



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISCELLANOUS CRIMINAL APPLICATION NO. 702 OF 2010**

**IN THE MATTER FOR AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION**

**AND**

**IN THE MATTER OF THE CHIEF MAGISTRATES COURT AT NAIROBI CRIMINAL CASE  
NO. 1519 OF 2010**

**AND**

**IN THE MATTER FOR AN APPLICATION FOR JUDICIAL REVIEW**

**BETWEEN**

**JOSEPPH WARARI GATHOGA .....APPLICANT**

**VERSUS**

**THE HONOURABLE THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATES COURT, NAIROBI .....2<sup>ND</sup> RESPONDENT**

**THE CITY COUNCIL OF NAIROBI.....INTERESTED PARTY**

**EX PARTE JOSEPH WARIRI GATHOGA**

**JUDGEMENT**

**Background**

The application before me was instituted by way of a Notice of Motion dated and filed on 16<sup>th</sup> December 2010. The Applicant had sought for leave to institute judicial proceedings by a Chamber Summons dated and filed on 24<sup>th</sup> November 2010, and brought under a Certificate of Urgency. The application is brought under **Articles 22, 23, 25(c), 27(i) and 50** of the Constitution; Order 53 Rules I (1), (2), and (4) of the Civil Procedure Rules and the Law Reform Act. The *ex parte* Applicant is seeking for the following orders:

- a) An order of prohibition stopping the Attorney General from proceeding with the criminal prosecution of the Applicant pending before the Chief Magistrate's Court, Nairobi, Criminal Case

No. 1519 of 2010, *Republic v Joseph Warari Gathoga*.

b) order of certiorari do issue to remove into this honourable court and quash the decision of the Attorney General and the Chief Magistrates Court, Nairobi, to charge the Applicant with nine (9) counts of the offence of making a document without authority contrary to section 357(a) of the Penal Code arising out of complaints made to the Director of Criminal Investigations by the City Council of Nairobi

c) An order of prohibition to prohibit the Chief Magistrate's Court, Nairobi from proceeding with the hearing of the Criminal Case No. 1519 of 2010 scheduled for hearing on 25<sup>th</sup> November 2010 and all proceedings including mentions against the Applicant till further orders of the court.

The application is supported by Statutory Statement dated and filed on 23<sup>rd</sup> November 2010 and the Verifying Affidavit sworn by the Applicant on 23<sup>rd</sup> November 2010. It is premised on the grounds that the Applicant's prosecution is intended to frustrate the civil suit pending before the court in ELC No. 577 of 2009; and further that the prosecution is driven by ulterior motives and intended to intimidate the Applicant to withdraw the contempt proceedings in the civil case. Further, the Applicant alleges that the criminal case is not founded in any legal principle and only meant to further the complainant's ill motive to seeking evidence for the civil case following the Applicant's successful application for injunctive orders. Further, the Applicant stands to be prejudiced if both proceedings are allowed to proceed and continued prosecution would amount to double jeopardy and jeopardize the Applicant's right to a fair trial. Furthermore, none of the Respondents stand to be prejudiced.

### **Applicant's case.**

The Applicant is described as the Director of Devlan Company Limited and Rockville Investments Limited, which are the registered proprietors of the parcels of land known as L.R. No. 209/10172/14, 209/10172/15, 209/10172/17, and 209/10172/18, situated within Woodley Estate in the City of Nairobi. The Applicant is facing nine (9) counts of the offence of making a document without authority contrary to section 357(a) of the Penal Code in CMC Nairobi Criminal Case No. 1519 of 2010.

The Applicant claims that the pending criminal charges were fabricated against him by the City Council of Nairobi, the Interested Party herein. He avers that the charges were instituted due to a pending civil case HCCC ELC No 57 of 2007 which the Applicant instituted when the Interested Party demolished developments in the above-cited land parcels, following which restraining orders were issued against the Interested Party. He further avers that the following failure by the Interested Party to honour the orders of the court contempt proceedings were commenced, which at the time of filing the application before this court, were pending hearing and determination. The Applicant also alleges constant harassment by employees of the Interested Party. He alleges that despite the orders of injunction, criminal charges were fabricated against him at the behest of the Interested Party.

The Applicant denies the charges as alleged, stating that the disputed building plans were approved by the Interested Party. He adds that the issues in the pending criminal case are similar to the issues in the civil case, further citing that similar charges had been previously instituted against him in Criminal Case No. 536 of 2005 was subsequently dismissed for lack of evidence, thus, charging him in respect of the disputed building plans amounts to double jeopardy and is therefore, against his constitutional rights and basic principles of natural justice. The Applicant further states that the criminal proceedings are malicious, illegal, and amount to an abuse of the process of court and should therefore, be quashed.

The *ex parte* Applicant filed a Supplementary Affidavit on 27<sup>th</sup> June 2016 in response to the Replying Affidavit filed by the Interested Party in which he denied being issued with reject notice of his application for approval of plans. He further alleges that the withdrawals by the architects were a result of intimidation by officers of the Interested Party. He also maintained that the proceedings against were biased, and cited several instances to demonstrate this fact.

### **Interested Party's Case**

The City Council of Nairobi sought to be enjoined as an interested party in an application dated and filed on 3<sup>rd</sup> March 2011 and supported by the Affidavit of Ajuma J. Owuor sworn on 2<sup>nd</sup> March 2011. The interested party also relied on the Replying Affidavit of Tom Ngwala, the Deputy Director of Planning, Compliance and Enforcement at the Council, sworn on 26<sup>th</sup> May 2016. The allegations by the Applicant were countered. It is averred that the Applicant's companies commenced construction after the expiry of approvals that had been issued by the Council and without structural drawings. Further, that the constructions were being undertaken in excess of the approved ground coverage.

It is deponed further that the Applicant's attempt to regularize the approvals were rejected and further that despite this rejection, the Applicant proceeded with the construction and that during a site visit, it was discovered that the plan in use had a fraudulent renewal approval stamp. It is further deponed that the previous criminal case alleged by the Applicant arose out of other developments that the Applicant's company commenced in violation of the building code and without the necessary approvals. The two criminal cases did not therefore touch on the same issues. It is also deponed that the Applicant proceeded with the construction upon getting orders of the court in the civil case, and uttered false documents, leading to the criminal charges pending before the Magistrate's court.

It is the Interested Party's view that the court should not be used to usurp the powers of the Director of Public Prosecutions to undertake prosecution. Further, being judicial review proceedings, the Applicant failed to impugn the procedure that led to the institution of criminal proceedings, thus, there is no basis for discontinuance of the criminal proceedings and the case should be allowed to proceed on merit.

### **Respondent's Case**

The application was opposed. The 1<sup>st</sup> Respondent raised Grounds of Objection to the Applicant's application; dated 21<sup>st</sup> June 2011 and filed on 22<sup>nd</sup> June 2011. The grounds are that: firstly, the application is misconceived, frivolous, vexatious, incompetent, improperly before the court and an open abuse of the court process; secondly, that the application has not met the prerequisites for the grant of the orders sought; thirdly, that the matters raised by the Applicants are defences which should be raised before the trial court; fourthly, that no sufficient grounds have been advanced to warrant the orders sought and finally, that the Applicant is guilty of material non-disclosure. Appearance was also made for the Director of Public Prosecutions by prosecutions counsel, Ms. Nyauncho who relied on the Grounds of Opposition and Submissions that were filed on behalf of the 1<sup>st</sup> Respondent.

### **Applicant's Submissions**

The Applicant relies on his written submissions filed on 25<sup>th</sup> May 2016. It is submitted that even though under section 193A of the Criminal Procedure Code criminal proceedings can proceed concurrently with civil action, each case should be treated on its own merits. This court was urged to find that the decision to charge the Applicant was unreasonable, irrational and was aimed at assisting the Interested Party to build a defence in the civil case. The case of ***Republic v Chief Magistrate Court at Mombasa ex parte Ganijee & Another*** [2002] 2KLR 703 was relied on. It was further submitted that the charges were instituted for extraneous purposes and should therefore, be quashed. Further, it is submitted that the charges will jeopardise the Applicant's right to a fair trial. The case of ***Mohammed Gulam Hussein Fazal Karmali & Another v Chief Magistrate Court Nairobi & Another*** (2006) eKLR was cited to emphasize that the provisions of Section 193A notwithstanding, the court was bound to ensure that its process is not abused by litigants. ***Kuria & 3 Others v Attorney General*** [2002] 2 KLR 69 was also cited in support of the Applicant's case.

### **1<sup>st</sup> Respondent's Submissions**

The 1<sup>st</sup> Respondent relied on written submissions filed on 22<sup>nd</sup> June 2015. It submitted that the issues raised by the Applicant were premature before the High Court as they form part of the defence that the Applicant should advance before the trial court. Thus, no abuse of process of malice has been proved as alleged. The following cases were cited in support: ***Kenya National Examinations Council v Republic***

*ex parte Geoffrey Gathigi Njoroge Civil Appeal No. 266 of 1996, Teresia Wanjiru Githinji v The Attorney General Misc. Application No. 1295 of 2005, Surjit Singhunjam v The Principal Magistrate Kibera Misc. Application No. 519 of 2005, Republic v The Chief Magistrate Nairobi Law Courts Misc. Civil Application No. 152 of 2006, Kimano Kibaya v Republic Cr. Application No. 453 of 2003, David Njogu v The Director of Criminal Investigations Department Misc. Application No. 658 of 2004 and Bryan Yongo V The Hon. Attorney General High Court Civil Case No. 61 of 2006 and 196 of 2006.*

### **Interested Party's Submissions**

In its written submissions filed on 28<sup>th</sup> June 2016, the Interested Party submitted that the court should not usurp the constitutional mandate of the Director of Public Prosecutions under **Article 157**. Further, the Inspector General of Police enjoys independence with regard to investigation of any particular offence or offences. It further submitted that investigations into criminal conduct was a matter of public interest. The duty therefore, lies with the trial court to determine on merit whether the evidence presented would be sufficient to prove the charges. The case of *Republic v Commissioner of Police & Another ex parte Michael Minari & Another (2012) eKLR* was cited in support. It was also submitted that judicial review proceedings concerned with the procedure and not the merit of the impugned proceedings. The Interest Party maintained that criminal proceedings in Cr. Case No. 1519 of 2010 and Cr. Case No. 536 of 2005 were concerned with distinct issues, in that charges in the initial case arose out of undertaking developments contrary to approved plans, while the pending case is concerned with offences of making false documents. Further, some of the complaints in the pending case arose long after the conclusion of the earlier case and that the pending charges also involve other parcels of land that were not the subject in the previous case. Thus, no abuse of process was proved. The Interested Party also submitted that the Applicant did not meet the prerequisites for the grant of orders sought, since the Applicant only makes mere allegations. Relying on the case of *Republic v Director of Public Prosecutions & 2 Others ex parte Francis Njakwe Maina & Another (2015) eKLR*, it was submitted that no proof was presented to illustrate abuse of court process. The court was therefore urged to dismiss the application and allow the pending criminal proceedings to proceed.

### **Determination.**

The main issue for consideration is whether or not the orders of prohibition and certiorari as sought by the Applicant should be granted. The Applicant is challenging both the decision to prosecute him and proceed with the criminal proceedings pending before the lower court.

In an application of this nature, this court is enjoined to consider the guiding principles in determining whether or not to prohibit or discontinue criminal proceedings before the lower court. The power to conduct criminal prosecutions is vested in the Director of Public Prosecutions. Under **Article 157(6)**, the Director has the power to:

*'(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;*

*(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and*

*(c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).'*

In exercising this power, the Director *'shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority'*. However, the Constitution enjoins the Director to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. These ideals are reiterated in the **Office of the Director of**

**Public Prosecutions Act** particularly under **section 4**.

Thus, where proceedings are carried out contrary to the constitutional principles, the court would not hesitate to prevent abuse of its process. As stated by the Court of Appeal in the case of *Joram Mwenda Guantai vs. The Chief Magistrate*, [2007] 2 EA 170, the Court of Appeal:

*‘...an order of prohibition ... lies, not only in 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...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.’*

Further, as stated in the above case, such proceedings are not concerned with the merits of the case, as this Court must remain alive to the realm of the trial court to consider the charges before it on the basis of the evidence presented to reach a determination as to whether or not the prosecution makes out its case against the accused to the required standard. This was well-set out in the case of *Meixner & Another vs. Attorney General* [2005] 2 KLR 189, where the Court stated:

*‘... the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct.... The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards ... to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge .... It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.’*

That said, the Applicant alleges that the pending civil suit HCCC ELC No 57 of 2007 was the reason the criminal charges were commenced against him as he challenged the Interested Party’s action of demolishing developments that were being undertaken by the Applicant’s companies. The cited civil suit is not disputed. The Applicant was granted orders of injunction restraining the Interested Party, and consequently, the concerned officials of the Interested Party were cited for contempt for violating the said orders. That said, existence of a civil suit does not bar commencement of criminal proceedings. **Section 193A** of the Criminal Procedure Code provides in this regard as follows:

*‘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.’*

As rightly submitted by the Applicant, each case should be determined on its own merit. It is not sufficient to cite existence of concurrent proceedings. The Applicant stated that the criminal proceedings were instituted to intimidate him from pursuing his claims against the Interested Party in the civil suit. The

issues in this matter arose out of developments on land parcels owned by the Applicant's companies. The Applicant is charged with several counts of the offence of making a document without authority contrary to section 357(a) of the Penal Code. The Applicant maintains that the impugned developments were made with approvals issued by the Interested Party. This claim was countered by the Interested Party which claimed that the Applicant made use of approvals after the expired dates and further that the plans in use were in excess of the approved ground coverage for the construction. The Interested Party further alleged that the application for renewal of the approvals were rejected by the Interested Party. Thus no approval could have been given by the Council when the renewal had been rejected in the first place. The Interested Party also alleged that complaints had been lodged against the Applicant's developments by the residents' association and the National Housing Corporation. It also cited the withdrawals by the architects of the indemnity and occupation certificates in support of its case.

The Applicant maintained that no such rejection notices were issued to them, neither were any complaints made concerning the development. He further cited intimidation by the Interested Party as the cause for withdrawals by the architects.

Considering the issues raised by the parties, I find that these are matters of evidence, the veracity of which should be tested in the trial court where each party will have an opportunity to support its case. That is not the realm of these proceedings which are not concerned with the merits of the case. This court must be careful not to usurp the role of the trial court would amount to micro managing the trial courts.

The Applicant also alleged that the Interested Party had instituted similar allegations in a similar case. The Interested Party maintains that the issues in the two cases were not similar, and arose out of different set of facts. While the initial case was concerned with constructions without approvals, the pending case was concerned with making of documents without authority. An examination of the proceedings of the previous criminal case shows that the accused was acquitted under section 202 of the Criminal Procedure Code out of failure by the prosecution to present its witnesses. The facts cited alongside some of the charges against the Applicant arose in various dates in the year 2008 and 2009 long after the facts cited in the previous criminal case, which was determined on 4<sup>th</sup> July, 2007 when the court acquitted the Applicant. In that case, the Applicant was arraigned in court on 29<sup>th</sup> July, 2005. The Applicant did also not attach a copy of the charges in the said case alongside the proceedings. I find that no double jeopardy has been demonstrated by the Applicant. Again, challenging the charges on this basis also requires consideration of evidence which goes to the merits or otherwise of the charges against the Applicant. Thus his application fails on this ground.

The Applicant further alleged that the prosecution was malicious, an abuse of the process of court and was contrary to the Constitution. To demonstrate this bias, the Applicant cited several instances of harassment, failure to be issued with statements, and the report of the police document examiner exonerating him of forgery. He also believes that the continued harassment arose out of the conviction of contempt in the civil case.

**In *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69, the court set out considerations to be made in determining whether or not there is an abuse of the court process in the following terms:**

***‘There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the Applicants might not get fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the***

*available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the Applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the Applicants the chance to clear their names.'*

Further in *Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another* [2002] 2 KLR 703, the court stated that the use of criminal investigations or prosecution to help an individual advance his civil case amounted to an abuse of the process. Thus, the trial process should be disallowed where it is demonstrated the prosecution is motivated by ulterior motives. It was stated in this case that:

*"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the Applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...'*

In this case, the Interested Party lodged a complaint with the Directorate of Criminal Investigations in a letter dated 19<sup>th</sup> May, 2010 for investigation into planning fraud. In this case, the police acted on a complaint registered by the City Council. It is the duty of the police to investigate any complaint. It has not been shown that in so doing, the police acted contrary to the public interest or the interests of justice. The Interested Party, like any other person, is entitled to make a complaint. Thus, by simply acting on such a complaint does not automatically amount to abuse of process or malicious action. The Applicant's assertion that he has been exonerated on the claims of forgery by the document examiner's report is also a matter of evidence that should be presented before the trial court. Furthermore, it is not clear from such a report, that the examiner's report covers all the documents that from the subject matters of the offences against the Applicant.

The documents presented by the Interested Party show that an enforcement notice was issued on 19<sup>th</sup> May 2010. The letter requesting for investigations into planning fraud also bears the same date. The Applicant instituted the civil suit on 13<sup>th</sup> November 2009 and a temporary injunction was issued against the Interested Party on 27<sup>th</sup> November 2009. This injunctive order restrained the Interested Party from interfering with the Applicant's construction of the premises. The issue of renewal of approvals remains disputed which is a matter of evidence at the trial. The action of the Interested Party of issuing the enforcement notice was the subject of the contempt proceedings. This is an issue before the civil suit. That said, nothing stopped the Interested Party from investigating into the matters complained of and that alone does not prove malice or abuse of process. The facts in the criminal relate to documents relied on in the disputed construction. The veracity of these allegations should be determined by the trial court. The

Applicant shall have the opportunity to challenge these allegations, and therefore, there is no basis for his apprehension on being afforded a fair trial.

In consideration of the above, this court does not find a concrete basis for stopping the pending criminal proceedings. I will be reluctant to prohibit the continuance of the criminal proceedings as no cogent basis has been laid to justify the issuance of orders sought. The Applicant's Notice of Motion is therefore dismissed with no orders as to costs.

**DATED and SIGNED** this 17<sup>TH</sup> day of **AUGUST, 2016.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of;**

1. *Munyu holding brief for Wanjohi for the Applicant.*
2. *M/s Sigei for the Respondent.*
3. *No appearance for the Interested Party.*