



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

MISCELLANEOUS CRIMINAL APPLICATION NO. 49 OF 2020

IN THE MATTERS OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI TO

REMOVE INTO COURT TO QUASH THE PROCEEDINGS AND ORDERS OF KITALE

CHIEF MAGISTRATE’S COURTS CRIMINAL CASE NO. 1241 OF 2020

BY ESTHER NEKESA KUKUBO

AND

IN THE MATTER OF CHAPTER FOUR SECTION 22(1) OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLICAPPLICANT

VERSUS

CHIEF MAGISTRATE KITALE.....1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

OFFICER COMMANDING POLICE DIVISION -

KITALE3RD RESPONDENT

SILIPAR MUTORO WANJALA4TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....5TH RESPONDENT

VERSUS

ESTHER NEKESA KUKUBOEX-PARTE /APPLICANT

RULING

The Exparte Applicant, Esther Nekesa Kukubo was aggrieved by the decision of the Director of Public Prosecution to charge her in Kitale CMC CRC No. 1241 of 2020. The Exparte Applicant, sought, and was granted leave to institute Judicial Review proceedings in the nature of certiorari to bring forth to this court the said decision for the purpose of quashing the same. The Exparte Applicants further sought the termination of the said proceedings. The application is supported by the grounds stated on the face of the application and the annexed affidavit of the Exparte Applicant.

According to the Exparte Applicant, the decision to charge her went contrary to her fundamental rights. She contends that the decision to charge her was an attempt to cover up the complaint that she had lodged with the police concerning the conduct of her co-wife by the name Silpah Mutoro Wanjala. She stated that the proceedings were instituted as a way to camouflage her co-wife’s blatant unlawful conduct of evicting her from her matrimonial home and stealing from her the sum of Kshs 300,000/-. She was of the view that the charges laid against her were framed up with a view to aiding her co-wife and the police bury the Complaint that she had lodged against them with the aim of concealing their unlawful conduct. It is on the above premises that the Exparte Applicant urges the court to quash the Criminal charges and

the proceedings brought against her by the Director of Public Prosecution.

The Application is opposed. The investigating officer CPL Hillary Birir attached to Matisi police station swore a reply affidavit in opposition to the Application. He deponed that a complaint was lodged at the said police station to the effect that the Exparte Application had forged transfer documents and subsequent had a parcel of land registered Land reference No. Kiminini/Kinyoro Block 3/Matisi/971 transferred to her name. He swore that upon investigations, he established that the Exparte Applicant transferred the said parcel of land more than two (2) months after the registered owner had died. He further deponed that the Exparte Applicant presented someone to the surveyor purporting it to be the registered owner of the suit parcel of land. It was the Respondents' case that investigations had indeed established that the Exparte Applicant forged transfer documents and used the same to register herself as the owner of the suit parcel of land knowing very well that the registered owner was deceased. The Respondents urge the court to dismiss the Application and direct the criminal charge before the chief Magistrate's court to be tried to its conclusion.

In response to the allegation that she had forged the transfer documents, the Exparte Applicant explained that the deceased had in the month of February 2020, prior to his death, signed the transfer instruments in her favour. She took the documents to the Lands office Kitale but unfortunately the Land Registrar failed to register the same before the demise of the deceased registered owner. She pointed out that that the deceased had in his Will, indicted that the said parcel of land would be inherited by her. She insisted that the Director of Public Prosecutions had no legal justification to charge her with a criminal offence in what was essentially a Succession dispute.

The jurisdiction of this court in determining applications for Judicial Review is circumscribed. As was held by the Court of Appeal in Kenya National Examination Council Vs-Republic Exparte Geoffrey Gathenji & 9 others Civil Appeal No. 266 of 1996:

“ that now bring us to the question we started with, namely, the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against Public bodies such as the council in this case. What does an order of Prohibition do and when will it issue? It is an order from the High Court directing on inferior tribunal or body which forbid the 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 and Procedures of an inferior tribunal or a wrong decision on the merits of proceedings – See Halabury's Law of England, 4th Edition Vol 1 at Pg 37 paragraph 128”.

In respect of an application seeking to quash the decision of the Director of Public Prosecution to charge, the court in Joram Mwenda Guantai -Vs- the Chief Magistrate [2007] 2 EA 170 held thus:

“The High Court has inherent jurisdiction to grant an order of Prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High court has an inherent power and duty to serve fair treatment for all persons who are brought before the court or to a subordinate court to prevent an abuse of the process of the court.”

In Douglas Maina Mwangi Vs Kenya Revenue Authority and Another HC Constitutional Petition No. 528 of 2013, the Court held thus:

“When dealing with the decision as to whether or not to prosecute , the office of DPP exercises independent judgment and the Court cannot interfere unless it is shown that the exercise is contrary to the Constitution, in bad faith or amounts to an abuse of the process I do not find any reason or ground to intervene in the decision nor is it an obligation of the Court to supervise the minutiae of investigations and Prosecutions.”

In the present application, the issue for determination by this court is whether the Exparte Applicant made a case that reaches the threshold to enable this court grant the orders that she seeks in the application. The Exparte Applicant has stated that the decision to charge him with the offences of forgery and stealing was not justified in the circumstances of the case. Is that the correct position?

From the affidavit of the investigating officer, Its is clear to this court that prima facie evidence has been gathered to enable the Exparte Applicant to be prosecuted. This court will not delve into the merits or otherwise of the Prosecution's case in the present application as it may prejudice the trial before the Chief Magistrate's court. Suffice for this court to state that there was justification for the complaint to be investigated and there after conclusion of the investigations, to have charges laid against the Exparte Applicant. The allegations of breach of her Constitutionally guaranteed rights will be addressed by the trial court.

This court therefore finds no merit with the Exparte Applicant's application for Judicial Review. Before penning off, this court notes that the dispute between the Exparte Applicant and the complainant in the criminal case with ultimately boil down to a Succession dispute whose main component will be the determination of who will inherit the properties that comprise the Estate of the deceased. However the outcome of the criminal case, the complainant and the Exparte Applicant will have to grapple with the question whether they prefer an efficacious way of resolving the succession dispute or they would prefer a more circuitous and arduous path: the choice is theirs. The only unfortunate thing is that the welfare of the children is involved. In such circumstances, their best interest will not be of paramount consideration.

In the premises therefore the application for judicial review is dismissed with no orders as to costs.

DATED AT KITALE THIS 9TH DAY OF JUNE 2021.

L. KIMARU

JUDGE