



**Njaiimwe & another v Director of Public Prosecutions & 3 others (Judicial Review E002 of 2022) [2023] KEHC 21907 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21907 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**JUDICIAL REVIEW E002 OF 2022**  
**FN MUCHEMI, J**  
**JULY 17, 2023**

**IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF**  
**CERTIORARI AND PROHIBITION**  
**AND**  
**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010**  
**AND**  
**IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE,**  
**CAP 75 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF: THE PENAL CODE, CAP 63 LAWS OF**  
**KENYA**  
**AND**  
**IN THE MATTER OF: MAGISTRATE COURT AT KARATINA**  
**CRIMINAL CASES NO. 312 OF 2019 &**  
**E426 OF 2021**  
**AND**  
**IN THE MATTER OF: KARATINA MAGISTRATES COURT**

**BETWEEN**

**DAVID MURIITHI NJAUIMWE ..... 1<sup>ST</sup> APPLICANT**  
**CHRISTOPHER KIMUNYU NJAU IMWE ..... 2<sup>ND</sup> APPLICANT**  
**AND**  
**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**



INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT  
KARATINA MAGISTRATES COURT ..... 3<sup>RD</sup> RESPONDENT  
JAMES MAREGWA NJAU IMWE ..... 4<sup>TH</sup> RESPONDENT

## JUDGMENT

### Brief Facts

1. By a Notice of Motion dated 24<sup>th</sup> May 2022, the ex parte applicants instituted these Judicial review proceedings seeking for the following orders:-
  - a. An order of certiorari be issued quashing the decision of the 1<sup>st</sup> & 2<sup>nd</sup> respondents to arrest, charge and prosecute the ex parte applicants in Karatina Magistrate Court Criminal Cases Nos. 312 of 2019 and E426 of 2021.
  - b. An order of prohibition be issued against the 1<sup>st</sup> & 2<sup>nd</sup> respondents prohibiting them from prosecuting the ex parte applicants in Karatina Magistrates Court Criminal Cases Nos. 312 of 2019 and E426 of 2021 or any intended arrest or prosecution of the ex parte applicants on grounds of the estate of the late Erastus Njau Imwe.
2. The application is unopposed.

### Ex parte Applicants' Case

3. The 1<sup>st</sup> ex parte applicant deposes that the issues relating to the instant matter arise from the succession cause relating to the estate of the late Erastus Njauimwe being Succession Cause No. 308 of 2011, where he is an administrator. He further states that the respondents have taken sides in the succession dispute wherein they have resulted to arresting, charging in court and prosecuting some of the beneficiaries of the estate. For instance the 2<sup>nd</sup> applicant is facing criminal charges in Karatina Magistrates Court Criminal Case Nos. 312 of 2019 and E426 of 2021 Republic vs Christopher Kimunyu Njauimwe.
4. The 1<sup>st</sup> ex parte applicant further states that further complaints have been made against the 1<sup>st</sup> & 2<sup>nd</sup> respondents and are apprehensive that they are about to be arrested and charged in court. The 1<sup>st</sup> ex parte applicant argues that the criminal proceedings are not intended to achieve any criminal justice but to help one party in the succession cause to achieve what he desires. It is further argued that the 4<sup>th</sup> respondent and his house claim that they own the whole estate Moresho land parcel number Kariamukuyu/Gachuiro/535 and they seek to evict the 2<sup>nd</sup> applicant from the said land. The 1<sup>st</sup> ex parte applicant avers that the prosecution is one sided while the other complaints are ignored. He further states that none of the administrators of the estate have any complaints.
5. Parties hereby disposed of the application by way of written submissions.

### The Ex parte Applicants' Submissions

6. The ex parte applicants rely on Articles 19 and 50 of the *Constitution* and the cases of *Githunguri vs Republic* (1986) KLR and *Director of Public Prosecution vs Praxidis Namoni Saisi & 2 Others* [2020] eKLR and submit that they are entitled to a fair trial, which ought to be concluded without unreasonable delay. The exparte applicant further argued that the prosecution and their intended arrest is out of malice and meant to create fear on the beneficiaries so as to abandon their rightful



claim over the estate. The respondents have shown bias against the ex-parte applicant in a case where the succession court has jurisdiction to determine the issues at hand. The ex parte applicants further argue that the alleged damage occurred on the estate and the only proper people to complain are the administrators, who include the 1<sup>st</sup> ex parte applicant, but they have not complained. Thus, the ex parte applicants submit that the 1<sup>st</sup> & 2<sup>nd</sup> respondents are acting on extraneous allegations and the prosecutions and arrests are solely meant to settle a score in the succession cause and not serve any other purpose.

7. The ex parte applicants rely on Article 157 (11) of *the Constitution* and the cases of *Republic of Kenya vs Director of Public Prosecution & 2 Others ex parte Azim Jiwa Rajwani & Another* [2022] eKLR and *Patrick Ngunjiri Muiruri vs DPP* [2017] eKLR and submit that this court can intervene in the instance that the 1<sup>st</sup> respondent, in exercising its discretion, is keen on achieving certain extraneous goals other than those legally recognized under *the Constitution* and the *Office of the Director of Public Prosecutions Act*.
8. Pursuant to the decision of the Court of Appeal in *Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge* [2017] eKLR the ex parte applicants urge this court to grant the orders of certiorari and prohibition in terms of these proceedings.

#### **Issue for determination**

9. The main issue for determination is whether the ex parte applicants have established a case to warrant the grant of the orders sought.

#### **The Law**

#### **Whether the ex parte applicants have established a case to warrant the grant of the orders sought.**

10. The ex parte applicants case is to the effect that the respondents are misusing their powers to give one of the parties' leverage in the succession cause that is pending before Karatina court. It is trite law that the powers and secretion given to the police and the prosecution ought to be exercised lawfully and in good faith and purely for achieving justice for a complainant in a criminal case.. It is alleged that the issues the respondents are dealing with are aimed at usurping the powers of the Succession court. Further that the respondent are biased against the exparte applicants in that their complaints have been ignored but those of the respondent given preference.
11. In *Kuria & 3 Others vs Attorney General* [2002] 2 KLR 69, the High Court held:-

The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is the duty of the court to ensure that its process does not degenerate into tools for personal score settling or vilification on issues not pertaining to that which the system was even formed to perform....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious.....The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the court's) independence and impartiality (as per Section 77(1) of the Kenya Constitution in relation to criminal proceedings and Section 79(9) for the civil process. The invocation



of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilization is far from that which the courts indeed the entire system is constitutionally mandated to administer.....In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute.

12. The circumstances which the court takes into consideration in deciding whether or not to halt a criminal process were set out by Musinga J (as he then was) in Paul Stuart Imison Another vs The Attorney General & 2 Others Petition No. 57 of 2009 in the following manner:-

The instances in which a court can declare a prosecution to be improper are well considered in Macharia vs Attorney General & Another (2001) KLR 448. A prosecution is improper if:-

- a. It is for a purpose other than upholding the criminal law;
  - b. It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;
  - c. It is an abuse of the criminal process of the court;
  - d. It amounts to harassment and is contrary to public policy;
  - e. It is in contravention of the applicant's constitutional rights to freedoms.
13. The Director of Public Prosecution (DPP) derives its prosecutorial power from both *the Constitution* and the *Office of the Director of Public Prosecutions Act*. Whereas Article 157(10) of *the Constitution* provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings ad in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:-

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.

14. Thus the discretion given to the DPP is not absolute and must be exercised within certain laid down standards provided under *the Constitution* and Section 4 of the Office of the Director of the Public Prosecutions Act. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognized under *the Constitution* and the *Office of the Director of Public Prosecutions Act*, that would in my view constitute an abuse of the legal process and would entitle the court to intervene and bring to an end such wrongful exercise of discretion.
15. In this case, the 1<sup>st</sup> ex parte applicant argues that the 4<sup>th</sup> respondent has instituted two criminal cases against the ex parte applicants being Karatina Criminal Case Nos. 312 of 2019 and E426 of 2021 which arise from the estate of the late Erastus Njauimwe being Succession Cause No. 398 of 2011 pending in the High Court in Nyeri. The 2<sup>nd</sup> ex parte applicant has been charged with malicious damage to properties based on a complaint made by the 4<sup>th</sup> respondent herein. The ex parte applicants argue that the alleged properties belong to their deceased father who was polygamous however, the house of the 4<sup>th</sup> respondent disputes the beneficiaries and houses of the deceased and they further claim that the



deceased left the entire estate to them. For that reason, the 4<sup>th</sup> respondent seek to evict and/or bar the other beneficiaries in the succession cause from accessing the estate hence the criminal complaints.

16. I have perused the court record in Succession Cause No. 398 of 2011 and noted that the bone of contention is land parcel number Kirimukuyu/Gachuiro/535. There is no dispute that the deceased was polygamous but the bone of contention is the number of wives the deceased had and whether he died intestate or not. I have also noted that the grant of letters of administration were issued to Peterson Mwihi Njauimwe, the 1<sup>st</sup> ex parte applicant herein and Purity Mwarana Njauimwe. During the pendency of the cause, various complaints by the 4<sup>th</sup> respondent for theft and malicious damage to property cropped up. The 1<sup>st</sup> administrator has instituted contempt of court proceedings against the ex parte applicants in the Succession Cause urging the court to commit ex parte applicant in civil jail. The court however did not hear the application but set the suit down for the main hearing which is scheduled to proceed on 26<sup>th</sup> October 2023. It is notable that all the complaints have been made by the 4<sup>th</sup> respondent who is from the 1<sup>st</sup> house. The 4<sup>th</sup> respondent claims that the suit property belongs to the 1<sup>st</sup> house exclusively as the deceased gave the other houses their land parcels during his lifetime. The 4<sup>th</sup> respondent and his brothers have been accused by the other beneficiaries of evicting them from the said land and occupying that land. The complaints to the police which have led to the exparte applicants being charged in court are based on the same issues. The succession cause is still ongoing and until the court makes a determination on inheritance some beneficiaries cannot claim that the land belongs to them.
17. Therefore, it is my considered view that there is simply no factual basis upon which the 2<sup>nd</sup> respondent preferred charges against the ex parte applicants in respect of a matter that is also the subject of a succession cause. Furthermore, the 1<sup>st</sup> respondent having been served with these proceedings had a chance to file a response to explain the reasons behind its action. The fact that no response was filed by the respondents raises doubt as to the justification of the charges against the exparte applicants.
18. Moreover, Section 45 of the [Law of Succession Act](#) provides for intermeddling. If aggrieved by any kind of intermeddling, the 4<sup>th</sup> respondent has a recourse in the succession cause. There is nothing to show that such an application has been filed in the succession court. It appears that the 4<sup>th</sup> respondent is solely using the criminal justice system to frustrate the beneficiaries of the estate in a succession cause that is still in court. This is a move that should not be encouraged by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and their agents.
19. Having found that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' decision to charge the ex parte applicant was unprocedural and tainted with illegality, the issue for determination is what reliefs are available to the ex parte applicants. The ex parte applicants sought judicial review orders of certiorari and prohibition. A useful guide on the appropriate reliefs is found in the decision of the Court of Appeal in [Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge](#) (1997) eKLR where the court stated:-

Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws



of the land. It lies not only for excess of jurisdiction or absence of it but also for departure from the rules of natural justice. It does not however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....

Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.

20. I find that the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to arrest and charge the ex parte applicant was unprocedural and tainted with illegality and that the ex parte applicant has made a case for a relief. I hereby issue the following orders:-
- a. That an order of certiorari do and is hereby issue to quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondent to arrest and charge the ex parte applicant in Karatina Criminal case No. 312 of 2019 and E426 of 2021.
  - b. That an order of prohibition do issue against the 1<sup>st</sup> and 2<sup>nd</sup> respondent prohibiting them from arresting and charging the ex parte applicants in criminal cases relating to property in Nyeri HC Succession cause No. 308 of 2011 in the estate of Erastus Njauimwe Gachinga
  - c. That each party meets their own costs of these proceedings.
21. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 17<sup>TH</sup> DAY OF AUGUST 2023.**

**JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 17<sup>TH</sup> DAY OF AUGUST 2023**

**F. MUCHEMI**

**JUDGE**

