



**Republic v Lunani & 2 others; Julius Masiva Obuga - Chairperson VCBE & HROF (Exparte Applicant) (Miscellaneous Criminal Application E036 of 2024) [2025] KEHC 1401 (KLR) (24 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1401 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
MISCELLANEOUS CRIMINAL APPLICATION E036 OF 2024  
JN KAMAU, J  
FEBRUARY 24, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**JOSEPH KARUNGANU LUNANI ..... 1<sup>ST</sup> RESPONDENT**

**WILBER OTICHILO, GOVERNOR VIHIGA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**VIHIGA COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JULIUS MASIVA OBUGA - CHAIRPERSON VCBE & HROF ..... EXPARTE APPLICANT**

**RULING**

**Introduction**

1. In his Notice of Motion dated 29<sup>th</sup> February 2024 and filed on 4<sup>th</sup> April 2024, the Ex parte Applicant sought leave to institute private criminal proceedings against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein and any other person who was involved in the nomination and appointment of the Vihiga County Executive Committee Member, the 1<sup>st</sup> Respondent herein, contrary to the County Government Act.
2. He swore an Affidavit in support of the said application on 29<sup>th</sup> February 2024. He averred that he had been a pensioner since 1989 with the Kenyan government and the Chairperson of Vihiga County Budget Environmental and Human Rights Oversight Forum. He stated that from the inception of the said Forum, it had petitioned the Supreme Court during the BBI saga, Kakamega High Court, Eldoret High Court, Kisumu Employment and Labour Court, Anti-corruption and Economical (sic) High



Court, Vihiga High Court and Magistrate's Courts in both civil and criminal matters hence the filing of this application.

3. He contended that the Forum together with other Civil Societies in Vihiga County and the Country at large had gone the extra mile in protecting, upholding and defending *the Constitution* of Kenya, 2010 through Articles 2 and 3(1) and that both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were aware of the same. He pointed out that according to records that were kept by Vihiga County Assembly, the 1<sup>st</sup> Respondent lied that he complied with Section 89 and 90 of the *Criminal Procedure Code* and Sections 35 of the Government Act thereby violating Section 129 of the Criminal *Penal Code* (sic).
4. He further stated that when he was asked to produce the certificates and degrees, he did not do so hence the Assembly did not approve his appointment to the 3<sup>rd</sup> Respondent. He termed both actions as criminal.
5. He averred that those in authority had failed to investigate and prosecute the offenders or once they were charged, the authorities either withdrew the cases or failed to prosecute them. It was his contention that Kenyans were being overtaxed. He asserted that the Respondents had continued to commit economic crimes with impunity including the allegation herein and it was imperative that his present application be allowed as it was intended to protect public funds.
6. In response thereto, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed Notice of Preliminary Objection dated 3<sup>rd</sup> April 2024. They contended that this court lacked the jurisdiction to entertain the application herein on grounds that it was an invitation to the court to grant leave for their prosecution for corruption-related charges which was not within the lawful jurisdiction of this court as presently constituted but that the said charges were an exclusive reserve of anti-corruption courts established by Sections 3, 4 and 5 of the *Anti-Corruption and Economic Crimes Act*.
7. They further contended that the application was foreign to law and in particular to the Judicial Review processes and remedies anticipated in Order 53 of the Civil Procedure Rules and/or Articles 22 and 258 of *the Constitution* of Kenya or the Mutunga Rules.
8. They asserted that they were not suited in the matter as Respondents and were improperly enjoined as they had no powers of effecting arrest in criminal process and/or prosecution of suspects perceived to have been involved in suspected crimes.
9. They averred that the application was incurably and fatally defective for non-joinder of the Inspector General of Police, the Director of Criminal Investigations and the Director of Public Prosecutions. They contended that the Ex parte Applicant lacked the required locus standi to institute or maintain this application in the manner presented or at all. They termed his application as frivolous, vexatious and an abuse of the process of the court.
10. The Respondents' Written Submissions were dated 1<sup>st</sup> August 2024 and filed on 2<sup>nd</sup> August 2024 while those of the Ex parte Applicant were dated 3<sup>rd</sup> September 2024 and filed on 4<sup>th</sup> October 2024. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

### Legal Analysis

11. The Ex parte Applicant pointed out that the bone of contention herein was that the 1<sup>st</sup> Respondent forged certificates which he presented before the County Public Service Board (CPSB) when he sought to be employed as a County Executive Committee (CEC) member. He submitted that that was an integrity issue which fell under the anti-corruption and economic crime court. He added that the 1<sup>st</sup> Respondent forged certificates to secure employment for his own economic gain.



12. He argued that the political elite had taken this country hostage by enabling laws to be applied to specific citizens and not to them. He asserted that although the County Assembly had clearly indicated that the certificates were forged, the 2<sup>nd</sup> Respondent proceeded to appoint the 1<sup>st</sup> Respondent.
13. He asserted that provisions of law he relied on in the application herein were in existence and even if they did not exist, there were provisions that allowed individuals to move to court for leave to institute private prosecution where crimes had been committed.
14. On their part, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents placed reliance on the case of Owners of Motor Vessel “Lillian S’ vs Caltex Oil (Kenya) Limited (1989) where it was held that jurisdiction is everything and without it a court had no power to take one more step. They submitted that jurisdiction was conferred by statute and was not assumed.
15. They further relied on the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others [2012]eKLR where it was held that where *the Constitution* exhaustively provided for the jurisdiction of a court of law, the court had to operate within the constitutional limits.
16. They invoked Section 4(1) of the *Anti-Corruption and Economic Crimes Act* Cap 65 (Laws of Kenya) and contended that the charges the Ex parte Applicant was intending to institute against them upon leave being granted fell outside the jurisdiction of any other court save for special magistrates.
17. They added that Section 3 of the *Anti-Corruption and Economic Crimes Act* provided for the manner of appointment of special magistrates and the qualifications they had to hold to be entitled to be appointed special magistrates as was provided in Section 88(1) of the *Criminal Procedure Code*.
18. They further submitted that it was well established through judicial pronouncements that applications for leave to institute private prosecutions could only be maintained in the court that was vested with the requisite jurisdiction to try the accused upon grant of leave.
19. In this regard, they relied on the case of Akoth Properties Limited (No CPR/201/101276) vs Republic & 8 Others; Esther Akoth Kokeyo (Interested Party/Intended Accused) (eKLR citation not given) where it was held that in the case of a private prosecution, an application first had to be made under Section 88(1) of the *Criminal Procedure Code* for the magistrate trying the case to grant or refuse to grant permission to the plaintiff to conduct a private prosecution.
20. They further submitted that the conduct of any trial before a court of law was governed by rules of procedure which had to be adhered to. They were emphatic that the courts had pronounced themselves on the issue of people abusing procedure by hiding behind Article 159(2)(d) of *the Constitution* and warned that the said provision was no longer a panacea.
21. They argued that since Section 88(1) of the *Criminal Procedure Code* did not confer power of granting permission for private prosecution to the High Court, the application herein should be struck out.
22. They asserted that pleadings went towards determining the cause of action but and from the pleadings that were filed by the Ex parte Applicant herein, he appeared to be pursuing a constitutional right by seeking permission to institute private prosecution.
23. They pointed out that Constitutional Petitions were governed by Articles 22, 23 and 258 of *the Constitution* as read with Mutunga Rules but that in the said provisions, there was no requirement for application for leave to institute proceedings as that right was already guaranteed by those provisions.
24. They asserted that the second assumption would be that the Applicant was seeking leave under Order 53 of the Civil Procedure Rules which applied to remedies of Judicial Review but that such



- applications would not amount to a private criminal prosecution against them. They urged the court to find that the application herein was unknown to law and dismiss the same.
25. They further contended that the Ex parte Applicant had sued them yet they were the very people he was seeking leave to prosecute. They argued that they were not responsible for the administration of criminal justice as those powers lay elsewhere as provided in Articles 157 and 244 of *the Constitution* of Kenya and that he did not expect them to arrest and prosecute themselves.
  26. They contended that the reason the Applicant was seeking leave to institute private prosecution was because he believed that criminal cases of high profile (sic) had either been poorly prosecuted and/or withdrawn unreasonably and therefore he was well placed or entitled to the orders to prosecute privately.
  27. They urged this court not grant the reliefs the Ex parte Applicant had sought unless it confirmed that he Applicant had lodged a complaint with the authority that was responsible for the prosecution and it had failed to take action.
  28. To buttress their argument, they cited the case of Kimani vs Kahara (eKLR citation not given) where it was held that the non-joinder of the DPP in the case and the Inspector General (IG) of police who was responsible for criminal investigations did not only violate the rule of law (natural justice) (sic) as guaranteed by Articles 10 and 50(1) of *the Constitution* but also confirmed that the Applicant was dishonest, if not malicious.
  29. They further submitted that he lacked the locus standi to institute or maintain this application in the manner presented as he purported to represent an amorphous entity without proving that the same existed, that it was an organisation registered in Kenya with an objective of instituting and maintaining public interest suits in courts of law and that the same was operating lawfully and he was indeed the chairman of the forum. They asserted that he had not filed any document to prove any of the above and hence lacked the right of audience in court to represent himself or this forum.
  30. In that regard, they placed reliance on the case of Kimani vs Kahara (Supra) where it was held that even if it was true that every citizen had sufficient interest in seeing that the law was enforced, it did not follow that every citizen had a sufficient interest in conducting the prosecution of another citizen for an offence which had caused him no damage or injury.
  31. They pointed out that the Applicant ought to have taken precaution in filing his pleadings and included the proposed charge sheet, list of witnesses and statements of the proposed witnesses. To augment their assertion, they further referred to the case of Kimani vs Kahara (Supra) where it was held that the court must be certain about the limit of the permission granted and the charges to be preferred because at the same time the court granted permission, that was the time it signed the summons compelling attendance for the proposed accused to attend court for plea.
  32. They argued that the Applicant did not present any evidence to prove that the 1<sup>st</sup> Respondent was from Kakamega County and not Vihiga County, that a CEC member must be a resident of the county of employment and that the 1<sup>st</sup> Respondent was not approved by the County Assembly or that in appointing him, the 2<sup>nd</sup> Respondent was under influence of corruption. They added that the Applicant had failed to enjoin the County Assembly in the suit as a respondent and/or interested party and that it was in fact clear from the Inventory of the CEC-Member Nominees which he had filed that the 2<sup>nd</sup> Respondent had satisfied the requirements of Section 35(3)(c) having submitted documents related to Chapter six of *the Constitution* of Kenya.



33. They were emphatic that these proceedings had been instituted to irritate or annoy them and in particular the 2<sup>nd</sup> Respondent and hence urged this court to uphold their Preliminary Objection and strike out the present application.
34. A preliminary objection can only therefore be raised on a pure point of law which if determined would dispose the entire case. In the celebrated case of *Mukisa Biscuits Manufacturing Co Ltd vs West end Distribution Ltd* [1969] EA 696, it has been defined as:-
- “a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit.... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
35. Notably, Black’s Law Dictionary at page 1416 defines “private prosecution” as follows:-
- “A criminal prosecution initiated by a privately employed attorney or by a lay person or private organization rather than a district attorney or other government employed prosecutor.”
36. Section 88 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) sets out the procedure to institute private prosecution. It provides as follows:-
1. Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.
  2. A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.
  3. Complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate.”
37. It therefore followed that a person seeking to institute private prosecution against another had to follow laid down procedures in lodging his/her application before the magistrate’s court that was seized with the jurisdiction to the matter.
38. An applicant had to satisfy the trial magistrate that there had been failure by relevant state organs to discharge their constitutional and statutory mandate in receiving complaints, carrying out investigations and conducting prosecution.
39. This court had due regard to the case of *Floriculture International Ltd & Others vs The Attorney General* High Court Misc. Civil Application No 114 of 1997 (unreported) which set out the requirements for one to carry out a private prosecution. They were as follows:
- “For all these reasons criminal proceedings at the instance of a private person shall be allowed to start or to be maintained to the end only where it is shown by the private prosecutor:
1. that a report of the alleged offence was made to the A.G. or the Police or other appropriate public prosecutor, to accord either of them a reasonable opportunity to commence or take over the criminal process, or to raise objection (if any) against prosecuting; that is to say, the



complainant must firstly exhaust the public machinery of prosecuting before embarking on it himself; and

2. that the A.G. or other public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings; or that he has maintained a more than usual and reasonable reticence; and either the decision or reticence must be clearly demonstrated; and
  3. that the failure or refusal by the State agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued; and
  4. that unless the suspect is prosecuted and prosecuted at the given point of time there is a clear likelihood of a failure of public and private justice; and
  5. the basis for the locus standi such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics or some ulterior considerations devoid of good faith; and
  6. that demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous A.G. or Police Force guilty of capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counter act the culpable refusal or failure to prosecute to neutralize the attempts of crooked people to stifle criminal justice.”
40. The Ex parte Applicant herein had not provided any documentary evidence to justify why he ought to be granted leave to institute a private prosecution. He did not show how he was wronged, if at all he was wronged, if he lodged a complaint with the Police, Director of Public Prosecution, Directorate of Criminal Investigations, Ethics and Anti-Corruption Commission, Public Service Commission and they failed to take action.
41. Turning to this court’s jurisdiction, Section 4(1) of the *Anti-Corruption and Economic Crimes Act* Cap 65 (Laws of Kenya) provides as follows:-
- “Notwithstanding anything contained in the *Criminal Procedure Code* (Cap. 75), or in any other law for the time being in force, the offences specified in this Act shall be tried by special Magistrates only.”
42. The exclusive jurisdiction of the Anti-Corruption and Economic Crimes Division of the High Court to hear anti-corruption and economic crimes cases was pursuant to the Practice Directions of the Court published by the Hon. Chief Justice (Emeritus) David Maraga which were gazetted on 9<sup>th</sup> December 2016. They stated as follows: -
2. All new cases relating to corruption and economic crimes shall be filed in the Principal Registry of the Division at Nairobi for hearing and determination.
  5. The following matters shall be heard by the Anti-corruption and Economic Crimes Division of the High Court—
    - a. petitions and Judicial Review applications on claims of infringement or the threatened infringement of constitutional rights relating to corruption and/or economic crimes related matters;



- b. all proceedings relating to corruption and economic crimes over which the Magistrates' Anti-Corruption Court has no jurisdiction;
- c. all criminal reviews, revisions, appeals and any other applications arising from decisions of the special Magistrates appointed under section 3 of the [Anti-Corruption and Economic Crimes Act](#), 2003;
- d. cases relating to corruption and economic crimes filed under the following Acts:-
  - i. [Anti-Corruption and Economic Crimes Act](#), cap. 65.
  - ii. [Proceeds of Crime and Anti-Money Laundering Act](#), cap. 59B'.
  - iii. [Anti-Counterfeit Act](#), cap. 130A.
  - iv. [Leadership and Integrity Act](#), Cap. 182.
  - v. [Public Procurement and Asset Disposal Act](#), No. 33 of 2015.
  - vi. Public Officers Ethics Act, Cap. 183.
  - vii' [Public Finance Management Act](#), No. 18 of 2012.
  - viii [Extradition \(Contiguous and Foreign Countries\) Act](#), Cap. 76.
  - ix. [Extradition \(Commonwealth Countries\) Act](#), Cap. 77.
  - x. Prevention of Organized Crimes, Cap. 59.
  - xi. [Mutual Legal Assistance Act](#), Cap. 75A.  
(xii)Regional and International Treaties and Conventions on Anti-Corruption.
  - xiii. Or filed under any other enabling provisions of law.
- e. Disputes touching on or related to:-
  - i. offences or the recovery, or protection of public property, or
  - ii. the tracing of, freezing of, or confiscation of proceeds of corruption or related to corruption and money laundering, and
  - iii. the payment of compensation of proceeds of corruption and economic crimes.”

43. A perusal of the present Notice of Motion Application showed that the Ex parte Applicant had brought his said application under Article 3(i), Article 10(i) a, b, c, Article 37 (2) a, b, and c, [Criminal Procedure Code](#) Section 89 1-5, Section 90 1-3, County Government [Act No 17 of 2012](#) Section 35 1-36



Chapter XIII Section 129 and any other provisions of the 2010 Constitution..(sic). At no point did he mention the Sections of the *Anti-Corruption and Economic Crimes Act* and/or related statutes the present application was premised.

44. This court therefore agreed with the Respondents that his pleadings were defective in form as it was not clear if his concern was hinged on the provisions of *the Constitution* of Kenya by which he ought to have come by way of a Constitutional Petition and/or a Judicial Review or if it was a matter under the *Anti-Corruption and Economic Crimes Act* and/or related statutes.
45. Be that as it may, this court did not have the jurisdiction to handle his allegations of corruption against the Respondents by virtue of Section 4(1) of the *Anti-corruption and Economic Crimes Act* and the Practise Directions of 9<sup>th</sup> December 2016.
46. It was clear to this court that not only did the Ex parte Applicant fail to demonstrate that the relevant organs had failed to discharge their constitutional mandate, it did not have any jurisdiction to entertain this present application. In the case of Owners of Motor vehicle” Lilian S” vs Caltex Oil (Kenya) Ltd (Supra), it was held that jurisdiction was everything and that without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. It had no option but to down its tools.

### **Disposition**

47. For the foregoing reasons, the upshot of this court’s decision was that the Ex-parte Applicant’s Notice of Motion application dated 29<sup>th</sup> February 2024 and filed on 4<sup>th</sup> March 2024 was not merited and the same be and is hereby dismissed.
48. On the other hand, the Respondents’ Preliminary Objection dated 3<sup>rd</sup> April 2024 and filed on 4<sup>th</sup> April 2024 was merited and the same be and is hereby upheld.
49. In view of the fact that the 1<sup>st</sup> Respondent did not participate in the proceedings herein and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were the Governor of the County Government of Vihiga and the County Government of Vihiga respectively, this court hereby deviated from the general principle that costs follow the event and hereby directs that each party will bear its own costs of the Ex parte Notice of Motion application dated 29<sup>th</sup> February 2024 and the Respondents’ Preliminary Objection dated 3<sup>rd</sup> April 2024 and filed on 4<sup>th</sup> April 2024.
50. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 24<sup>TH</sup> DAY OF FEBRUARY 2025**

**J. KAMAU**

**JUDGE**

