



Maranya & another v Director of Public Prosecutions & another (Miscellaneous Civil Application E003 of 2023) [2023] KEHC 17731 (KLR) (23 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17731 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E003 OF 2023**

EM MURIITHI, J

MAY 23, 2023

IN THE MATTER OF AN APPLICATION BY JAPHET KOBIAH MARANYA AND GABRIEL MWENDA MIUNGI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS IN THE NATURE OF CERTIORARI AND PROHIBITION AGAINST THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE INSPECTOR GENERAL OF POLICE OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF MERU CHIEF MAGISTRATE’S CRIMINAL CASE NUMBER E155 OF 2023 REPUBLIC VERSUS JAPHET KOBIAH MARANYA AND GABRIEL MWENDA MIUNGI

AND

IN THE MATTER OF INFRINGEMENT OF CONSTITUTIONAL RIGHTS UNDER ARTICLES 47, 48 & 50(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

BETWEEN

JAPHETH KOBIAH MARANYA 1ST APPLICANT

GABRIEL MWENDA MIUNGI 2ND APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

RULING

1. By ex parte Chamber Summons dated 18/4/2023 the Exparte applicants sought leave to file judicial review proceedings in specific terms as follows:



- “2. The Ex-parte applicants be granted leave to apply for orders of judicial review in the nature of Certiorari to remove into this honourable court for quashing in their entirety the charges preferred against the ex parte applicants in Meru Chief Magistrate's Criminal Case No. E155 OF 2023 together with any/all proceedings and consequential orders arising therefrom.
 3. The Ex-parte applicants be granted leave to apply for orders of judicial review in the nature of Prohibition to bar the Respondents from further prosecuting the applicants in Meru CM Criminal Case NO. E155 OF 2023 or from preferring any further Criminal charges against the applicants arising from the agreement dated 11.5.2016 between the applicants and Shree Hari Steel Works Ltd (hereafter The Subcontractor).
 4. Such leave, when granted do operate as stay of any further proceedings in Meru Chief Magistrates Criminal Case No. E155 of 2023.”
2. The grounds of the application were set out in the application as follows:
- “I. The applicants, as Directors of Newspace Creators Ltd secured a contract with The County Government of Meru (hereafter the Employer) in 2016 for purposes of renovation and improvement of Kinoru Stadium to International standards.
 - ii. After the contract had been secured, the applicants, through the 2nd applicant sub contacted Shree Hari Steel Works Limited (hereafter the Subcontractor) to build a roof cover on the straight terraces as per the drawings provided by Employer.
 - iii. A crucial term of the contract was that the contractual sum would be paid upon completion of the roof.
 - iv. Before the works could be done and completed, The Employer unlawfully terminated the contract between herself and the applicants and declined to pay for the works done.
 - v. The applicants not only suffered immense loss materially but also lost machinery and equipment which were detained at the site.
 - vi. It is for this reason that the applicants referred the dispute to arbitration, and the process is still ongoing.
 - vii. The Subcontractor has now moved the Respondents herein and placed false allegations that the applicants obtained services by false pretences and that the applicant's intention was to defraud the Subcontractor.
- VIII. The prosecution is illegal, oppressive and vexatious as the Subcontractor is seeking to enforce a civil claim through a Criminal process.
- ix. The Respondent have now, in the absence of any or proper investigations bought the narrative that the applicants intended to defraud the Subcontractor and consequently preferred charges against the applicants in Meru Chief Magistrates Criminal Case No. E155 of 2023.
 - x. The applicants constitutional rights to a fair judicial process under article 50 of *the Constitution* of Kenya, 2010 has been infringed.
 - xi. Proceeding with the charges and trial currently before court would be tantamount to exposing the applicants to double jeopardy especially now that the arbitration process is ongoing and the Contractor has not been paid.



- xii. The Subcontractor's claim is purely Civil in nature and should not be converted to a criminal process.”
3. The Court pursuant to Order 53 Rule 1 (4) of the Civil Procedure Rules directed service upon the Respondents and Interested Party for inter partes hearing.

Principles

4. The principle for consideration of grant of leave under Order 53 of the Civil Procedure Rules are set out in *Meixner & Another v. Attorney General* (2005) 2 KLR 189,193-4:

“The leave of the court is a pre-requisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion. The Court can only interfere with the discretion of the learned judge denying the appellants leave to apply for judicial review on the firmly established principles stated in *Mbogo v. Shah* [1968] EA 93.

.... The test to be applied in deciding whether or not to grant leave is whether the applicant has an arguable case. In *Njuguna v. ministry of Agriculture* (2001) 1 EA 184, this Court said at page 186 paragraph g:

“.... The leave should be granted if on the material available the Court considers without going into the matter in depth that there is an arguable case for granting leave.”

The learned judge used the phrase, a “prima facie case” But considering the matters that were considered, we are satisfied that learned judge applied the correct test, the words used notwithstanding.”

5. As regards the powers of the police to conduct criminal investigations and the DPP to institution criminal proceedings I held in *Christopher Mbugua Kiiru v Inspector General of Police & 3 others* [2015] eKLR, as follows:

“17. While considering a similar application for stay of criminal prosecution, this court dealt with the discretion of the DPP and the impact of Articles 25 and 50 of *the Constitution* in *Mombasa HC Misc. Application No. 77 OF 2013, Republic v. Inspector General of Police and 2 Ors. Ex Parte Zelea Jakaa Akiru* held that

“34. The Director of Public Prosecutions (DPP) has constitutional duty to prosecute offences under Article 157 of *the Constitution* and in the exercise of such mandate, the DPP may use the police investigators and prosecutors as may have happened in this case, and I would, therefore, find that the 2nd respondent acted within his powers to file criminal prosecution. The Prosecution would, of course, be expected to bring charges only where the investigations reveal an offence. However, whether the investigations leading to the arrest and charge of the applicant were properly done, if at all, will be established before the trial court in its decision whether the applicant has a case to answer or whether the prosecution proves the case beyond reasonable doubt upon full hearing in accordance with section 215 of the Criminal procedure Code. The court cannot, in exercise of its judicial review jurisdiction of Order 53 of the Civil Procedure Rules, consider the merits of the criminal charges facing the applicant and determine whether proper investigations were conducted in the alleged offence, and consequently, whether the applicant is guilty or not guilty as charged.



35. Under the criminal trial the applicant will be afforded all the Article 50 rights including the right to a fair trial which is, in accordance with Article 25 of *the Constitution*, not subject to limitation. If the rights of the applicant are breached in the criminal trial setting, the accused will be at liberty to lodge an appeal on the merits or file a constitutional application for their enforcement and protection. Such is not the application before the court.”
18. In my view, the High Court must in determining an application for stay or striking out of criminal proceedings consider four significant matters, namely:
- (a) the rule of law principle underpinning the discretion of the DPP to prosecute criminal cases without undue influence, direction or control by any other authority;
 - (b) the need to protect accused persons from violation of their fundamental rights and freedoms through unwarranted criminal prosecution;
 - (c) the need to ensure that the criminal process of the court is not abused to further or defeat private interests which are, or should be, the subject of civil proceedings or for other improper purposes; and
 - (d) as, an over-arching principle, the existence of fair trial guarantees for accused persons in the criminal process by virtue of Articles 25 and 50 of *the Constitution* of Kenya, 2010.
19. I have respectfully noted the concurring views of Waki, J. as he then was in *Republic vs Chief Magistrate’s Court, Mombasa ex parte Ganijee & Another* [2002] 2 KLR 703, Mulwa, J. in *Kuria & 3 Others vs AG* [2002] 2 KLR 69 and Odunga J, in *Republic vs Attorney General & 4 Others ex parte Kenneth Kariuki Gathii* (2014) eKLR.”
6. In *Director of Public Prosecutions v. Justus Mwendwa Kathenge & 2 others* [2016] eKLR the Court of Appeal restated the principle that the powers of the DPP to prosecute are not absolute, and may be halted in cases of abuse of process, as follows:
- “From the days of *Githunguri* [(1986) KLR 1], the prosecutorial powers, then exercised by the Attorney General, was held to have limits; that it must never be abused, never exercised oppressively, maliciously or against the public interest. The Court in that decision emphasized that, where it was clear that the power to prosecute was being misused, the court, under its inherent jurisdiction would stop such prosecution as it would amount to an abuse of the process of the court. This holding has since been consistently followed. See also *Mohammed Gulam Hussein Fazal& another v The Chief Magistrate Court, Nairobi & another H.C. Misc Application No 367 of 2005*, and *Peter George Antony D’costa v A.G & Another, Petition No. 83 of 2010*.”
7. See also this court’s decision in *Nairobi PETITION NO. 523 OF 2014, Christina Gakuhi Kubai v. DPP & 2 Ors.* observing that:
- “39. Although both powers of investigations and prosecution are to be exercised independently without direction or control from any person, this does not preclude the High Court as a constitutional court from terminating investigations and prosecution undertaken in breach of rights and fundamental freedoms, public interest or in abuse of the legal process. The position was first established in Kenya by the High Court (Madan Ag. CJ., Aganyanya & Gicheru, JJ.) in *Githunguri v. Republic* (1986) KLR 1 and affirmed subsequently by the Court of Appeal (*Tunoi, Githinji & Deverrel,*



JJA.) in Joram Mwenda Guantai V The Chief Magistrate, Nairobi[2007]
eKLR....”

8. The Court has considered the application for leave dated 18th April 2023 and its supporting affidavit and grounds of opposition dated 25th April 2023 filed in response by the 1st Respondent and the oral submissions of the parties. The Attorney General for the 2nd respondent did not oppose the application maintaining that it was a DPP issue. The rest of the parties argued the application to some unnecessary detail since it was not the actual Notice of Motion upon leave but only an application for leave. As held in Meixner, it was unnecessary to establish a prima facie case as an arguable case would suffice.
9. In this matter, the subject of the criminal prosecution is an agreement for the construction of a roof at the Kinoru Stadium Meru signed between the 2nd Accused/applicant and witnessed by the 1st Accused/applicant in terms as follows:

“Agreement For Roof Construction At Kinoru Stadium On The Straight Terraces Between Shree Hari Steelworks And Gabriel Miungi

This agreement is made this 11th day of May 2016 between Shree Hari Steelworks of P.O Box xxxx-60200, Meru and Gabriel Miungi of P.O Box xxxx-60200. Meru ID/NO xxxx and it is agreed as follows:-

1. Shree Hari Steelworks will build the roof cover and as per drawings provided by the County Government.
 2. That Gabriel Miungi will pay Shree Hari Steelworks (Kshs. 11, 288, 592, 00) Kenya Shillings eleven million two hundred and eight thousand and five hundred and ninety two only.
 3. The above amount is according to the quotation attached to this agreement and after ten percent discount.
 4. If there is any material changes there will be an increase or decrease of price proportionally.
 5. The roof will be completed within 3 months or earlier.
 6. The payment will be paid after completion of the roof.
 7. If any payment received in relation to the project then the Sub Contractor will be paid immediately for work done to that point.”
10. The criminal charges facing the applicants present an offence of c/s of the Penal Code as follows:

“Count 1

Obtaining Services By False Pretences Contrary To Section 312 Read With 313 Of The Penal Code:

1. Japheth Kobiah Maranya 2. Gabriel Mwenda Miungi:

On diverse dates between 15th day of May, 2016 and the Month of July, 2016 at Kinoru Stadium in Imenti North Sub-County within Meru County, being Director and Agent of Blue Space Creators Limited respectively with intent to defraud, you obtained services of building the roof including the roof cover of Kinoru Stadium as per drawings provided by the Meru County Government from Hiraji Devji Khetan the Director of Shree pretending that you were in a position to pay him the said Kshs. 8,064,000/= a fact you knew to be false.

Count 11

Conspiracy To Defraud Contrary To Section 317 Of The Penal Code:



Particulars:

1. Japheth Kobiah Maranya 2. Gabriel Mwenda Miungi:

On diverse dates between 15th day of May, 2016 and the Month of July, 2016 at Kinoru Stadium in Imenti North Sub-County within Meru County, being Director and Agent of Blue Space Creators Limited Respectively With Intent To Defraud, Conspired To Defraud Hiraji Devji Khetan The Director Of Dhree Hari Steelworks Limited Kshs. 8,064,000/= for the services rendered in building the roof including the roof cover of Kinoru Stadium.”

11. The trial court has not commenced trial of the applicants by taking evidence any prosecution witnesses.

Determination

12. Without making any determination as to the merits of the criminal prosecution or any civil suit for the recovery of such contract terms, as this may prejudice the trial and hearing, as the case may be, of matter before the criminal trial court or the civil court, this judicial review court does find that there is an arguable case, not necessarily one that must succeed, for the grant of the reliefs of certiorari and prohibition sought.
13. Even as a civil claim there was a question posed by the arguments of counsel whether the payment of the money is due the construction subject of the contract having not been completed and the contract for the construction of the main works of the stadium construction having been cancelled and arbitration proceedings commenced.
14. Having found an arguable case, it not being necessary to establish a prima facie case in accordance with authority, the court must grant leave so that the question of legality of the decision to prosecute may be examined upon the Notice of Motion to be filed under Oder 53 Rule 1 of the Civil procedure Rules.
15. The Court cannot at this stage of leave determine the question to be taken by motion.
16. On the question of leave operating as stay of the prosecution, it would, on the second principle of consideration in the principles for stay of criminal prosecution set out above, be justified on “the need to protect accused persons from violation of their fundamental rights and freedoms through unwarranted criminal prosecution.” It would be unnecessary to put the applicant to the trauma of a criminal trial on a matter which may later be adjudged a civil dispute.
17. Section 193 A of the Criminal Procedure Code is not lost on the Court. However, the necessity in public interest, in terms of Article 157 (11) of *the Constitution*, for a prosecution in addition to a possible civil claim under the contract for works between the complainant Interested Party herein and the applicant is a matter to be deliberated at the hearing of the Notice of Motion upon grant of leave! The decision cited by the Interested Party of R v. DPP and 2 Ors. Ex p. Mildred Mbuya Muli (2015) eKLR per Odunga, J. (as he then was) where the court allowed prosecution to proceed on the ground that the trial had “reached a very advanced stage”, is a final decision, a judgment on the Motion for certiorari and prohibition in the Judicial review proceedings, and not at ex parte stage.
18. The Court is satisfied of the need, therefore, to protect the applicant from criminal prosecution pending the determination of the Notice of Motion whose leave to commence is on account of existence of an arguable case herein granted.

Orders:

19. Accordingly, for the reasons set out above, the court makes the following orders:



1. Leave is granted to the applicant to file judicial review proceedings for orders of certiorari and prohibition against the DPP's decision to charge the applicant in Meru Chief Magistrate's Criminal Case No. E155 OF 2023.
 2. The grant of leave herein shall operate as stay of any further proceedings in Meru Chief Magistrates Criminal Case No. E155 of 2023.
 3. The Notice of Motion shall be filed within 21 days from today.
 4. Directions as to the hearing of the Notice of Motion shall be taken on 19/6/2023.
20. Costs to abide the outcome of the judicial review proceedings.
- 21 Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. B. Gitonga for the Applicants.

Mr. Ken Muriuki for the 2nd Applicant.

Mr. Masila for DPP.

Mr. Wachira Nguyo for 2nd Respondent.

Mr. Otieno C. for the Interested Party.

