



**Robert v Director of Public Prosecutions & another (Judicial Review Application E002 of 2023) [2024] KEHC 404 (KLR) (15 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 404 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
JUDICIAL REVIEW APPLICATION E002 OF 2023**

**SN MUTUKU, J  
JANUARY 15, 2024**

**IN THE MATTER OF AN APPLICATION BY AMUTALAH ROBERT FOR  
PREROGATIVE JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI  
AND  
IN THE MATTER OF: THE CRIMINAL PROCEDURE  
CODE CAP 75 OF THE LAWS OF KENYA**

**BETWEEN**

**AMUTALAH ROBERT ..... APPLICANT**

**AND**

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

**THE INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This Application was brought through a Notice of Motion under Section 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law seeking for the following orders:
  - a. An order of Prohibition be and is hereby issued prohibiting the Respondents whether by themselves, their agents, representatives, employees, servants, officers or otherwise from making any determination to prosecute the Applicant of acts arising out of his duties as an advocate or otherwise from hearing and determination of CR. Case No E 1111 of 2022 or making findings against the Applicant out of acts arising out of his duties as an advocate until these proceedings are heard and determined.
  - b. An order of *Certiorari* be and is hereby issued to remove into this Honorable Court the decision of the Respondents hereto, to charge, and/or prosecute the Applicant out of his



duties as an advocate and for purposes of quashing the same with further orders of *Certiorari* to remove Ngong Chief Magistrates Criminal Case No E 1111 of 2022 into this Honorable Court to be quashed.

- c. That the Respondents herein be condemned to costs occasioned by the application.
2. The application is premised on the grounds on the face of it and in the annexed affidavit of the applicant sworn on 16<sup>th</sup> February, 2023. The Applicant swore that he was performing his duties as an advocate representing his two clients, Johana Wanjau Waweru and James Muriithi Muchiri in drafting of a sale agreement for purchase of land KJD/NTASHART/2801. That a search and a green card at the land's registry at Ngong confirmed that the said Johana Wanjau Waweru was the registered owner of the land. That he was only involved in drafting the agreement and that the parties were to effect the transfer and that the sale agreement is not a completion document and it does not confer any proprietary right to anyone.
3. He deposed that on 25<sup>th</sup> August, 2022 he received a letter from D.K Cheruiyot from the DCI Office Ngong requesting that he sheds light on the sale agreement and transaction. That he responded to the letter in good faith on 30<sup>th</sup> August, 2022. That on 19<sup>th</sup> October, 2022 while at his office he was arrested by DCI officers and escorted to Ngong Police Station. That he was charged with 3 counts of conspiracy to defraud, forgery and making false document vide Criminal Case No E1111 of 2022 at Ngong Law Courts.
4. That on Count 1 he was charged with conspiring to defraud by making false land transfer document of the said land. He stated that he was only involved in the drafting of the agreement and that there is a trend by security agencies of prosecuting advocates in line with their duties. That the complainant has filed a civil suit against the said two individuals at ELC Case No 31 of 2022. That he has not been sued in the said case for the alleged offences.

### Submissions

5. The matter was canvassed by written submissions as directed by this court. The Applicant's filed his submissions dated 19<sup>th</sup> October, 2023. He has submitted that this court has the inherent jurisdiction to deal with this matter and cited *Jotham Mwenda Guantai v Chief Magistrate Nairobi* [2007]eKLR where the Court of Appeal held that:

“The High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression and the court finds that his prosecution amounts to an abuse of the process of the court, oppressive and vexatious. The court further held that the High Court has inherent powers and duty to secure fair treatment for all persons brought before the court in order to prevent an abuse of the court process.”
6. He also relied on the case of *Republic v Director of Public Prosecution and 2 others Ex Parte Pius Kiproop Chelimo and another* [2017] eKLR and *Kuria & 3 others v Attorney General* [2002] 2 KLR 69.
7. He has argued that in this case the criminal charges have been preferred which violate rules of natural justice and in disregard of relevant matters. That in exercising their discretion to charge a person both the police and the DPP must exercise the discretion based on the evidence of sound legal principles.



He relied on *R v Attorney General ex parte Kipngeno Arap Ngeny* High Court Civil Application No 406 of 2001 where it was held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

8. The 1<sup>st</sup> Respondent filed its submissions dated 30<sup>th</sup> October, 2023. It is the 1<sup>st</sup> Respondent’s submissions that it is opposed to the application and that the same should be dismissed and marked as closed for the reason after reviewing the evidence in the matter it was decided to withdraw the charges against the Applicant herein. That the Applicant has failed to disclose this fact to this court and is presenting a picture that the criminal case against him is still ongoing and that the orders sought should not be entertained as the application has been overtaken by events.

### **Analysis and Determination**

9. I read the application and the grounds in support as well as the submissions of the parties. I have noted that none of the Respondents filed a response to this application and the reason for this could be what the 1<sup>st</sup> Respondent has stated that the matter is overtaken by events.
10. I have considered the submissions of the 1<sup>st</sup> Respondent that this application has been overtaken by events for reasons that after reviewing the evidence the 1<sup>st</sup> Respondent decided to withdraw the charges against the Applicant in Criminal Case No E1111 of 2022 the subject matter of this application. Although the 1<sup>st</sup> Respondent did not present the facts of withdrawal through a proper response where evidence of such withdrawal would have been attached evidence to show that the Criminal case was withdrawn, I have no reason to doubt the counsel from the ODPP for stating so.
11. The Applicant must have known that the criminal charges have been withdrawn or if he did not know about it he ought to have reacted to the submissions of the 1<sup>st</sup> Respondent. Court orders are not issued in vain, and it will not serve any purpose for this court to issue orders on the reliefs sought in this application if there is not in existence any criminal charges against the applicant. As submitted by the 1<sup>st</sup> Respondent, it will remain an academic exercise if this court were to delve into analyzing the matter and making a determination on it as though the criminal charges are still hanging over the head of the applicant.
12. With no criminal charges against the applicant being in existence, there is no reason for this court to make its pronouncements on a matter that has already been withdrawn. For that reason, I will and do hereby dismiss the Notice of Motion dated 16<sup>th</sup> February 2023. I order that each party bears own costs.
13. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 15<sup>TH</sup> JANUARY 2024.**

**S. N. MUTUKU**

**JUDGE**

