



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 398 OF 2013**

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT

CHIEF MAGISTRATES'S COURT

KIBERA LAW COURT NAIROBI.....2<sup>ND</sup> RESPONDENT

AND

COMMISSIONER OF LANDS .....INTERESTED PARTY

EX-PARTE

JOSEPH GATHUKU KAMUIRU

MARY NJERI NJUKU

**JUDGMENT**

Joseph Gathuku Kamuiru and Mary Njeri Njuku, the 1<sup>st</sup> and 2<sup>nd</sup> ex-parte applicants have through the notice of motion dated 18<sup>th</sup> November, 2013 prayed for orders:

- “1. **THAT** an Order of Certiorari do issue to remove into this Honourable Court and quash the proceedings against Joseph Gathuku Kamuiru and Mary Njeri Njuku in Criminal Case No. 6283 of 2012 at Kibera Law Courts.
2. **THAT** an Order of Prohibition do issue directed to the Director of Public Prosecutions preventing him by himself or any other person, body or authority under his direction and/or command from continuing with the prosecution of Criminal Case No. 6283 of 2012, Kibera Law Courts in its present form or in any intended variation thereof akin to the charge preferred in the criminal case aforesaid.
3. **THAT** the costs of this application be provided for.
4. **THAT** any other order or relief as this Honourable Court may deem fit and expedient to

**grant.”**

The application is supported by a statement of facts, the verifying affidavits of the applicants plus exhibits annexed to the affidavits.

The Director of Public Prosecutions (DPP) is the 1<sup>st</sup> Respondent whereas the Kibera Chief Magistrate's Court is the 2<sup>nd</sup> Respondent. The Interested Party is the Commissioner of Lands and is listed as the complainant in the criminal trial.

In their detailed account, the applicants stated that Brookside Studios Ltd is the registered proprietor of L.R. No. 209/11803/3 comprised in a grant registered as number I.R. 70835/3. On the other hand, Yellow Horse Inns Ltd is the registered proprietor of L.R. No. 209/11803/2 comprised in a grant registered as number I.R.112602/1. Further, that grant No. I.R. 112602/1 registered in the name of Yellow Horse Inns Ltd was issued on 25<sup>th</sup> August, 2008 pursuant to a surrender of the previous grant registered as No I.R. 70834/1 as a result of erroneous description of the parcel of land as L.R. No. 209/11083/2 instead of as L.R. No.209/11803/2.

The applicants aver that sometimes in 2009 some people with the support of officers from the City Council of Nairobi and the Office of the Commissioner of Lands started claiming ownership of the parcels of land on allegation that their titles were forgeries. As a result of the said claims, the applicants' companies filed **ELC No. 346 of 2009** and **ELC No. 347 of 2009** against M/s Nduachi Company Ltd, City Council of Nairobi and John Kich Ayiecho for fraudulently attempting to alienate the said parcels of land. Injunctions were issued *ex parte* but after *inter partes* hearing the same were dismissed by the High Court on 30<sup>th</sup> November, 2010.

The companies proceeded to the Court of Appeal vide **Civil Application Nos. NAI 281 of 2010 (UR/198/2010)** and **NAI 280 of 2010 (UR/197/2010)** and obtained injunctive orders on 4<sup>th</sup> March, 2011 pending the hearing and determination of **Civil Appeal No. 116 of 2011** and **Civil Appeal No. 115 of 2011**. As the said appeals were pending in the Court of Appeal the same officers from the City Council of Nairobi and the Office of Commissioner of Lands colluded with another party called A. A. Kawir Transporters Ltd and attempted to issue it with two new grants over the same parcels of land. On getting wind of this new development, the applicants instituted **ELC No. 746 of 2011** and **ELC 747 of 2011** against A.A. Kawir Transporters Ltd, Philma Farm Produce and Suppliers Ltd, the City Council of Nairobi, the Commissioner of Lands and the Attorney General. The applicants also filed applications for injunction in the said matters. As the matters were pending in the High Court, the applicants were arrested and charged with the offence of forgery contrary to Section 349 of the Penal Code in **Kibera Chief Magistrate's Court Criminal Case No.6283 of 2012**.

It is the applicants' case that the criminal trial is an abuse of the process of the court as it is being used to harass and intimidate them into surrendering their companies' claims of ownership of the said parcels of land. It is the applicants' case that some officers of the office of the 1<sup>st</sup> Respondent are colluding with A.A. Kawir Transporters Ltd in their prosecution and this amount to abuse of power by the 1<sup>st</sup> Respondent. The applicants contend that their prosecution is done in bad faith as there is no evidence to sustain their prosecution.

The applicants' case is that the grants in question were legally and lawfully issued to their companies in March, 1996 by the then Commissioner of Lands, Mr Wilson Gachanja. According to the applicants, the said Mr Wilson Gachanja has sworn an affidavit stating that he has never been called upon to record a statement with the police for purposes of their criminal trial. It is the applicants' case that failure to record the statement of the former Commissioner of Lands points to bias and ulterior motive in their prosecution.

The applicants assert that the former Commissioner of Lands has sworn an affidavit to confirm that the signatures are his and that Mr Antipas Nyanjwa, a document examiner has sworn an affidavit confirming that the signatures on the grants are genuine.

The applicants contend that they have never been called upon to produce the original grants of the said parcels of land to authenticate the signatures appearing therein and this only confirms that their prosecution is being done in bad faith.

The applicants contend that the disputes over the ownership of the parcels of land are matters for resolution through civil suits and not the criminal process. They submit that their prosecution is meant to harass and intimidate them so as to enable A.A. Kawir Transporters Ltd to fraudulently and illegally acquire the parcels of land in question.

The 1<sup>st</sup> Respondent opposed the application through the replying affidavit of Corporal Joseph Kiragu sworn on 21<sup>st</sup> January, 2014. In the said affidavit Corporal Joseph Kiragu avers that he is the lead investigator in the criminal trial facing the applicants. He averred that the complaint leading to the arrest and prosecution of the applicants was made by the Deputy Commissioner of Lands, Mr P. K. Kahuho on 2<sup>nd</sup> December, 2009 in respect of the applicants' acquisition of title deeds numbers I.R. 112602 and I.R. 70825 as it was alleged that the allocation therein was questionable.

As a result of the investigations, it emerged that vide allotment Ref. No. 98112/11 of 26<sup>th</sup> August, 1992 the Commissioner of Lands allocated the City Council of Nairobi approximately 50 acres of land situate along Mombasa Road to be used as a parking yard for oil tankers. Consequently, that particular parcel of land could not be allocated to any other party without the written approval of the City Council of Nairobi. Investigations also revealed that title deed numbers I.R. 112602 and I.R. 70835 formed part of the 50 acres of land allocated to the City Council of Nairobi.

From the investigations, it emerged that the applicants' allocations, unlike the allocations for the other sub-divisions of the same piece of land, had not received the approval of the City Council of Nairobi. The said parcels of land therefore remained the property of the City Council of Nairobi and it was on this basis that the City Council of Nairobi issued a temporary occupation licence to Nduachi Company Ltd.

The investigating officer avers that the allocation of the said titles by the then Commissioner of Lands Mr Wilson Gachanja was curious since the Commissioner knew of the procedures for allocation of property belonging to the City Council of Nairobi. The investigations also disclosed that the signatures on the title deeds and the specimen signatures of the Commissioner of Lands were not in agreement.

Further, that the 1<sup>st</sup> Respondent upon independently reviewing and analysing the evidence in the investigations file directed the charging of the applicants for the offence of forgery.

Corporal Joseph Kiragu asserts that under Article 157(6) of the Constitution the 1<sup>st</sup> Respondent, among other functions and duties, exercise state powers and functions of prosecution which entails the institution, undertaking, taking over, continuance and or termination of criminal proceedings. That in doing so, the 1<sup>st</sup> Respondent is required by Article 157(11) of the Constitution to have regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process. The 1<sup>st</sup> Respondent is also required to uphold the Constitution and apply the national values and principles of governance enshrined in Article 10 of the Constitution. The 1<sup>st</sup> Respondent is also enjoined to respect, observe, protect, implement, promote and uphold the rights and freedoms in the Bill of Rights.

It is the 1<sup>st</sup> Respondent's case that the applicants have not demonstrated that the 1<sup>st</sup> Respondent exceeded his powers or infringed the Constitution in making the decision to charge them. Further, that the Court should exercise extreme caution as concerns the execution of the constitutional authority by the 1<sup>st</sup> Respondent.

The only question to be answered in this case is whether the applicants have met the threshold for the prohibition of a criminal trial. In **CAPE HOLDINGS LIMITED v ATTORNEY GENERAL & ANOTHER [2012] eKLR**, Warsame, J (as he then was) captured the applicable principle when he stated that:

**“My understanding of the law is that the responsibility to investigate, determine the credibility of the complaint and prosecution is solely left for the police under the direction and control of the Director of Public Prosecution. The predominant factor being that they must act in accordance with the law and so long as they do not exceed the limits, then a court should not prohibit the prosecution of an individual. The investigation of a criminal offence or complaint cannot be easily prohibited or stopped unless there is credible and reasonable evidence to show the same is mounted for ulterior purposes or objectives.”**

That the role of judicial review in criminal trials is limited was clearly expressed by the Court of Appeal in **MEIXNER & ANOTHER v ATTORNEY GENERAL [2005] 2KLR** when it observed that:

**“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.”**

However, the Constitution does not give the Office of the Director of Public Prosecutions unlimited powers. The Constitution is clear that in exercise of his powers the 1<sup>st</sup> Respondent **“shall have regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”** – Article 157 (11) of the Constitution.

The question that follows therefore is: What amounts to abuse of power by the 1<sup>st</sup> Respondent? The answer is found in a plethora of authorities.

In **KURIA & 3 OTHERS v ATTORNEY GENERAL [2002] 2KLR 69** the Court stated that:

**“In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, I do not find any greater duty for the court than to ensure that it maintains its integrity, the 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 utilized. As stated time and time again, justice must not only be done but must be seen to be done. Because the nature of the judicial review 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 illegalities and ulterior motives.”**

In **MOHIT v THE DIRECTOR OF PUBLIC PROSECUTIONS OF MAURITIUS (MAURITIUS) [2006] UKPC 20** (25 April 2006) the Privy Council recognized that the orders of judicial review are

available to an applicant in criminal proceedings. The Court went ahead and cited the decision of the Supreme Court of Fiji in **MATALULU v DPP [2003] 4LRC 712** in which grounds for review of the exercise of prosecutorial powers were enumerated. The Supreme Court of Fiji is quoted to have stated that:

**“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.**

**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.”**

The powers of the DPP are found in the Constitution and statute and they should be exercised within the constitutional and statutory provisions. In view of the source of the powers of the DPP, this Court has the authority to ensure those powers are exercised constitutionally and lawfully.

In **THE COMMISSIONER OF POLICE & THE DIRECTOR OF CRIMINAL INVESTIGATION DEPARTMENT & ANOTHER v KENYA COMMERCIAL BANK LIMITED & 4 OTHERS [2013] eKLR**, the Court of Appeal reaffirmed the fact that the exercise of prosecutorial power by the Director of Public Prosecutions is subject to the supervision of this Court. The Court noted that:

**“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it**

would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See Githunguri V. Republic [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R. [2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR 69.”

Whether a prosecution will be quashed or prohibited will therefore depend on the facts of each case. The existence of civil proceedings arising out of the same set of facts is, however, not in itself a bar to commencement or continuation of criminal proceedings. Section 193A of the Criminal Procedure Code, Cap 75 is clear on this.

In KURIA & 3 OTHERS, supra, it was stated that:

**It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused. There is a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or of even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same set of facts”**

The question the court will therefore ask is whether an applicant has demonstrated that a prosecution is contrary to the public interest, the interests of the administration of justice or amounts to an abuse of the legal process.

It is agreed by all the parties that the signatures the applicants are alleged to have forged are that of the former Commissioner of Lands Mr Wilson Gachanja. The applicants told the Court that the said Mr Wilson Gachanja has sworn an affidavit confirming that he signed the grants in respect of the parcels of land in question. The handwriting expert Mr Antipas Nyanjwa has also disowned his report in which he had indicated that the signatures in the grants did not belong to Mr Wilson Gachanja.

In fact the investigating officer Corporal Joseph Kiragu concedes in the replying affidavit:

**“9. THAT there are new developments in the case whereby the forensic document examiner, Mr. Antipas Nyanjwa whose report formed part of the evidence we relied upon and former Commissioner of Lands Wilson Gachanja have now confirmed that the signatures on the two**

**titles in question are genuine, thereby creating some doubt in our case.**

**10. THAT the new development has prompted the Director of CID to recall our duplicate police file and forward the same to the 1<sup>st</sup> Respondent seeking a fresh review and analysis of the case which is on-going.”**

The basis of the charges against the accused persons is that they forged the signatures of Mr Wilson Gachanja. Once it is demonstrated that this is not true, then the foundation of the prosecution's case collapses and there is no need to continue with the trial.

The applicants allege that their prosecution was commenced in bad faith. They are right. They have demonstrated that their prosecution was commenced without the statement of the person whose signature they are alleged to have forged.

Evidence of bad faith and ulterior motive is also found in the covering report of the officer who investigated the case. In the undated report, A. S. Kuria concluded that:

**“In the view of the evidence in the file, I therefore recommend the Directors of M/s Yellow Horse Inns Limited and M/s Brookside Studios Ltd be charged with the offence of forgery contrary to section 349 of the Penal Code for the two titles L.R. 209/11803/2 (IR 112602) and L.R. 209/11803/3 (IR 70835) and also Philip Indiaka Keya and Martin Muthui Kangara be charged for the same offence for title No. 209/11803/2 and the City Council of Nairobi be advised to allocate the land as per letter of allotment ref. 14449 & 44 dated 2<sup>nd</sup> November, 1995 to A.A. Kawir Transporters”.**

**(Emphasis mine)**

By recommending that the land in dispute be allocated to A.A. Kawir Transporters Ltd, A. S. Kuria crossed the boundaries of an investigating officer into the jurisdiction of the courts which had already been seized with the issue of the ownership of the parcels of land in question. This report clearly reveals that the criminal investigation was aimed at assisting one of the parties in the civil cases acquire the land.

The paradox of the recommendation emerges when one considers that the purported allocation to the applicants is alleged to have been done without the approval of the City Council of Nairobi. This was one of the reasons given for the recommendation of the prosecution of the applicants. In support of the claim that the City Council of Nairobi had not approved the allocation, a letter dated 3<sup>rd</sup> November, 2009 was exhibited. That letter which was addressed to the Commissioner of Lands by the Acting Chief Valuer of the City Council of Nairobi states in part:

**“RE: IR NO'S 209/11803/2 (IR NO. 70834) AND 209/11803/3 (IR NO. 70835)**

**The above matter refers.**

**The two plots above form part of a parcel that measures 50 Acres, unsurveyed, that was granted to the Nairobi City Commission on 25<sup>th</sup> August, 1992 for a term of 99 years with effect from 1/5/1984, vide letter of allotment Ref. No. 98112/11 a copy of which is attached for your ease of reference.**

**Some persons are claiming to have also been granted the above plots and titles issued from your office without any reference to the City Council of Nairobi on 14<sup>th</sup> October, 1996, long after the City Council of Nairobi had been allotted the same. The matter is at the moment in court E.L.C. No. 346 and E.L.C. 347 of 2009.”**

If the City Council of Nairobi had not approved allocation to the applicants, how then could the investigating officer recommend allocation to A.A. Kawir Transporters based on a letter of allotment

dated 2<sup>nd</sup> November, 1995? Shouldn't A.A. Kaur transporters' directors be also charged with forgery?

When those bestowed with power abuse those powers, they find themselves boxed into corners like has happened in this case. The only conclusion is that the prosecution of the applicants was commenced with a view to giving their opponents an upper hand in the civil cases. This is not the purpose for which the 1<sup>st</sup> Respondent was given prosecutorial powers by the people of Kenya. In such situations the court must exercise its supervisory jurisdiction.

It was argued by the respondents that this application has been brought late in the day. The prosecution of the applicants is still on and in the circumstances the prohibition of an illegal prosecution has no time limits.

The end result is that the application succeeds and an order of certiorari will issue to quash the criminal trial facing the applicants. This is also one case in which the respondents should be prohibited from forever prosecuting the applicants over the same set of facts. An order of prohibition will therefore issue accordingly. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of October, 2014

**W. KORIR,**

**JUDGE OF THE HIGH COURT**