



Said & 2 others v Director of Public Prosecutions & another (Miscellaneous Criminal Application E148 of 2023) [2024] KEHC 171 (KLR) (Crim) (18 January 2024) (Ruling)

Neutral citation: [2024] KEHC 171 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E148 OF 2023
K KIMONDO, J
JANUARY 18, 2024
[FORMERLY NAIROBI CONSTITUTIONAL PETITION NO. E143 OF 2023]**

BETWEEN

**AWADH SWALEH SAID 1ST APPLICANT
SWALEH AWADH SWALEH 2ND APPLICANT
VICTOR ARARA WERE 3RD APPLICANT**

AND

**DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT**

RULING

1. The applicants seek various declarations and orders primarily to bar the respondents from prosecuting them in Milimani Chief Magistrates Criminal Case Number E226 of 2023.
2. The impugned charge sheet in the lower court contains two counts of conspiracy to defraud; and, fraudulent appropriation by directors contrary to sections 317 and 328 (b) of the [Penal Code](#).
3. The applicants originally lodged a petition dated 3rd May 2023 at the Constitutional & Human Rights Division in Constitutional Petition Number E143 of 2023. It was predicated on an affidavit of the 2nd applicant of even date.
4. On the same date, the High Court (Thande J) ordered that the matter be transferred to the Criminal Division. Following that order, the matter was registered as the present Miscellaneous Criminal Application and re-numbered.



5. The prayers can be compressed into four: Firstly, for a declaration that the respondents have violated articles 10, 27, 28, 35, 47 and 50 of *the Constitution* by a delayed or inordinate decision to charge; and, by detaining the 3rd respondent for a period of more than 24 hours before presenting him to the lower court.
6. Secondly, for a declaration that the respondents' conduct violates section 4 of the *Office of Director of Public Prosecutions Act*; and, thirdly, for orders of certiorari and prohibition to quash the decision to charge and to prohibit any further prosecution. Lastly, there are prayers for damages and costs.
7. I should add that contemporaneously with the original petition, the applicants filed a notice of motion seeking conservatory relief. On May 16, 2023, the High Court (Kavedza J) granted a temporary stay of proceedings and called for the lower court file. The original file was transmitted to the High Court on May 23, 2023. Directions were later granted that the main Miscellaneous Criminal Application be heard by way of written submissions.
8. The three applicants are all directors, shareholders or secretary of the company known as Kilindini Warehouse (Kenya) Limited (hereafter the company). The complainant in the impugned criminal case is Omar Saleh Said. In a replying affidavit sworn on May 31, 2023, he equally claims to be a shareholder or director of the company.
9. The gist of his complaint is that the applicants defrauded him and the company. He avers that sometime in the year 2000, he learnt that the applicants "had pushed him out of the company and documentation filed at the Registrar of Companies claiming that [he] had ceased to be a director...".
10. The applicants on the other hand argue that the criminal proceedings are ill-founded for four main reasons: Firstly, that the decision to charge was made many years after the complaint was lodged and is accordingly an abuse of prosecutorial powers. Secondly, that there were previous civil proceedings between the parties in *In the matter of Kilindini Warehouses (Kenya) Limited*, Mombasa High Court, Winding Up cause 1 of 2010 [2014] eKLR.
11. Thirdly, that the criminal proceedings are meant to serve a collateral purpose: to harass the applicants or to force them to concede to unwarranted claims by the complainant. Fourthly, and as stated earlier, the applicants contend that the criminal proceedings are a violation of, among others, articles 47, 48, and 50 of *the Constitution*.
12. The Republic contests the motion through grounds of opposition dated May 18, 2023. In a nutshell, it was submitted that under article 157 (6) & (10) of *the Constitution*, the Director of Public Prosecutions (hereafter the DPP) has power to bring the criminal charges and "shall not be under the direction or control of any person or authority". It is also contended that there is no limitation of time to such action.
13. Following the directions I referred to earlier, the applicants filed submissions dated 2nd August 2023 with a list of precedents. The respondents' submissions are dated 30th August 2023 while those by the complainant are dated 1st September 2023.
14. On 8th December 2023, I heard further arguments from learned counsel for the applicants, the respondent and the complainant.
15. I take the following view of the matter. Article 165 (6) of *the Constitution* confers the High Court with supervisory jurisdiction over all subordinate courts. Furthermore, and, by dint of sections 362 to 364 of the *Criminal Procedure Code*, the High Court is imbued with wide powers to review the impugned proceedings in the lower court.



16. In addition and by virtue of articles 22 and 23 of *the Constitution*, the applicants have properly invoked the jurisdiction of the High Court for redress for the alleged violations of their rights. See generally, *Meme v Republic*, [2004] 1 KLR 637.
17. In view of the nature of orders that I propose to make, it would be prejudicial to delve too deeply into the merits of the criminal charges now facing the applicants.
18. I can however safely state the following. The applicants had earlier approached the High Court in Miscellaneous Criminal Application No. E343 of 2022 in which they were granted anticipatory bond in the sum of Kshs 300,000. It is also instructive that in the criminal trial at the lower court, the accused persons were all granted bail on 3rd May 2023, the same date when they lodged the constitutional petition earlier mentioned.
19. So much so that the liberty of the applicants is not currently in jeopardy. What I must determine is whether the proceedings in the lower court are in violation of *the Constitution*.
20. I will commence with the existence of other civil proceedings. It is true that the disputants have previously litigated over the company. A case in point is *In the matter of Kilindini Warehouses (Kenya) Limited*, Mombasa High Court, Winding Up cause 1 of 2010 [2014] eKLR. The winding-up proceedings were brought by the complainant, Omar Saleh Said, alleging that the 1st respondent in those proceedings (Awadh Said) had fraudulently falsified the records and minutes of the company to defraud “the legal and beneficial shareholders of the company”. He also alleged that as the managing director, Awadh had “excluded the petitioner [Omar Said] from the affairs of the company including financial records”.
21. I have perused the decision of the High court dated 16th November 2018. The substantive complaints or merits were not determined because the learned judge (Otieno J) found that the petitioner had no standing. He ruled as follows-

[57] I do find that the petitioner lacked the requisite locus standi at the time of filing petition and to date continues to lack the standing. For that reason the petition cannot be maintained but must fail. Consequently the other issues deserve no employment of courts time to consider because if there is no valid petition then there is nothing to be considered on the merits.
22. I thus readily find that the merits of the complaint the subject matter of the criminal trial were not resolved in the civil proceedings. Secondly, and more importantly, the general rule is that the existence of such civil proceedings is not a bar to criminal prosecution.
23. I will now turn to the inordinate delay in the decision to charge. It is conceded that the complaint dates back to the year 2000. The applicants submitted that the decision to charge was made by the DPP only in the year 2016 following fresh complaints in 2014. The charges were only presented on 4th April 2023, many years later.
24. The particulars of the charge on conspiracy are that on diverse dates between 1st December 1999 and 31st January 2000, the accused conspired to defraud Omar Saleh Said of 1 share in the company. The particulars of Count II were that on 14th January 2000, they falsified Notification of Change of Directors Form to show that the complainant had ceased to be a director.
25. The DPP has not explained the delay at all. The indecision may as well anchor the defences to the criminal prosecution. However, under article 157 (6) of *the Constitution*, the DPP has independence to bring criminal proceedings in respect of any offence alleged to have been committed. I am equally



alive that under section 42 of the Limitation of Actions Act, criminal actions are excluded. Arguably, there is no bar to the prosecution now.

26. There is some merit in the argument that delayed prosecution militates against the right to mount a proper defence. The uncertainty of prosecution continued to hang above their heads much like the sword of Damocles. I find that the dithering by the DPP is thus despicable. See generally, Reuben Mwangi v DPP & others, Nairobi High Court Constitutional Petition E216 of 2020 [2021] eKLR.
27. However, in the instant case, I note that the applicants remain as shareholders or directors or secretary of the company; and, that the alleged falsified records are documents supposedly held by the Registrar of Companies. There is also no evidence before me that the DPP had made a decision not to charge or conveyed such promise. I am not thus satisfied that the delay is a violation of articles 10, 47 and 50 of the Constitution. I say that very carefully and without prejudice to any defence that may be mounted by the applicants in the lower court.
28. But is the prosecution mounted to serve a collateral purpose? The misuse of criminal prosecution for ulterior purposes was well explained in Meme v Republic, [2004] 1 KLR 637 at 678 where it was stated-

An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.
29. The complainant may have let the cat out of the bag in paragraphs 7, 10 and 11 of his replying affidavit. He avers that prior to lodging the latest complaint that led to the criminal charges, he wrote to the applicants in April 2023 "requesting for a better and legal way of running the company but they have never responded to me even by a call".
30. He avers that although his "share was returned on paper, the applicants have continued to defraud the company and myself which issue I have raised with them several times". He deposes at paragraph 11 that the applicants are "feigning willingness to talk now that they have seen the seriousness of their actions but if the suit in the lower court does not proceed, the applicants will continue with their illegal activities".
31. The point to be made however is that the applicants have not presented solid evidence to show the prosecutorial power is being abused by the DPP to achieve such collateral purpose. The applicants aver generally that "the allegations have resulted to an endless push and pull between ourselves and the police with the said Omar Salef Said having the petitioners harassed by police". A cardinal precept of the law of evidence encapsulated in sections 107 and 108 of the Evidence Act is that (s)he who alleges must prove.
32. I am thus unable to find that merely by facing the criminal charges, the applicants' constitutional rights guaranteed by articles 47 or 50 will be violated. I also find that the applicants have not proved that the DPP has breached section 4 of the Office of Director of Public Prosecutions Act. In addition, the criminal trial is at the preliminary stages and the applicants have been granted bond. There is no allegation that the lower court is biased or will not hold a fair trial. Some of the key arguments raised in this application may as well constitute a line of defence at the trial. The less I say about it the better.
33. Lastly, the 3rd applicant claims that he was arrested on 27th April 2023 but was not presented to court until 2nd May 2023. On the face of it the period would seem to be in excess of the 24 hours dictated by the Constitution. I do however take judicial notice of the intervening weekend and Labour Holiday. In the event that the applicant ultimately proves he was detained beyond the constitutional timelines, the remedy lies not in barring the criminal trial, but in damages for violation of the right to liberty. See



generally, *Joseph Kipkemboi Ariambe v OCS Kisii Police Station & others*, Kisii High Court, Petition 1 of 2017 [2021] eKLR.

34. For all of those reasons, the application dated 3rd May 2023 is devoid of merit and is hereby dismissed. The original lower court file shall now be remitted back to the lower court together with a certified copy of this ruling.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY 2024.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of: -

Ms. Mathia for the applicant instructed by Mathia & Company Advocates.

Ms. Nzamsa for the complainant instructed by Nzamsa Sankale & Company Advocates.

Ms. Wafula for the respondent instructed by the office of the Director of Public prosecutions.

Mr. E. Ombuna, Court Assistant.

