



REPUBLIC OF KENYA



Mungu & another v Director of Public Prosecution (Miscellaneous Criminal Application 74 of 2022) [2023] KEHC 18374 (KLR) (13 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION 74 OF 2022
RN NYAKUNDI, J
JUNE 13, 2023**

BETWEEN

JOSEPH FREDRICK MUNGU 1ST APPLICANT

LEONARD MUKIRI KARONGO 2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

Coram: Before Justice R. Nyakundi

M/s Mathai Miana & Co. Advocates

Mr. Mugun for the state

- 1 The applicant approached this court vide ab application dated 13th October 2022 seeking the following orders;
 1. Spent.
 2. That Eldoret Chief Magistrates Criminal matters 5046/2016,5047/2016,4156/2016 and 3333/2019 all of them being R vs Odadiah Macharia Maina should not be to be consolidated with Eldoret Chief Magistrates Criminal case 5059/2015 R - vs- Odadiah Macharia Maina.
 3. Costs of the Application be provided for.
- 2 The application is premised on the grounds set out therein and the annexed affidavit of Joseph Fredrick Mungu.



Applicant's case

- 3 The applicant contends that the crux of the matter is that parties appeared before Honourable Linus Kassan Chief Magistrate and directions were taken on Eldoret Chief Magistrate's Criminal Case No. 5059 of 2015 Republic - IIs- Obadiah Macharia Maina which was the lead file that the carious files that had been opened against the accused Obadiah Macharia be handled by different courts, as a result of the said direction, various files were distributed to different courts for hearing and determination. Subsequently, one Jairus M. Onkoba state Counsel in the office of the Director of Public Prosecution took fresh directions before Honourable Mikoyan Chief Magistrate and sought to have all other files in the various courts be consolidated with Criminal Case No. 5059 of 2015 without disclosing that directions had already been taken on how various files were to be dealt with.
- 4 That the Chief Magistrate not knowing that there were previous directions taken granted the orders of consolidation, but unfortunately there are matters which had already been heard partially to wit Criminal Matters 5046/2016, 5047/2016, 4156/2016 and 3333/2019 all of them Republic -Vs- Obadiah Macharia Maina. These part were heard in different courts where evidence was taken by different Magistrates. Further, that even though the Director of Public Prosecutions are given powers to conduct Criminal trials under Article 157(11) of *the Constitution* of Kenya, shall have regard to public interest, the interests of the Administration of Justice and the need to prevent and avoid abuse of the legal process. The Applicant saw a red Flag and that is their worry that the said state counsel, wants to move with the said files which are purported to be consolidated to the court he is stationed and hence personalizing the matters. Though Section 135 of the Criminal Procedure Code provide for joinder of charges, these are not circumstances where the court joins changes since there was no duplicity in the charge sheet.
- 5 The Applicants urged the court to set aside the orders of consolidation and also a different state counsel to handle the matter.

Respondent's case

- 6 The respondent filed replying affidavit sworn by Jairus M Onkoba on 2nd March 2023 and submissions of the same date. He deponed that it is not in dispute that the Respondent has caused consolidation of 5059/2015, 5046/2016, 5047/2016, 4156/2016 and 3333/2019. Further, that it is not true that all these matters have been partially heard and he invited the court to look at the records with respect to all files. He urged that the consolidation was guided by the law.
- 7 He stated that there is no evidence attached to the affidavit on such a grave allegation against the officer of the Respondent with respect to Paragraph 3 of the Affidavit, notifying the court that the deponent of that affidavit shall be called to be cross examined on the same. Counsel further stated that they wish to notify the counsel who prepared the Affidavit to inform this Honourable Court on what they based their reliance as officers of this Court to draw and file the said Affidavit with such allegations.
- 8 The accused persons from whence this Application arises were charged with a common charge of conspiracy to defraud several complainants between July 2013 and August 2015. They are further charged for operating Goodlife Sacco and Fedha Micro Finance Limited as deposit taking entities without Sacco license and valid financial business license from Ministry of Finance. Upon the prosecution considering the relevant laws and the facts to the complaints



raised it was clearly established that the matters could not be in different courts at the same time hence the consolidation. After the consolidation, the Respondent requested that the matter be mentioned in court No. 9, a new court, with a view of getting nearer and clear dates for Hearing so that the victims could have their day in court the soonest possible. It was during the mention to fix hearing dates on 18th July, 2022 when the victims came to court in numbers and opposed taking of Hearing dates in Octobers for two consecutive weeks and demanded the matter be heard in different court.

- 9 He submitted that it should not be lost that the Respondent acted in the best interest of justice and that only two witnesses have testified in one of the matters and the accused person had proceeded with the hearing without being represented or the counsel representing him had not come on record. It was expected the witnesses were to be recalled for cross examination by the defence counsel. The Applicants claimed that the charges be in different courts to avoid biasness but it is not clear how spreading the files to different courts will help in avoiding biasness. They could not bring out the exact bias. The prosecution's desire in this case was the hope to expedite the matters which had been mentioned severally and help the victims express themselves in court. The decision to consolidate was well thought and was to benefit the victims.
- 10 The respondent submitted that it is true that there are different counts for each of the victims' complaint and it is also true that they emanate from the same transaction. He cited Section 135(1) of the Criminal procedure Code and submitted that from the charges facing the Accused person and the accompanying particulars thereto, it is very clear that the common complaint by the victims is that they were defrauded by the accused persons within the same period of time under an umbrella in the style and name of Goodlife Sacco and Fedha Micro Finance Limited. Therefore, it is thus true that all counts save for the last two are founded on the same facts and as well as do form a series of offences of the same or similar character. The last two charges are joined for the reason that taken together with the first batch of 65 counts, they are founded on the same facts. To this end, there was a justification in having the various matters in different courts brought together and consolidated. He cited the case of Peter Ochieng v Republic [1985] eKLR in support of his submissions.
- 11 He submitted that the next question that arises is whether the charge sheet is overloaded as presently presented before the Chief Magistrates Court at Eldoret. The charge sheet has a total of 67 counts, 65 of which are of conspiracy to defraud and the other two on lack of licenses for operating the two saccos in Eldoret. Principally, the counts are with respect to conspiracy to defraud and lack of licenses. The respondent relied on page 80 of the Essential of Criminal Procedure in Kenya and the case of Kamau John Kinyanjui v Republic [2004] 2 KLR 364 and submitted that no prejudice is occasioned to the defence as it will actually be convenient to him on preparing his defence which basically is one across the 65 counts of conspiracy to defraud. He also cited the case of Makhura and Another v State 1986 BLR 36 in further support of his submission.
- 12 Counsel urged that when plea was taken for the consolidated charge sheet, the court exercised its discretion and satisfied itself that the counts as framed and presented were okay. The defence did not and has not raised any objection or demanded that they elect what counts to proceed with and which ones they would withdraw as had been opined in the Peter Ochieng case. It is also on record that during plea, three representatives of the victims were in court and did not object. The accused persons too did not object. The Respondent thus relied on the provisions of Article 157 (6)(a), (9), (10), and (11) in his actions.



- 13 It is the Respondent's assertion that it is an abuse of the court process to have matters presided over in different courts on offences being charged that are founded on the same facts, or form or are part of a series of offences of the same or a similar character. The Respondent submitted that any Order issuing against a legally sound and backed consolidation will greatly prejudice the Respondent and will be prejudicial to its constitutional mandate of independence in exercise of its powers as donated by the constitution itself. The law provides that offences arising out of same transaction or similar facts should be consolidated.
- 14 Counsel urged that the application is unmerited and urged the court to dismiss it.

Analysis & Determination

- 15 There are several concerning issues I have noted with the present application. The first issue being that the applicants are not accused persons and further, the supporting affidavit does not inform the court on who they are in connection with this matter.
- 16 Secondly, there is the issue concerning the framing of the prayer.
- 17 From the orders sought one cannot tell whether there is a specific ruling that they seek to be revised or specific orders they seek to set aside. There is no indication as to the orders that resulted in the consolidation, in fact, the phrasing of the orders creates the impression that they seek to have an impending consolidation halted. Upon consideration of the application and responses thereto, I have identified the following key issues for determination;
1. Whether the applicants have locus standi
 2. Whether the consolidation of Eldoret 5046/2016, 5047/2016, 4156/2016 and 3333/2019 all of them being R vs Obadiah Macharia Maina should not have been consolidated with Eldoret Chief Magistrates Criminal case 5059/2015 R - vs- Obadiah Macharia Maina
- 18 The task of the court is not to retry the case but to give its opinion on the questions submitted to it concerning the objection raised against the intended application for consolidation. This is not a case the court is required to substitute its decision with that of the court below. In my view deduced from the submissions of both counsels this ground of challenge covers situations questioning whether the trial court are either consciously or in advertently omitted to exercise discretion vested in it within the parameters of procedural justice. In deed the applicants must demonstrate that the trial court in purporting to exercise its power took into account irrelevant factors or applied wrong principles of the law. As a consequence, the decision occasioned prejudice or a failure of justice. In this context the trial court exercises its jurisdiction as provided for under Article 50 (1) of the Constitution. The facts of the referenced cases No. 5046/2016, 5047/2016, 4156/2016 and 3333/2019 and arguments are to be submitted to trial court to determine the strength of the indictment against the Applicants. At the outset it should be noted that the question whether consolidation of the files is a procedural legal impediment to the fair administration of justice squarely falls within the jurisdiction of the trial court. In other words, in terms of questions of consolidation the trial court is competent to adjudicate the issue pursuant to the criminal procedure code. Having said so, I need to say something about the framed issues relevant to application by the applicants.



Whether the applicants have locus standi

19 Locus standi is defined in Black's Law Dictionary, 9th Edition (page 1026) as "the right to bring an action or to be heard in a given forum". In the case of BV Narayana Reddy vs State of Kamataka Air (1985) Kan 99, 106 (*The Constitution* of India, ARD 226), cited in Law Society of Kenya vs Commissioner of Lands & 2 others [2001] eKLR by Ombija J. it was stated that the term locus standi refers to the right to address a court of law. It signifies a right to be heard and that a person must have a sufficiency of interest to sustain his standing to sue in a Court of law

20 The Supreme Court of Nigeria in Adenuga V Odumeru [2008] S.C Part (1) observed;-

Locus standi, denotes the legal capacity, based upon sufficient interest in a subject matter, to institute proceedings in a Court of law to pursue a certain cause. In order to ascertain whether a plaintiff has locus standi, the statement of claim must be seen to disclose a cause of action vested in the plaintiff and also establish the rights and obligations or interests of the plaintiff which have been or are about to be violated, and in respect of which he ought to be heard upon the reliefs he seeks."

21 A broader interpretation of *the constitution* allows parties to institute causes on behalf of others but there are requirements that must be fulfilled in order for the court to entertain them as parties. In the Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR the court stated:

(28) It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of *the Constitution* in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013—which, in view of its long title, we take the liberty to baptize, the "Mutunga Rules", to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under *the Constitution* is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of *the Constitution*.

(29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of *the Constitution*."



- 22 The present application has not been shown to be made on behalf of a determinate class of persons who are unable to approach the court for relief. Therefore, the applicants having no locus to make the present application, I find that the same is incompetent and intended to delay the process in the trial court.
- 23 The incompetence of the application on this limb notwithstanding, I shall consider the substantive issue raised by the applicant.
- 24 Whether the consolidation of Eldoret 5046/2016,5047/2016,4156/2016 and 3333/2019 all of them being R vs Obadiah Macharia Maina should not have been consolidated with Eldoret Chief Magistrates Criminal case 5059/2015 R - vs- Obadiah Macharia Maina
- 25 The main prayer in the application is not clear on what the applicant seeks. It presents different scenarios in its wording as it is not clear whether there is a consolidation that has been done, if said consolidation is what the applicants seek to be set aside and if so, what date the said consolidation was done. The vagueness of the application presents a challenge as the court cannot direct the setting aside of an order that is not pleaded in the prayers. It is trite law that parties are bound by pleadings and consequently, so are the courts.
- 26 The application is expressed to be brought under sections 362 and 363 of the Criminal Procedure code. Section 362 provides as follows;
- 27 The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
- 28 Section 363 states;
- (1) A subordinate court of the first class may call for and examine the record of any criminal proceedings of a subordinate court of a lower class than it and established within its local limits of jurisdiction, for the purpose of satisfying itself as to the legality, correctness or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings.
 - (2) If a subordinate court acting under subsection (1) considers that a finding, sentence or order of the court of lower class is illegal or improper, or that the proceedings were irregular, it shall forward the record with its remarks thereon to the High Court.
- 29 The relevant section in the present application is section 362 of the Criminal Procedure Code. The applicant contends that the consolidation of the charges amounts to a review of the order made in Criminal Case No. 5059 of 2015 Republic vs Obadiah Macharia. It is trite law that he who alleges must prove. The applicants have provided no evidence that such order exists and therefore this allegation remains just that, an allegation.
- 30 The respondent has a constitutional mandate under article 157 of [the constitution](#) which states as follows:
- The Director of Public prosecution 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 clause (7) and (8) discontinue at any stage before judgement is delivered any criminal proceedings instituted by the Director of Public prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)
 - 2. The Director of public prosecution shall not require the consent of person or authority for commencement of criminal proceedings or in the exercise of his or her powers or functions shall not be under direction or control of any person or authority
 - 3. in exercising the powers conferred by this Article, the Director of Public prosecution shall have regard to the public interest, the interests of administration of justice and need to prevent and avoid abuse of the legal process.

31 The court cannot direct the respondent on how to charge accused persons as that would be contrary to the doctrine of separation of powers.

32 The revisionary jurisdiction that the applicant seeks to have this court exercise is premised on the court satisfying itself to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. I have perused the record of the court in 5046/2016,5047/2016,4156/2016 and 3333/2019 and it is my considered view that the consolidation of the files is in the interest of justice. Section 135 (1) of the Criminal Procedure Code (cap 75) Laws of Kenya, that deals with consolidation of cases provides as follows;

- 1. Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information, if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

33 The purpose of consolidation of cases is to expedite justice. The accused person stands to benefit from the consolidation as he shall only have to prepare one defence across 65 counts. The Supreme Court of Kenya, in the case of; Law Society of Kenya v The Centre for Human Rights and Democracy (2013) eKLR, stated as follows:

The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”

34 There has been no allegation and far less any evidence that the respondent sought instructions from any other person or that he had in any manner let the wishes of third parties prevail over the interest of justice. Dissatisfaction with the failure of the respondents to sufficiently prosecute the specific offences in terms of the charge sheet against the applicants within a reasonable time is a question for another forum. The scope of inquiry on the reasonableness or propriety of the offences has to be conducted but the trial court to establish whether the respondent erred on a question of law relating on the provisions of the criminal procedure code on consolidation. The arguments by the Applicants had misconceived because they tend to suggest incorrectly so that the respondents explicitly and implicitly has no powers to make



an application in substance to achieve a fair administration of justice of the cases before the trial court. In the performance of his duties the DPP and the staff shall not seek or receive instructions from any person, agent, or authority as to the manner and procedure to prosecute the cases filed in the various courts in our Republic. What *the constitution* demands of the DPP is that at all times to safeguard *the constitution* imperatives on the rights of fair trial under Article 50. I presume that the measure to consolidated the criminal files by the DPP may be rationally connected to the objective to strike a balance between the rights of the Applicants and the interests of the victims. If then the DPP satisfies the procedural requirements in the decision making process likely to secure a just outcome for the Applicants and compliance with the rule of law this court has no jurisdiction to intervene. In overall I echo the dicta in the language by Justice Marshall in the case of Osborn et al. V. the Bank of the United States (1824, U.S) 9 Wheat. 738, 866 “ Judicial power, as contradistinguished from the power of the laws has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law, and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the Legislature, or in other words to the will of the law.”

35 Whatever the justification, for consolidation it is understood that the discretion that goes with it would be properly exercised by the trial court without any oversight from the High Court. It is for this reason that every piece of the arguments and submissions expressed in the model of a revisionary jurisdiction by this court should inevitably fail. In other words, the designate legal evidence that is enough to establish an infringement or violation of a right against the applicants remains wanting and there is no likelihood of irreparable loss in the event the DPP and the trial court apply the principle of a balance of convenience to consolidate the pending matters before it. For those reasons the application is lost

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 13TH DAY OF JUNE 2023

In the presence of:

Mr. Mugun for the DPP

Mr. Mathai for the Applicants

.....

R. NYAKUNDI

JUDGE

