



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION CASE NO. 6 OF 2014**

**BENJAMIN WAMBU JAMES**

**JOSEPH KAWINZI MUTHIANI**

**ANTHONY MUSAU MUTHUSI ..... APPLICANTS**

**VERSUS**

**THE PRINCIPAL MAGISTRATE, KANGUNDO**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**INSPECTOR GENERAL OF POLICE THRO'**

**KENYA POLICE OFFICER IN-CHARGE OF**

**KANGUNDO POLICE STATION ..... RESPONDENTS**

**AND**

**PETER MWAKA MUTHIANI**

**ALEXANDER MUOKI ..... INTERESTED PARTIES**

**JUDGMENT**

1. Pursuant to leave granted by the court, the applicant filed a

substantive motion seeking an order of prohibition to issue prohibiting the Senior Principal Magistrate at Kangundo Law Courts from hearing or proceeding with the hearing and /or determination /disposal of **Criminal Case No. 49 of 2013 – Republic versus Benjamin Wambua James; Joseph Kawinzi Muthiani and Anthony Musau Muthusi**. And an order of certiorari to remove to this court to be quashed the proceedings together with any / all decisions made in the case.

2. The grounds upon which the relief is sought as set out in the statement that accompanied the motion are that; the arrest and detention of the applicants and their subsequent arraignment before Kangundo court in SPMCR Case No. 49 of 2013 on purported charges of making a document without authority or forgery were not only illegal and unconstitutional, but also arbitrary and callous and an abuse of power and the court process. The applicants were duly appointed as personal representatives of the estate of Paul Muthiani Musau, deceased in succession Cause No.

667 of 1984. They were endowed with powers to obtain titles to the land forming the estate. It was therefore wrong for the applicants to be charged for administering the estate of the deceased. That the subsequent order annulling the grant does not criminalize the act done by the applicants in abeyance of the orders.

3. That the 3<sup>rd</sup> respondent was aware of the orders in the succession cause. By entering into a consent when the respondents and interested parties had no intention of honouring it was being contempt of court and an abuse of the court process. Therefore a pure civil case was turned into a criminal case.

4. The respondents ignored the provisions of the constitution when they arrested the applicants and arraigned them in court.

5. The matter before the High court, Family division is the same or substantially the same as the matter before the subordinate court at Kangundo which calls upon the High Court to exercise its supervisory jurisdiction by removing the criminal case from Kangundo Law Courts and by quashing it.

6. The applicants are already prejudiced following a letter written by Osoro Juma & Co Advocates that forms part of the record where the applicants are condemned as fraudsters.

7. The applicants jointly deposed a lengthy verifying affidavit which delved into giving the historical background of the matter.

8. In response thereto the respondents relied upon an affidavit sworn by No. 230535 SP Erastus Gichohi the officer who investigated the case. He deposed that a report was made at the police station in relation to making a document without authority. The document which purported to be a Title Deed in respect of Land Parcel No. **Machakos/ Nguluni/774. The reportee was Peter Mwaka Muthini** (1<sup>st</sup> interested party).

9. Investigations carried out established that the land in issue

was a subject of **Succession Cause No. 667 of 1984 (Nairobi)** and was in the name of Paul Muthiani Musau, deceased. The ex parte applicants were administrators.

10. The interested parties applied for revocation of grant – the grant was temporarily suspended on 15<sup>th</sup> December 2009. Despite the order of the court, the ex parte applicants proceeded to apply for transfer of transmission of the land into their names. The deed was issued on 9<sup>th</sup> September 2011.

11. Further investigations established that Kawinzi Paul Muthiani entered into a land sale agreement with one Serah Wangari on 10<sup>th</sup> January 2012 whereby he disposed of five (5) acres of land being part of the Asset - Machakos/Nguluni/774. Evidence gathered established an offence known in law that culminated into institution of the criminal case.

12. The 1<sup>st</sup> interested party filed a replying affidavit whereby he averred that the ex parte applicants obtained a grant of representation of the estate of the deceased on 9<sup>th</sup> November 2004 fraudulently. The grant was subsequently declared null and void. It was later established that the ex parte applicants conspired to take a title that belonged to the Estate of the deceased. They reported the matter to the police.

13. The 2<sup>nd</sup> Interested Party stated in reply that the ex parte applicants on obtaining the grant assumed that they were the only dependants and beneficiaries of the Estate of the deceased. They have intermeddled with the Estate of the deceased. Therefore they should defend themselves in court.

14. In reply thereto the ex parte applicants stated that the title deed in question was issued on the strength of the grant. The agreement of sale was premised on the survey and distribution that is still in process and the interested parties have also sold several acres from the estate per the information they had.

15. The application was canvassed by way of written submissions which I have duly considered.

16. Issues raised by the ex parte applicants herein emanate from a Succession Cause where the ex parte applicants and interested parties herein were beneficiaries. A grant of representation was issued in respect of the Estate of Paul Muthiani Musau (deceased). The ex parte applicants were appointed as trustees of each house. Thereafter the grant was revoked on the 9<sup>th</sup> November 2004 and a fresh one issued where four (4) administrations were appointed the 1<sup>st</sup> interested party was appointed as the 4<sup>th</sup> administrator. The administrators were to hold the estate in trust for other beneficiaries.

17. On the 9<sup>th</sup> September 2011, the ex parte applicants caused a title deed to be processed. It was issued in their names. The name of the 1<sup>st</sup> interested party was omitted as he was not involved in the process. He subsequently reported the matter to the police. It is not denied by the Ex parte applicants that they acted by having the land transferred to them but they argue that they acted pursuant to legal court orders. This in their opinion was neither fraudulent nor a criminal act. Therefore, criminal proceedings instituted against them were a waste of time.

18. Further, they argued that they had even entered into a consent to return the documentation of registration for re-issuance to all the four (4) administrators of the Estate where after the criminal proceedings would be withdrawn.

19. Charges preferred in the criminal case are making a document without authority and forgery. The document in issue is Title No. Machakos/Nguluni/774, an asset forming part of the Estate of the deceased, that was obtained without the knowledge of the 4<sup>th</sup> administrator (1<sup>st</sup> Interested Party) preferring charges against them was in accordance with the law.

20. When it comes to issuance of orders prohibiting a subordinate court from continuing with a criminal trial, courts have been reluctant to seize and hold constitutional powers of the Office of the Director of Public Prosecutions to conduct proceedings. In the case of **George Joshua Okungu and another vs Chief Magistrate's Court – Anti-corruption court at Nairobi and another (2014) eKLR** which is persuasive it was stated thus:-

***“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 good defence for halting those proceedings. That a petitioner 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 bonafide since that defence is always open to the petitioner in those proceedings.”***

21. In the instant case I am being asked to prohibit the office of the DPP to continue with the criminal proceedings and the ex parte applicants have not demonstrated that the charges were trumped up. Evidence placed before the court suggests that there has been intermeddling with the estate of the deceased prior to the same being distributed.

22. In considering its discretion to issue or not the order of prohibition this court must take into account the need of good administration. It has not been demonstrated that any provision of the law has been contravened. There is nothing to suggest that the discretion seized of the 2<sup>nd</sup> respondent has been abused therefore. The innocence of the ex parte applicants can only be determined unless the criminal case is heard. In deciding to charge the ex parte applicants the respondents did not act in excess of their jurisdiction or in breach of rules of natural justice. In the premises the order of certiorari sought cannot issue.

23. In the result I find the application lacking merit. The same is dismissed with costs to the respondents and interested parties.

24. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 28<sup>th</sup> day of JULY, 2015.**

**L.N. MUTENDE**

**JUDGE**