



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JR MISCELLANEOUS APPLICATION NO.105 OF 2016

**IN THE MATTER OF THE CONSTITUTION OF KENYA AND CIVIL PROCEDURE RULES
AND SECTION 8 AND 9 OF THE LAW REFORM ACT**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF
PROHIBITION AND CERTIORARI**

AND

**IN THE MATTER OF PRINCIPAL MAGISTRATE'S COURT AT MAVOKO LAW COURTS
CRIMINAL CASE NO**

316 OF 2016

BETWEEN

NICHOLAS NZIOKA NDAMBUKI.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE PRINCIPAL MAGISTRATE, MAVOKO LAW COURTS.... 2ND RESPONDENT

RULING

The Application

The Applicant claims to be the registered owner of the property known as L.R. NO 1507/7 IR NO 6458 situated in Mlolongo within Machakos County, which he has sub-divided and sold to several individuals. He was then charged in Criminal Case No 747 of 2012 at the Principal Magistrate's Court at Mavoko with the offence of conspiracy to defraud Margeret Wamaitha Humphrey of the said property. The Applicant claims the said criminal case is ongoing. He has now filed an application by way of a Notice of Motion dated 9th May 2016 seeking the following substantive orders:

1. That he be granted leave to commence proceedings in the nature of judicial review for the following orders:-

a. An order for certiorari to remove into this Court and quash the decision of the 1st

Respondent to prosecute the Applicant in criminal case number 316 of 2016 pending for plea at the Principal Magistrate's Court at Mavoko Law Court.

b. An order for certiorari to remove into this Court and quash the proceedings in criminal case number 316 of 2016 pending for plea at the Principal Magistrate's Court at Mavoko Law Court.

c. An order of prohibition prohibiting the Respondents from prosecuting the Applicant and/or conducting proceedings including the taking of plea by the Applicant in Criminal Case Number 316 of 2016 or any other Court proceedings base on the same factual and evidentiary basis as in Criminal Case Number 316 of 2016 pending for plea at the Principal Magistrate's Court at Mavoko Law Court.

2. That the leave so granted operates as a stay of proceedings in Criminal Case Number 316 of 2016 pending for plea at the Principal Magistrate's Court at Mavoko Law Court.

The grounds for the said application are that the Applicant is already facing charges of a similar nature in Criminal Case No. 747 of 2012 whose hearing is going on at Mavoko Law Courts , and that the charging of the Applicant in Criminal Case Number 316 of 2016 will prejudice his defence in Criminal Case No. 747 of 2012. Further, the charging of the Applicant in Criminal Case No. 316 of 2016 is malicious, and his constitutional rights of fair trial will be contravened if the case is allowed to proceed. The Applicant attached the charge sheets in Criminal Case No. 747 of 2012 and Criminal Case Number 316 of 2016 to the supporting affidavit he swore on 9th May 2016.

The Applicant also filed a further affidavit on 15th June 2016 wherein he averred that the two complainants in Criminal Case No. 316 of 2016, Joseph Muthemba Kamau and Peter Muanye Kimuyu have no intention of proceeding with their complaint, and had filed affidavits withdrawing their claim, which were annexed. Further, that he never went missing after being charged in Criminal Case Number 747 of 2012, and that he was only seeking to protect his constitutional rights as he is presumed innocent until proved guilty.

The Applicant's learned counsel, Alphonse Mutinda & Co Advocates, filed submissions dated 19th September 2016 wherein he reiterated the arguments made in the foregoing, and submitted that the Applicant had demonstrated a *prima facie* case for leave to be granted.

The Response

The 1st Respondent opposed the Application by way of a replying affidavit he sworn on 30th May 2016 by IP Richard Mugo, a police officer attached at Mlolongo CID and the lead investigating officer in Criminal Case No. 316 of 2016. He stated therein that on 3rd May 2013, a report was made at Mlolongo police station in relation to land L.R No. 1504/7 IR 6458 by Joseph Muthemba Kamau and Peter Muange Kimuyu, complaining of encroachment of the land by some strangers, and that the parcel of land had been sold to them by the Applicant. The deponent attached copies of statements made by the two complainants.

Further, that after the report was made the Applicant went missing until he was arrested on the 20th April 2016 resulting to the opening of Criminal Case 316 of 2016 which is pending plea. It was contended that the charge sheet in the said criminal case is not similar to that in Criminal Case number 747 of 2012, as the complainants are different and the causes of action happened at different times. Further, that the property subject matter of both criminal cases is the same and registered under the late Margaret Wamaitha Humphrey who was the legal owner of the property, and not the Applicant as alleged. Copies of the charge sheets were attached.

The deponent further stated that investigations had revealed that the Applicant had defrauded the complainants, and all questioned documents have been examined by a document examiner and connected

the Applicant with offences charged. It was also averred that the 1st Respondent has used its powers mandated by the Constitution in charging the Applicant herein with the offence disclosed in charge sheet which is a known offence, and that the Respondent is not in any way going against the rules of Justice. Further, that the charges against the Applicant are supported by overwhelming evidence which will be tabled before the trial court, and are hence not an abuse of court process and neither does it in any way neither subvert justice nor breach the applicants' rights.

Ms. Rita Rono, the learned counsel for the 1st Respondent filed written submissions dated 21st October 2016, wherein the above arguments were reiterated and it was contended that the affidavits sworn by Joseph Muthembwa Kamau and Peter Muange Kimuyu are the same affidavits that had been supplied to this court in Constitutional Petition Number 47 of 2013, and that the court referred to **Michael Monari & Another vs Commissioner of Police & 3 others, in Miscellaneous Application No 68 of 2011** and held that that the same be dealt with in the criminal court.

It was also submitted that Article 157 (10) of Kenyan Constitution is clear that the Director of Public Prosecutions shall not require any person or authority for commencement of criminal proceedings, and in the exercise of his or her powers or function, shall not be under the direction or control of any person. Therefore, that the 1st Respondent has used its mandate under constitution in the administration of Justice and has not abused court process or infringed on the rights of the applicant.

The 2nd Respondent did not file any response to the application.

The Issues and Determination

I have considered the pleadings and submissions made by the Applicant and 1st Respondent. The issues that require to be determined is whether an arguable case has been shown for leave to be granted to the Applicant to commence judicial review proceedings, and if so whether the leave should operate as a stay of the proceedings in Criminal Case No. 316 of 2016 at the 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 1st Respondent to charge them in Criminal Case No. 316 of 2016 at Mavoko Principal Magistrate's Court. The main reasons given are that the said criminal proceedings involve land which is the subject of other criminal proceedings in which the Applicant has also been charged with the same offence, namely Criminal Case No. 747 of 2012 which is also before the Principal Magistrate's

Court at Mavoko. The 1st Respondent have countered this argument by stating that the complainants in the two criminal cases are different and the offences happened at different times, and that their investigations found that there is a basis to charge the Applicant for an offence known in law.

This Court is in this regard 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 Applicant is disputing the validity of the 1st Respondent's reason to charge them with a second criminal offence in light of the facts presented by the parties.

In my view, the proper forum to determine the propriety of the charges brought against the Applicant in Criminal Case No. 316 of 2016 and indeed any defences he may have to the said charge, including whether or not he is being doubly jeopardized, is the criminal court that is seized of the proceedings, which is the Principal Magistrate's Court at Mavoko. I am in this regard persuaded by the holding by Warsame J (as he then was) in the case of **Michael Monari & Another vs Commissioner of Police & 3 Others, Miscellaneous Application No.68 of 2011** as follows:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. "

In addition, the 1st 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 1st 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.

It is my finding that the Applicants have failed to satisfy the Court that the discretion given to the 1st Respondent has been abused, as they have not contested the averments that the complainants in the two criminal cases are different and that the events leading to the two cases arose at different times. In addition, I am also not convinced that there was an ulterior purpose of instituting criminal proceedings against the Applicant. In any event the Applicant will be afforded an opportunity to defend himself, cross-examine witnesses and adduce evidence in support of his case in the two criminal matters, 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 9th May 2016 fails and is accordingly dismissed with costs to the 1st Respondent.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF NOVEMBER 2016

P. NYAMWEYA

JUDGE