



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 264 OF 2014

ESTHER WAMBUI MUIKIRIA & OTHERS.....APPLICANTS

VERSUS

DEPUTY PUBLIC PROSECUTOR.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

JUDGEMENT

1. The applicants herein, **Esther Wambui Muikiria, Elizabeth Wanjiru Muigai and Emily Njambi Ngugi**, by their Notice of Motion dated 7th July, 2014, seek substantially an order that the 3rd Respondent and specifically his agents **C I Richard Kowyier** and **Cpl Daudi Mutui** be barred from harassing, threatening and/or intimidating the applicants.
2. According to the applicants, they are the officials of Gatundu Horticultural Growers Limited which owns a total of 81 acres of land in Kajiado specifically LR No. Kajiado/Kipeto/214 and LR No. Kajiado/Kipeto/220 which are held in trust for the shareholders.
3. They however contended that there is a possibility that third parties have unscrupulously forged their certificates and have purported to illegally sell their plots to innocent third parties who have lodged complaints with the police.
4. The applicants further contend that despite co-operating with and explaining their position to the police the two officers mentioned hereinabove have continued harassing them in the absence of any case and the applicants now read malice and ill intent from the conduct of the said officers.
5. According to the applicants they are advanced in age with the Chairlady being 95 years in age while two of the directors are suffering from ill health hence the numerous summons have been impacting adversely on their health. According to the applicants, they ought to be treated as witnesses other than as culprits if there are any claims since they are equally affected by the conduct of the unscrupulous individuals involved.
6. In response to the application, the 1st and 3rd Respondent filed a replying affidavit sworn by **Cpl David Kibabi**, a corporal police officer attached to Directorate of Criminal Investigation Headquarters, Serious Crime Section on 15th August, 2014.
7. According to him, he was one of the investigating officers in respect of the matter the subject of these proceedings. He deposed that on 20th May, 2014 a report was made in their office by a number of complainants to the effect that some time in 2013 they were defrauded of their money by a group of women operating in the name of Gatundu Horticultural Women Growers Association who gave them purported share certificates upon payment of colossal sums of money which certificates have been disowned. Upon receipt of the complaints statements were recorded and investigations commenced. Upon investigations it was found that the receipts issued to the

said complaints emanated from the offices of the said Group and were issued by the 1st applicant who was the secretary of the Group. Despite asking the other officials to record their statements, the same are yet to be done.

8. According to the deponent their statements and specimen handwriting and signatures will be instrumental in the investigations. While citing sections 28 of the **National Police Service Act** and Article 244 of the Constitution the deponent averred that they are carrying out procedural requirements which necessitate that the 3rd Respondent summons persons who may aid in the investigations since it is the mandate of the 3rd Respondent to receive complaints from the public, carry out investigations and upon reasonable grounds institute prosecution. It was averred that it had not been shown that the 3rd Respondent had exceeded its mandate hence it is speculative, presumptuous and premature for the applicants at this juncture to allege that they have been summoned with a view to being charged. Citing Article 157(11) of the Constitution, it was averred that the issues raised by the applicants are evidence which ought to be addressed before the trial court.

2nd Respondent's Case

9. On the part of the 2nd Respondent the following grounds of opposition were filed:

1. **That the application herein is unmerited and therefore an abuse of the due process of the court.**
2. **That the application herein is intended to curtail the statutory obligations and duties of the Deputy Public Prosecution.**
3. **That should the applicants be charged, they have an opportunity before the trial court to prove and or demonstrate innocence.**
4. **That the Deputy Public Prosecution is carrying out its constitutional and statutory duty of conducting prosecutions.**
5. **That the application herein offends the mandatory requirement that the applicant should be the Republic.**
6. **That it is not clear from the application which orders the applicant is seeking.**
7. **That the application herein is defective and the same should be dismissed with costs to the respondents.**

10. I have considered the application, and it is clear from the affidavit filed in support of the application that no allegations have been made against the 1st and 2nd Respondents. Apart from that the Court is unaware of an office known as “Deputy Public Prosecutor” as opposed to “Director of Public Prosecutions” though the 2nd Respondent seems also to have fallen into the same error by referring to “Deputy Public Prosecution” in the grounds of opposition. It is also noted that the application is brought in the name of the ex parte applicants rather than the Republic as is required in these kinds of matters. On this issue **Ringera, J** (as he then was) in **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** expressed himself as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefor are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

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EX PARTE

JOTHAM MULATI WELAMONDI”

11. The applicants are seeking an order barring the 3rd Respondent from harassing, threatening and/or intimidating them. I agree with the Respondents that the orders sought are so vague that the grant of the same are unlikely to be of any use to the said applicants. The Respondents on their part allege that they are investigating complaints made to them and are in the course of taking statements from all concerned. The applicants themselves seem to admit that a criminal offence may have been committed in respect to the properties owned by them which are the properties which are the subject of investigations.
12. Section 24 of the *National Police Service Act No 11 A of 2011* sets out functions of the Kenya Police Service as being the—

- (a) *Provision of assistance to the public when in need;*
- (b) *Maintenance of law and order;*
- (c) *Preservation of peace;*
- (d) *Protection of life and property;*
- (e) *Investigation of crimes;*
- (f) *Collection of criminal intelligence;*
- (g) *Prevention and detection of crime;*
- (h) *Apprehension of offenders;*
- (i) *Enforcement of all laws and regulations with which it is charged; and*
- (j) *Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.*

13. The word “investigate” is defined in the *Black’s Law Dictionary 9th Edition* as: “*To inquire into a matter systematically; to make an official inquiry.*”

14. In Republic vs. Chief Magistrate Milimani & another Ex-parte Tusker mattresses Ltd & 3 others [2013] eKLR this Court expressed itself as follows:

“The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission of a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so... The warrants were issued to enable the allegations be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence prosecution of the ex parte applicants or any of them is a matter which is premature at this stage to dwell on.”

15. It is trite that the Court ought not to usurp the Constitutional mandate of the 3rd Respondent to

- investigate any matter that, in the 3rd Respondent's view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the 3rd Respondent since the purpose of a criminal investigations conducted *bona fide* is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid.
16. It must always be noted that judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence to the complaint 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 to bring to the attention of the investigators in the course of the conduct of the investigations.
17. However, if the applicant demonstrates that the investigations that the 3rd Respondent intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are given to the 3rd Respondent.
18. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170**, the Court of Appeal held:

“It is trite that an order of 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 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...”

19. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189**, the same Court expressed itself as hereunder:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, 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 other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution 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. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. 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.”

20. The duty and mandate of the police was appreciated in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

21. It is therefore clear that whereas the discretion given to the 3rd respondent to investigate criminal offences is not to be lightly interfered with, that discretion must be properly exercised and 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, the Court will not hesitate to bring such proceedings to a halt. However, it must be emphasised that judicial review applications do not deal with the merits of the case but only with the process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the powers of the police by halting otherwise proper complaints made before them. In this case, it is admitted even by the applicants that fraud may have been committed against innocent third parties. If what the applicants mean by harassment is the investigation of the said complaints, then this Court would be abusing its supervisory jurisdiction by granting the orders sought.

22. It is therefore clear that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements. The 3rd Respondent has enumerated the facts which led him to undertake the investigations in question and to seek statements from the applicants. It is not the mandate of this Court in these proceedings to make a finding as to the merit of the decision.

23. In order for the applicant to succeed it must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. Although it was alleged that the criminal investigations have been commenced with a view to achieving collateral and extraneous purposes I am not satisfied based on the evidence on the record that this is so. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the ***predominant*** purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

24. I have said enough to show that this application has no merit.

25. Consequently the Notice of Motion dated 7th July, 2014 is dismissed with costs to the Respondents.

Dated at Nairobi this day 19th day of January, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ndege for the 1st and 3rd Respondents

Cc Patricia