



**REPUBLIC OF KENYA**

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

**JR MISCELLANEOUS APPLICATION NO.154 OF 2015**

**IN THE MATTER OF AN APPLICATION BY DANIEL NDUTU MASIKA AND ANTHONY  
MUTUA KIOKO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE CRIMINAL PROCEDURE CODE**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PRINCIPAL MAGISTRATE'S COURT KANGUNDO...1<sup>ST</sup> RESPONDENT**

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

**HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**KOMAROCK HOUSING CO-OPERATIVE**

**SOCIETY.....INTERESTED PARTY**

**AND**

**Ex Parte**

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

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

**JUDGMENT**

**The Application**

The Applicants are members of Komarock Housing Co-operative Society, the Interested Party herein, which is a Co-operative Society registered under the Co-operative Societies Act. The 1<sup>ST</sup> Respondent is

the Kangundo Principal Magistrate's Law Court while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are the Director of Public Prosecution and the Attorney General of Kenya respectively. The Applicants sought, and were granted leave to bring an application by way of a Notice of Motion dated 10<sup>th</sup> August 2015 seeking the following orders:

(a) That an order for certiorari do issue to remove to this Court for purposes of quashing Kangundo Principal Magistrate's Criminal Case No. 613 of 2014- Republic vs Daniel Nduu Masika and Antony Mutua.

(b) An order of prohibition do issue prohibiting the 2<sup>nd</sup> Respondent from preferring other criminal charges against the Applicants herein.

The Applicants relied on a statement of facts and verifying affidavit both dated 16<sup>th</sup> July 2015 which accompanied their application for leave of the same date. The Applicants' claim that the Interested Party bought 27,195 acres of land in 1963 through its members contribution, which land was registered as Donyo Sabuk/Komarock Block 1/9218. Further, that in 1979 the Government sought to compulsorily acquire 1,250 acres of the said land to be used for construction of transmission equipment.

However, that the members of the Interested Party were not consulted prior to the land being acquired, nor were they compensated for the acquired land. That the Interested Party being aggrieved by the actions of the Government, filed two suits being Nairobi ELC Number 34 of 2013 and Machakos Constitutional Petition Number 15 of 2015. The Applicants annexed copies of the pleadings filed in the two cases.

It is the Applicants' case that the title to, and ownership of Donyo Sabuk/Komarock/Block 1/9218 is the issue in the two cited cases, and that therefore criminal proceedings preferred against the Applicants in Kangundo Criminal Case Number 613 of 2014 are aimed at intimidating them to abandon their claim of ownership of their land. The Applicants attached the amended charge sheet in the said criminal case.

### **The Response**

The 1<sup>st</sup> and 3<sup>rd</sup> Respondent opposed the Application by way of Grounds of Opposition filed in Court dated 12<sup>th</sup> August 2015, wherein it was stated that the 1<sup>st</sup> Respondent acted within the premises of the law, and that section 6 of the Judicature Act provides that no judge or magistrate shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty. Further, that judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates, and that the application was therefore incompetent and an abuse of the court process.

The 2<sup>nd</sup> Respondent's response was in a replying affidavit sworn on 15<sup>th</sup> September 2015 by Cliff Machogu, a prosecution counsel in the Office of the Director of Public Prosecutions. It was deponed therein that a complaint was lodged against the Applicants at K.B.C. Police Station on 19<sup>th</sup> September 2014, and that in the course of investigating the complaints it was discovered that the Applicants were involved in uprooting /damaging fencing posts belonging to the complainant which led to their arrest and charging in Court in Kangundo Criminal Case number 613 of 2014, for malicious damage property contrary to section 339(1) of the Penal Code.

Further, that the bringing of charges against the Applicants by the Director of Public Prosecutions was based on sufficient evidence and was not done in bad faith, and that the prosecution of the criminal case will not in any way affect the proceedings or outcome of the pending land dispute cases.

The Interested Party responded by way of a replying affidavit sworn on 23<sup>rd</sup> September 2015 by its Chairman, Bernard Nzioki Maembe, wherein it was stated that the Interested Party was in support of the application herein.

### **The Issues and Determination**

I have considered the pleadings and submissions made by the Applicants, Respondents and Interested Party. The scope of the judicial review remedies of *certiorari*, *mandamus* and prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** in which the said Court held *inter alia* as follows:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”**

The issue therefore that requires determination is whether any grounds have been established by the Applicants for the orders sought of *certiorari* and prohibition to issue against the Respondents.

The Applicants in submissions dated 5<sup>th</sup> October 2015 filed by B.M Mungata & Company Advocates their learned counsel, urged in this respect that the criminal proceedings should be quashed because the decision to charge the Applicants with a criminal offence was arrived at maliciously, and was motivated by malice and aimed at intimidating the Applicants to abandon their claim in the suit property.

Further, that unless the prohibition orders are issued, other charges will be preferred against the Applicants. It was also submitted in this respect that the Applicants are not challenging the work and decisions of the 1<sup>st</sup> Respondent, who is joined as a necessary party in the event that the Court finds that the 2<sup>nd</sup> Respondent acted in bad faith, then the orders quashing the proceedings have to be directed against the 1<sup>st</sup> Respondent.

Munene Wanjohi, a litigation counsel in the office of the Attorney General, filed submissions on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Respondent dated 12<sup>th</sup> August 2015. He contended that the remedy of judicial review is concerned with the decision making process and not with the merits of decisions made by statutory bodies. Further, that the orders sought against the 1<sup>st</sup> Respondent cannot issue as by so doing the Court would be curtailing its statutory duty to hear and determine matters before it. Section 6 of the Judicature Act was also cited with respect to the immunity of judicial officers from being sued for acts being done in the course of their judicial duty.

The 2<sup>nd</sup> Respondent did not file any submissions, while the Interested Party in submissions filed by its Chairman dated 24<sup>th</sup> May 2016, stated that it would adopt the submissions made by the Applicants.

I note that the allegations of bad faith made against the 2<sup>nd</sup> Respondent by the Applicants arise from the two civil suits filed by the Interested Party in Nairobi ELC Number 34 of 2013 and Machakos Constitutional Petition Number 15 of 2015, in which they claim to have an interest as members of the said Interested Party, and in which the complainant in the criminal case has been sued as a Defendant.

The legal position however is that the facts constituting the basis of a civil suit may similarly be a basis for criminal offence and proceedings, and is not ground for staying the criminal process. 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 an applicant to submit to the civil claim. Section 193A of the *Criminal Procedure Code* provides as follows in this respect:

***“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.”***

It is notable in this regard that the Applicants are not party to the civil suits they are relying on to allege bad faith and malice on the part of the 2<sup>nd</sup> Respondent, and have not provided details of any specific acts against them by the 2<sup>nd</sup> Respondent to lay a basis for the alleged malice and bad faith. In addition they did not disclose and/or deny the facts that led to their prosecution for criminal offences, which the 2<sup>nd</sup> Respondent detailed in their response. This Court is therefore handicapped and has inadequate information from the Applicants, and is not able to evaluate the decision making processes of the 2<sup>nd</sup> Respondent in instituting the criminal proceedings against them.

Lastly, it is a settled position that Courts 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 under Article 157 of the Constitution, or interfere with the jurisdiction of the Courts to hear and determine cases, unless there is clear evidence that the said bodies have acted in abuse of process. No such evidence has been provided in the present application.

I therefore find that no grounds have been established for the orders of certiorari and prohibition sought by the Applicants, and the Applicants’ Notice of Motion dated 10<sup>th</sup> August 2015 is found not to have merit and is dismissed with costs to the Respondents.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 30<sup>TH</sup> DAY OF AUGUST 2016**

**P. NYAMWEYA**

**JUDGE**