



**REPUBLIC OF KENYA**

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

**CRIMINAL MISCELLANEOUS APPLICATION NO. 17 OF 2014**

IN THE MATTER OF ALLEGED BREACH OF THE PROVISIONS OF ARTICLE 157(11), 22 & 47  
OF THE CONSTITUTION

**REUBEN MUSYOKI MULI.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**THE PRINCIPAL MAGISTRATE .....RESPONDENTS**

**RULING**

1. The application dated **13<sup>th</sup> January, 2014** is brought by way of Originating Summons pursuant to the provisions of **Article 157(11) 22** and **57** of the **Constitution** and **Section 123** of the **Criminal Procedure Code**.

2. **Reuben Musyoki Muli**, the Applicant seeks; the following orders:-

i. An order of Declaration that the petitioner's constitutional rights have been and are likely to be violated by the prosecution who had withdrawn a charge under **Section 87(a)** of the **Criminal Procedure Code** in Machakos Chief **Magistrate's Court Criminal Case No. 230 of 2012** and subsequently the prosecution has now charged the petitioner with a similar charge based on the facts and same witnesses and using the same exhibits in **Criminal Case No. 1132 of 2013** and this amounts to an abuse of the process of the court and misuse of the prosecutors powers as provided under **Article 157(11)** of the **Kenya Constitution**.

ii. An order of Declaration that the 1<sup>st</sup> respondent by instituting the 2<sup>nd</sup> charge is not exercising his powers constitutionally having regard to the public interest, the interests of the administration of justice and the need to prevent and avoid an abuse of the legal process but the exercise of the powers is meant to enforce civil contractual obligations and to give the complainant an opportunity to recover a civil debt using a criminal process which is unconstitutional.

iii. An order of Declaration that if the prosecution continues to prosecute the petitioner with the new charge, this shall amount to giving the prosecution power to be enforcing civil debts rather that promoting their mandate of prosecuting criminals which shall

be a new mandate not provided by the Kenya Constitution of the law.

3. The application is supported by an affidavit whereby he avers that the charge he faced of obtaining credit by false pretence in **Criminal Case No. 230 of 2012** was withdrawn under **Section 87 (a)** of the **Criminal Procedure Code** and he entered into an arrangement with the complainant whereby he was to settle the debt owing. He paid part of the debt. However, following a disagreement between them. The complainant complained to the police whereby another charge was made against him. Consequently, he was charged in **Criminal Case No. 1132/2013**; no further investigations were recorded prior to him being charged; the charge was instituted to force him pay the debt which is misuse of prosecutorial powers and an abuse of the court which is not in the interest of the administration of justice.

4. In reply thereto, the State Counsel in conduct of the case, **Ms Kefa** deponed that **Criminal Case No. 230 of 2012** was withdrawn pursuant to the provisions of **Section 87(a)** of the **Criminal Procedure Code** after the applicant entered into an agreement with the complainant to pay the outstanding sum of **Kshs. 800,000/=**, an agreement he failed to honour hence charges being reinstated as provided by the law.

5. The application was canvassed by way of written submissions. In his submissions, counsel for the applicant stated that, re-arresting the applicant was actuated by improper motive therefore the trial magistrate should have acted pursuant to the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual, **High Court Practice and Procedure Rules, 2006 (Gicheru Rules)**) by staying the proceedings. He therefore called upon this court to stay the Lower Court proceedings until the constitutional issues raised are dealt with.

6. In response thereto the State Counsel submitted that the Director of Public Prosecutions acted to safeguard the public interest and in the interest of the administration of justice which has met an abuse of the legal process.

7. Further, she stated that reference to the **Gicheru Rules, 2006** was misguided as the rules in operation are the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, **2013 (Mutunga Rules)**. Consequently the trial Magistrate was not obligated to stay proceedings before him. She called upon the court to note that he applicant's intention is to delay justice and subvert the cause of justice.

8. The Director of Public Prosecutions is mandated by the law to institute Criminal Proceedings against any person who commits an offence. He is also seized of powers to discontinue any case. (See **Article 157(6)** of the **Constitution of Kenya, 2010**). In exercising powers under this article, it is mandatory for the DPP to have regard to public interest, interest of administration of justice so as not to abuse legal process (See **Article 157(11)** of the **Constitution**).

9. This is a matter where the applicant had sought an order staying the court proceedings where due to misguidance they alluded to the evidence rules that are now existent as properly argued by the State Counsel.

10. Going to the gist of the matter the applicant was indeed charged in **Criminal Case No. 230/2012, Machakos Subordinate Court** as outlined. The case was withdrawn by the prosecution under **Section 87(a)** of the **Criminal Procedure Code** which provides thus:-

***“87. In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Attorney- General, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal -***

***(a) If it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;”***

11. It is expressly provided that a withdrawal under **Section 87(a)** of the **Criminal Procedure Code** is not a bar to subsequent proceedings. When the application for withdrawal of the case was made the applicant had no objection to it. Infact another angle of argument is introduced by the State where it is argued that the applicant was obliged to adhere to some condition that he deliberately failed to discharge. That notwithstanding, the parties were to adhere to the provisions of the law. Following the withdrawal, the applicant was discharged not acquitted. This means that he could be charged with the same offence based on the same facts. The court has a duty of ensuring that a person who offends the law is prosecuted and he is answerable to the law as provided. (also *see George Taitumu versus the Chief Magistrate's Court, Kibera and others, Petition No. 81 of 2010*).

12. The question to be answered will therefore be whether the Director of Public Prosecutions (DPP) did act in contravention of **Article 157(11)** of the **Constitution, 2010**? Were the powers abused? Was the DPP actuated by improper motive?

13. In exercising the powers of withdrawal of the charge, the DPP is expected to have regard to public interest and the administration of justice. There must be no abuse of legal process.

14. By ensuring public interest is considered, it means the well-being of the general public must be considered. The applicant herein is alleged to have obtained credit by false pretenses. Subsequently he issued a bad cheque to make in an endeavour to meet his obligations. This means that if prosecuted by the State, he will be answerable to charges in his personal capacity. If the action of the State is declared unconstitutional, it will be for the benefit of the applicant. It will not be for the wellbeing of the public.

15. The administration of justice envisaged by **Article 157(11)** of the **Constitution** would behoove a court to consider facts of each case in reaching a decision whether legal process is being abused or not.

16. This is a case where the applicant is championing his own -interest as an individual. If orders sought are granted he will benefit in that he will avoid the criminal process that he is answerable to. In the premises no legal process has been abused.

17. From foregoing, the application must fail.

18. Accordingly, it is dismissed.

**DATED, SIGNED and DELIVERED at MACHAKOS this 23<sup>RD</sup> day of SEPTEMBER, 2014.**

**L.N. MUTENDE**

**JUDGE**