



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL MISC. CAUSE NO. 13 OF 2020**

**REPUBLIC**

**MUNYALO MAKAU (EXPARTE APPLICANT).....APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL POLICE SERVICE.....2<sup>ND</sup> RESPONDENT**

**THE MAGISTRATE COURT KITUI.....3<sup>RD</sup> RESPONDENT**

**SIMON MULAVAI LENGETA.....INTERESTED PARTY**

**JUDGEMENT**

1. Before this court is a Judicial Review matter brought by way of Notice of Motion dated 22<sup>nd</sup> July 2020 brought under **Order 53 Rule (1)** of the **Civil Procedure Rule**. The ex parte **Applicant** herein, **Mr.Munyalo Makau** is seeking the following reliefs from this court namely:-

*i. That an order of prohibition do issue to stop and prevent the Director of Public Prosecution (The 1<sup>st</sup> Respondent herein), The National Police Service Commission (2<sup>nd</sup> Respondent and The Chief Magistrate's Court Kitui (3<sup>rd</sup> Respondent) from further proceedings with the proceedings in Kitui Chief Magistrate's Court Criminal case No.2141 of 2016.*

*ii. That an order of certiorari do issue to remove or bring to this court and quash the charges and/or decision made in April 2016 to prosecute the ex parte Applicant in Kitui Chief Magistrate's Court Criminal Case No.2141 of 2016.*

*iii. That costs of this application be provided for.*

2. This motion is based on the statutory statement of Facts, and the Verifying Affidavit sworn by the ex parte applicant on 17/1/2020 that accompanied the application for leave to institute this proceeding. The procedural requirements dictated that the **Ex parte Applicant** should have file a separate substantive cause upon obtaining leave in this miscellaneous cause but I will go into the matter later in this judgment. Suffices to say this court finds it just and fair to consider this motion on merit for the reasons to advanced shortly.

3. The **Ex parte Applicant's** main ground to challenge the **first Respondent's** decision to prefer criminal charges against him is that the decision to charge him was made in bad faith and is outrightly malicious which he opines amounts to an abuse of court process.

4. The Ex parte Applicant avers that the charges facing him at the lower court is related to ownership of that property known as **MIAMBANI/MIAMBANI/398**. He claims that the issue of ownership was exhaustively litigated and that the High Court barred the **2<sup>nd</sup> Respondent** from undertaking any criminal prosecution over its ownership.

5. The **Applicant** further avers that the basis of the charge facing him has been disapproved by a Forensic Document Examiner.

6. He claims that he bought the parcel (Miambani /Miambani/398 (herein to be referred to as the parcel land in dispute) from **SIMON MULAVAI LENGETA** (the Interested Party herein) in 1995 during Land Adjudication process in Miambani Adjudication Section and that upon purchase the subject property was lawfully transferred to him. He avers that the interested part starting re-claiming back the land in question in 2001 which claim according to him led to criminal charges against the interested party after he trespassed onto the said parcel. It is his contention that the High Court directed that issues touching on the ownership of the land in question be litigated in a Civil Court and that the Civil Court later decided in his favour. It is his case that the Land's Ministry exhaustively investigated the sale and transfer of the

property by the interested party to the **Exparte Applicant** and that the Lands Ministry concluded that the processes followed were lawful.

7. In his Supporting Affidavit sworn on 17<sup>th</sup> January, 2020, the Exparte Applicant asserts that he is a registered owner of the parcel of land in dispute and has exhibited a copy of the Title Deed as proof of the same. He avers that the issue of ownership was fully determined *vide* a **Kitui Chief Magistrate's Court Civil Suit No.318 of 2005** and that a belated appeal against that determination was struck out *vide* **Machakos ELC Appeal No. 67 of 2010**. He adds that the interested party was evicted pursuant to a decree issued *vide* **Kitui Chief Magistrate's Court No.318 of 2005** and was put in possession of the parcel in dispute.

8. The **Ex parte Applicant** accuses the Interested party for conspiring with his relative, who is alleged to have been a Senior Police Officer, to create a false report that he (the Exparte Applicant) had forged the agreement of sale between him and the Interested Party. He further claims that he was arrested and arraigned for fraud on 23<sup>rd</sup> November, 2016. He claims that he requested the police through his counsel for independent verification of signatures and that a forensic expert concluded that the interested party signed the impugned sale agreement.

9. The **Applicant** expresses strong convictions that his continued prosecution amounts to oppression and a breach of his constitutional rights. He blames the first **Respondent** for abusing its powers under **Article 157 (1) of the Constitution of Kenya 2010**.

10. In his written submissions made M/s **J.K. Mwalimu and Company Advocates** the **Exparte Applicant** submits that Land Adjudication Department exhaustively investigation concluded that he was the lawful owner of the disputed parcel and has drawn the court's attention to a letter dated 26<sup>th</sup> November, 2001 from District Land Adjudication and Settlement Officer – Kitui exhibited in his Supporting Affidavit sworn on 17<sup>th</sup> January 2020.

11. The **Exparte Applicant** submits the ownership of the parcel in dispute has been resolved by the Lands Officer and does not understand why he is being prosecuted adding that the conclusion from a document examiner vindicated him, against accusations of forgery.

### **The Interested Party's Case**

12. The interested party has opposed this motion *vide* a Replying Affidavit sworn on a date not indicated. He avers that the motion is an abuse of court process and that it does not disclose any reasonable cause for the reliefs sought.

13. The **Interested Party** insists that the parcel in dispute belongs to him and rejects any assertion that the sold it to the Ex parte Applicant. He further avers that the **Exparte Applicant** forged the agreement of sale.

14. The Interested Party further asserts that **Kitui Criminal Case No.2141 of 2016** which is the subject of this proceedings, is grounded on fraud and illegal acquisition of certificate of title to the property in dispute.

15. He contends that while the question of ownership can be determined in a civil court, any matter touching on fraud and illegal acquisition should be subject to criminal proceedings as in **Kitui Chief Magistrate's Court Criminal Case No. 2141 of 2016**.

16. The **Interested Party** avers that he approached the police for help after asking for help in vain from the Land Registry on how the parcel in dispute changed hands adding that it was the police who discovered that the agreement used by the Exparte Applicant to validate the transaction was a forgery. He reiterates that his signature in the agreement was forged.

17. In his written submissions through Learned Counsel M/s Maosa and Company Advocates, the Interested Party submits that the reliefs sought in this motion are prejudicial to his pursuit of justice in a court of law adding that despite his advanced age of 77 years he still eager for justice and the attendant peace that would allegedly enable him live long.

18. He contends that once a complaint is made to the police and a prima facie evidence is established, it is upon the trial court to analyse and determine the same. He relies on the case of **Republic –Vs- Commissioner of Police and Another Exparte Michael Monari & Another [2012] eKLR** to support his contention that the work of analyzing evidence should be left to a trial court rather than a constitutional court. He further contends that the Exparte Applicant has tendered some evidence about his case but has not faulted the ongoing trial in his court view.

19. The Interested Party further denies that the ex parte applicant is being persecuted in the lower court asserting that he is being tried for forgery and conspiracy to defraud which offences he says are spell out in the **Penal Code Cap 63 Laws of Kenya**.

20. He contends that this court can only interfere with the Director of Public Prosecution's decision to charge the ex parte Applicant if he had proved that the Director of Public Prosecution's action was actuated by malice or bad faith. It is submissions that the Applicant has not demonstrated that and has cited the decisions in the case of **Paul Ng'ang'a Nyaga –Vs- Attorney General & 3 others [2013] eKLR** to buttress his point adding that a Court of Law can only interfere where the Director of Public Prosecution if is shown that it has exceeded his mandate or acted in contravention of the law. He also relies on the case of **Kenya Commercial Bank Ltd and 2 others –Vs- Commissioner of Police and Another [2013] eKLR** where the court held *inter alia* that courts would, not interfere in the affairs and exercise of the discretion granted to Director of Public Prosecution, Inspector General of Police or any independent office unless the facts disclose a violation of the rights and fundamental freedom guaranteed under the constitution or that they have gone outside the scope or limits of their powers under the constitution.

21. The Interested Party contends that the disparity regarding the opinion of experts (document examiners) in regard to the document alleged to have been forged should be left for interrogation and determination by the trial court adding that the document exhibited by the Exparte Applicant could be misleading as it was not accompanied by an exhibit memo or specimen signatures. He contends that he was not involved in the process that led to the findings by Chief Inspector Alex Mwangela.

22. He urges this court not to halt the ongoing criminal proceeding against the **Exparte Applicant** and relies on the decision of **R –Vs- Kenya Anti Corruption Commission & 2 Others Exparte Life Lodges Ltd. [2014] eklr** where the court held that a mere fact that allegations are likely to be found worthless is not a ground for halting investigations into the complaints made or brought to the attention of prosecution agency. He submits that he should have the opportunity to present his case against the ex parte Applicant and that there is no proof laid showing that there is abuse of power, illegality, irrationality or ulterior motive to invite the intervention by this court.

23. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have also opposed this motion through written submissions. I have gone through the record and I have found no replying affidavit from the Director of Public Prosecution nor Notice of Appointment/ entry of appearance. There is no formal opposition made on behalf of the Respondents and the only assumptions to be made is that the Respondents have not opposed this motion notwithstanding the written submissions made by Mamba Vincent on behalf of the Director of Public Prosecution where he has urged this court not to intervene with the decision to prefer charges against the ex parte Applicant. According to him the matter should left to the trial court (the 3<sup>rd</sup> Respondent) to determine whether indeed an offence was committed.

### **Analysis and Determination**

24. This court has considered this application and the response made by the Interested Party. As I have noted above the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not file any response save for written submissions perhaps due to some inadvertence but his court is inclined to determine this matter on the merit due to the dictates of the interest of substantial justice clearly enshrined under **Article 159 (2) (d)** of the Constitution of Kenya.

25. This court further notes that the Ex parte Applicant filed the main motion within the same miscellaneous cause under which he sought leave to challenge the 1<sup>st</sup> Respondent's decision to charge or prosecute him. The Applicant was required upon obtaining leave in this miscellaneous cause, to file a separate substantive motion or Judicial Review proceedings and in that file attach the proceedings if or the miscellaneous file purely for purposes of record and references. The separate substantive motion or Judicial Review is normally registered in the civil registry and assigned a new number because essentially once leave is granted or declined to be granted in a miscellaneous cause, that is the end of the cause. The court granting leave becomes *functus officio* and no further proceedings are entertained in that cause.

The meaning of the word "Miscellaneous" as per the online English Dictionary is "means consisting of diverse things or members, .... having various traits or dealing with diverse subject." It is also denotes something that is heterogeneous or "different process". Therefore by its ordinary meaning a miscellaneous cause in Judicial Review proceedings is a different process and the 1<sup>st</sup> phase in the proceedings that may lead to a substantive suit or Judicial Review proceedings and that is why the statute prescribes that once leave is granted, an applicant is required to file the main motion 21 days upon grant of leave. My considered position therefore is that filing the main motion within the miscellaneous cause after leave has been granted as the ex parte Applicant did in this instance is not proper for the aforesaid reasons. However this court is aware that some courts have been proceedings with the miscellaneous cause despite the fact that the proceedings are no longer miscellaneous but main motion. Having stated that, this court for the interest of substantial justice shall proceed to consider this motion on the merits rather than on procedure again owing to the aforesaid dictates of the Constitution.

26. This court will now go back to the issues raised by the ex parte Applicant. The Applicant is seeking for prerogative orders of prohibition and certiorari to stop his prosecution and quash the criminal proceedings facing him *vide* **Kitui Chief Magistrate's Court Criminal Case No.2141 of 2016**. The main issue in this motion is whether the Exparte Applicant has demonstrated to this court that the 1<sup>st</sup> Respondent misused or abused his powers or mandate in its decision to prefer charges and prosecute him.

27. It is true that the office of Director of Public Prosecution is an independent institution established under **Article 157 (1)** of the Constitution and its independent in carrying out its objective clearly stipulated under **Article 157(II)**. The exercise of that power is however Not absolute because **Section 4** of the **Director of Public Prosecutions Act** as well as **Article 157 (II)** of the Constitution provides parameters or the scope under the Director of Public Prosecution is required to discharge its mandate. Anything outside the scope provided can be challenged in Constitution and this court has powers under **Article 165 (3) (5) (6) and (7)** of the court to intervene by way of Judicial Review or when it is moved as contemplated under **Article 23** of the Constitution.

28. The question that crops up is when does the court intervene and what is the standard of proof required. In the case of **FRANCIS MATHEKA & 10 OTHERS –VS- DIRECTOR OF PUBLIC PROSECUTION AND ANOTHER [2015] eklr**, Justice Odunga held as follows:-

*"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supporting that the continued prosecution of a criminal case manifests an abuse of the judicial process, much that the public interest would be best served by the staying of the prosecution... In the instant case there is no evidence of malice, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under Section 77 of the Constitution.. The law in these kind of cases is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and under take prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal procedure are in all likelihood bound to fail is not a ground for halting those proceedings by way of Judicial Review since judicial review proceedings are not concerned with the merits but with the decision making process..."*

29. It is trite that the burden of proof rests on the one alleging it **Section 107** of the **Evidence Act** is clear on this. The Ex parte Applicant in this instance is the one alleging that the Interested Party was engaging in witch hunt by presenting his complaint to the police and that the charges preferred against him were in bad faith. The law therefore places the burden of proof on him.

30. I have carefully perused through the statement of facts that forms the subject of this motion and the main grounds relied by the Exparte Applicant is that charges facing him is about the ownership of the parcel in dispute and reasons that the matter having been adjudicated and

settled through a civil process in court, it is an abuse of power by the 1<sup>st</sup> Respondent to drag him through a criminal process.

31. The Interested Party has on the other hand made out a strong case arguing that what is before the criminal court is a charge of forgery and conspiracy to defraud and that both counts are offences known in law and that the trial court should be left to determine the same.

32. This court has looked at the charge sheet filed in the criminal court on 23<sup>rd</sup> November, 2016 and I am persuaded that the charges facing the ex parte Applicant are not related to the ownership of the parcel in dispute per se but they are about forgery contrary to section 349 of the **Penal Code (Cap 63 Laws of Kenya)**. So while there is elaborate evidence from what the ex-parte has exhibited that the ownership of the parcel in dispute was determined in favour of the Applicant, there is no order barring the police or the 1<sup>st</sup> respondent from prosecution the ex-pater applicant or any one for that matter with any criminal charges or in particular the charges facing the Exparte Applicant at the trial court. As a matter of law **Section 193 A** of the Criminal Procedure Code is explicit.

*“Notwithstanding the provision of any other 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. The Ex parte Applicant was arraigned in 2016 with the charges he has impugned in this motion. He has not given details of what has transpired in those proceedings for more than four years now. This court notes that he only commenced judicial review proceedings to challenge the decision to charge him reached in 2016 and though the Exparte Applicant got leave to challenge the decision outside the statutory period of six months, he has not given any explanation for such a delay if he truly felt that the Respondents were driven by malice and/or were acting outside their legal mandate.

34. The ex parte has of course laid before me evidence suggesting that the sale agreement was not forged as alleged by the Interested Party. This court however takes the position that the power and indeed the jurisdiction to determine the veracity of documents tendered in evidence and indeed the entire prosecution's case rests squarely on the competent court to try the criminal matter. In this instance, the **Chief Magistrate's Court in Kitui Criminal Case No.2141 of 2016** is competent and has the requisite jurisdiction to try the matter and determine whether the charges facing the Ex parte Applicant are well grounded. As noted in the case of **Francis Matheka & 10 others (supra)**, a mere fact that the ongoing criminal proceedings are likely to fail is not a ground to halt those proceedings by way of judicial review because apart from the fact that Judicial Review does not concerned itself with the merit but decision making proves, it also amounts to undue interference with the mandate and jurisdiction granted to a criminal court. It should be left to determine the merits of cases presented to them because that is within their per` view.

35. The Ex parte Applicant has not demonstrated that any of his rights has been infringed by the Respondent or that his prosecution is oppressive or aims at achieving a collateral purpose. All he has demonstrated is that he has a sound defence to the charges facing him but he has not shown why he cannot use the same in his trial to have the case against fail.

36. The interested has submitted that he should not be prevented from pursuing justice on account of his advanced age but his court for the record wishes to point out that access to justice is not and cannot be based on age. On the contrary access to justice is a right to all regardless of age, sex, social standing or any discriminative criterias suffices to say that this court is persuaded by the submissions made by the old man that his complaint to the police and the attendant investigations disclosed on offence known in law, and the same was done in good faith. I am also persuaded by the decision cited in the case of **Michael Monari & Another [2012] eKlr** where the court held that the trial court is best placed to analyse and determine the evidence presented before it. In the end this court finds no merit in the Notice of Motion dated 22<sup>nd</sup> July, 2020. The Application fails in its entirety with costs to the Interested Party.

**Dated, Signed and Delivered at Kitui this 1<sup>st</sup> day of February 2021.**

**R.K.Limo**

**JUDGE**