



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW APPLICATION NO. 2 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR

THE JUDICIAL REVIEW REMEDIES OF CERTIORARI AND PROHIBITION

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS IN THE BILL OF RIGHTS
UNDER CONSTITUTION OF KENYA (2010)**

HENRY AMING'A NYABERE.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT, NAKURU.....3RD RESPONDENT

AND

SARAH JOSLYN.....1ST INTERESTED PARTY

STEPHEN NGATIA MAINA2ND INTERESTED PARTY

JUDGMENT

1. This judgment comes on the heels of a Ruling dated 05/12/2019 in which the Court granted conservatory orders in the following terms:

The leave granted on 27/01/2010 to bring the Judicial Review Application in this matter shall serve as stay of proceedings in Nakuru Chief Magistrate's Court Criminal Case No. 1977 of 2019, Republic Vs Henry Aming'a Nyabere.

2. In *Nakuru Chief Magistrate's Court Criminal Case No. 1977 of 2019*, the Applicant herein, Henry Aming'a Nyabere, an advocate of the High Court of Kenya, is charged with six counts of forgery, making documents without authority and conspiracy to defraud. The charges relate to a matter in which the Applicant is representing a client, Sarah Joslyn, in a succession dispute. Sarah Joslyn is the 1st Interested Party in this matter. Her main adversary in the succession dispute is Stephen Ngatia Maina. Stephen is the 2nd Interested Party in this matter. The Succession matter is pending before a different judge in this station. It is *Nakuru High Court Succession Cause No. 356 of 2018 (In the Matter of the Estate of Richard Ingram Crawford)*. Related to the same facts, the ODPP has charged Sarah Joslyn with various offences in *Nakuru Chief Magistrate's Criminal Case No. 215 of 2018*.

3. In the Succession Cause, the Applicant's client claims to be the Administratrix of the Estate of the Deceased pursuant to a will she says is the authentic last will of Richard Ingram Crawford (Deceased). The 2nd Interested Party has contested the will and claims it to be a forgery. That is the subject of the Criminal Matter in which the 1st Interested Party is the Accused Person.

4. When the DPP registered *Chief Magistrate's Court Criminal Case No. 1977 of 2019* charging the Applicant with the six counts of forgery, making documents without authority and conspiracy to defraud all related to various properties owned by the Deceased, the Applicant approached this Court for leave to bring Judicial Review proceedings to quash the charging decision by the DPP.

5. The Applicant is persuaded that he is being targeted because of advice granted and work undertaken in his role as a lawyer to the 1st Interested Party. He seeks the following Judicial Review orders:

1) *An Order of Certiorari to remove to this Court and to quash the entire Criminal Case and the entire proceedings in Nakuru Chief Magistrate's Court Criminal Case No. 1977 of 2019, Republic Vs Henry Aming'a Nyabere.*

2) *An Order of Prohibition, to prohibit the 1st, 2nd and 3rd Respondents herein, being the Director of Public Prosecution (DPP), Directorate of Criminal Investigations, and the Chief Magistrate's Court, Nakuru from prosecuting, trying hearing, or taking any further proceedings whatsoever in Nakuru Chief Magistrate's Court Criminal Case No. 1977 of 2019, Republic Vs Henry Aming'a Nyabere.*

6. As aforesaid, this Court both granted leave to the Applicant to bring the Judicial Review Application as well as conservatory orders restraining the DPP from proceeding with the criminal case instituted.

7. After the substantive Judicial Review Application was filed, the DPP had given an indication that it was minded to withdraw the charges filed against the Applicant and compromise this suit. In the end, however, the DPP failed to file the promised compromise and appeared to endlessly stall the hearing of the suit. The DPP also failed to file any submissions in opposition of the Application as ordered by the Court.

8. What makes this case even stranger is the fact that the ostensible complainant in the criminal case in which the Applicant has been charged, to wit, the 2nd Interested Party, has written a letter to the DPP indicating that he never lodged any complaint against the Applicant and expressly requesting the DPP to terminate the commenced criminal trial against the Applicant. That letter is written on behalf of the 2nd Interested Party by his lawyers, Waiganjo & Co. Advocates. It is dated 02/07/2020. It is exhibited in the Further Affidavit of the Applicant filed in Court on 18/02/2021.

9. This history, alone, clearly indicates the tenuousness of the DPP's decision to charge in this case. It requires little analysis of the facts to conclude that this is a case where the DPP is acting not in the public interest required under Article 157 of the Constitution but for unknown, ulterior motives. There are many tell-tale signs of the kind of mala fides Article 157(10) is, thankfully, supposed to cure in the exercise of DPP's public authority. At least five of these deserve brief mention.

10. First, as alluded to above, there is no complainant in the alleged criminal offences. The ostensible complainant, enjoined to this suit as an interested party, explicitly disavows making any complaint against the Applicant. His lawyers have written to the DPP explicitly asking him to withdraw the charges. The DPP has remained adamant. Can there be more obvious indicator of mala fides on the part of the DPP?

11. Second, the uncontroverted status of the criminal case lays bare the misuse of the criminal justice system in this case. There are no listed witnesses and no witness statements availed or available for the criminal case. They are, so to speak, criminal charges filed in vacuum and in search of facts and potential complainants and witnesses. They are floating dangerously waiting to crystallize at some point in the future – all in intransigent defiance of the promises of Article 49 and 50 of the Constitution respecting the rights of an arrested and Accused Person and information which must be given to them at the commencement of their criminal prosecution.

12. Third, at least one of the counts jointly charges the Applicant with his client, the 1st Interested Party, for the offence of “jointly conspiring to defraud Richard Ingram Crawford...” Yet, the 1st Interested Party was never formally charged.

13. Fourth, in at least two of the counts the Applicant is charged with, the documents in question clearly indicate that they were drawn by advocates who previously acted for the 1st Interested Party – and not the Applicant. These documents are exhibited in the Supporting Affidavit by the Applicant. Both the documents and the deduction therefrom have not been controverted. Yet, the Applicant is charged with having “made” or “forged” these documents. There is no indication why the advocates who are named as having drawn them were neither questioned nor charged if, indeed, the documents were forged or made without authority.

14. Fifthly, what is most troubling about this case is that it appears readily obvious that the Applicant has been targeted because of his work as a lawyer for the 1st Interested Party. There is not even an attempt to justify why the Applicant was charged. The DPP has not even made allegations that the Applicant somehow trampled the lawyer-client relationship into a forbidden zone of enabling illegality or fraud. During the interlocutory stage, I had this to say about this aspect of the case:

*The unique features of this case are that the Applicant is a lawyer who is charged with offences which appear, at first blush, to be related to his work as a lawyer. Of course, on full ventilation of the facts it may be demonstrated that the Applicant did travel outside his remit as a lawyer to facilitate or commit fraud or other crimes or that the intended prosecution is unrelated to his work as a lawyer. Before then, however, it is prudent for the Court to act with abundance of caution to protect the sacred lawyer-client relationship. This can only be done, in the present circumstances, by staying the criminal proceedings until the Court determines the merits of the Judicial Review Application. This aspect of the case satisfies the first three conditions for grant of the stay requested. To be clear, what distinguishes this case from **Attorney General v Chief Magistrate's Court Milimani & 3 Others Ex Parte Mahan Galot [2018] eKLR** is that here the intended Accused Person is an advocate who is being prosecuted for work which appears to have been rendered in his capacity as an advocate. Such a prosecution is presumptively definitionally prejudicial to the Applicant and inimical to public interest and warrants a stay of proceedings pending full consideration of the context and circumstances by the Court. To be sure this is not to suggest that advocates are presumptively immunized from prosecution before scrutiny by the Courts. Instead, it is to say that when an Advocate is, on the face of it, is charged with an offence for work undertaken qua advocate, there will be a need to ascertain that the prosecution is warranted before the criminal prosecution is allowed to proceed. This is a necessary incident and corollary to the sacred advocate-client relationship. That principle is also good for public policy because it reinforces the sacred nature of Advocate-Client relationship by assuring both Advocates and public that advocates will not be whimsically hauled to Court for work performed in their professional capacities. This, in turn, accentuates the independence of the bar which is an unqualified public good in a constitutional democracy.*

15. The DPP has now had the opportunity to disabuse the Court of the initial perception that the Applicant had been targeted specifically

because of his work for his client. The DPP has been unable to demonstrate that the Applicant acted in any way beyond his remit as a lawyer to justify being tarred by criminal prosecution. The DPP does not need to be reminded of the sacred and important role played by lawyers in constitutional democracies and the dangers involved in unfairly identifying them with their client's causes. If the DPP needed such a reminder, Counsel for the Applicant has done some good schooling in her Written Brief to the Court dated 08/02/2021. In particular, Counsel has cited three principles in the UN Basic Principles on the Role of Lawyers (adopted in 1990 in Havana, Cuba, by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders):

Principle 16: Governments shall ensure that lawyers – (a) are able to perform their professional functions without intimidation, hindrance, harassment, or improper interference.

Principle 18: Lawyers shall not be identified with their clients or their clients' causes as a result of discharge of their functions.

Principle 20: Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a Court, tribunal, or other legal or administrative authority.

16. It is imprudent to flog a dead horse. This one was dead on arrival. It is, however, important to stay on point long enough to remind the DPP the dangers of the path he chose in this ill-advised prosecution. The persecution of lawyers for their advocacy work on behalf of their clients is one of the surest ways of stifling a vibrant democracy. It is like severing the aorta of the independent bar. Its inimical effects on the society cannot be overemphasized.

17. In *Patrick Ngunjiri Muiruri v DPP [2017] eKLR*, this Court said the following regarding the standard the Court uses to scrutinize the DPP's use of his charging authority:

The law and practice, then, are quite clear: while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the Court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the Court can review the DPP's decisions for rationality and procedural infirmities, it cannot review them on merit.

18. In *R v Inspector General of Police & 3 Others Ex Parte Lillian Wangari & 5 Others [2017] eKLR*, this Court explained the application of this principle in the following words:

It is for this reason that while the DPP has complete discretion and full autonomy to determine whether and against whom to bring criminal charges, the Courts have held that he must at least demonstrate that he has a prosecutable case and that his aim in bringing those charges are in the public interest. Hence, in R v Attorney General Exp. Kipngeno Arap Ngeny (High Court Civil App. No. 406 of 2001), the Court stated thus:

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting criminal prosecution otherwise the prosecution will be malicious and actionable.

19. In the present case, as is readily obvious, the charging decision by the DPP against the Applicant, an advocate of the High Court of Kenya enlisted to perform professional service on behalf of his client, cannot, even with the exercise of extreme caution and circumspection, survive the level of scrutiny required by our Constitution. The circumstances here reek of a rogue Investigating Officer who is driven by crazed animus against the 1st Interested Party which has now been transferred to her lawyer. Unfortunately, the Investigating Officer so fueled by his own animus has not found the needed moderating and modulating judgment of the DPP. These criminal proceedings should never have been begun; and a prudent Prosecutor should never have signed off on the charges or defend the charging decision. The charges are a clear abuse of the Criminal Justice System. They are also a danger to our system of law undergirded by the independence of the bar. It is the duty of the Court to quash the charges, and I hereby do so.

20. Consequently, I find merit in the Notice of Motion dated 17/02/2020 and grant the following orders:

1) An Order of Certiorari is hereby issued removing to this Court and quashing the entire Criminal Case and the entire proceedings in Nakuru Chief Magistrate's Court Criminal Case No. 1977 of 2019: Republic v Henry Aming'a Nyabere.

2) An Order of Prohibition hereby issues prohibiting the 1st, 2nd and 3rd Respondents herein, being the Director of Public Prosecution (DPP), Directorate of Criminal Investigations, and the Chief Magistrate's Court, Nakuru from prosecuting, trying hearing, or taking any further proceedings whatsoever in Nakuru Chief Magistrate's Court Criminal Case No. 1977 of 2019, Republic v Henry Aming'a Nyabere.

21. Given the egregious conduct of the investigating agencies and the DPP in this matter, the 1st and 2nd Respondents shall pay the Applicant the costs of this suit.

22. Orders accordingly.

Dated and Delivered at Nakuru this 1st July, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.