



Ngome v Director of Public Prosecutions & another; Ethics and Anti-Corruption Commission (Interested Party) (Judicial Review E009 of 2023) [2024] KEHC 8195 (KLR) (5 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
JUDICIAL REVIEW E009 OF 2023**

DK KEMEL, J

JULY 5, 2024

BETWEEN

PROF. CHARLES KIBANI NGOME EX PARTE APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

CHIEF MAGISTRATE BUNGOMA LAW COURTS 2ND RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

JUDGMENT

1. Vide the ex-parte applicant's amended substantive motion dated 8th February, 2024 and based on the grounds in the statutory statement dated 23rd November 2023, he sought orders inter alia; judicial reviews orders of certiorari and prohibition with regard to the decision by the DPP Bungoma to withdraw criminal case E462 of 2023- Republic versus Christine Muyaka & Stephen Wangusi Fedha lodged at the Chief Magistrate's Court Bungoma; a declaration that the withdrawal of criminal case E462 of 2023- Republic versus Christine Muyaka & Stephen Wangusi Fedha lodged at the Chief Magistrate's Court Bungoma by the DPP was abuse of power and discretion; that an order transferring the lower court case to another magistrate's court within Bungoma County; costs of the application.
2. A brief background of the Ex-parte applicant's case that, by a letter reference number ODPP/BGM/CAM/2 VOL.VI (49) dated 28th February 2023, the Director of Public Prosecution Bungoma County head, Mr. Robert Oyiemo, directed Bungoma County Criminal Investigations Officer to arraign in Court and prefer chargers against Christin Nasimiyu Muyaka for obtaining money by false pretence and conspiracy to defraud. The said Christine Nasimiyu Muyaka and her alleged husband Stephen



Wangusi Fedha were on 1st March 2023 arraigned and charged before the Chief Magistrate's Court, Bungoma.

3. According to the letter by Bungoma County Criminal Investigations Officer dated 27th February 2023, it was alleged that Christine Nasimiyu Muyaka on 8th November 2017 signed a sale agreement as the registered owner of two parcels of land and obtained Kshs. 14,000,000/= from the ex-parte Applicant herein and that he was to pay 1st instalment of Kshs. 6,000,000/= through Stephen Wangusi Fedha. Prior to making the payment he decided to conduct a search at the relevant land registry where he established that Christine Nasimiyu was not the owner of the parcels and that the registered owner was her husband Stephen Wangusi Fedha.
4. Vide its replying affidavit sworn on 1st March 2024, the 1st Respondent averred inter alia; that the matter proceeded to Court vide E462 of 2023- Republic versus Christine Muyaka & Stephen Wangusi Fedha. Vide the impugned decision as contained in the letter ref: ODPP/BGM/CAM2/VOL.IV (95) dated 2nd November 2023(annexure E01"), the DPP proceeded to withdraw the lodged criminal case E462 of 2023- Republic versus Christine Muyaka & Stephen Wangusi Fedha but that the same was overturned by a letter reference ODPP/HQ/CAM/2/2201 dated 27th December 2023, which was on the request of the ex-parte applicant's advocates and which was copied to him; that the decision to reserve their earlier decision cures prayers 1, 2 and 3 of the substantive motion thus rendering the same obsolete with no need for litigations.
5. The Respondent prayed that the application be dismissed with costs to the Respondent as the same was filed after the ex-parte applicant had been made aware of its decision as contained in the letter dated 27th December 2023.
6. Vide Court directions, parties canvassed the substantive motion application by way of written submissions. Both parties filed and exchanged their written submissions.
7. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions for and against the grant of the orders sought and the authorities cited on behalf of the parties thereto.
8. Except in cases where criminal charges are terminated by operation of the law where upon death of an accused, there is no person to be tried, convicted and sentenced in a trial, there are three ways upon which a criminal charge may be terminated by act of the parties, and it is opportune in this case to discuss the principles involved. A criminal case may be terminated by act of the parties, by reconciliation under section 176 of the Criminal Procedure Code (CPC); withdrawal or discontinuance of the charge by the complainant (S. 204 of the Criminal Procedure Code) or the prosecutor (Art. 157 (6) (c) of *the Constitution* and S. 87 of the Criminal Procedure Code); An alternative dispute resolution agreement pursuant to Article 159 (2) (c) of *the Constitution*. A criminal case may also terminate partly by act of complainant and by operation of the law under section 202 of the Criminal Procedure Code where the complainant fails to attend court.
9. The principle that emerges from our decisional law, is that while the Court has the duty and authority to review the charging decisions of the DPP, the Court is extremely cautious in performing that duty because of the danger of usurping the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecutions and, where, appropriate, withdraw charges. Hence in



the Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR the Court held thus:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court.....As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

10. In the present case, the DPP had given his go-ahead for the prosecution to begin and proceed. He had based his information on the evidence collected by that time – including evidence presented by the ex-parte Applicant. That evidence tended to show that the ex-parte Applicant vide a sale agreement signed by Christine Nasimiyu purchased for two parcels of land and for Kshs. 14,000,000/=. He was to pay the 1st instalment of Kshs. 6,000,000/= through Stephen Fedha, her husband. Prior to making the payment, he decided to conduct a search at the relevant land registry where he established that Christine Nasimiyu was not the owner of the parcels and that the registered owner was her husband Stephen Wangusi Fedha. After investigations, the DPP Bungoma County proceeded to institute a Criminal Case at the [*Chief Magistrate’s Court Bungoma vide E462 of 2023*](#)- Republic versus Christine Muyaka & Stephen Wangusi Fedha. Vide letter ODPP/BGM/CAM2/VOL.IV (95) dated 2nd November 2023, the DPP proceeded to withdraw the lodged criminal case E462 of 2023- Republic versus Christine Muyaka & Stephen Wangusi Fedha but that the same was overturned by a letter reference ODPP/HQ/CAM/2/2201 dated 27th December 2023, which was on the request of the ex-parte applicant’s advocates and which was copied to him.
11. Despite been served with letter reference ODPP/HQ/CAM/2/2201 dated 27th December 2023, the ex-parte Applicant still proceeded to file this substantive motion before this Court.
12. In Peter Ngunjiri Maina v Director of Public Prosecutions & 2 others [2017] eKLR, the court held thus:

“The law and practice, then, are quite clear: while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the Court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the Court can review the DPP’s decisions for rationality and procedural infirmities, it cannot review them on merit.”
13. The Court never performs a straight-up merit review of the decision by the DPP in his charging or terminating decisions. The furthest the Court goes in that direction is a proportionality analysis which involves a determination whether the decision is disproportionate in the sense of being unnecessary or unsuitable for the purpose. The other question the Court asks is whether the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker.
14. In the present case, it is elaborate that Criminal Case at the [*Chief Magistrate’s Court Bungoma vide E462 of 2023*](#)- Republic versus Christine Muyaka & Stephen Wangusi Fedha, was clearly reinstated vide letter reference ODPP/HQ/CAM/2/2201 dated 27th December 2023. As the matter has since been reinstated for continued prosecution, i find the Ex-parte Applicant’s grievance has been resolved as he can now proceed with the matter before the trial court. The applicant was expected to withdraw his application the moment the matter had been reinstated in the lower court but not to compel this



court to engage in an exercise that ends in futility. It is improper for the applicant to mount the present application while having knowledge that the lower court matter has since been reinstated. In efforts to avoid this judgement being an academic exercise, this Court will not grant the orders sought as they are clearly overtaken by events.

15. Finally, the Ex-Parte applicant has sought for an order for transfer of the lower court matter to another court within Bungoma County. Indeed, the applicant now admits and confirms that the lower court case has been reinstated and thus he ought to proceed there and have the case prosecuted. However, vide the amendment, he now seeks for the transfer of the matter to another court within Bungoma County. It is instructive that such a prayer is not one of the Judicial Review remedies envisaged under Order 53 of the Civil Procedure Rules and hence the said prayer is misplaced and must be rejected. In any case, the Applicant has not tendered any cogent reasons why the prayer should be granted.
16. The upshot of the foregoing observations is that the amended substantive motion by the Ex-parte Applicant herein dated 8.2.2024 has no merit. It is hereby dismissed in its entirety. Due to the nature of the case, each party will bear their own costs.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 5TH DAY
OF JULY 2024.**

D. KEMEI

JUDGE

In the presence of:

Miss Nekeyo for Ex-Parte Applicant

Miss Kibet for 1st Respondent

Miss Kibet for 2nd Respondent

Kizito Court Assistant

