



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC CIVIL APP. NO. 384 OF 2014

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF; CERTIORARI, PROHIBITION AND MANDAMUS**

AND

IN THE MATTER OF CRIMINAL CASE 2779 OF 2014 AT KIAMBU MAGISTRATES COURTS

AND

**IN THE MATTER OF DIRECTIONS ISSUED BY HON. D. K. MOCHACHE –PM ON 17TH
SEPTEMBER 2014**

AND

**IN THE MATTER OF VIOLATION OF THE EX PARTE APPLICANTS CONSTITUTION
RIGHTS: ARTICLES 22, 49, 50 CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF SECTION 129, 353 & 357 OF THE CRIMINAL PROCEDURE CODE

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

EX-PARTE: AHMED CHEGE GIKERA

HENRY WAINAINA WAKI HORO

JUDGEMENT

1. By a Notice of Motion dated 22nd October, 2014, the applicants herein, **Ahmed Chege Gikera**

and **Henry Wainaina Wakihoro**, seeks the following orders:

1. **That orders of Certiorari to remove to this court to quash the proceedings of criminal case 2779 of 2014 at Kiambu magistrates court dated 17th September 2014, Republic Vs Ahmed Chege Gikera & Another, and an order prohibiting and further proceedings in of criminal case 2779 of 2014 at Kiambu magistrates court, Republic vs. Ahmed Chege Gikera & Another.**
 2. **Costs of this application.**
2. The application was supported by an affidavit sworn by the applicant on 22nd October, 2014.
 3. According to the applicant, there exists a leadership wrangle in the Githunguri Constituency Ranching Company within which there is a ruling pending before **Hon, Mutungi, J.** However, in the meantime one faction continues to vandalise the property of the company necessitating the holding of a special general meeting.
 4. It was disclosed that whereas the shareholders met and discussed the problems of the company on 16th August 2014, the complainant herein in cahoots with the OCS Ruiru commenced criminal proceedings with the intention of intimidating shareholders and in total disregard of court orders continue to take sides.
 5. According to the deponent Criminal Case 2779 of 2014 at Kiambu Magistrates courts, amounts to an abuse of the criminal justice system to settle both known and unknown personal scores.
 6. Although the respondents were given an opportunity to respond to the application, no such response was filed. Consequently the applicants' averments remain largely uncontroverted.
 7. The law however is that if the applicant demonstrates by way of credible evidence that the criminal proceedings that the police or the Director of Public Prosecutions intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.
 8. 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...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.”

9. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for

the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer.....”

10. In Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703, it was held:

“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 overawe 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...”

11. In this case, it is contended which contention is not died that there exists civil proceedings in respect of the same subject matter.

12. **Majanja, J** in Petition No. 461 of 2012 – **Francis Kirima M’ikunyua & Others vs. Director of Public Prosecutions**, expressed himself as follows:

“It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State’s coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent.”

13. I however appreciate that the mere fact that there are civil proceedings pending or that the cause of action can be subject of civil proceedings does not bar criminal proceedings from being commenced where it is shown that a criminal offence has been committed. Therefore the applicant is not permitted to use the pending civil proceedings to commit criminal offences and where that happens the Court would not bar the applicant from being prosecuted. In other words the existence of civil proceedings is not a passport for commission of criminal offences.

14. In this case however, the Respondents In Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer...In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute...It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the

section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings....”

15. In this case, in the absence of a replying affidavit the averment that the Complainant herein in cahoots with the OCS Ruiru commenced criminal proceedings with the intention of intimidating shareholders cannot be wished away. To commence criminal proceedings for such purposes must be frowned upon by the Court and must be nipped in the bud. Such motives are not the legally recognised motivation for commencement of criminal proceedings and amount to an abuse of the criminal process
16. In the premises just as was held in Petition No. 461 of 2012, judicial resources are not infinite and judges and magistrates have limited time to allocate to each and every case that comes before them and give each case such attention as meets the Constitutional objective of dispensing justice without delay. A multiplicity of cases, dealing with the same parties and issues, are a waste of judicial resources and impose direct and indirect costs on the parties and the body politic. I further agree that continued criminal proceedings in light of the existing court proceedings revolving around the suit property and between the same or substantially the same parties or parties claiming through them is an abuse of the court process in these circumstances and further action on that front must be halted.
17. Accordingly, I hereby issue an order of Certiorari to removing into this court the proceedings of criminal case 2779 of 2014 at Kiambu Magistrates Court dated 17th September 2014, **Republic vs. Ahmed Chege Gikera & Another** which proceedings are hereby quashed.
18. I further issue an order prohibiting further proceedings in of criminal case 2779 of 2014 at Kiambu Magistrates Court, **Republic vs. Ahmed Chege Gikera & Another**.
19. As the dispute is between shareholders of the company the subject of these proceedings which dispute still remains unresolved, each party will bear own costs of this application.

Dated at Nairobi this 28th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Odhiambo for Miss Kihara for the Respondent

Cc Patricia