



Konosi v Inspector General of Police & another; Adam (Interested Party) (Judicial Review E014 of 2023) [2024] KEHC 1664 (KLR) (21 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
JUDICIAL REVIEW E014 OF 2023
HM NYAGA, J
FEBRUARY 21, 2024**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
THE JUDICIAL REVIEW ORDER OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER SECTIONS 8 AND 9 OF THE LAW REFORM ACT,
CAP 26 AND ORDERS 53 OF THE CIVIL PROCEDURE RULES, 2010**

AND

IN THE MATTER OF A DECISION TO CHARGE MADE ON 22ND MARCH 2023

AND

IN THE MATTER OF AN APPLICATION BY;

WILFRED NYAUNDI KONOSI ----- APPLICANT

VERSUS

THE INSPECTOR GENERAL OF POLICE ----- 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS ----- 2ND RESPONDENT

AND

MAJID MOHAMED ADAM ----- INTERESTED PARTY

BETWEEN

WILFRED NYAUNDI KONOSI APPLICANT

AND

THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

AND



JUDGMENT

1. The Applicant moved the court vide the Notice of Motion dated 22nd August, 2023. In which he sought the following prayers;-
 - i. That this Honourable Court be pleased to issue an order of Certoriari to remove into the High Court for Quashing and to Quash the decision of the Director of Public Prosecutions made on 22nd March 2023 and all subsequent decisions based thereon to charge the ex parte Applicant over his occupation of Nakuru Municipality Block 11/66, Nakuru Municipality Block 11/680 which are subject of Nakuru ELC Number 472 of 2017 Wilfred Nyaundi Konosi versus Majid Mohamed Adam as consolidated with Nakuru ELC Number 1 of 2018 Wilfred Nyaundi Konosi versus Herman Ngari Kirika, Nakuru ELC Number 60 of 2019 Wilfred Nyaundi Konosi versus Kenedy Nyabwari Bosire and Nakuru ELC Number 138 of 2019 Wilfred Nyaundi Konosi versus Saleh Hassan.
 - ii. That this Honourable Court be pleased to issue an order of prohibition to prohibit the prosecution of the exparte Applicant over his occupation of Nakuru Municipality Block 11/66, Nakuru Municipality Block 11/678, Nakuru Municipality Block 11/679, Nakuru Municipality Block 11/680 which are subject of Nakuru ELC Number 472 of 2017 Wilfred Nyaundi Konosi versus Majid Mohamed Adam as consolidated with Nakuru ELC Number 1 of 2018 Wilfred Nyaundi Konosi versus Herman Ngari Kirika, Nakuru ELC Number 60 of 2019 Wilfred Nyaundi Konosi versus Kenedy Nyabwari Bosire and Nakuru ELC Number 138 of 2019 Wilfred Nyaundi Konosi versus Saleh Hassan.
 - iii. An order for costs of the proceedings.
2. The Application is propped by the grounds set out on the face of it and is supported by the Verifying Affidavit of the Applicant sworn on 16th August 2023 and the statement of even date.
3. In a nutshell, the Applicant's case is that on 18th March 1991, one Kennedy Nyabwari Bosire (Mr.Bosire)leased all that parcel of land known as Nakuru Municipality Block 11/66 measuring approximately 0.8701 hectares from the Municipal Council of Nakuru for a term of 99 years. That the said lease was registered vide presentation book No. 216/3 of 1999 and thereupon the said Bosire was issued with a lease and certificate of lease.
4. The Applicant further states that he expressed an interest in purchasing the suit parcel of land from Mr. Bosire and pending commencement of formalities of the purchase, in June, 2000, he moved into and occupied the house erected the suit land. He then applied for electricity connection which was done in his name. That the intended sale fell through and Mr. Bosire offered the land to 3rd parties. That despite Mr. Bosire's requests that he vacates the premises, he has continued to occupy the house to date.
5. The applicant also avers that some time in 1999, some unscrupulous land speculators purported to subdivide the suit land into 3 parcels namely;
 - i. Nakuru Municipality Block 11/678
 - ii. Nakuru Municipality Block 11/679
 - iii. Nakuru Municipality Block 11/680



6. That the 3 parcels of land measured 0.4232 hectares each, totalling to 1.0832 hectares, more than the size of the original parcel. That the subdivision was done without the consent of Mr. Bosire the holder of the lease, which has never been cancelled nor surrendered.
7. The Applicant further states that around 20th December 2017 the interested party entered upon the suit land, purporting to intend to develop parcel No. Nakuru/Municipality Block 11/680. The interested party destroyed the live fence and placed beacons on the land. That the Applicant then filed Nakuru ELC Case No. 472 of 2017 against the interested party and obtained injunction orders.
8. The Applicant states that the interested party defied the said orders and descended upon the suit land again, this time purporting to be on Nakuru/Municipality Block 11/679 and deposited building materials on the land. That this time, the interested party used one Herman Ngari Kirika to invade the land and so the applicant filed Nakuru ELC No. 1 of 2018 but in further defiance the interested party put up a fence on the land. That the court issued further injunction orders.
9. The Applicant states that on 14th February 2018 the 2 cases were mentioned in court and it directed that the Applicant could deal with the stones deposited on the suit land as he deemed fit since both the interested party and Herman Kigira has disowned them.
10. The Applicant further states that in May and June 2019 the interested party and the said Herman Kirika wrote to the Judicial Service Commission (JSC) objecting to the Applicant's appointment as a Judge. The former attached a letter he had addressed to the office of the Director of Public Prosecutions (ODPP), accusing Mr. Bosire of fraudulent occupation of the suit land.
11. The Applicant also avers that on 25th June, 2019, he commenced ELC Case Number 60 of 2019 against Mr. Bosire and on 11th November 2019 he instituted a ELC Case No. 138 of 2019. That vide the Court's ruling on 30th April 2020, the said suits were consolidated and orders of maintenance of the status quo were issued.
12. It is further averred that the said consolidated suits have not proceeded for various reasons, including the demise of Herman Kirika.
13. The Applicant avers further that by a letter dated 22nd march 2023, the 2nd Respondent has recommended that the Applicant be charged with the offence of forcible detained, contrary to Section 91 of the Penal Code.
14. The Applicant avers that the 2nd Respondent cannot legally recommend criminal charges against the Applicant as there are existing orders of the court on the maintenance of the status quo in the matters mentioned above, which were all consolidated.
15. The applicant maintains that the intended prosecution of the Applicant is aimed at achieving a collateral purpose, being to steal a match on the Applicant and exert pressure on the Applicant to abandon his claims in the aforementioned suits, including a claim of adverse possession which is the subject of ELC No. 472 of 2017.
16. The Applicant further avers that the intended prosecution is intended to settle a civil dispute pending before a competent superior court and as thus an affront to the administration of justice. That unless the orders sought are granted, he is likely to be charged, which would be an abuse of the court process.
17. The Applicant further states that despite service of the Application, the Respondents and Interested party have not filed any response.



18. When the matter came up for directions, on the ex parte application for leave to file the application, I granted leave but did not grant any stay orders as sought then.
19. The Applicant then filed the Application dated 9th October, 2023 in which he sought orders that the grant of leave issued on 18th August 2023 to operate as a stay of the decision of the DPP dated 22nd March 2023 and all subsequent decisions regarding to the Applicant's occupation of the suit property. The applicant stated after serving the application and while this matter was pending, officers from the 1st Respondent arrested him and directed that he appears in court. The court duly granted the orders sought.
20. None of the Respondents and the interested party filed any response despite service of the applications in question. The Court directed the Applicant to proceed to file his submissions which I summarise as hereunder.
21. The Applicant submitted that the issues that fell for determination were first, whether the orders of certiorari and prohibition ought to issue as prayed and second, who should bear the costs of the Application. The Applicant referred the court to the provisions of Article 157 of *the Constitution*, which creates the office of the Director of Public Prosecutions and sets out his duties and powers.
22. The Applicant further referred the court to the decision in Republic vs Director of Public Prosecutions and 2 Others, Evanson Muriuki Kariuki, Exparte James M. Kahumbura [2019] eKLR where the court expressed itself on the purport of Article 157 of *the Constitution*. Also cited was Rosemary Wanja Mwangiru & 2 Others vs Attorney General & 3 Others [2013] eKLR where the court dealt with the use of criminal proceedings in a civil dispute.
23. The Applicant submits that whereas the 2nd interested party has the powers to prosecute any matter, the same must be within the four corners of the law cited above.
24. The Applicant submits further that it apparent that the Interested Party was unhappy that he had been restrained from interfering with the Applicants occupation of the suit land and he resorted to complaining to the 2nd Respondent, who then directed that the Applicant be charged. That the 2nd Respondent acted in bad faith and acted on flimsy evidence.
25. The Applicant submits that he has demonstrated that the intended prosecution is aimed at achieving a collateral purpose of exerting pressure on him to abandon his legitimate claim in the pending suits described hereinabove. He thus seeks the orders as sought.
26. On costs, the Applicant submits that the same be borne by the Respondent and the Interested Party. He relied on the case Jasbir Singh Rai and 3 Others vs Tarlachan Singh Rai & 4 others [2014] eKLR.

Analysis and Determination

27. The Respondents and the Interested Party did not file any response(s). This is despite service of the substantive application, confirmed by the filed Affidavit of Service.
28. Therefore, this Application is unopposed.
29. Despite there being no responses, the court must be satisfied that the Application meets the threshold of the requirement of proof in order to have the orders granted.
30. That said, I find that the issues for determination to be as follows;
 - (a) Whether there is sufficient material before the court to warrant the grant of the orders of certiorari and prohibition.



- (b) Who bears the costs of this Application.
31. It is the Applicant's case that the decision by the 2nd Respondent to have him charged was not made in good faith since there are subsisting orders of maintenance of the status quo in the four suits mentioned above.
32. Article 157 of *the Constitution* provides as follows;-
- “Director of Public Prosecutions
- (1) There is established the office of Director of Public Prosecutions.
- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
- (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- (c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
- (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
- (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”
33. It is well settled law that the DPP Acts independently. *The Constitution* has expressly stated so. However, the powers to prosecute or even terminate any prosecution have to be within the confines of *the Constitution* itself, at sub article 11 hereinabove. This was eloquently expressed in *Republic vs DPP & 2 Others Evanson Muriuki Kariuki; Exparte James Kahumbura (supra)* and *Rosemary Wanja Mwangiru vs The Attorney General (supra)*.
34. It is thus clear that the office of the ODPP is independent and ordinarily courts will be reluctant to interfere with that independence. The court can only intervene when there is a clear violation of *the*



Constitution or the law or where it is clear that such exercise amounts to an abuse of the process of the court.

35. It must be remembered that under Article 165 of the Constitution, thus court has powers to intervene when there is a violation of the Constitutional or other right.
36. Therefore the independence of the Office of the ODPP is not a carte blanche to that office to engage in acts that would be deemed to be in violation of a right or is an abuse of the said discretion.
37. It is also settled law that under Section 193 A of the Criminal Procedure Code (CPC) concurrent civil and criminal proceedings can continue simultaneously. The said section provides as follows:-

“193A. Concurrent criminal and civil proceedings.

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

38. Despite the above provisions the superior courts have repeatedly expressed themselves on the use of the criminal process to settle a civil dispute.
39. In *Rosemary Wanja Mwangi vs A. E. and 3 Others* [supra] the court held that:-

“It is, I believe, undisputed, as provided under Section 193 A of the Criminal Procedure Code, that the institution of civil proceedings does not preclude the State from undertaking criminal proceedings against a party with respect to an issue which is also directly in issue in a pending civil suit.

That notwithstanding, it is the duty of the Court to exercise its inherent jurisdiction so as to prevent its process being used to perpetrate injustice or otherwise as an abuse of its process. Since *Githunguri v Republic* (supra), it has been established that the High Court is entitled to exercise its jurisdiction to avert abuse of power, discretion or process. Thus, an examination of the events unfolding prior to the institution of the five civil suits and the eventual institution of the criminal complaints by the 2nd and 3rd respondents causes serious unease about the institution of the criminal process. Given the timing of the criminal complaint and the institution of the criminal prosecutions immediately following upon the filing of five civil claims involving the same parties over the same subject matter, and an application for orders of contempt against the petitioners in the Winding Up Causes which they had lodged against the 2nd and 3rd respondents, it is difficult to reach a conclusion other than that the criminal case was calculated to harass, coerce, oppress or otherwise intimidate the petitioners”.

40. In *Republic vs Chief Magistrate’s Court Mombasa Ex-parte Ganijee and Another*(2002) KLR 703 the High Court expressed itself as follows:-

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in



the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

41. Again in *Reuben Mwangi vs DPP and 2 Others* [2012] eKLR the court held that;

"It is, hence, a settled legal principle and position that whenever a Petitioner sufficiently demonstrates the stifling of or threats of infringement of rights, fundamental freedoms, *the Constitution* and/or the law by the investigative and prosecutorial agencies, a Court should not hesitate to intervene and stop such a prosecution. Such intervention by the Courts should, however, be in clearest of the cases."

42. Reference is also made to the decision in *Kuria and 3 Others vs AE* (2002) 2 KLR 69 where the Court held that:-

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score settling or vilification on issues not pertaining to that which the system was even formed to perform.....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process)."

43. Lastly, reference is made to the decision in *Republic vs AE and 4 Others: Exparte Kenneth Kariuki Githii* [2014] eKLR where the court held that:-

"It is therefore clear that whereas the discretion given to the 3rd respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the



commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.”

44. From these authorities, it is clear that the court can intervene to check on the powers of the DPP where it is shown that the actions complained of are an abuse of his powers or the court process.
45. In the instant case, there is no dispute that the ELC issued orders of maintenance of the status quo until further orders in the four (4) consolidated suits. The orders are still subsisting. It is not shown that these interlocutory orders have been set aside or vacated.
46. To me, therefore, the intended prosecution of the Applicant is in clear violation of the said orders. I think that in the peculiar circumstances of the case, and there being an order as stated, it was out rightly wrong to proceed to prosecute the Applicant.
47. It was brought to the court’s attention that when leave was granted to apply for orders of Judicial Review, the court refrained from issuing stay orders. It ordered that the substantive application be served on the respondents, with timelines given for filing of responses. Instead of filing responses, the 1st Respondent had the Applicant arrested and directed him to appear in court to take plea on the offences of forcible detained, Contrary to Section 91 of the Penal Code. If that is not a show of abuse of the prosecutorial powers, I don’t think what else is. The Applicant was then forced to come back to court to seek stay, which order was granted.
48. In my opinion, the Applicant has sufficiently proven that there are orders of the Environment and Land Court (ELC) on the maintenance of the status quo in place, and proceeding with the intended prosecution will only be interpreted as a violation of the said orders. The court cannot sit and watch as the said orders are violated.
49. There will be no prejudice if the respondents await the conclusion of the 4 cases before the Environment and Land Court Nakuru. Suppose the Applicant is successful in his suits or any of them, then wouldn’t the prosecution directly conflict with the orders issued? That situation will place the two courts in an embarrassing situation.
50. I therefore think that the right thing is to have the intended prosecution to await the outcome of the four (4) suits. After all the Criminal case has no limitation period.
51. In conclusion, I find that the Applicant has surmounted the threshold for the grant of the orders sought. I therefore issue the following orders;
 - a. An order of certiorari is hereby issue to quash the decision of the 2nd Respondent dated 22nd March 2023 to charge the Applicant herein as intended.
 - b. An order of prohibition issued preventing the 2nd Respondent and by extension the Respondent, from arresting, charging or prosecuting the Applicant over any matters that are substantively in issue in the 4 suits (consolidated) before the Environment and Land Court at Nakuru.
 - c. These orders shall last for the time the four (4) suits are pending and depending on their outcome, the Respondents are at liberty to take action within the confines of the law.
 - d. The Respondents and interested party shall bear the costs of this application jointly and severally.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 21ST DAY OF FEBRUARY, 2024.

H. M. NYAGA,



JUDGE.

In the presence of;

C/A Dickson

Ms Ekesa for Ndubi - Applicant

N/A for Respondent

