



Republic v Director of Criminal Investigation & 3 others; Gacanja & another (Exparte) (Judicial Review E019 of 2023) [2024] KEHC 8220 (KLR) (Judicial Review) (5 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8220 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW**

JUDICIAL REVIEW E019 OF 2023

JM CHIGITI, J

JULY 5, 2024

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF CRIMINAL INVESTIGATION 1ST RESPONDENT

OFFICE OF THE DPP 2ND RESPONDENT

THE CHIEF MAGISTRATE'S COURT MAKADARA 3RD RESPONDENT

OFFICE OF THE ATTORNEY GENERAL 4TH RESPONDENT

AND

WILSON GACANJA EXPARTE

JOSEPHINE TRACY WANINI GACANJA EXPARTE

JUDGMENT

1. The application before that is before this court is the one dated 13th February, 2023. The applicants seek the following orders:
 - a. That this honourable court be pleased to issue an order of CERTIORARI to bring into this Court for purposes of quashing the 2nd Respondent’s decision to charge the applicants herein vide letter dated 17thDecember 2021 or at all.
 - b. That this honourable court be pleased to issue an order of CERTIORARI to bring into this Court for purposes of quashing all proceedings pending before the 3rd Respondent in MCCR/E4955/2022



- c. That this honourable court be pleased to issue an order of PROHIBITION prohibiting the 3rd Respondents from undertaking further proceedings in the Chief Magistrates' court in MCCR /E4955/2022.
- d. That this honourable court be pleased to issue an order of PROHIBITION prohibiting 1st Respondent from undertaking any or further investigations and/or recommending the Applicants for prosecution by the 2nd Respondent.
- e. Costs of the proceedings be borne by the Respondents.

Brief background;

2. The Ex-Parte Applicants have filed the present application challenging the decision to institute criminal proceedings (MCCR/E4955/2022) wherein they have been charged with conspiracy to commit a felony contrary to section 393 of the Penal Code, obtaining registration via false pretenses contrary to section 320 of the Penal Code, abuse of office contrary to section 101 of the penal code and being in possession of proceeds of crime contrary to section 4(a) of The Proceeds of Crime and Money Laundering Act of 2012.
3. In Applicant's verifying affidavit, they contend that Gatero Enterprises Limited wherein they are directors, has always held a valid title to the property known as Land Reference No. L.R. No.209/13415 located within Nairobi County until sometime in 2007 where it passed the title to Njuwangu Holdings Limited. That Njuwangu held title and possession of L.R. No.209/13415 until sometimes in the year 2014 when Tana Mining Company Limited purported to be the registered owner of a portion of the suit property pursuant to a subsequent allotment of the suit property that gave rise to two titles L.R No. 209/14754 and L.R 209/14619. That due to the dispute in ownership, Njuwangu Holdings Limited instituted a claim in the Environment and Lands Court at Nairobi, being Elc No. 830 of 2015 Njuwangu Holdings Limited v Tana Mining Company Limited & 4 Others in which it has challenged Tana Mining's title to the suit property on the basis that the same was acquired illegally, and the said matter is still pending hearing and determination before the said court. However, despite the ongoing dispute on validity of title, the 2nd Respondent, pursuant to investigations purportedly carried out by the 1st Respondent, has moved to charge the Applicants over fraudulent transfer of title among other charges in Criminal Case No. MCCR/E4955/2022, Republic v Wilson Gacanja, Josephine Tracy Wanini Gacanja, Elizabeth Gitiri Gacanja presided over by the 3rd Respondent.
4. The Applicants have faulted the Respondents' decision to charge them on account of glaring of substantive and procedural improprieties and do not conform to the Principles of Fair Administrative Action as envisioned in *the Constitution* of Kenya 2010, The Fair Administrative Act, The *Law Reform Act* and all other relevant legal provisions and being aggrieved by the said decisions and actions of the Respondents, they have moved this honorable court to invoke its supervisory jurisdiction and protect the Applicants' rights.
5. The Applicants' have averred that prior to being charged in Criminal Case No. MCCR/E4955/2022, Republic v Wilson Gacanja, Josephine Tracy Wanini Gacanja, Elizabeth Gitiri Gacanja, they had not been summoned to record any statement(s) over acquisition and transfer of title for L.R. No.209/13415 and the charges were instituted while solely relying on the information purportedly gathered by the 1st Respondent during investigation. This is also evident from the fact that the 1st Respondent vide letter dated 20th January 2023 wrote to the Applicant's Advocate on record wherein it purported to issue summons for the to the Ex-parte Applicants to present themselves at their offices for purposes of recording their statements over the aforementioned investigations.



6. It is the applicants' contention that they were not accorded a right to be heard contrary to the rules of natural justice enshrined in *the constitution*. Further, the 1st Respondent's actions contravene Section 35 of the *National Police Service Act* which obligates the 1st Respondent to conduct independent investigations. Failure to accord suspects the right to be heard in the course of the investigations, if at all any investigations were conducted, and arriving at a decision to charge without according suspects fair hearing by the investigative agency was conventionally held to be an infringement on the right to fair administrative action as was held in the case of *Philomena Mbete Mwilu v D.P.P & 3 Others* [2019] eKLR where the learned judge stated that:

“ 314. With regard to the process or manner of the conduct of investigations, the court in *Josephat Koli Nanok & Another v Ethics & Anti-Corruption Commission* (supra) went on to consider what an investigation process might entail. It stated that the person subject of the investigation would be entitled to fair administrative action, so that before a decision is taken for the prosecution of the suspect, the investigative agency must observe that person's rights by granting him or her the opportunity to respond to the allegation. It was observed that there would be as a matter of course, a preliminary inquiry, conducted internally, before the formal investigations, and that it should be at the formal investigation stage that the suspect is entitled to be heard.”

7. The applicants assert that their Constitutional right enshrined under Article 47(1) of *the Constitution* of Kenya, entitling them to be subjected to fair administrative action has been infringed by the 1st Respondent by failing to observe procedural fairness in its investigations that led to their prosecution. The applicants further wish to enumerate the infringement of the right to be heard by invoking the case *Catherine Chepkemai Mukenyang v Evanson Pkemei Lomaduny & another* [2022] eKLR where the learned judge elaborated the tenets of the right to be heard by quoting Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639 on the right to be heard states that:

“ The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”

8. It is the Applicants' humble submission that failure by the 1st Respondent to adhere to the rules of natural justice points to procedurally impropriety hence the said investigations and findings arising from the impugned investigations ought to be quashed. Additionally, the Applicants pray that any attempts by the 1st Respondent to re-open the investigation after charging the Applicants should be prohibited as it amounts to an irregularity and infringement of the Applicants' right to fair administrative action.

9. That further, the legitimacy of the title being subject for determination in ELC No. 830 of 2015 *Njuwangu Holdings Limited vs. Tana Mining Company Limited & 4 Others*, the dispute having been instituted by private persons, ought to be resolved via civil proceedings without putting their liberty



at risk. To buttress this position, the Applicants seek to rely on the case of Loyford Kaburu Joseph v Director of Public Prosecution & 3 Others [2016] eKLR where the court stated that:

“In my view, the civil litigation process also exists to provide effective remedies to disputants especially on issues of ownership of land and where such process has been initiated by the private person themselves, the police and the Director of Public Prosecutions have no business to interfere and purport to process charges against the offending parties. Such a conduct is what subjects the tax payers to unwarranted costs of paying for damages in malicious prosecution claims and which can be avoided.”

10. The Applicants avers that the dispute subject of this Application is civil in nature and thus should be dealt with at the Environment and Land Court.

Respondents case;

11. The matter in question was first investigated by the 1st Respondent’s office, Embakasi Police Station and the outcome of the investigation shared with the 2nd Respondent. upon independently reviewing the investigation file, the 2nd Respondent directed that the evidence on record was sufficient to sustain criminal charges against the ex parte Applicants.
12. The decision was made pursuant to the 2nd Respondent’s mandate as enshrined in Article 157 6 (a) of *the Constitution* of Kenya. The decision was made in the public interest and in the interest of the wider administration of justice.
13. Following the directive by the 2nd Respondent, Criminal Case No. MCCR E4955/2022 Republic versus Wilson Gacanja, Josephine Tracy Wanini Gacanja and Elizabeth Gitiri Gacanja was instituted at Makadara Law courts. In the course of the proceedings, the Applicants through their Counsel on record wrote to the 2nd Respondent requesting a review of the investigation file.
14. The 2nd Respondent called for the investigation file and reviewed the evidence in the context of the Applicants’ request. Consequently, the 2nd Respondent directed that the Case instituted against the Applicants be withdrawn under Section 87 (a) to pave way for further investigations.
15. As a result, Makadara Criminal Case No. MCCR E4955/2022 Republic versus Wilson Gacanja, Josephine Tracy Wanini Gacanja and Elizabeth Gitiri Gacanja was withdrawn under Section 87 (a). Additionally, the investigations were taken over by the 1st Respondent’s office at the Headquarters.
16. In Republic v Director of Public Prosecution & 2 others Ex-parte Francis Njakwe Maina & another [2015] eKLR, the learned Justice G.V. Odunga stated that:

“The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim.” Emphasis added



17. We humbly submit that the Applicants have failed to prove that the criminal proceedings had been instituted as a means of compelling them to submit to the civil suit. In the absence of such evidence, the claim against the 1st and 2nd Respondents is without basis. Whether the Applicants should be granted the prayers sought.
18. Though the Applicants wants this honourable court to prohibit any further investigations, no evidence has been tabled to justify the grant of such a prayer. An Order of Prohibition is discretionary and is only tenable where a public body or official has acted in excess of their powers and as such the order requires the public body to cease from performing a certain act. However, in this case there is no evidence of misuse of power or contravention of rules of natural justice as alleged by the Ex-parte Applicant.
19. In this case, there is no evidence of misuse of power or contravention of rules of natural justice as alleged by the Applicants.
20. *Mativo J. in High Court in J.R Application. No. 621 of 2017 R v Inspector General, Director of Public Prosecutions & 3 others* stated that;

“The power to stay or prohibit criminal proceedings is meant to advance the Rule of Law and not to frustrate it. The Constitutional provision in Article 157(10) of *the Constitution* ensures that the DPP has complete independence in his decision making process, which is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences.”

Analysis and Disposition;

21. In the case of *Pastoli v Kabale District Local Government Council & Others*, [2008] 2 EA 300, that:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also, *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”



22. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of *the Constitution*, which provides for the right to fair administrative action.
23. Section 7 of the *Fair Administrative Action Act* in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.
24. I do not find any breach of the right to fair administrative action against the applicants. To allow the application will amount to deny of the right to fair hearing for the Interested Party, and I so hold.
25. Article 165(6) of *the Constitution* provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person's rights.
26. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office.
27. The merits of the criminal case, and particularly whether the criminal proceedings have a likelihood of success, or that the Applicant has a good defence is not a ground for halting criminal proceedings by way of judicial review.
28. Where an Applicant demonstrates that the criminal proceedings constitute an illegality or abuse of process, this Court should not hesitate in putting a halt to such proceedings, as that falls squarely within its mandate as a judicial review Court.
29. In the cases of *Peter Ngunjiri Maina v DPP & 2 Others* [2017] eKLR, and *R v DPP & 2 Others Ex parte Nomoni Saisi* [2016] eKLR identified various scenarios that would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions as follows: (a) Where there is an abuse of discretion; (b) Where the decision-maker exercises discretion for an improper purpose; (c) Whether decision-maker is in breach of the duty to act fairly; (d) Whether decision-maker has failed to exercise statutory discretion reasonably; (e) Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (f) Where the decision-maker fetters the discretion given; (g) Where the decision-maker fails to exercise discretion; and (h) Where the decision-maker is irrational and unreasonable.
30. The Applicants have not tendered any evidence towards demonstrating that their case fulfills the principles as enunciated in the case of *Peter Ngunjiri Maina v DPP & 2 Others*.
31. It is this court's finding and I so hold that the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court as recognised by Section 193A of the Criminal Procedure Code; unless the commencement of the criminal proceedings is meant to force the Applicants to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.
32. Section 193A of the Criminal Procedure Code provides that;

“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.”
33. It is this court's finding that the Environment and Lands Court at Nairobi, in ELC No. 830 of 2015 *Njuwangu Holdings Limited Vs. Tana Mining Company Limited & 4 Others* has the requisite



jurisdiction to determine the suit under Article 162 of *the Constitution* and an order of certiorari cannot issue as sought.

34. The applicants' argument that, despite the ongoing dispute on validity of title, the 2nd Respondent, pursuant to investigations purportedly carried out by the 1st Respondent, has moved to charge the Applicants over fraudulent transfer of title among other charges in Criminal Case No. MCCR/E4955/2022, Republic Vs. Wilson Gacanja, Josephine Tracy Wanini Gacanja, Elizabeth Gitiri Gacanja must fail.
35. In Republic vs Commissioner of Police and Another ex parte Michael Monari & Another, [2012] eKLR it was held that:

“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. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. 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”.
36. The Applicant has failed and I so hold to prove that the Director of Public Prosecutions has abused discretion or exercised his discretion for an improper purpose; or acted in a manner that amounted to a breach of the duty to act fairly; the Respondents have failed to exercise statutory discretion reasonably; or that the Respondents acted in a manner to frustrate the purpose of the Act donating the power, have fettered the discretion given or failed to exercise discretion; or that the Respondent has acted irrational and unreasonable.
37. In any event, it is this court's finding that the trial court has the Jurisdiction and competence to hear and determine the charges before it.
38. The Applicant has also sought orders of prohibition.
39. In Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [20221 eKLR, the Court rendered itself thus:

“The Order of "Prohibition" issues where there are assumptions of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi's Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction.”

"Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself."
40. It is my finding and I so hold that the issuance of prohibition orders as sought will serve no useful purpose given that this court has already made a finding that the Applicants did not prove that they are entitled to the orders of Certiorari as sought



Disposition:

41. The veracity of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with quality and sufficiency of evidence gathered and properly adduced in support of the charges.
42. The Applicants seek to curtail the mandate of the criminal justice system actors as set out in *the Constitution* by attempting to circumvent a foreseeable trial process against them without any justifiable reasons as they have failed to demonstrate with specificity how the Respondent has acted ultra vires or in bad faith.

Order:

The Notice of Motion dated 13th February, 2023 lacks merit and the same is dismissed with costs

Dated, signed and delivered at Nairobi this 5th day of July 2024.

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J. CHIGITI (SC)

JUDGE

