulars of the offence it is in the interest of justice that the three cases be consolidated. The charges do not offend the rule of joinder of accused persons in a charge.

Whether the trial should be stayed

34. Additionally, it is up to the applicant to choose his interest now that he is a co-accused to his client; to opt to drop representation as the

trial against him shall proceed. The court cannot choose for his

35. The third prayer was for stay of all the related criminal cases pending the determination of the civil cases in the High Court: **High Court Civil Case No. 340 of 2012: Constantine George Sphikas v Florence Seyanoi Moschion and High Court Civil Case No. 567 of 2013: Deborah Achieng Aduda v Florence Seyanoi Moschion**. This prayer must be considered against Section 193 A of the Criminal Procedure Code which states-

“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.”

36. The provision was also considered in **Republic v Director of Public Prosecution & 2 others Ex-parte Francis Njakwe Maina & another [2015] eKLR**, where the court held-

“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.”

37. The import of the above decision is that the existence of criminal and civil proceedings concurrently does not on its own render any of them an abuse of the court process. For a prayer of stay to issue, it must be shown that the intention is not to prosecute for an offence but to attain ulterior motives. The applicant argued that the charges against him are an abuse of the court process. He stated that he acted as an advocate and any misconduct should be dealt with in a disciplinary process by the Law Society of Kenya which regulates the profession. He argued that the prosecution was initiated at the instance of one of the complainants, Constantine George Sphikas, who was aggrieved by the fact that he was representing Florence Seyanoi Moschion in the criminal cases and threatened the applicant with dire consequences if he continued to act for her. Shortly after the threat was issued, the applicant was arrested on the instructions of the Director of Public Prosecutions and charged. It is his belief that the prosecution is intended to coerce him into impressing upon his client to settle the civil cases.

38. The above issues were also the subject of **JR No. 34 of 2013 Republic v Director of Public Prosecution & 3 Others exparte George Peter Opondo Kaluma** wherein the applicant sought orders of certiorari to quash the criminal case and an order of prohibition to restrain his arrest and prosecution. Specifically, the applicant alleged in that case that Constantine George had instigated the prosecution against him for representing Florence Seyanoi. He led evidence that the said Constantine paid the Director of Public Prosecutions, Mr. Keriako Tobiko, Kshs. 5,000,000/= to bring the criminal charges. He also argued that the prosecution against him is unfair and it is intended to embarrass him for performing his duties as an advocate. He argued that the existence of civil and criminal cases concurrently exposes him to double jeopardy.

39. In a judgment delivered on 31st March, 2014 the court rejected the above arguments and dismissed the application. Citing Articles 157 (10) and (11) of the Constitution the court found that the Director of Public Prosecutions should not be under the direction or control of any person or authority in exercising his powers and that he has a duty to act having regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. The court will only exercise its supervisory jurisdiction over the DPP in situations where it is shown that the powers were used unconstitutionally, unlawfully or irrationally.

40. Therefore and further guided by the presumption that the DPP is equipped to analyse a case and decide on whether the same should be prosecuted or not, the court refused to analyse the evidence of witnesses finding that it would be tantamount to usurping the powers of the DPP and the trial court. It found that the applicant's allegation that he was subjected to double jeopardy because of the civil and criminal cases to be without basis in light of Section 193A of the Criminal Procedure Code. The criminal, civil and disciplinary processes are different aimed at achieving different outcomes. It was the ultimate finding of the court that the applicant's claim that his prosecution was commenced for extraneous purposes was not supported by evidence.

41. Each of the issues raised under this ground by the applicant in this Motion was considered and determined by the Court that heard the Judicial Review application and I concur with the findings of the court. There are no additional grounds that have been raised by the Applicant in this Motion that would justify departing from the pronouncement of the court on them. There was not an iota of evidence that the prosecution was acting under the instructions of third parties to prosecute the applicant or that the prosecution instigated for ulterior motives beyond attainment of justice. Constantine George Sphikas who allegedly threatened the applicant and at whose instance the prosecution is acting was not enjoined in these proceedings to answer to the allegations levied against him. In his absence, this court is unable to determine if those allegations were made which in turn renders the applicant's allegations unsubstantiated. As stated earlier, the fact that the applicant is an advocate does not exempt him from criminal prosecution in transactions where, even if acting as counsel, he acted in furtherance of a criminal venture. Furthermore, if the complaints raised by Constantine lack merit, the same shall be basis for analysis of the evidence of the prosecution in vindicating the Applicant. As at now the court has not had the advantage of looking or testing the evidence that shall be presented at the trial and so this argument is not only premature but unmerited.

42. From the foregoing, it is my finding that the application for revision has no merit. The Applicant should take plea and proceed with the trial. The same is hereby dismissed with no orders of costs.

DATED and DELIVERED this 29th day of NOVEMBER, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Osiemo Osiemo for the Applicant*
2. *Ms. Sigei h/b for Ms.Nyauncho for the Respondent*