



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 161 OF 2013**

**REPUBLIC .....APPLICANT**

**VERSUS**

**INSPECTOR GENERAL OF POLICE .....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**Ex-parte**

**ODADIAH KIOKO KAVIVYA**

**JUDGEMENT**

After leave was granted to the ex-parte Applicant, Obadiah Kioko Kavivya, he filed a notice of motion application dated 28<sup>th</sup> May, 2013 in which he seeks an order of prohibition prohibiting the Inspector General of Police (the 1<sup>st</sup> Respondent) and the Director of Public Prosecution (the 2<sup>nd</sup> Respondent) **“from instituting and/or proceeding with any criminal charges against the Applicant or otherwise prosecuting him an matters relating to the property known as L.R. No 12661/79 situated in Nairobi.”** He also prays for the costs of the application.

A perusal of the chamber summons application for leave, the statutory statement, the verifying affidavit and annexures thereto reveal that the Applicant’s case can be summarized as follows. On 2<sup>nd</sup> April, 2013 the Applicant was arrested and detained at Langata Police Station. He was released the following day. It was alleged that he had fraudulently and illegally sold a property known as L.R. No. 12661/79 to third parties. After he was released from police custody the Applicant was directed to continue reporting to the police station in connection with the said matter. The Applicant avers that he is not the registered owner of the land in question and neither has he obtained money from anybody in connection with the said parcel of land. It is the Applicant’s case that he has been threatened with criminal charges and the respondents’ actions are actuated by malice and amounts to harassment and intimidation. He contends that the respondents’ actions are unlawful, irregular and are likely to interfere with his right to freedom and security of the person.

The respondents opposed the application through the replying affidavit of Corporal Richard Limo of CID Langata General Office. Through the said affidavit Corporal Limo informed the court that on 2<sup>nd</sup> April, 2013 he received a complaint from Timothy Barre and Marsella Omwenga alleging that the Applicant had obtained Kshs.2 million from them and Timothy Karre’s deceased wife Grace Karre on the pretext that he was going to sell them L.R. No. 12661/79 in Hardy, Karen.

Upon investigation he confirmed that some money was indeed paid to the Applicant. He also established that the land in question was registered in the name of Samson Mutuku who was alleged to be the Applicant's brother. He summoned the Applicant to the police station but he refused to turn up. On 11<sup>th</sup> April, 2013 he arrested him for interrogation and was released the following day having denied knowledge of the allegations. He was compelled to be reporting to the police station as investigations continued. Corporal Limo averred that the application before court is premature since he has not made a decision as to whether to charge the Applicant or not.

In a supplementary affidavit sworn on 22<sup>nd</sup> July, 2013 the Applicant denied that he had ever worked in the lands office as alleged by the investigating officer. He also wondered why the investigating officer had not completed investigations commenced on 13<sup>th</sup> April, 2013.

This application challenges the exercise of power by the respondents. The question to be answer is whether they have overstepped their boundaries thus the need to leash them. In answering this question, the Applicant's claim that his legitimate expectation to a fair process has been breached will also be addressed.

What is the purpose of criminal proceedings? Justice R P. V. Wendoh answered this question in **LINUS WANJOHI WARUIRU V ATTORNEY GENERAL & 2 OTHERS [2008] eKLR** when she stated that:-

**“The purpose of criminal proceedings is to hear and determine whether the accused has engaged in conduct which amounts to an offence and on that account is deserving of punishment. The court can stop the criminal proceedings if they are oppressive, vexations or used as personal vendetta to resolve personal scores as a tool for vilification. In the case of STANLEY MUNGA GITHUNGURI V REPUBLIC HCR 271/1985 the court considered the following principles;**

- a. **Where a criminal prosecution amounts to nothing more than an abuse of the court process, the court will employ its inherent power and Common Law to stop it;**
- b. **A prosecution that does not accord with an individual's freedom and rights under the Constitution will be halted;**
- c. **A prosecution that is contrary to public policy or interest will not be allowed.**

**In KURIA & OTHERS v ATTORNEY GENERAL [2002] 2 KLR, Justice Mulwa held that:-**

1. **The court has the power and indeed the duty to prohibit the continuation of criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation;**
2. **It is the duty of the court to ensure that the processes are not used as tools for vilification on issues not pertaining to that which the system was even conferred to perform.**

**As observed in the above case, it is the duty of the court to ensure that it maintains its integrity and ensure that justice is done to all and it does not matter that the decision has been made but what matters is the objective for which the court procedure is being utilized.”**

The above cited principles, I believe, apply to the process of investigating crimes. Where the powers of the police are invoked to meet ends that are not envisaged by the law, then the court should not hesitate to terminate such investigations. A citizen cannot be allowed to undergo a criminal investigation process that is commenced and is aimed at achieving unlawful ends.

Counsel for the respondents was indeed correct when he submitted that under Section 24 of the National Police Service Act the police are mandated to investigate any complaints brought to their attention. He was also correct when he asserted that under Article 157 (10) of the Constitution the 2<sup>nd</sup> Respondent is

expected to carry out his duties without direction or control of any person or authority. There is a caveat however. The powers of the respondents must be exercised within the law, in compliance with the rules of natural justice and rationally.

That brings this court to the question as to whether the respondents overstepped their boundaries. The replying affidavit is detailed on the

allegations that were made against the Applicant. Corporal Richard Limo has indeed carried out investigations and has come up with preliminary findings. He explained to the court the reason for arresting the Applicant. He stated that the Applicant had refused to heed his summons. I find no malice in the decision by the said officer to have the Applicant arrested. The decision as to whether to prosecute or not to prosecute the Applicant is in the province of the respondents. This court cannot usurp that power from them. The Applicant must submit himself to the authority of the respondents and co-operate with them in their investigations. Any attempt by this court to block the investigations will not only amount to misuse of power but will also result in injustice to the complainants.

The complainants were even not served with this application. I note that counsel for the respondents indicated to the court that he would take care of their interests. It was, however, necessary to serve them as interested parties so that they could elect whether to make their representations or not. If the application is allowed, they would be adversely affected without a hearing. The end result is that the Applicant has not established grounds for grant of the orders sought. His application fails and the same is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 5th day of December, 2013

**W. K. KORIR,**

**JUDGE OF THE HIGH COURT**