



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 3 of 2014

REPUBLICAPPLICANT

VERSUS

**THE CHIEF MAGISTRATE, MALINDI 1ST
RESPONDENT**

**MAURIZIO TURATO2ND
RESPONDENT**

**PEPE TERESAEX PARTE
APPLICANT**

AND

**DIRECTOR OF PUBLIC PROSECUTION (DPP)1ST INTERESTED
PARTY**

**DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT.....2ND
INTERESTED PARTY**

RULING

In her Notice of Motion dated 1st April, 2014, the exparte Applicant is seeking the following orders:

- “1. CERTIORARI to remove into this Honourable Court and quash the criminal proceedings brought by the 2nd Respondent against the ex-parte Applicant in Malindi Chief Magistrate Criminal Case Number 129 of 2014.**
- 2. PROHIBITION prohibiting the 2nd Respondent from prosecuting or charging the Ex-parte Applicant in Malindi Chief Magistrate Criminal Case Number 129 of 2014 or in any other private prosecution on the basis of the facts of this case.”**

The application is supported by the Applicant's affidavit sworn on the same date. The second Respondent filed a replying affidavit sworn on 15th September, 2014 in opposition to the application.

Background to the Dispute

The dispute herein can be traced to a sale agreement made on the 22nd of October, 2007 whereby the exparte Applicant (hereafter referred to as Applicant or Teresa) sold to the 2nd Respondent two apartments located at Plot Number 1862 in Malindi. These two apartments were described as flat

numbers **K301** and **D305**. In 2008 the 2nd Respondent was approached by Teresa and her husband to purchase two more apartments. This time the consideration was that the 2nd Respondent was to renovate and subdivide six other apartments at his own costs and get the two apartments. The 2nd Respondent complied with that arrangement and took possession of the two extra apartments. The renovation works were completed in 2009. These two extra apartments are described as **E101** and **E102**.

Once again in 2009 the 2nd Respondent was made to purchase from the applicant two more apartments described as **K201** and **K205**. The 2nd Respondent was to pay the purchase price by installments but later stopped paying. The 2nd Respondent filed Civil suitS number **17 of 2010** and **133 of 2010** before the Malindi High Court.

It is also clear from the background information that the 2nd Respondent complained about the non transfer of title or sublease in his favour for the six flats. This led to the prosecution of the Applicant. There are three criminal cases related to this dispute as follows:

1. Criminal Case No. 880 of 2011 Republic -vs- Thomas Hinzano Ngonyo and Cosimo Polcino
2. Criminal Case No. 490 of 2012 Republic -vs- Thomas Hinzano Ngonyo
3. Criminal Case No. 501 of 2012 Republic -vs- Cosimo Polcino and Teresa Pepe Maria

In criminal case number 501 of 2012, the Applicant herein was the 2nd accused. This case was withdrawn by the office of the DPP in 2013. Following the withdrawal of case number 501 of 2012, the 2nd Respondent filed Miscellaneous criminal Application Number 49 of 2013 and was granted permission by the court to institute private prosecution against Teresa. Teresa was charged in Criminal Case Number 733 of 2013: The 2nd Respondent withdrew the case in December, 2013. According to the 2nd Respondent, Teresa went to Italy claiming to be sick and the case could not be prosecuted.

The Applicant seems to have returned to Kenya in 2014. The 2nd Respondent prepared a fresh charge sheet and instituted Criminal Case No. 129 of 2014 against Teresa. The 2nd Respondent applied and obtained summons against the Applicant to appear in court and take the plea.

The current application seeks Judicial Review Orders against the Magistrate's Court from prosecuting the Applicant. The Applicant contends that she was not involved in the application for leave to initiate the private prosecution. Other relevant background information is that the Applicant and her husband filed Malindi Civil Case Number 83 of 2005 against Polcino Oasis but the suit was dismissed.

Applicant's Case

It is the Applicant's case that she was not involved in the application that sought leave to have her prosecuted through private means. The Applicant further contends that the chief magistrate's court decision allowing the prosecution somehow reviewed the decisions of the DPP and the CID which decisions stopped the prosecution of the Applicant. The Court exceeded its powers by deciding that Teresa should be prosecuted for the alleged offences the Applicant was condemned unheard. Articles 47 and 50 of the Constitution provides for the right to administrative action and the Applicant's rights were violated. It is further contended by the Applicant through her counsel, Mr. Oyomba that during the sale of the properties to the 2nd Respondent, the Applicant revealed to the 2nd Respondent about the difficulty in having the title transferred to the 2nd Respondent.

The Applicant maintains that there is a balance of 67,000 Euros due from the 2nd Respondent. The 2nd Respondent has been having exclusive possession of the six flats without any competing interest and has enjoyed all the rights of a proprietor. The difficulty in transferring the properties to the 2nd Respondent is alleged to be caused by the death of one of the directors of one of the majority shareholding company. The 2nd Respondent was ordered by the court to deposit the balance of 67,000 Euros but he has failed to do so.

Counsel for the Applicant maintains that the decision in Malindi Civil Case Number 83 of 2005 did not determine the ownership of the property. The 2nd Respondent filed Civil Suit Number 133 of 2010 and should pursue that case instead of pursuing criminal prosecution.

2nd Respondent's Case

The 2nd Respondent's case is that he was approached by the Applicant to buy two apartments and he agreed. The Applicant once again in 2008 requested the 2nd Respondent to incur his own expense by renovating some six apartments and create twelve apartments out of those six. He utilized his own resources and fulfilled his part of the bargain. He was for the third time asked to purchase two more apartments by the Applicant and he agreed. Despite making payments to the Applicant, he has not received any registered sub-lease. He is in occupation of the premises but he would like to be supplied with legal documents to prove his ownership.

It is the 2nd Respondent's position that he filed two civil cases seeking to get title deeds but those suits are still pending in court. The Applicant had filed Civil Suit Number 83 of 2005 but this suit was dismissed. The Applicant did not reveal to him about that case when he was buying the properties. Since that case held that the Applicant had no interest on the title, she then defrauded him. The administrator of the main shareholder wrote two letters indicating that he does not know the 2nd Respondent.

According to the 2nd Respondent, the Applicant obtained money fraudulently from him. He complained to the authorities with prosecution powers and investigations were done. The Applicant was charged in court but the suit was later withdrawn. It is the 2nd Respondent's case that he had reached a dead end and that is why he decided to institute private prosecution. Mr. Macharia, Counsel for the 2nd Respondent submitted that they filed Miscellaneous Criminal Application Number 49 of 2013. The Chief Magistrate's Court evaluated the application and gave them the green light to prosecute the criminal charges privately. The magistrate held that the main issue is whether the Applicant had proprietary interest and concluded that she had none. There was no need to serve the Applicant with the pleadings in Miscellaneous Criminal Application Number 49 of 2013 as Section 88 of the Criminal Procedure Act only requires a complaint to be made to the court and the court interrogates it.

Mr. Macharia further contends that private prosecution does not take away the DPP's prosecutorial powers. Criminal Case number 733 of 2013 was withdrawn under Section 87 as the Applicant had gone to Italy alleging to be sick. This did not prevent subsequent prosecution. Further, Section 89 of the Criminal Procedure Act does not require service upon the person to be charged. The Applicant has had all the time to register sub leases in favour of the 2nd Respondent but has failed to do so. Therefore, her prosecution is fair as there is fraud committed. The Applicant also obtained money by false pretenses.

Analysis and Determination:

Several issues arise out of this dispute: The outstanding ones are whether the 2nd Respondent followed the right procedure when he resorted to private prosecution. Did the judgment in Civil Suit Number 83 of 2005 conclude that the Applicant has no proprietary interest in Oasis Village? Whether the Chief Magistrate's Court was wrong in allowing the private prosecution without hearing the Applicant; whether the dispute is civil in nature and whether the Applicant should be granted the orders of Judicial Review;

The 2nd Respondent felt frustrated when Criminal Case Number 501 of 2012 was withdrawn. He opted to prosecute Teresa himself and obtained leave of the court to do so. Section 88 of the Criminal Procedure Code (Cap 75 Laws of Kenya) states as follows:

“(1) A magistrate trying a case may permit prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Attorney-General in this behalf shall be entitled to do so without permission.

2. Any such person or officer shall have the same power of withdrawing from the prosecution

as is provided by Section 87, and the provisions of that section shall apply to withdrawal by that person or officer.

3. Any person conducting the prosecution may do so personally or by an advocate”

Section 28 of the office of the Director of Public Prosecution Act No. 2 of 2013 provides as follows:-

“(1) Notwithstanding any provision under this Act or any other written law, any person may institute private prosecution.

2. Any person who institutes private prosecution shall, within thirty days of instituting such proceeding, notify the Director in writing of such prosecution.

3. In accordance with Article 157 of the Constitution and this Act, the Director may undertake, take over or discontinue any private prosecution.”

Counsel for both parties cited several authorities in relation to private prosecution. The totality of these authorities is that the person intending to institute private prosecution must first exhaust the public prosecution machinery before taking up the prosecution himself, secondly, the public prosecutorial powers such as the DPP or the Attorney General must have been aware of the complaint but decided not to prosecute, thirdly, the decision by the prosecuting authorities not to prosecute should be found unreasonable or faulty, fourthly, one has to show that due to the non prosecution by the public authorities, he/she has suffered loss, injury or damage, fifthly, that unless the suspect is prosecuted, there would be failure of justice and lastly, that reasonable grounds exist to proceed with the prosecution as non prosecution of the alleged offender would lead to allowing crime to go unpunished.

According to the pleadings herein, I do find that the 2nd Respondent was within his right to seek private prosecution. He had exhausted the public prosecution process and the criminal case against the applicant had been withdrawn. I do therefore hold that the 2nd Respondent followed the correct procedure by filing the application for leave to institute private prosecution. Under Section 88, a private prosecutor has the same powers as a public prosecutor and can withdraw the case he has initiated under Section 87 of the same Act.

Section 28 and Chapter 75 Laws of Kenya allows public prosecutors to withdraw criminal cases. It appears that both criminal cases numbers 501 of 2012 and 788 of 2013 never took off. The withdrawal of both cases was therefore not a bar to subsequent prosecution. I do further find that there was no need for a second application for leave to institute private prosecution after the withdrawal of case number 788 of 2013. This is so as the private prosecutor has the same powers as the public prosecutor once leave to prosecute has been granted. Such a prosecutor does not require a second leave. However, the actions of the private proprietor have to be checked by the court whenever withdrawal of the case is made under Section 87. In the current case, the accused in criminal case No. 788 of 2013 was out of the country and the withdrawal of the case was reasonable.

The Applicant contends that she ought to have been allowed to participate in the application seeking leave to institute private prosecutions. It should not be lost that private prosecution still carries the criminal element of the case. A public prosecutor does not seek leave to prosecute. The private prosecutor only applies to the court for the green light. The court is not duty bound to request service of the application for leave. If the court feels that the proposed accused need to be notified, it would direct service to be effected. However, there are no mandatory requirements for notification of the accused. All what is required is that once leave is granted, the private prosecutor should indicate to the accused the charges being preferred. This is in line with the requirements of the Constitution of informing the accused of the charges he/she is facing as soon as possible.

It is my finding that the fact that the Applicant did not participate in the application for leave did not violate her rights neither does it make the proceedings null and void. Just like in the normal criminal process, an accused person is not expected to participate in the process of deciding whether to prosecute

or not. There was no breach of the rights of natural justice. The Applicant will be at liberty to defend herself in the criminal case and cannot complain that she was condemned unheard. On the same vane, I do find that the Chief Magistrate's Court was within its powers to hear and determine the application for leave to prosecute. Whether the application was merited or not is a different thing altogether. Further, the fact that the office of the DPP was not notified within thirty (30) days after the private prosecution was initiated does not render the prosecution null and void.

With regard to the issue involving Malindi HCC No. 83 of 2005, the pleadings herein show that the Applicant through her company, Cosimo Teresa Ltd. And Giovanni De Caro had sued Polcino Oasis complaining that he had failed to comply with the terms of the agreement entered into on 27th May, 1999. The Plaintiffs wanted the Registrar of Land to be compelled to sign all the relevant documents so that sub leases could be given to the proprietors. That case was dismissed. In essence therefore there was no declaration of failure to comply with the agreement or order directed to the land registrar to execute the transfer documents. That case was not filed to determine ownership of Oasis Village. Justice Ouko reproduced Clause II of the agreement dated 27th May, 1999. That clause is quite relevant in this dispute and I will turn to it later.

The contentions by the 2nd Respondent that the court held that the Applicant does not have any proprietor interest in the property cannot therefore be true. The court did not nullify the agreement of 27th May, 1999 which is the source of the Applicant's claim for ownership.

Is the dispute civil in nature? The documents herein as well as the submissions show that the dispute involves the sale of six apartments by the Applicant to the 2nd Respondent. This was a civil arrangement preceded by a sale agreement. Had the Applicant managed to effect transfer in favour of the 2nd Respondent, all these issues could not have arisen. The pleadings herein can be traced to the agreement of sale dated 27th May, 1999. That agreement is the one that created Oasis Village. It is clear that although the houses built on the suit land are contained in one title document, each house is owned as a separate unit. That is why sub-leases have been created under the same title. Clause 6.2 of the agreement indicates that the property was sold subject to **“the occupation of the lessees holding the benefit of the sub-leases”**

Paragraph 11.1 of the agreement is titled **Cosimo Teresa Apartments** and states as follows:

“The Purchaser acknowledges that following completion it shall hold the title and ownership of the Cosimo Teresa Apartments as nominee and in trust for Cosimo Teresa and hereby agrees that it will at the request and cost of Cosimo Teresa grant a sub-lease in the Agreed Form to such person or persons at such time or times and in such manner or otherwise deal with the same as Cosimo Teresa shall direct or appoint and will make such applications to the registrar of the Land Titles Registry, Mombasa and execute and do all such documents acts and things as may be necessary to procure to give effect to the grant of any sub-lease or dealing or if so required to enable the interest of Cosimo Teresa to be protected.”

The first agreement between the 2nd Respondent and Teresa was entered into on behalf of Cosimo Teresa limited. It is therefore established that Teresa is a shareholder or director of Cosimo Teresa Limited. Under the agreement of 27th May, 1999, some apartments were retained for Cosimo Teresa Limited. This essentially means that although the title was transferred to Polcino Oasis Limited, not all apartments were transferred to the purchaser. NAYWA investments Limited was the vendor and I presume the directors of Naywa were Giovanni De Caro, Teresa Pepe and Renato Weroni as per the agreement: Clause II reserved some apartments for Cosimo Teresa Limited which were to be itemized under schedule five of the agreement to be found on pages 15-17 of the annexures. The Applicant has never exhibited those pages both before Justice Ouko in case number 83 of 2005 or before this court. It is contended that forty (40) flats were retained for Cosimo Teresa Limited. Since the general consensus as per the agreement of 27th May, 1999 is that not all apartments were sold, I do find that Teresa Pepe still had some property to sell being the director of Cosimo Teresa Ltd.

The Chief Magistrate's Court faulted the Applicant's title. That was not necessary as all what the court could have done was to grant the application for leave and leave the merits of the criminal case to the trial court. It is true that the Applicant has failed to transfer sub leases to the 2nd Respondent. It is also admitted that there is a balance of the purchase price that is due to the Applicant.

The subsequent sale agreements between the Applicant and the 2nd Respondent prepared by Muli & Ole Kina Advocates indicate that Cosimo Teresa Limited owned 39 incomplete apartments at the Oasis Village: The Applicant contends that no one has claimed ownership of the apartments sold to the 2nd Respondent. The 2nd Respondent took possession and is enjoying the rights of a proprietor. According to the Applicant, the majority shareholder of Polcino Oasis Ltd, a Mr. Nicola Polcino died in a road accident in 2002. This caused the delay in executing the sub-leases. The 1999 agreement indicate that Polcino Oasis Ltd. Was to execute the sub-leases for the apartments owned by Mr. Neroni and Cosimo Teresa apartments. There seems to be a dispute pending as to the estate of Mr. Nicola Polcino: I have seen a letter dated 2nd December, 2009 from the firm of Inamdar & Inamdar Advocates explaining that they are holding the original title deed and that the death of Nicola Polcino caused the delay in registering the sub-leases.

In essence therefore, this dispute revolves around the failure of the Applicant to effect the transfer of the sub-leases. That failure has been explained which is that Polcino Oasis Ltd which holds the mother title cannot effect the transfers due to lack of directors. That position does not disposes the Applicant herein of her claim over the apartments which she retained after the mother title was transferred. The conclusion that Teresa Pepe has no proprietary interest at Oasis Village cannot be true. The charge of obtaining money by false pretenses contrary to Section 313 of the Penal Code cannot be true either. There was no fraud or cheating.

Similarly, there is no intermeddling with the estate of a deceased person. Teresa is selling her own property. Indeed paragraphs B of the agreement of 1st April, 2009 and 30th April, 2009 by M/s MULI OLE KINA Advocates indicate that the vendor (Cosimo Teresa Ltd) was selling the properties with the intention that Polcino Oasis Ltd will therefore transfer them to respective purchasers by way of sub-leases. The 2nd Respondent cannot fault those agreements. They are in line with the agreement of 27th May, 1999. If there is a problem with Polcino Oasis Ltd. in effecting the transfers, that cannot be held to be false pretence. That is why the Chief Magistrate's Court was wrong by concluding that there was criminal element in the dispute. The court found that the Applicant sold a property yet she knew her title was questionable. The Applicant's title is not questionable. The problem is that she cannot effect the transfers herself and Mr. Nicola Polcino is deceased. The Applicant had proprietary right over the apartments that were sold to the 2nd Respondent and had power to sell to the 2nd Respondent. If one fails to understand the Applicant's right over some apartments, one can easily conclude that the Applicant had no right to sell. That is not the position. The Applicant is not obtaining money from people without owning those apartments she has been selling. If that was the case, the real owner could have evicted the 2nd Respondent from the six apartments.

Given the information herein, I do find that this is a civil dispute. The 2nd Respondent correctly instituted Malindi Civil Cases Number 17 of 2010 and 133 of 2010. He should pursue those cases: I believe the 2nd Respondent was very much aware of the Applicant's predicament. I am satisfied that the office of the DPP and the Criminal Investigations Department were correct in holding that the dispute is civil in nature. There is no evidence that the decision not to prosecute was arrived at as a result of persuasion by the Applicant. This was an objective decision which had nothing to do with the parties. The DPP evaluated the evidence and found that the elements of obtaining by false pretenses had not been established. I entirely agree with that finding as the 2nd Respondent was fully aware that the sub-leases were to be executed by Polcino Oasis Ltd and NOT the Applicant.

In the end, I do find that the application dated 1st April, 2014 is merited and is hereby granted as prayed. An order of certiorari shall issue bringing to this court and quash the criminal proceedings brought by the 2nd Respondent against the Applicant in Malindi Chief Magistrate's Criminal Case Number 129 of 2014. An order of prohibition is hereby prohibiting the 2nd Respondent from prosecuting or charging the Applicant, Pepe Teresa, in Malindi Criminal Case Number 129 of 2014 or in any other private

prosecution on the basis of this case as prayed.

Since the Applicant and the 2nd Respondent are still involved in civil cases which are still pending in court, I will not condemn any party to pay costs. Each party shall meet his/her own costs of this application.

Delivered and dated at Malindi this **10th** day of **December, 2014** in the presence of:

Said J. Chitembwe

JUDGE