REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 34 OF 2013

REPUBLIC .....APPLICANT

VERSUS

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

INSPECTOR GENERAL,NATIONAL POLICE SERVICE .....2ND RESPONDENT

DIRECTOR, CRIMINAL INVESTIGATIONS DEPARTMENT.....3RD RESPONDENT

LAW SOCIETY OF KENYA .....1ST INTERESTED PARTY

CONSTANTINE GEORGE SPHIKAS .....2ND INTERESTED PARTY

DEBORAH ACHIENG ADUDA .....3RD INTERESTED PARTY

FLORENCE SEYANOI KIBERA .....4TH INTERESTED PARTY

EX-PARTE

GEORGE PETER OPONDO KALUMA

JUDGEMENT

The ex-parte Applicant George Peter Opondo Kaluma has through the notice of motion dated 14th February, 2012 moved this Court for:

> **"a. AN ORDER OF PROHIBITION prohibiting the Respondents by themselves, subordinates or otherwise howsoever from harassing, arresting, bringing criminal charges or prosecuting the Applicant in MILIMANI CRIMINAL CASE NO. 111 of 2013: REPUBLIC VS GEORGE PETER OPONDO KALUMA or on matters relating to the Applicant's work as an Advocate of the High Court of Kenya.**
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> **b. AN ORDER OF CERTIORARI to remove to this Honourable Court to be quashed the charges brought by the Respondents against the Applicant in MILIMANI CRIMINAL CASE NO. 111 of 2013: REPUBLIC VS GEORGE PETER OPONDO KALUMA and such other**

case as may be brought touching on the Applicant's work as an Advocate of the High Court of Kenya.

c. Costs."

The application is supported by grounds on its face. It is also supported by the statutory statement and the verifying affidavit of the Applicant filed together with the chamber summons application for leave on 30th January, 2013.

The 1st, 2nd and 3rd respondents are the Director of Public Prosecutions, the Inspector General of Police and the Director of Criminal Investigations Department. Initially, the only interested party was the Law Society of Kenya (LSK). Subsequently, the complainants in the criminal trial which the Applicant seeks to quash and prohibit were enjoined as interested parties. As a result, the LSK became the 1st Interested Party and Constantine George Sphikas and Deborah Achieng Aduda became the 2nd and 3rd interested parties. Florence Seyanoi Kibera was later enjoined to these proceedings as the 4th Interested Party.

According to the statutory statement, the grounds upon which the Applicant seeks relief are:

a. **The Respondents have threatened to charge the Applicant in MILIMANI CRIMINAL CASE NO. 111 OF 2013: REPUBLIC VS GEORGE PETER OPONDO KALUMA; without reasonable cause/basis.**
b. **The threatened prosecution of the Applicant is purposed to intimidate the Applicant in the execution of his duties as an Advocate of the High Court.**
c. **The charge sought to be quashed/prohibited is solely purposed to embarrass the Applicant and undermine his election for the National Assembly seat he is currently destined to secure.**
d. **The charge and threatened prosecution are contrary to law and public policy for seeking to militate against an individual's constitutional right to legal representation.**
e. **The intended prosecution is malicious, unfair and solely intended to harass and intimidate the Applicant in his professional business as an Advocate.**
f. **The intended criminal prosecution is contrary to law and public policy and is an open abuse of the prosecutorial powers vested in the office of the Director of Public Prosecutions and the powers vested in the Criminal Investigations Department.**
g. **The intended charge is unreasonable, does not take into account relevant considerations including the law governing criminal process; and, is a flagrant abuse of the criminal justice process to achieve extraneous ends.**
h. **The decision to charge/prosecute the Applicant is based on extraneous, irrelevant and improper/corrupt considerations, actuated by bad faith, contrary to the Applicant's legitimate expectations, ultra vires, unlawful and null and void.**
i. **On the whole, the decision is capricious, unfair and has the deliberate consequence of shattering the Applicant's reputation, standing, career, life and livelihood without cause or justification.**

From the Applicant's point of view, as presented in his verifying affidavit sworn on 30th January, 2013, the facts giving rise to his prosecution are as follows. On or about 5th March, 2012 an old widow known as Dorothy Seyanoi Moschion Kibera (Mrs. Kibera) and one Constantine George Sphikas (the 2nd Interested Party) approached the firm of Lumumba Mumma and Kaluma Advocates in which the Applicant is a partner and requested the Applicant to witness a lease agreement which Mrs. Kibera claimed had been drawn by the 2nd Interested Party. The Applicant witnessed the lease agreement.

After the witnessing of the lease agreement, the parties requested for the services of the firm's clerk to get the lease agreement stamped and registered. They paid the requisite stamp duty and fees. The lease agreement was presented for stamping and registration. It was returned duly stamped but it was not registered on the ground that it had not been endorsed by a firm of advocates as required by law.

Through a letter dated 19th June, 2012 Mrs. Kibera and the 2nd Interested Party were informed that the

lease agreement had not been registered. They were asked if they wanted endorsement by the firm of Lumumba Mumma and Kaluma Advocates in order to enable the registration of the lease agreement. The 2nd Interested Party instead went to their office and took away the documents saying the said firm could not endorse the documents since they were not his advocates and that he was going to carry out the registration himself.

On 7th June, 2012 Mrs. Kibera went to the Applicant's firm seeking legal representation in respect of a transaction for sale of one acre of L.R. No. 5892 whose total acreage was 35.5. The parcel of land is in Karen. She informed the advocates that an agreement for sale had been drawn on 16th February, 2012 by Wamiti Njagi and Associates who had acted as advocates for both parties. She further explained that she needed a new advocate to represent her in the transaction as the purchasers had debriefed Wamiti Njagi and Associates and appointed Lumumba and Lumumba Advocates and that the said Wamiti Njagi and Associates had advised that they could not continue representing her having been the joint advocates for the parties in the transaction. The Applicant avers that was the first time he became aware of the sale transaction and the parties involved therein. The Applicant also avers that no money including legal fees was paid to his firm under the transaction.

The firm agreed to represent Mrs. Kibera and wrote to Lumumba and Lumumba Advocates for the purchasers informing them of Mrs. Kibera's instructions and the need to progress the matter to conclusion. Correspondences were exchanged the last of which was a letter written by Lumumba Mumma and Kaluma Advocates rescinding the agreement for breach by the purchasers of the terms relating to payment of the balance of the purchase price. Subsequently, on 10th July, 2012, the 2nd Interested Party filed **Milimani Civil Suit No. 340 of 2012** against Mrs. Kibera claiming monies allegedly paid in rent and seeking orders restraining his eviction from the leased property. The Court issued an order by consent stopping the eviction of the 2nd Interested Party pending the hearing of an application by Mrs. Kibera seeking the striking out of the suit for being an abuse of the court process.

The Applicant states that on 1st August, 2012 the 2nd Interested Party and Deborah Achieng Aduda (the 3rd Interested Party) caused **Milimani Criminal Case No. 1133 of 2012, REPUBLIC v FLORENCE SEYANOI KIBERA; Milimani Criminal Case No. 1134 of 2012, REPUBLIC v FLORENCE SEYANOI KIBERA AND JOHN WAMITI NJAGI; Milimani Criminal Case No 1519 of 2012 REPUBLIC v FLORENCE KIBERA**; and **Milimani Criminal Case No. 1260 of 2013 REPUBLIC v FLORENCE KIBERA,** to be brought against Mrs. Kibera and her former advocate Mr. John Wamiti Njagi.

The Applicant avers that in **Milimani Criminal Case No. 1133 of 2012** the 2nd Interested Party was claiming that Mrs. Kibera had obtained from him Shs.6,900,000/= by false pretences.This was despite the fact that he had sworn an affidavit in **Milimani Civil Suit No. 340 of 2012** to the effect that he had paid Mrs. Kibera the money in question as rent.

The Applicant asserts that their firm decided to represent Mrs. Kibera in the criminal cases on *pro bono* basis. On the date of plea the 2nd Interested Party intimated that he had connections with Mr. Ndegwa Muhoro the Director of Criminal Investigations Department and the said Director had assigned him CID officers to ensure that he got Mrs. Kibera's 35 acres of land in Karen. The 2nd Interested Party allegedly further claimed that he had spent over Kshs.20 million on his connections and Mrs. Kibera should transfer her land to him or face dire consequences. The 2nd and 3rd interested parties also threatened the Applicant for representing Mrs. Kibera. The Applicant averred that the 2nd Interested Party claimed that he had paid the Director of Public Prosecutions Mr. Keriako Tobiko Kshs.5,000,000/= to bring such criminal charges as he wished against any advocate seeking to represent Mrs. Kibera in the criminal cases.

The Applicant also averred that the 2nd Interested Party had taken over the Criminal Investigations Department and the Prosecution Office, headed by one Mr. Towett, at Milimani Chief Magistrate's Court so as to execute his scheme against Mrs. Kibera. The Applicant indicated that Mrs. Kibera had

filed **Constitutional Petition No. 314 of 2012** which was awaiting the determination of the Court at the time the Applicant commenced these proceedings. The Applicant stated that the 3rd Interested Party later lodged a complaint against him with the Law Society of Kenya (LSK) and since the complaint was full of falsehoods he sued her and others for defamation in **Milimani High Court Civil Case No. 569 of 2012, PETER KALUMA V CONSTANTINE GEORGE SPHIKAS & 2 OTHERS.**

The Applicant averred that on 24th January, 2013 at around 4.00 p.m. he met CID officers outside Anniversary Towers who asked him to accompany them to CID headquarters. At the CID headquarters, the officers informed him that they had instructions from the DPP to enjoin him as a co-accused in **Milimani Criminal cases No. 1133 of 2012** and **1134 of 2012.** He was asked to attend Court on 25th January, 2013 but he fell ill and did not attend Court. He later learned that his alleged criminal prosecution had been widely reported in the newspapers and was being used as a tool against his campaign for Homa Bay Town constituency parliamentary seat. The Applicant contended that his prosecution is unfair and baseless and is intended to embarrass him for performing his duties as an advocate.

The respondents opposed the application through a replying affidavit sworn on 25th February, 2013 by a police officer by the name Mark Ndiema. The deponent introduced himself as the investigating officer in the criminal cases. He averred that the 2nd and 3rd interested parties lodged a complaint with the CID alleging that they had been defrauded by Mrs. Kibera. He averred that according to the report he received, Mrs. Kibera had entered a sale agreement dated 6th February, 2012 in which she agreed to sell one acre from L.R No. 5892/22 to the 3rd Interested Party. A disagreement ensued thereafter and Mrs. Kibera and John Wamiti Njagi were charged in Court. He averred that investigations revealed that the Applicant had colluded with Mrs. Kibera in misleading the 2nd and 3rd interested parties that the property was free of encumbrance and yet he knew that Cooperative Bank had a charge over the property.

Further, the investigating officer states that even after entering the sale agreement with the 3rd Interested Party, Mrs. Kibera also went ahead and leased the same parcel of land through an agreement dated 5th March, 2012 to the 2nd Interested Party without revealing to him the existence of the said sale agreement. By the time the 2nd Interested Party discovered the existence of the sale agreement between Mrs. Kibera and the 3rd Interested Party, he had already paid Kshs.6,900.000/= to Mrs. Kibera as rent.

Mr. Ndiema avers that Mrs. Kibera made the two agreements in respect of the same parcel of land and obtained money from the 2nd and 3rd interested parties with the knowledge and assistance of the Applicant who knew Mrs. Kibera had no intention of selling the suit property to the 3rd Interested Party or leasing the same to the 2nd Interested Party. Mr. Ndiema contends that the Applicant assisted Mrs. Kibera to obtain money from the 2nd and 3rd interested parties fraudulently. He avers that the lease agreement between Mrs. Kibera and the 2nd Interested Party was drawn by the Applicant and the 2nd Interested Party paid him Kshs.313,000/= as fees.

It is Mr. Ndiema's case that the 2nd Interested Party later became apprehensive and instructed the firm of Oyomba & Company Advocates to push for the finalization of the transaction. Mr. Ndiema contends that the Applicant was aware of payment of rent to Mrs. Kibera as he witnessed the receipt of rent of Kshs.3 million by Mrs. Kibera on 28th March, 2012. Mr. Ndiema refuted the allegations of the Applicant that the DPP had been influenced by the 2nd Interested Party so as to charge the Applicant. He asserted that the DPP acted within his constitutional mandate and treated the Applicant fairly.

Through a replying affidavit sworn on 13th March, 2013 Constantine George Sphikas refuted the allegations made by the Applicant. He averred that it is the Applicant who drafted and witnessed the lease agreement between him and Mrs. Kibera. He stated the Applicant also undertook to register the lease agreement. The 2nd Interested Party averred that he instructed the Applicant and paid the necessary

legal fees. He contended that even as he was entering the lease agreement with Mrs. Kibera, the Applicant knew that the said Mrs. Kibera was in the process of selling an acre of the property in question to the 3rd Interested Party.

The 2nd Interested Party also swore another replying affidavit on 8th July, 2013. This was in response to Mrs. Kibera's affidavit sworn on 31st May, 2013. Mrs. Kibera (the 4th Interested Party) supported the Applicant's case.

For purposes of record, it is noted that Mumbi Ngugi, J delivered judgment in **Petition No. 341 of 2012** and dismissed the petitioners' prayer for prohibition of their prosecution in **criminal case Nos. 1133 of 2012** and **1134 of 2012.**

Under Article 157 (6) of the Constitution the 1st Respondent (DPP) is granted prosecutorial powers in the following words:

> **"(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—**
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> **(*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 clause (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*)."**

The powers should, however, be exercised in compliance with the Constitution and the laws of the country. Although Article 157 (10) of the Constitution provides that the DPP shall not be under the direction or control of any person or authority in exercising his powers, Article 157(11) of the Constitution states that in exercising his powers the DPP **"shall 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"**. This Court therefore has a duty of ensuring that the DPP has applied his powers in accordance with the Constitution. Although the DPP has discretion in deciding whether to prosecute or not to prosecute an alleged offender, the discretion should be exercised legally and reasonably.

In the persuasive decision of the Privy Council in **MOHIT V THE DIRECTOR OF PUBLIC PROSECUTIONS OF MAURITIUS (Mauritius) [2006] UKPC 20 (25 April, 2006)** the decision of the Supreme Court of Fiji in **MATALULU v DPP [2003] 4LRC 712** was cited as outlining the circumstances under which prosecutorial powers could be reviewed:

> **"It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.**
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> **The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written Constitution they are not to be**

treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

1. **In excess of the DPP's constitutional or statutory grants of power-such as an attempt to institute proceedings in a court established by disciplinary law (see s 96 (4) (a)).**
2. **When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion–if the DPP were to act upon a political instruction the decision could be amenable to review.**
3. **In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.**
4. **In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.**
5. **Where the DPP has fettered his or her discretion by a rigid policy – e.g. one that precludes prosecution of a specific class of offences.**

There may be other considerations not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the consideration, to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice."

I am of the view that this Court indeed has the authority to check any abuse of power by the DPP.

Although this Court has supervisory jurisdiction over the exercise of prosecutorial powers by the DPP, the Court should exercise such power in situations where it is clearly shown that the DPP is using his powers unconstitutionally, unlawfully or irrationally. It is always presumed that the DPP is equipped with the skills and tools of analyzing a case and deciding whether the same should be prosecuted or not. An attempt by this Court to analyze the evidence of the witnesses would amount to taking over the legal mandate of the DPP. It would also amount to taking over the power vested on a magistrate's Court to hear and determine certain criminal cases.

The Court of Appeal powerfully put across this message in **MEIXNER & ANOTHER v ATTORNEY GENERAL [2005] 2KLR 189** when it stated that:

"As the learned judge correctly stated, 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 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, we agree with 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. 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 an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. 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."**

As stated by the Court of Appeal in the above cited case, judicial review is about the decision making process and not a review of the decision itself.

The parties have by way of affidavits placed a lot of information before this Court. The affidavits give contradictory accounts of what happened. An attempt by this Court to reach a finding on the evidence will amount to deciding a criminal case on affidavit evidence. It is only the trial court which can make such a decision after hearing the evidence of the witnesses.

The Applicant claims that he has been subjected to double jeopardy since there are civil cases related to the criminal proceedings. The answer to this submission is found in Section 193A of the Criminal Procedure Code (Cap 75) which provides that:

> **"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."**

It should also be noted that in one of the cases, the Applicant alleges he was defamed by the 2nd and 3rd interested parties. He cannot be allowed to use his own case to stall his prosecution.

The Applicant claims that since the 2nd and 3rd interested parties have filed complaints against him before the Disciplinary Committee of LSK, it would be punitive to also subject him to a criminal trial. This argument has no basis. I agree with counsel for the respondents that the proceedings before LSK and the criminal trial are aimed at achieving different outcomes. In fact Section 80 of the Advocates Act (Cap 16) states that the fact that an advocate has been acquitted in a criminal trial is no bar to the institution of proceedings before the Disciplinary Committee. The Advocates Act therefore contemplates a situation where proceedings before the Disciplinary Committee and a trial for criminal offences can go hand in hand.

In any case, the underlying idea in the double-jeopardy principle is that no person should face the might of the state twice over the same facts and offence. I do not think that the Applicant can be protected from answering for private wrongs through the civil process. Likewise, the Applicant who is a member of the legal profession cannot avoid a probe of his professional conduct by the Disciplinary Committee by hiding behind the double-jeopardy principle.

The Applicant's application and the supporting documents are full of allegations which he has not substantiated. He makes serious allegations of corruption against public servants without any iota of evidence. According to the Applicant, all the public officers he has come across are corrupt. He has, however, not placed any evidence before the Court to support his allegations. Had the Applicant adduced evidence of the allegations of bribery, there would be a basis for allowing his application. There is however no evidence placed before the Court to support the Applicant's claim that his prosecution was commenced for extraneous purposes.

From the material placed before the Court, I find that the Applicant has not adduced any evidence to support his claim that any of the respondents acted unconstitutionally, unlawfully, maliciously or unreasonably. The Applicant having failed to establish the grounds for grant of judicial review orders, his application fails.

Even if the Applicant had established grounds for the issuance of judicial review orders, no orders

would have issued because he failed to comply with the mandatory requirement of Order 53 Rule 3(2) of the Civil Procedure Rules, 2010 which provides that:

> **"The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings."**

By the time the Applicant filed this application he already knew that Criminal Case No. 111 of 2013 had been opened for him in the magistrate's court. He ought to have enjoined the magistrate's court in these proceedings but he failed to do so. Any order prohibiting his prosecution ought to be directed at the trial court for implementation. It was therefore necessary to comply with the above cited rule.

The end result is that this matter is dismissed with costs to the respondents, the 2nd Interested Party and the 3rd Interested Party.

Dated, signed and delivered at Nairobi this 31st day of March, 2014

W. KORIR,

JUDGE OF THE HIGH COURT