



**Angoyia & another v Angoyia & 10 others; Director Criminal Investigations
& another (Interested Parties) (Miscellaneous Criminal Application
E005 of 2023) [2024] KEHC 16023 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16023 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E005 OF 2023
JN KAMAU, J
DECEMBER 16, 2024

IN THE MATTER OF ARTICLE 2, 22, 23, 24, 28, 31, 36 AND 50 OF THE CONSTITUTION
AND
IN THE MATTER OF THE CHIEF'S ACT CAP 128, LAWS OF KENYA
AND
IN THE MATTER OF THE ALTERNATIVE DISPUTES RESOLUTION ACT, 2019
AND
AND IN THE MATTER OF THE CYBER CRIME ACT
AND
IN THE MATTER OF THE ESTATE OF HARRISON OMULANDO ANGOYIA (DECEASED
AND
IN THE MATTER OF KAKAMEGA HIGH COURT SUCCESSION CAUSE NO 170 OF 2010
AND
IN THE MATTER OF VIHIGA PM'S COURT CRIMINAL CASE NO E007 OF 2023

BETWEEN

ZAKAYO HENRY ANGOYIA 1ST APPLICANT

ELIAKIM CHITWA 2ND APPLICANT

AND

SHEM ANGOYIA 1ST RESPONDENT

ABEDNEKO OSIAGO 2ND RESPONDENT



ONGUSO SON OF MATAYO IMBIRA 3RD RESPONDENT
PHENUS JUSTIN OMWELA OMULANDO 4TH RESPONDENT
RIDA OMWELA OMULANDO 5TH RESPONDENT
ELLY OKWEMBA OMULANDO 6TH RESPONDENT
THE CHIEF OF EMUSENJELI LOCATION 7TH RESPONDENT
THE ASSISTANT CHIEF OF ESIANDA SUB-LOCATION 8TH RESPONDENT
THE INSPECTOR GENERAL OF POLICE 9TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 10TH RESPONDENT
THE PRINCIPAL MAGISTRATE’S COURT AT VIHIGA 11TH RESPONDENT

AND

THE DIRECTOR CRIMINAL INVESTIGATIONS INTERESTED PARTY
THE DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY

RULING

1. In their Notice of Motion dated 10th March 2022 and filed on 13th March 2023, the Applicants herein sought for the following orders:-
 - a. That the certificate of electronically generated evidence, the electronically generated evidence and the certificate of translation attached to their application be deemed to be properly on record.
 - b. That this court makes a finding that the Summons that was issued to them by the Chief of Emusenjeli Location and/or the Assistant Chief of Esianda Sub-location through unsigned letters were null and void.
 - c. That this court makes a finding that the action of the police in altering the name of the 1st Respondent from Shem Angoyia to Shem Ongayo was illegal and unethical and the same be corrected to read Shem Angoyia.
 - d. That the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents herein be permanently restrained from trespassing on the suit land which was marked as Portion 3 on the sketch map marked as Exhibit ZHA-6C and that the 1st Respondent be ordered to remove all his property including the house and fence which he had erected in the middle of the portion of land which was shaded and designated as Portion 3 on the sketch map marked Exhibit ZHA-6C.
 - e. That the Inspector General of Police be ordered to apprehend the 3rd Respondent and investigate the 1st Respondent on his declaration of having a militia or “kamjesh” (sic) with a view to arraigning them in court.
 - f. That the 1st, 2nd and 3rd Respondents be charged for threatening to kill them and that the electronic and physical evidence resulting from the activities of the 1st, 2nd and 3rd Respondents be used in evidence in support of the charges.



- g. That in the event the State failed to charge the said Respondents, they be allowed to retain an advocate to prosecute a criminal suit against them in respect of the said offences.
 - h. That the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents herein be ordered to pay special, general, aggravated and exemplary damages and the costs of this suit.
 - i. That this court makes a finding that the actions of the Assistant Chief of Esianda Sub-location, Astone Okwemba Ngambwa, to forcefully constitute himself into a conciliator and/or a mediator was illegal and ultra-vires of the powers conferred to him by the Chief's Act.
2. They both swore Supporting and Further Affidavits on 10th March 2023 and 19th February 2024 respectively in support of their said application. The said Further Affidavit was filed on 20th February 2024.
 3. They averred that the 1st Applicant's father, Harrison Omulando Angoyia (hereinafter referred to as the "deceased") died on 12th October 1996. He was survived by five (5) sons. The deceased had three (3) parcels of land that he had distributed to his sons in portions. They stated that in 1992, the 4th and 5th Respondents started harassing the 1st Applicant and his family members preventing them from using the foot path to their home by digging a trench in the middle of the said access road. They added that the 1st Applicant built on L/R East Bunyore/Ebubayi/2399 on 10th October 1998.
 4. They asserted that since then, there had been constant battles over the said parcel of land which culminated to threats to kill. It was their further contention that on 30th September 2022, the 1st Applicant was attacked by people who included the 2nd, 4th and 5th Respondents herein. They said that he was badly injured and was treated at Emuhaya County Hospital. They said that he reported the assault and was issued with OB No 10/01/10/22.
 5. They also asserted that on 2nd October 2022, the 2nd Applicant was attacked by the 2nd Respondent who threatened to kill him unless he moved out of the said land. They contended that the 8th Respondent prevented the matter from proceeding to court and that on 4th October 2022, he called a public meeting without his consent.
 6. They pointed out that although they were aware of the order of court directing that the Assistant Chief do hold a public meeting to resolve the issues, they did not attend for their own personal and security issues. They added that they did not attend the public meeting because they knew it was against the law for one to impose himself as a mediator or conciliator. They were emphatic that there was no court order compelling them to attend the said meeting.
 7. They stated that the 1st, 2nd, 3rd and 5th Respondents had continuously trespassed on their land and had caused extensive damage on crops, doors and windows. They annexed audio records of conversations that led to insults and threats. They pointed out that the 1st and 2nd Respondents were arraigned in court on 3rd January 2023 and charged in Vihiga SPM Criminal Case No E007 of 2023.
 8. On their part, the 1st and 2nd Interested Parties filed Grounds of Opposition in opposition to the said Applicants' application. The same was filed and dated 31st July 2023.
 9. They termed the application as vexatious, frivolous and an abuse of the court process. They pointed out that the said application had sought orders which if granted, would interfere with their constitutional mandate to investigate and prosecute offenders.
 10. They stated that the 1st and 2nd Respondents were charged with the offence of creating disturbance in MCCR Case No E007 of 2023 and that the Trial Court made an order on 3rd January 2023 referring



the case to the Area Chief for mediation which the Applicants disregarded. They were categorical that the Applicants should first attend the mediation in line with the court's orders since they had an avenue of contesting the Area Chief's findings.

11. They argued that the Applicants had not shown this court why it should grant the orders they had sought and urged this court to dismiss the said application.
12. The Applicants' Written Submissions were dated 19th February 2024 and filed on 20th February 2024 while those of the 1st, 2nd, 4th, 5th and 6th Respondents were undated and filed on 19th May 2023.
13. Although, the 1st and 2nd Interested Parties asked for time to put in their Written Submissions, the same were missing in the court file as at the time of writing this decision. This court checked the e-filing portal and confirmed that the same had not been filed.
14. The Ruling herein has therefore been delivered based on the aforementioned Written Submissions which the parties relied upon in their entirety.

Legal Analysis

15. The Applicants submitted that they were laymen who had filed this application under Article 22 and 23 of the Constitution as their rights were being violated. They pointed out that in the year 2021, the 2nd Applicant suspected that the 1st Respondent was having an affair with his wife and he expressed his fears to the 1st Applicant who called for a meeting who resolved the matter by telling the 1st Respondent to stop having meals in 2nd Applicant's house. They asserted that having been stopped from accessing the 2nd Applicant's house, the 1st Respondent developed hatred towards them and had been threatening them with death through a gang that consisted of about eleven (11) people which included the 2nd and 3rd Respondents herein.
16. They submitted that although they reported the matter to the 1st and 2nd Interested Parties, no action had been taken. They added that on 30th September 2022, the said gang attacked and nearly killed the 1st Applicant and that in the month of October 2022, they raided the home of the 2nd Applicant more than three (3) times. They added that those episodes were reported at Luanda Police Station but that the police refused and/or neglected to take any action.
17. They further submitted that the 2nd and 3rd Respondents were not related to them and that there was no reason why they should be restrained from accessing their homesteads. They pointed out that it was not easy for the 1st Applicant herein to proceed and administer the estate of his father effectively when foreigners were interfering with it.
18. They were categorical that the 8th Respondent was working with the 1st Respondent and his gang against their family. They submitted that since the 8th Respondent had not challenged their averments, it was only fair that he be restrained from misusing his position to harass them. It was their argument that allowing Chiefs and Assistant Chiefs to act as courts of law was contrary to the provisions of the Alternative Disputes Resolution Act, 2019. They were emphatic that Chiefs were not accredited arbitrators, conciliators or traditional dispute resolvers.
19. They asserted that some Chiefs were immigrants who did not understand the laws. They pointed out that their current Chief was an Idakho by birth and she was married in their area. They were emphatic that women by nature were not taught their traditional law but were only taught traditional law that pertained to women. They added that the Office of the President could not be allowed to carry out the work of the Judiciary as that would violate the doctrine of separation of powers.



20. They further argued that the Constitution did not envision the presence of the Provincial Administration after the transition period of five (5) years after its promulgation in 2010. It was their contention that all those offices from the Assistant Chief to the Regional Commissioner were unconstitutional offices. They urged the court to grant all the prayers sought in their application.
21. On their part, the 1st, 2nd, 4th, 5th and 6th Respondent submitted that the Applicants' application was based on wishful thinking and lacked any moral and/or judicial merit.
22. They contended that the order to have a public baraza resulted from a case in which the 2nd Applicant was the complainant. The said that the 7th Respondent held a meeting at the home of the 2nd Respondent and compiled a report which was used before the court on 15th March 2023. They argued that the said Chief acted on a court order which had been issued earlier and that upon being served with an invitation to attend he ignored (sic). They submitted that the Applicants should have attended the meeting for them to have a fair hearing before the report was compiled.
23. They were categorical that whereas the Applicants had rights which could be violated, the Respondents also had rights which ought to be protected. They asserted that the court had both the jurisdiction and/or powers to order for a public and private hearing of any matter in order to determine facts which would assist it make a fair ruling. They averred that both Applicants had criminal history and had on different occasions been incarcerated for criminal acts.
24. They further submitted that it was the 2nd Applicant who had initiated the criminal case against them and that if they had any personal differences with the magistrate, they were free to appeal to court for a change of magistrate. They added that it was costly and inconveniencing for a party to be subjected to judicial process just because one wanted to seek compensation and/or damages.
25. They pointed out that LR No East Bunyore/Ebuchtwa 1916 was still under the name of Omulando Angoyia (deceased) and that they were son, daughter-in-law and grandchild of the deceased while the 1st Applicant was a son to the deceased and the 2nd Applicant was his grandchild. They pointed out that the 1st Applicant lived on LR No East Bunyore/ Fabubayi 2399 which also belonged to the deceased. They were emphatic that the said parcels of land should be subjected to a succession process so that the children and grand children of the deceased could get a fair share of the estate. They asserted that the 1st Respondent had a greater share of the property marked ZHA- 6C (sic) on the sketch but withheld the reason for the moment.
26. They argued that if the Applicants were granted the orders sought herein, they would misuse orders. They pointed out that the 1st Applicant had re-ignited his quest for acquisition of most of the deceased's land and they were forced to seek the help of the Chief who convened a baraza but that the 1st Applicant failed to attend, which was spiteful of any efforts towards mediation. They pointed out that they had no inheritance to forfeit.
27. Right from the onset, this court noted that the Applicants' dispute related to the deceased's estate and which would have been well resolved under a Succession Cause. The disputes had resulted into criminal and civil actions emanating from assault and crop and material damage respectively.
28. This court had due regard to Article 159 of the Constitution of Kenya, 2010 which provides as follows:-
 1. Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
 2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles-



- a. justice shall be done to all, irrespective of status;
 - b. justice shall not be delayed;
 - c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted (emphasis court), subject to clause (3);
 - d. justice shall be administered without undue regard to procedural technicalities; and
 - e. the purpose and principles of this Constitution shall be protected and promoted.”
29. The Trial Court in MCCR Case No E007 of 2023 was thus constitutionally mandated to promote alternative disputes resolution including referral of matters to Chiefs to resolve disputes. Resolution of a dispute by a Chief pursuant to a court order was therefore valid and not contrary to the law as the 1st and 2nd Applicants had asserted.
30. Going further, the 1st Interested Party was charged with the duty to carry out investigations into suspected criminal activities and to apprehend those culpable. On its part, the 2nd Interested Party exercised the power to prosecute criminal cases. The legal basis of the exercise of prosecutorial and investigative powers in Kenya was anchored in the Constitution of Kenya and statute.
31. Notably, Article 245 of the *Constitution* of Kenya states as follows:-
1. There is established the office of the Inspector-General of the National Police Service.
 2. The Inspector-General:
 - a. is appointed by the President with the approval of Parliament; and
 - b. shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
 3. The Kenya Police Service and the Administration Police Service shall each be headed by a Deputy Inspector-General appointed by the President in accordance with the recommendation of the National Police Service Commission.
 4. The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to:-
 - a. the investigation of any particular offence or offences;
 - b. the enforcement of the law against any particular person or persons; or
 - c. the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
32. This court referred to the case of *Commissioner of Police & Another vs Kenya Commercial Bank Ltd & 4 others* [2013] eKLR where it was held that whereas there could be no doubt that the field of investigation of criminal offences was exclusively within the domain of the police, it was well settled that the aforesaid powers were designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law.



33. The 2nd Interested Party's office was also a constitutional office that was established by Article 157(6) of the Constitution of Kenya which provides that: -

“The director of public prosecutions shall exercise state powers of prosecution and may: -

- i. 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;
- ii. 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
- iii.discontinue at any stage before judgment is delivered any criminal proceedings instituted by the director of public prosecutions or taken over by the director of public prosecutions under paragraph (b).”

31. Article 157(8)-(12) of the *Constitution* of Kenya further provides that: -

8. The director of public prosecutions may not discontinue a prosecution without the permission of the court.
9. The powers of the director of public prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
10. The director of public prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority (emphasis court).
11. 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.
12. Parliament may enact legislation conferring powers of prosecution on authorities other than the director of public prosecutions.”

34. The Office of Director of Public Prosecutions Act No 2 of 2013 (hereinafter referred to as ‘the ODPP Act’) was enacted to give effect to Articles 157 and 158 of the Constitution and other relevant articles of the Constitution and for connected purposes.



35. Section 4 of the *ODPP Act* gives the guiding principles in prosecution of cases as follows: -

“In fulfilling its mandate, the office shall be guided by the *Constitution* and the following fundamental principles—

- i. the diversity of the people of Kenya;
- ii. impartiality and gender equity;
- iii. the rules of natural justice;
- iv. promotion of public confidence in the integrity of the office
- v. the need to discharge the functions of the office on behalf of the people of Kenya;
- vi. the need to serve the cause of justice, prevent abuse of the legal process and public interest;
- vii. protection of the sovereignty of the people;
- viii. secure the observance of democratic values and principles; and
- ix. promotion of constitutionalism.”

36. The 2nd Interested Party was therefore called upon to always act judiciously and not act in perpetuation of an unfair and malicious criminal complaint when prosecuting matters. It was to be guided by the principle that the right to a fair trial cannot be limited thus raising the bar in the determination of the question whether to prosecute or not.

37. Courts were therefore mandated to wait for investigations to be completed and the suspect charged before they could declare prosecutions unconstitutional.

38. Sections 107(1), (2) and 109 of the *Evidence Act* Cap 80 (Laws of Kenya) required that whoever desired any court to give judgment as to any legal right or liability and depended on the existence of facts, he or she had to prove that those facts existed. The burden of proof rested with the Applicants when they alleged any unconstitutional exercise of prosecutorial power.

39. Although the Applicants argued that they had reported the criminal acts of the Respondents several times to the police but nothing was being done, this assertion did not appear to have represented the correct position as there was already a criminal case MCCR Case No E007 of 2023 pending where the 2nd Applicant was the Complainant against the 1st Respondent in a case of creating disturbance in a manner likely to cause a breach of peace contrary to Section 95(1)(b) of the *Penal Code*.

40. Further, despite complaining that their rights had been infringed upon, the Applicants did not show the manner in which the said rights had been infringed upon. They did not set out in a clear manner the basis of each of their grievances and/or demonstrate the threshold for grant of the orders they sought.

41. They did not therefore advance any plausible argument to persuade this court to stop the criminal proceedings in MCCR Case No E007 of 2023. Indeed, they had no right to control what and how the Inspector General Police and/or the 2nd Interested Party discharged their duties as that would be contrary to the constitutional tenets.

42. In the case of *Diamond Hasham Lalji & Another vs Attorney General & 4 Others* [2018] eKLR, it was held that the exercise of prosecutorial discretion enjoyed some measure of judicial deference and



as numerous authorities established, the courts could only interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases.

43. This court's role was to ensure that the 1st and 2nd Interested Parties undertook all their functions in accordance and compliance with the law. If the Applicants had demonstrated that there had been abuse of power, it could have intervened to restrain abuse of power that could lead to harassment or persecution to ensure that the ends of justice were met.
44. It was therefore in the interest of justice that the criminal case proceeds to conclusion whether through an alternative dispute resolution and/or through the litigation process. The Applicants assertions thus fell by the wayside in their entirety.

Disposition

45. For the foregoing reasons, the upshot of this court's decision was that the 1st and 2nd Applicants' Notice of Motion application dated 10th March 2022 and filed on 13th March 2023 was not merited and the same and is hereby dismissed. In view of the fact that the 1st and 2nd Interested Parties were the government, there will be no order as to costs as it would be unconscionable to award costs to the government against its citizen. Further, there will be no order to be made in favour of the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents as they all belonged to the Applicants' larger family.
46. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 16TH DAY OF DECEMBER 2024

J. KAMAU

JUDGE

