



**REPUBLIC OF KENYA**

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

**JR MISCELLANEOUS APPLICATION NO.218 OF 2015**

**IN THE MATTER OF SECTION 317 OF THE PENAL CODE AS READ WITH THE KENYA CONSTITUTION**

**AND**

**IN THE MATTER OF PRINCIPAL MAGISTRATE'S CRIMINAL CASE NO. 705 OF 2015**

**BETWEEN**

**WILFRED JOSIAH MANDA.....1<sup>ST</sup> APPLICANT**

**DAVID WAMBUA MILA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**PATRICK MUKUA MUTHANI.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL MAGISTRATE'S COURT MAVOKO..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION .....3<sup>RD</sup> RESPONDENT**

**RULING**

**The Application**

The Applicants were Directors of Soykimau Farm Ltd which has since been wound up, and have brought an application by way of Chamber Summons dated 6<sup>th</sup> November 2015 seeking the following orders:

1. That leave be granted to the Applicants to file an application for Judicial Review seeking the following orders:-
  - a. An order for certiorari to bring into the High Court for purposes of being quashed the decision by way of charge sheet of the Director of Public Prosecutions charging the applicants in Criminal Case No. 705 of 2015 Principal Magistrate's Court Mavoko.
  - b. An order of prohibition restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from receiving, entertaining, proceeding with or in any manner dealing with the complaint and charge in criminal case no. 705 of 2015 Mavoko with respect to title No. 12715/416 and subdivisions created thereto.
  - c. Such further and other reliefs as this Court may deem just and expedient to grant.

2. That, the leave granted does operate as stay of criminal case no. 705 of 2015 Mavoko preferred against the Applicants and specially:-
  - a. Restrain the Respondents by themselves, servants, agents or otherwise at all from prosecuting the Applicants in criminal case No. 705 of 2015.
  - b. Staying the prosecution of the Applicants in connection to title No. 12715/416 and subdivisions created thereto.
  - c. Staying the decision of the 3<sup>rd</sup> Respondent to charge the Applicants in criminal case No. 705 of 2015 vide charge sheet forming basis of the criminal case.

The grounds for the said application are that the 3<sup>rd</sup> Respondent has abdicated its statutory authority, and has entertained and permitted an illegality and abuse of the criminal justice system to be used against the Applicants. Further, that the Respondents have made a grave error of law by failing to give effect to the Applicants' rights under Article 31,40 and 47 of the Constitution, and have acted unreasonably taking into account that the issue of ownership of title No. 12715/416 is subject to ELC Nos. 250 of 2003 and 380 of 2012 pending before this court. Further, that if the orders sought are not granted, the criminal case will be prosecuted without regard to the determination of ownership of the property in the land court.

It was also alleged that the Respondents' conduct amounts to breach of the Applicants' legitimate expectation and fair administrative action, and that they have deprived the Applicants of their right to natural justice and equal protection and benefit of the law guaranteed under the Constitution. The Applicants averred that they have a *prima facie* case with high chances of success and should be allowed to ventilate the same, and no prejudice will be suffered by the Respondents if the orders sought herein are granted.

The Applicants' Chamber Summons was supported by an affidavit sworn on 6<sup>th</sup> November 2015 and supplementary affidavit sworn on 10<sup>th</sup> December 2015 by the 1<sup>st</sup> Applicant. He explained therein that the Applicants are the accused persons in Criminal Case No. 705 of 2015 at the Chief Magistrates Court – Mavoko, and that the subject of the said criminal case is Title No. 12715/415 which was the property of Syokimau Farm Limited as registered owner.

Further, that one James Maingi Muthiani (now deceased) was employed by the said company as a farm manager, that the said company has never allocated and/or given the subject property to the deceased James Maingi Muthiani, and that no agreement or transfer has ever been entered into and executed by the said person and the company. It was further stated that the deceased during his lifetime did not lay claim or raise any issue as to the ownership of Title No. 12715/416.

The Applicants averred that the complainant in the said Criminal case is the 1<sup>st</sup> Respondent herein, who is a son of the deceased James Maingi Muthiani, and who having failed to obtain remedies as to ownership of the subject property sought in the civil suits, has now elected to intimidate and pressure the Applicants through the criminal justice system. The Applicants allege that the 1<sup>st</sup> Respondent has in this regard concealed material facts with regard to ELC No. 250 of 2003, ELC No. 380 of 2012 and ELC No. 381 of 2012 filed and pending before this Court.

The Applicants also contend that as directors of Syokimau Farm Ltd, they only executed documents on behalf of and for the benefit of the company and did not gain any material or pecuniary interest therefrom, and could not have conspired to defraud James Maingi Muthiani (deceased) of title No. 12715/416 when in the first instance the land has never belonged to him. Further, that Syokimau Farm acquired the said property on 1<sup>st</sup> November 1983 and could not have allocated the land to James Maingi Muthiani (deceased) in 1980 before it was acquired. They attached a copy of title to title No. 12715/416 and the pleadings in the cited civil suits.

It was contended that the Applicants were suing the 1<sup>st</sup> Respondent on account of being the complainant in the criminal case, and that the 1<sup>st</sup> Respondent also claims to be registered owner of LR 12715/416 in the civil suits he had filed in Court and has exhibited a title to this effect, which renders the charge sheet

void and an illegality in law.

### **The Response**

The 1<sup>st</sup> Respondent opposed the Application by way of a replying affidavit he swore and that was filed in Court on 7<sup>th</sup> December 2015. He stated therein that he is one of the children of the late James Maingi Muthiani who died on 23<sup>rd</sup> April 1988, and a beneficiary to his estate. He explained that his deceased mother Rael Roko Maingi had initially obtained letters of administration with respect to the estate of James Maingi Muthiani, and was substituted by his brothers Benjamin Wambua Maingi and John Bosco Maingi after her death on 1<sup>st</sup> April 2014. It was the 1<sup>st</sup> Respondent's contention that the Applicants ought to have sued the current administrators of his father's estate and not himself.

Further, that prior to her death, his mother had filed High Court ELC Case No. 280 of 2003, and that the fact of her death acted as an automatic termination of that case since no application was made to substitute her as the plaintiff therein, and that the said case cannot therefore be cited as an obstacle to Criminal Case No. 705 of 2015, The 1<sup>st</sup> Respondent also averred that the cases that are pending in court namely Machakos High Court ELC No. 380 and 381 of 2012 in respect of LR No. 12715/416 are not against the Applicants but against Mutuku Makumbi and Daniel Nzioka respectively.

Furthermore, that the fact that the said civil cases are still pending in court does not bar the 3<sup>rd</sup> Respondent from pursuing the criminal aspect in relation to the same parcel of land which cannot be canvassed in a civil court, and that both criminal and civil cases can run concurrently in their respective courts.

On the subject matter of Criminal Case No 705 of 2015, the 1<sup>st</sup> Respondent deponed that on or about 12<sup>th</sup> September 2014, he together with one of the administrators of the estate of his late father, namely Benjamin Wambua Maingi, made a report at Mlolongo Police Station regarding LR No. 12715/416 (original number 7149/11/R) of Syokimau Farm Ltd. Further, that the report was to the effect that the documents of the aforementioned land had been forged and fraudulently transferred to Kamweli Mwangangi Kituku, Jacinta Mwilio Wambua, Daniel Mutuku Mutisya, Wilfred Wanjohi and James Wanjau using deed plan number 124811. The 1<sup>st</sup> Respondent stated that the transfers were effected by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants herein.

The 1<sup>st</sup> Respondent further claimed that his father was a member and director of Syokimau Farm Ltd, which was the registered owner of the parcel of land known as LR. No. 12715/416 (original number 7149/11/1). Further, that the said parcel of land was subdivided by Syokimau Farm Ltd on 3<sup>rd</sup> November 1980, and his father was allocated 10 shares, and on 6<sup>th</sup> August 1981 a letter of allotment was written by Syokimau Farm Ltd informing the late James Maingi Muthiani that he had been allotted plot number 448 on LR 7149/11/R. He further stated that by a letter dated 22<sup>nd</sup> April 1986, Syokimau Farm Ltd instructed James Maingi Muthiani to pay the sum of Kshs.1500/= to enable it process the title deed for him from the Commissioner of Lands.

The 1<sup>st</sup> Respondent attached a copy of a share certificate dated 3<sup>rd</sup> November 1980 and a copy of the register of membership of Syokimau Farm Ltd, as well as the letter of allocation that was signed on 15<sup>th</sup> March 1982 by James Maingi Muthiani accepting the terms thereof, and the letter dated 22<sup>nd</sup> April 1986 from Syokimau Farm Ltd.

It is the 1<sup>st</sup> Respondent's averment that there are triable issues in Criminal Case number 705/2015 Mavoko Law Courts which cannot be conversed in civil court. Further, that it will be prejudicial to the interest of the estate of the deceased and a miscarriage of justice to order a discontinuation of the said criminal matter.

The 2<sup>nd</sup> Respondent did not file any response to the application despite having been served with the same.

The 3<sup>rd</sup> Respondent's response was in a replying affidavit sworn on 2<sup>nd</sup> December 2015 by IP Richard Mugo, the lead investigating officer in Criminal Case No. 705 of 2015. The said deponent stated that on 12<sup>th</sup> September, 2014, a report was made at Mlolongo Police Station in relation to land parcel number LR No. 12715/416 (Original Number 714911) of Syokimau Farm Limited belonging to the deceased James Maina Muthiani.

Further, the report that was made by Patrick Mutua Muthiani (the 1<sup>st</sup> Respondent herein) and Benjamin Wambua Maingi who are the sons of the deceased James Maingi Muthiani, was that the documents of the above land had been forged and fraudulently transferred by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants to Kamweli Mwangangi Kituku, Jacinta Mwilio Wambua, Daniel Mutuku Mutisya, Patrick Wanjohi and James Wanjau using deed plan No. 1248111. The deponent attached copies of the complainants' statements.

The deponent further stated that his investigations revealed the history of the allocation of LR No. 12715/416 (Original Number 714911) by Syokimau Farm Limited to the deceased James Maina Muthiani as stated by the 1<sup>st</sup> Respondent, and further revealed that a portion of the said land was subdivided and transferred to various persons by the Applicants.

The relevant details are that the first transfer was dated 15<sup>th</sup> August 2005 from Syokimau Farm Limited to one Kamweli Mwangangi Kituku of 2.025 hectares of land reference number 12715/416, which piece of land is delineated on land survey plan number LR 124811. A surrender was done to Government of the Republic of Kenya vide a letter dated 2<sup>nd</sup> September, 2005 from Syokimau Farm Limited of LR No. 12715/416/1 measuring 2.025 hectares and of land reference number 12715/416. Subsequently, the said parcel of land was further transferred to Jacinta Mutua Wambua on 28<sup>th</sup> July 2006, Daniel Mutuku Mutisya on 28<sup>th</sup> July 2006, and Patrick Wanjohi Ndasu and James Wanjau Ndagu on 6<sup>th</sup> December, 2010.

The deponent averred that all the documents of transfer and surrender were signed by the Applicants as Chairman and Secretary respectively of Syokimau Farm Ltd., and that the complaints made by Patrick Mukua Muthiani have been duly investigated and have disclosed the charged offences. Further, that the 3<sup>rd</sup> Respondent has used its powers mandated by the Constitution in the administration of justice in charging the Applicants herein with the charged offence disclosed in charge sheet, and that it is premature to quash the decision of the 3<sup>rd</sup> Respondent to charge the Applicants herein.

### **The Submissions**

The parties made oral submissions during the hearing of the application on 15<sup>th</sup> December 2015. Mr. Orange, learned counsel for the Applicants reiterated the facts of the application, and submitted that there had been material non-disclosure by the Respondents that the subject parcel of land was never transferred to the late James Maingi Muthiani, yet the 1<sup>st</sup> Respondent had not explained how he acquired title which he alleged to have in his pleadings in the pending civil cases. It was claimed in this regard that the criminal charges against the Applicants are intended to legitimize the fraudulent title held by the 1<sup>st</sup> Respondent to the subject property.

It was further submitted by the Applicant's counsel that a criminal court is not clothed with any constitutional mandate to deal with issues of title to property, and that the right forum to litigate the issue is the Environment and Land Court. Further, that the Applicants as directors of Syokimau Farm were only executing their legal mandate as directors of the company in signing company documents and cannot thereby be charged with fraud. Lastly, that Syokimau Farm Ltd was issued with title to the subject property in 1988, and could not therefore bestow title to the late James Maingi Muthiani in 1980 which it did not have.

Ms Wanjiku Mwaura, the learned counsel for the 1<sup>st</sup> Respondent on her part reiterated that the only pending civil cases are ELC Cases 380 and 381, and that the Applicants are not parties to nor do they have connections to the said civil suits which can act as a barrier to their prosecution. Further, that the

Applicants cannot sue the 1<sup>st</sup> Respondent as he is not an administrator to the estate of the deceased James Maingi Muthiani.

The counsel for the 1<sup>st</sup> Respondent submitted that while there may be need to investigate the title issued to the 1<sup>st</sup> Respondent with respect to the subject property, the criminal case is about the illegal transfer of the shares of the deceased by the Applicants, and criminal issues raised by the fraudulent transfer can only be determined by a criminal court and judicial review proceedings cannot be invoked to forestall a legal process in a criminal matter.

Ms Rono, the learned counsel for the 3<sup>rd</sup> Respondent associated herself with the submissions by Ms Mwaura, and further submitted that section 193A of the Criminal Procedure Code provides that pending civil matters shall not be a ground for stay of criminal proceedings, and that the pending civil matters were disclosed by the 3<sup>rd</sup> Respondent. Reliance was placed on the decision in **Victar Maina Ngunjiri & 4 Others vs Director of Public Prosecutions & 5 Others (2014) eKLR** in this regard. Ms. Rono contended that the decision to prosecute the Applicants was based on sufficient evidence and in the public interest, and the 3<sup>rd</sup> Respondent acted within its constitutional mandate.

### **The Issues and Determination**

I have considered the pleadings and submissions made by the Applicant and 1<sup>st</sup> and 3<sup>rd</sup> Respondents. The issues that require to be determined is whether an arguable case has been shown for leave to be granted to the Applicants to commence judicial review proceedings, and if so whether the leave should operate as a stay of the proceedings in Criminal Case No. 705 of 2015 Principal Magistrate's Court Mavoko. The applicable law in this respect is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted.

The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

**“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.**

In the present application, the Applicants are seeking leave to institute judicial review proceedings to quash the decision by the 3<sup>rd</sup> Respondent to charge them in a Criminal Case No 705 of 2015 at Mavoko Principal Magistrate's Court, and to prohibit the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from dealing with the complaint and charge in the said criminal case. The main reasons given are that the said criminal proceedings have been brought by the 1<sup>st</sup> Respondent to legitimize the fraudulent title held by the 1<sup>st</sup> Respondent to the subject property, that the criminal court is not the right forum to determine the issues arising as this is a dispute about title to land, and that there are pending civil cases on the said issue. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents have explained the investigations carried out before the decision to charge the Applicants was made, and have stated that it was found that there is a basis to charge the Applicants for an offence

known in law.

This Court is mindful of the purpose of judicial review proceedings, which is to address defects in decision making processes by public bodies, and not to deal with the merits of the case. It therefore follows that where an Applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties, the Court would not have jurisdiction in a judicial review proceeding to determine such a matter. In my view, this is one such matter, as the Applicants are disputing the validity of the 3<sup>rd</sup> Respondent's reason to charge them with a criminal offence in light of the facts presented by the 1<sup>st</sup> Respondent.

In addition, the 3<sup>rd</sup> Respondent has a clear constitutional mandate under Article 157 of the Constitution to direct that investigations be undertaken into allegations of criminal conduct, and to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. This mandate and discretion given to the 3<sup>rd</sup> Respondent should not be interfered with in judicial review proceedings without good reason, and this can only be where the Court finds that the discretion is being abused, or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence.

I am in this regard persuaded by the holding by Odunga J. in **Republic vs Attorney General & 4 Others ex-parte Kenneth Kariuki Githii (2014) e KLR** as follows:

**“The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. 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.”**

It is my finding that the Applicants have failed to satisfy the Court that the discretion given to the 3<sup>rd</sup> Respondent to investigate and prosecute criminal cases ought to be interfered with for the reasons that the even if the facts alleged by the parties disclose civil liability, this does not entitle this Court in judicial review proceedings to bring to a halt criminal proceedings arising from the same facts. In addition, I am also not convinced that there was an ulterior purpose of instituting criminal proceedings against the Applicants as the 1<sup>st</sup> Respondent has shown that the Applicants are not party to the pending civil cases, and the validity of the 1<sup>st</sup> Respondent's title or otherwise is the subject of said civil cases. In any event the Applicants will be afforded an opportunity to defend themselves, cross-examine witnesses and adduce evidence in support of their case in the criminal matter, which in my view is the proper course to take in the circumstances of this case.

In the premises, the Applicants' Notice of Motion dated 6<sup>th</sup> November 2015 fails and is accordingly dismissed with costs to the 1<sup>st</sup> Respondent.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 18<sup>TH</sup> DAY OF JANUARY 2016**

**P. NYAMWEYA**

**JUDGE**