



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.5 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MOHAN GALOT**

**SANTOSH GALOT.....RESPONDENT**

**RULING**

The Director of Public Prosecutions was aggrieved by the decision of the Chief Magistrate made on 16<sup>th</sup> December 2016. In the decision, the Chief Magistrate withdrew criminal charges brought against the Respondents in three criminal cases namely: **Criminal Case No.1554 of 2012**, **Criminal Case No.1555 of 2012** and **Criminal Case No.482 of 2014**. In his determination, the learned Chief Magistrate held that the persons who had made the application for the withdrawal of the cases were the complainants in the cases and therefore were entitled to withdraw the cases. The order of withdrawal was made under **Section 204** of the **Criminal Procedure Code**. This was despite the fact that the Director of Public Prosecutions insisted that he was willing to prosecute the case. It also emerged that the directorships of the companies that were the subject of the criminal charges were in dispute. The dispute is awaiting determination by the High Court.

The Director of Public Prosecutions invoked this court's jurisdiction under **Article 165(6)** and **(7)** of the **Constitution** and **Section 362** of the **Criminal Procedure Code** seeking to revise that decision and reinstate the withdrawn charges. Mr. Kadebe for the Director of Public Prosecutions submitted that the learned Chief Magistrate erred when he withdrew the charges without reference with the Director of Public Prosecutions. He explained that under **Article 157** of the **Constitution**, the Director of Public Prosecutions had powers to institute and terminate proceedings. In the present case, the Director of Public Prosecutions had indicated to the court that it was not willing to terminate the criminal proceedings. He submitted that the directorship for the various companies that were involved in the criminal cases was still in dispute yet the learned Chief Magistrate proceeded to terminate the proceedings on an application by one of the disputing parties. The learned Chief Magistrate had failed to take into account that other charges brought against the Respondents did not necessarily arise from their positions as directors of the companies in question but rather in respect of their conduct in purporting to prepare documents without authority. Mr. Kadebe reiterated that the person who went to court to seek the court's permission to withdraw the charges had no authority nor *locus standi* to do so. He insisted that the State was the actual complainant in the case. The State was desirous to continue with the case to its logical conclusion. Learned counsel submitted that the learned Chief Magistrate had no authority to terminate the proceedings without reference to the State. He urged the court to set aside that decision and reinstate the charges that were withdrawn.

Mr. Wandugi for the Respondents opposed the application. He submitted that the application was misplaced as it did not indicate under which Section of the **Criminal Procedure Code** it was being canvassed. The Applicant had not demonstrated that the orders made were improper, illegal or irregular. He submitted that the learned Chief Magistrate acted within his mandate when he ordered the cases to be withdrawn under **Section 204** of the **Criminal Procedure Code**. He questioned the contention put forward by the Director of Public Prosecutions that the State was the complainant in the case hence the case could not be withdrawn without his say so. Learned counsel submitted that his client was recognized as a director of the companies in question and therefore had the legal authority to withdraw the case. He explained that the person who purported to be the complainant in the cases was actually not a legitimate director of the company. In effect, learned counsel was saying that the complainant in the three cases had no authority to make any complaints to the police regarding any alleged criminal acts committed in the name of the company. He explained that the Respondents have suffered great prejudice during the pendency of the cases. He reiterated that it was against public interest and prejudicial to the management of limited liability companies for the Director of Public Prosecutions to take up such cases.

Mr. Kibe took the same position as Mr. Wandugi. He submitted that the position of the Director of Public Prosecutions as provided under **Article 157(6)** of the **Constitution** should not be confused with that of the State as the complainant. The Director of Public Prosecutions cannot be a complainant and a prosecutor at the same time. The State was not synonymous with the Director of Public Prosecutions. Learned counsel submitted that the Director of Public Prosecutions had clearly misapprehended his position as a complainant and therefore the application for revision lacks merit and should be dismissed. He explained that there was dispute regarding the directorship of the limited liability companies that were the subject of the criminal cases. The person who lodged the complaint with the police had no authority to lodge the complaints with the police. He reiterated that the learned Chief Magistrate correctly made the decision allowing the withdrawal of the charges against the Respondents. He urged the court to dismiss the application. Mr. Oonge, learned counsel for an Interested Party associated himself with the submission made by Mr. Wandugi and Mr. Kibe while Mr. Ojijo and Mr. Kaka associated themselves with the submission made by the Director of Public Prosecutions.

The issue for determination by this court is whether the Applicant made a case for this court to issue the order that he craves for under **Section 362** of the **Criminal Procedure Code**. **Section 362** of the **Criminal Procedure Code** grants this court jurisdiction to *“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.”* It is clear from the rival arguments made that the issue for determination is whether the learned Chief Magistrate properly exercised his mandate when he withdrew the charges brought against the Respondents in the three criminal cases.

There are certain facts that are not in dispute in this application. It was common ground that the directorships of the companies that are the subject of the three criminal cases is in dispute. Indeed, there are several cases pending before the High Court seeking determination of this very question. The difference between the disputing parties is such that litigation has been long drawn and acrimonious. This was noted by the learned Chief Magistrate at Page 5 of his Ruling:

*“There is no doubt in my mind that the parties herein have serious legal difference. The same appears to be long drawn and acrimonious. And there is no better proof of this than the evidence of a plethora of cases filed between the parties at various courts and the sheer volume of correspondences and documents filed both in court and with the Registrar. The issues are also complicated and some are still subject of determination by various courts or bodies.”*

At Page 6, the learned Chief Magistrate made the following observation regarding the directorship and shareholding of the companies:

*“Very lengthy submissions were made by the parties regarding the directorships and shareholdings of the companies herein. It came out clearly that these issues have been with*

***the Registrar of Companies for a long time. Various cases have also been filed before the High Court for determination of the same. The Registrar has already given directions on the issue of current directorships and shareholding, it is only reasonable to await the decision of the High Court. I share the same view as it is the High Court with jurisdiction to make a determination of these issues. I therefore do not make any orders or directions on this score.”***

Having made the above observations, the learned Chief Magistrate made findings in relation to who the complainant was in the three cases that went contrary to the holding made above. A casual perusal of the charge sheets in the three cases shows that some of the complaints made against the Respondents related to transfer of properties after the Respondents had purported to be directors of the companies in question. Therefore, the learned Chief Magistrate clearly fell in error when he upheld submissions advanced on behalf of parties who had not lodged any complaint with the police regarding alleged criminal activities perpetrated in respect of the properties owned by the subject companies.

The learned Chief Magistrate acted without jurisdiction when he allowed the application by some of the protagonists in these protracted disputes to be considered first as complainants and subsequently thereafter allowed them to withdraw the charges under **Section 204** of the **Criminal Procedure Code**. This court holds that the learned Chief Magistrate having found that there is dispute regarding the directorship of the companies, and having conceded that the issue can only be determined by the High Court which has the requisite jurisdiction, he could not make orders that in actual fact had the implication that he had already determined who the legitimate directors of the companies were.

In the premises therefore, the application made by the Director of Public Prosecutions has merit. The learned Chief Magistrate erred when he allowed persons, who for intent and purposes, were not recognized as complainants in the criminal cases, to withdraw the complaints under **Section 204** of the **Criminal Procedure Code**. He did this despite legitimate protests by the Director of Public Prosecutions that he could not do so without his concurrence. From the above reasons, it is clear that the decision made by the learned Chief Magistrate on 16<sup>th</sup> December 2016 cannot stand. It is hereby set aside in its entirety and substituted by an order of this court dismissing the application that was filed before the Chief Magistrate's Court seeking the withdrawal of the charges therein. For the avoidance of doubt, *status quo ante* prior to the delivery of the said Ruling shall be restored. It is so ordered.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JUNE 2017**

**L. KIMARU**

**JUDGE**