



Kaaria v Chief Magistrate’s Court Milimani & another (Miscellaneous Criminal Application E323 of 2022) [2024] KEHC 9379 (KLR) (Crim) (16 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9379 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E323 OF 2022
LN MUTENDE, J
JULY 16, 2024**

BETWEEN

NANCY KAGENI KAARIA APPLICANT

AND

CHIEF MAGISTRATE’S COURT MILIMANI 1ST RESPONDENT

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND
RESPONDENT**

RULING

1. Godfrey Mwenda Mbae was arraigned in Milimani Chief Magistrate’s Criminal Case No. 2154 of 2019 for having committed various fraudulent acts. It was alleged that with intent to defraud, on 20th November, 2015, he made: minutes of meeting of directors of Techglobal Trading Company Limited purporting them to be genuine minutes signed by Katana Kaingu Ndunge; an affidavit purported to be drawn and sworn by Solomon Mugo Advocate and signed by Nancy Kageni Kaaria; and, a resignation document as a director purportedly drawn and signed by Nancy Kageni Kaaria. Then on 15th September, 2015, he made: a Transfer of shares of stock document purportedly drawn by Nancy Kageni Kaaria; and, an Account opening form purportedly from KCB purportedly signed by Nancy Kageni Kaaria.
2. Subsequently, the fraudulently copied documents were uttered to the Registrar of Companies on 4th December, 2015, and 15th September, 2015, respectively, purported to be genuine.
3. Having denied the charges, the accused was granted bail and the matter was fixed for hearing. After two (2) witnesses testified the 2nd Respondent applied to withdraw the case under Section 87 (a) of the [Criminal Procedure Code](#) which application was allowed by the court on 4th February, 2022.



4. Consequently, through an application dated 2nd November, 2022, Nancy Kageni Kaaria, the Applicant herein and complainant in the matter who had testified filed the instant application seeking reinstatement of the case in the lower court.
5. The application is premised on the grounds that: The application to withdraw the case was done without the applicant's knowledge; no reasons were given for withdrawal of the matter; and, that it is in the interest of justice that the withdrawal be set aside.
6. That the withdrawal was an affront to justice and the procedure was ignored. That no reasons were given for the withdrawal and that the Interested Party's application was pending before court.
7. At the lower court the complainant, applicant herein had been granted orders preserving the property in question and business interests. The accused had filed an application seeking access to Mpesa Tills and login credential an application that was successful as per the ruling of the court dated 27/3/2020. The effect of that order was that the accused was given access to engage in transactions which he had been barred from while his co-directors continued to enjoy exclusive privileges.
8. Subsequently, Safaricom Ltd, describing itself as an Interested Party filed another application to set aside the above orders and also prayed in the alternative that access of Mpesa logs and Tills by all directors be suspended until the case is resolved or such time when directors shall pass a special resolution on modalities of access and distribution of commission.
9. When the application came up for hearing on 19/10/2022, the Prosecution Counsel distanced himself from the application for lack of instructions. It was also pointed out that there were new developments as there was intention to withdraw the case.
10. The court considered the application which it found incompetent having been brought under the Civil Procedure Rules and that the reasons given did not affect the case. Consequently the application was disallowed.
11. In the result, the prosecution applied for withdrawal under Section 87(a) of the [Criminal Procedure Code](#) an application that the court allowed in the impugned ruling holding that:

“The prayer to withdraw resonated with prayer 2 of the application and that it would be in the best interest to withdraw the matter since Safaricom was best placed to settle the dispute on ownership of till logs.”
12. Directions were given in the instant matter for parties to dispose the application through written submissions. However, only the respondent complied, the applicant's submissions were neither traced from online filing portals nor physically in court.
13. The respondent submits that the application is an abuse of court process and that there is no impropriety or illegality in the ruling. That the Director of Public Prosecutions has power to withdraw the case under Section 25 of [Office of the Director of Public Prosecutions Act](#) and Article 157 (11) of the [Constitution](#); and, shall in such exercise have regard to public interest and the interest of administration of justice.
14. That the advocate watching brief does not have any right to determine whether a matter can be discontinued if prosecution has re-evaluated the matter. That prosecution have the right to make necessary decisions where the guidelines on the decision to charge do not support continuation of the matter. That the prosecutor had express instructions from the DPP to make the application for withdrawal; and, the applicant has not demonstrated any prejudice suffered.



15. I have considered the application, affidavit in support, grounds of opposition and submissions by the respondent. The Director of Public Prosecutions is vested with express powers to initiate, take over or discontinue any criminal proceedings. This is a Constitutional and statutory function under Article 157 (6) (c), (7), (8) of the Constitution and Section 87 of the Criminal Procedure Code.
16. Section 87(a) provides that;
- In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions**, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal—
- a. If it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.
17. The 2nd respondent's actions are not subject to external direction, influence or supervision. This follows the principle of independence of the office the Director of Public Prosecutions. A reading of the law shows that the withdrawal by the officer prosecuting the matter is discretionary as discontinuance of the matter would require the consent of the court. The court is enjoined to ensure the decision and the process undertaken is informed by law, public interest and is beneficial to the wider interest of justice. Therefore, the court has power to disallow an intended withdrawal where it is in abuse of power or court process.
18. Article 157 (11) of the Constitution provides that:
- “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.”
19. In R -Vs- Izzam A. Omar Criminal Case No. 56 of 2007, it was held that the Court cannot be reduced to merely endorsing the decision by the Attorney General. Therefore, the trial court has a duty to ensure justice is done.
20. Whether or not to allow an application for withdrawal under Section 87(a) of the CPC is within the trial court's discretion. But, the discretion must be exercised judiciously and must not be seen to be whimsical. In George Taitimu -Vs- Chief Magistrate's Court Kibera & 2 Others (2014) eKLR the court stated that:
- “Section 87(a) of the CPC gives the learned magistrate broad discretion to accept or reject an application for withdrawal of charges presented by the prosecutor. Such discretion has to be exercised judiciously taking into account the facts of each case and in particular whether the application is brought in the public interest, the interests of administration of justice and the need to prevent and avoid an abuse of the legal process.”
21. In this case, the prosecution made the application before the trial court and therefore there was no breach of procedure.
22. The complaint by the applicant is that she was not informed of the intention to withdraw the case. Section 20(1) of the Victim Protection Act provides that:
- A victim has a right to submit any information for consideration to the —



- a. Police or prosecution on a decision whether or not to lay a charge, or to appeal or withdrawal.
23. The victim's right to participate in criminal proceedings should also be interrogated alongside the superior independent and constitutional function of the office of the Director of Public Prosecutions.
24. The applicant was represented by counsel at the trial. Her advocate was not present during the application but the prosecutor had earlier informed court of the intention to withdraw the case.
25. This court's revisionary power is provided under Section 362 of the Criminal Procedure Code which limits it to amending errors, omissions or illegalities or decisions taken in breach of procedure and based on impropriety.
26. It cannot be concluded that the withdrawal was against public interest or that the respondent's power was being abused. The court considered the matter as a whole and weighed all interest at hand. Further, the reasons for the decision to allow the withdrawal are on record. The trial court was of the view that the dispute could be resolved by Safaricom and therefore not capricious or whimsical in any way. No prejudice would be suffered or has been demonstrated by the applicant.
27. Lastly, Section 87(a) of the CPC does not bar further prosecution in the event the prosecution reconsiders taking back the case. Therefore, the application for revision is unmerited. Accordingly, it is dismissed.
28. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 16TH DAY OF JULY, 2024.

L. N. MUTENDE

JUDGE

