



Mavuti v Office of Director of Public Prosecution & another (Judicial Review Application E004 of 2024) [2025] KEHC 443 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 443 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
JUDICIAL REVIEW APPLICATION E004 OF 2024
MW MUIGAI, J
JANUARY 23, 2025**

BETWEEN

MAGDALINE NDILA MAVUTI APPLICANT

AND

OFFICE OF DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

RULING

1. By Certificate of Urgency Application filed by the Applicant Magdaline Ndila Mavuti on 28/2/2024 through Counsel Mr Mwangale Robert; is that the Applicant is Complainant in Mavoko Criminal Case 942 of 2022 Republic vs Joel Titus Musya and 2 contradicting instructions were lodged by ODPP through Senior Assistant Deputy Director of Public Prosecution vide letter dated 24/11/2023 to Prosecution to withdraw the instant case. At the same time Acting Director of Public Prosecution vide letter 26/7/2023 had directed otherwise, the matter proceeds.
2. On 5/12/2023, the 1st Respondent vide letter dated 5/12/2023 sought to have the said Criminal case withdrawn to pave way for recording of further statements/evidence by 2nd Respondent.
3. The Applicant objected to the withdrawal as the witness who was to record the Statement named as Gideon Muindi was/is deceased as confirmed by the Memo from 2nd Respondent dated 11/1/2024.
4. The Applicant deposed that at the time of withdrawal of Mavoko Criminal Case 942 of 2022 Republic vs Joel Titus Musya before Hon. S. Kandie in Mavoko Law Courts only 2 witnesses were remaining before close of the Prosecution case.
5. The Applicant deposed that the decision to prosecute was by the Sub County Head of Office of Public Prosecution vide letter of 19/8/2022 to Director of Criminal investigations Land Fraud Unit.



6. Through the Memo/Letter Acting Director of Public Prosecution vide letter 26/7/2023 directed Mavoko Criminal Case 942 of 2022 Republic vs Joel Titus Musya proceeds to its logical conclusion since the Sub County Head of Office of Public Prosecution made the decision to prosecute.
7. The Acting Director of Public Prosecution further advised that the Accused persons would have opportunity to raise any issues before the Trial Court with regard to allegations made against the Respondents.
8. The Applicant deposed that withdrawal of Mavoko Criminal Case 942 of 2022 Republic vs Joel Titus Musya contrary to 1st Respondent's Acting Director of Office of Public Prosecution's letter of 26/7/2023 would be contrary to Article 157 (8) of *the Constitution* which provides that ODPP may discontinue prosecution only with permission of the Court.
9. The Applicant deposed that withdrawal Mavoko Criminal Case 942 of 2022 Republic vs Joel Titus Musya as per 1st Respondent's letter dated 24/11/2023 and 5/12/2023 is contrary to Section 20 (1) (a) of Victim's Protection *Act No 17 of 2014* that provides that a victim has the right to submit any information for consideration to Police or Prosecution on a decision whether to charge, appeal or withdraw the case.
10. The Applicant alleged the Respondents are acting in bad faith as they are not acting on justifiable grounds, the evidence from the remaining witness Gideon Muindi cannot be obtained as he is deceased. The Applicant alleged ulterior motive or purpose calculated to prejudice the Applicant's legal rights and abuse of Respondents powers.
11. On 28/2/2024, this Court granted leave to file Judicial Review Application and stay of withdrawal was for 30 days. The Application was served, the 1st Respondent on 27/9/2024 informed the Court that they filed Grounds of Opposition & Replying Affidavit. Strangely. This Court found the copies of the same not filed in the Court file.
12. On 27/9/2024, the Law Firm of Messrs Kisilu Wandeti Advocates filed an Application for their client / Accused person to be joined as interested party to these proceedings. The said Application is not in the Court file.
13. On CTS this Court cannot access the same.
14. The Court record shows that the pleadings were not closed. Written Submissions were not filed.

Determination

15. Judicial review is law applied to powers, functions and procedures of administrative authorities and bodies discharging public functions.
16. Judicial review is the process by which the High Court exercises supervisory jurisdiction over proceedings and decisions of public bodies.
17. The instant Application is for leave to file Judicial Review brought under Section 8 (2) of *Law Reform Act*, Order 53 Rule 1 of CPR 2010 & Part 3 of *Fair Administrative Action Act*.
18. This Court granted leave to file Judicial Review upon consideration of the following factors;
 - a. Prima facie case- the Application & Supporting Affidavit contained facts if proved amounted to a prima facie case; the facts and circumstances deposed by the Applicant disclose potential violation of the Applicant's rights.



- b. Locus Standi- The Applicant has the standing to institute and maintain such Application for Judicial Review as she is the Complainant in the contested criminal proceedings Mavoko Criminal Case 942 of 2022 Republic vs Joel Titus Musya
- c. Time line-in compliance with Law Reform Act Section 9(2) the Application filed for leave was within the statutory period of 6 months.

19. This Court notes that emerging jurisprudence from binding precedent from Court of Appeal & Supreme Court indicates as follows;

In *Judicial Service Commission & another v Lucy Muthoni Njora* [2021] eKLR Court of Appeal held;

The Constitution of Kenya, 2010, changed the fundamental underpinnings of judicial review from the common law as codified in the Law Reform Act to article 22(3)(f) of the Constitution which recognized judicial review as an appropriate relief for human rights violations. Superior courts in Kenya had spoken with near unanimity that the existing constitutional and statutory landscape called for a more robust application of judicial review to include, in appropriate cases, a merit review of the impugned decision.

Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] the Supreme Court stated of Judicial Review;

The entrenchment of judicial review under the Constitution of Kenya, 2010 elevated it to a substantive and justiciable right under the Constitution. Accordingly, judicial review was no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in the Constitution. Thus, article 47 of the Constitution provided that every person had a right to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.

- 20. Therefore, from the above considerations, fortified by law, the Applicant was granted leave to file Judicial Review.
- 21. However, since the Court order granting leave to file Judicial Review Application the same has not been filed at least not in this matter. Hence in the absence of close of pleadings and written submissions to be filed and pending application(s) heard and determined by this Court; This cannot proceed further as there is no substantive application for hearing and determination in the Court file.
- 22. This Court is in Agreement with advise and action taken by ODPP vide Letters/Memos indicated above and the institution of criminal proceedings as Part Heard.
- 23. Any Grievances by Applicant/Complainant and/or Accused person are protected by Article 50 of the constitution that binds every Court to ensure every party is heard and not condemned unheard and is allowed access to justice.

In the case of *David Gicheru vs Gicheha Farm Limited & Anor* [2020] eKLR the Court held that

The fundamental duty of the Court is to do justice between parties. It is in turn , fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter.....



Disposition

1. The Application for withdrawal of Mavoko Criminal Case 942 of 2022 Republic vs Joel Titus Musya shall be by application and compliance of Article 157 (8) of *the Constitution* & Section 20 (1) (a) of Victim's Protection Act
2. Article 50 Constitution shall apply especially 50 (1) (2) (a) (c) (j) (k) of *the Constitution*.
3. Article 157(10) & (11) of *the Constitution* shall be complied with.
4. The substantive Applications said to be filed but are not in the Court file maybe pursued before Incoming Judge Machakos High Court.
5. FMD in Machakos High Court Court No1on 18/2/2025.

RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 23/1/2025 IN MACHAKOS HIGH COURT (VIRTUALLY/PHYSICALLY)

M.W. MUIGAI

JUDGE

