



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW NO. 19 OF 2018

IN THE MATTER OF ARTICLES 22,23,24, 49, 50 AND 157 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF AN APPLICATION TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT NAKURU CRIMINAL CASE NO. 1841 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE CHIEF MAGISTRATES COURT,

NAKURU.....2ND RESPONDENT

EX PARTEENSE LTD

DAVID GIKARIA1ST INTERESTED PARTY

BONIFACE MWANGI 2ND INTERESTED PARTY

ELIJAH KINYANJUI3RD INTERESTED PARTY

MOSES GICHANGL.....4TH INTERESTED PARTY

FRANCIS KAHERO5TH INTERESTED PARTY

JUDGMENT

1. The Interested Parties herein were presented before the *Chief Magistrate's Court in Criminal Case No. 1841 of 2016* charged with a single count of malicious damage to property contrary to section 339(1) as read with section 339(3)(b) of the Penal Code. The particulars alleged that the Interested Party had, on the 19th day of May, 2016, at Naka Estate in Nakuru township within Nakuru County, wilfully and unlawfully damaged a perimeter wall valued at Kshs. 7,000,000/-, the property of Ense Limited.

2. This charge had been preferred after some struggle by the Ex Parte Applicant. The Ex Parte Applicant had become convinced that the Interested Party had committed a criminal offence by damaging its property as alleged in the charge sheet. It was persuaded that the Interested Party was part of a mob of people who descended on the fence claiming that it had been used to illegally carve off public land meant for Naka Primary School. The ostensible aim of the mob, therefore, was to prevent what it perceived as land grabbing by the Ex Parte Applicant.

3. The Ex Parte Applicant reported the matter to the Police on 03/06/2015 under OB No. 03/06/2015. From its rendering of the story, the Police never took any action. About a year later, on 19/05/2016, the Interested Party, with another group of people, attacked the Ex Parte Applicant's property again causing further destruction. The matter, the Applicant says, was, again reported to the Police.

4. The Applicant says that initially no action was taken yet again. Among other actions it took was to write to the DPP complaining against the inaction. This forced it to file for an application to be allowed to bring private prosecution against the Interested Party and others. The Application would later succeed against some people who were later charged in in Criminal Case No. 1841 of 2016.

5. The DPP acted by bringing charges against the Interested Parties in Criminal Case No. 1841 of 2016. This respected the alleged destruction that took place in May, 2016. The DPP had already brought charges against the 1st Interested Party with respect to the June, 2015 events. This happened in the form of Criminal Case No. 1526 of 2016 in which the 1st Interested Party is charged with malicious damage to property.

6. The Applicant says that immediately the charges were preferred, the Interested Party and his co-Accused began interfering with the Prosecution. This culminated, it says, with the files being called for review by the DPP in Nairobi. The result of that review, the Applicant says, was a confirmation by the DPP, through Deputy Director Nicholas Mutuku, that the DPP had carefully analysed the two criminal files and was satisfied that there was sufficient evidence to support the charges already filed. The DPP directed the prosecution to proceed. This was contained in a letter dated 29/09/2016.

7. However, about a year later, before the criminal trial could conclude, the DPP wrote a letter dated 09/01/2018 reviewing the decision to charge. The letter narrates that new information had come to the attention of the DPP that necessitated the withdrawal of the criminal cases under section 87(a) of the Criminal Procedure Code "pending the outcome of the comprehensive investigations by the DCI and EACC on possible commission of offences by various persons." The new information that the DPP referred to in his letter was gleaned from the records of the Departmental Committee on Land. In pertinent part, it reads as follows:

That the land in question was dealt with by [the] National Land Commission (NLC) which gave two conflicting decisions.

That a petition on the said land was tabled before the Departmental Committee on Land and a report tabled in parliament with recommendations which included amongst others that the EACC, DCI and DPP to undertake an audit and prosecute persons who committed transactions in the said land...

We have perused the minutes of the Departmental Committee on Land held on 20th May, 2017 And noted that the Committee resolved that the EACC, DCI and DPP:

(i) To conduct investigations and prosecutions of the former trustees of Naka Primary School namely Joshua Kiptoo Toroitich, Harun Chelanga, and Stephen Kibowen who sold the said land.

(ii) Conduct forensic audit of the entire land transactions with the view to prosecute all public and private individuals involved...

The above mentioned new developments to wit: conflicting decisions by the NLC and the recommendations by the Departmental Committee on Land goes to the crux of the criminal case.

8. Once this letter was received by the ODPP in Nakuru, it proceeded to withdraw the charges in the criminal case. That is the decision the Applicant is aggrieved by and seeks Judicial Review over. In a Notice of Motion dated 19/03/2018, the Applicant seeks the orders that:

a. -spent-

b. An order of certiorari to remove to this Honourable Court for purposes of it being quashed the decision of the 1st Respondent to terminate Nakuru Chief Magistrate's Court Criminal Case No. 1841 of 2016 contained in the letter dated 9th January, 2018.

c. A declaration that the decision of the Respondents to terminate Nakuru Chief Magistrate's Court Criminal Case No. 1841 of 2016 under section 87A of the Criminal Procedure Code is an abuse of the Criminal Justice System, a contravention of the ex parte Applicants's rights, is oppressive, malicious and abuse of the Court process.

d. Costs of the suit and any other order the Court may deem fit and expedient to grant.

9. In essence, the Applicant argues that the decision to withdraw the criminal cases was administratively unfair, and was otherwise irrational. In its affidavits and submissions by its counsel, the Applicant argues that the decision should be reviewed for at least two reasons:

a. First, the Applicant says that it should have been consulted before that decision was made. The Applicant argues that Article 47 as read together with Article 10 of the Constitution obligated the DPP to take in the views of the Applicant before making a decision which was administratively prejudicial to it. The Applicant says that the decision taken flouted the rules of natural justice.

b. Second, the Applicant says that the decision taken by the DPP was unreasonable or irrational. It was so, the Applicant argues, because the DPP had earlier on concluded that there was sufficient evidence to sustain a criminal trial. The Applicant insists that the decision was taken in bad faith, was arbitrary, and was an abuse of process. This was so, the Applicant argues, because there was objective evidence which could have been used to sustain trial. In this regard, the Applicant relies on **Republic v Chief Magistrate,**

Milimani Criminal Division & 4 Others Ex Parte John Wachira Wambugu & Another [2018] eKLR. In that case, the Court made the following pertinent factors to consider in a case such as this one:

57. When evaluating the evidence regard should be had to the following matters:- (a) Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute" (b) If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused" (c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable" (d) Does a witness have a motive for telling less than the whole truth" (e) Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute. (f). whether the alleged offence is of considerable public concern and (g) the necessity to maintain public confidence. As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution.

10. The DPP is the 1st Respondent in the case. He filed Grounds of Opposition and submissions. The Grounds of Opposition nicely summarize the arguments the DPP pursued in the submissions. They are as follows:

- i. That the Interested Party herein was charged with an offence of Malicious damage to property contrary to Section 339(1) of the Penal Code.
- ii. Under article 157 of the Constitution of Kenya 2010 and the Office of the Director of Public Prosecution Act Cap 2 of the Laws of Kenya the 1st Respondent is vested with State powers to prosecute
- iii. PART II of the ODPP Act Cap 2 provides in parts:-
- iv. Pursuant to Article 157 of the Constitution the Director shall
 - i. (b) Exercise state powers of prosecution and may

v. Subject to Article 157(7) and (8) 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

a. Article 157(6) of the Constitution of Kenya 2010 provides:

- i. The Director of Public Prosecutions shall exercise State powers of prosecution and may
- ii. Subject to clauses (7) and (8) 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)
- vi. The 1st Respondent's decision to withdraw the Criminal Case No. 1526 of 2016 was premised on emerging issues which included the receipt of a letter from The Chapter One and the Minutes and Resolutions of The Parliamentary Committee on Lands.
- vii. Upon receipts of the letter from CHAPTER ONE the 1st Respondent deemed it appropriate to have the areas captured therein thoroughly investigated and addressed before the matter could proceed for further hearing.
- viii. The 1st Respondent did direct the DCIO Nakuru to cover certain areas and to submit the file once that was done so that further directions could be given.
- ix. That pursuant to the 1st Respondent's directions the DCIO Nakuru has already embarked on further investigations.
- x. As per the Kenya Gazette of July, 2017 parcel of land in question is *vacant and belongs* to a public school and it is therefore imperative to establish the status of the property in issue before further Court process is undertaken.
- xi. The instant Judicial Review Application intends to obstruct and interfere with the 1st Respondent constitutional mandate to prosecute.
- xii. The ex-parte Applicant has not demonstrated that the 1st Respondent in exercising its mandate, acted without or in excess of the powers conferred to it by law.
- xiii. The ex-parte applicant has not demonstrate that the 1st Respondent in exercising its mandate acted oppressively or contravened any of the provisions of the Constitution or any other provision of the law.
- xiv. That none of the ex-parte Applicant's Constitutional 1st rights have been or are likely to be violated by the 1st Respondent if further investigation are conducted.

xv. The decision to withdraw Criminal Case No. 1526 of 2016 was done in line with in line the Articles 157(ii) of the Constitution which provides that the DPP shall have regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

xvi. The decision to withdraw Criminal Case No. 1526 of 2016 was also in line with Cap 2 of the Laws of Kenya

xvii. The Judicial Review Application lacks merit and should be dismissed in its entirety.

11. On his part, the Honourable Attorney General, for the 2nd Respondent filed the following Grounds of Opposition which he pursued in his written submissions:

1) That the ex parte Applicant has not brought to this Court annexed to the Application the decision of the 2nd Respondent terminating Criminal proceedings in Criminal Case No. 1841 of 2016.

2) That the Director of Public Prosecution has powers to discontinue or withdraw Criminal proceedings at any stage before judgment is entered with permission of the Court.

3) That in allowing the withdrawal of the suit under Section 87(a) of the Criminal Procedure Code the 2nd Respondent exercised its mandate judiciously and lawfully as there was no compelling reasons to disallow the withdrawal.

4) That the decision of the 2nd Respondent is not tainted with any form of illegality procedural impropriety and or irrationality.

5) That the office of the Director of Public Prosecution is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to the control by the Court, the 2nd Respondent based on the aforesaid principles of illegality, irrationality and procedural impropriety and that the second Respondent did not find any reason to stop the withdrawal of the suit.

6) That the director of public prosecutions is not required to consult the ex parte Applicant as alleged under paragraph 2 of Certificate of Urgency before making its decision to withdraw a criminal case.

7) That the Application raises factual issues and allegations that cannot be determined within the purview of judicial review since it concerns the merits of the decision and requires adduction of *viva voce* evidence.

8) That on the foregoing reasons, we pray that the Application be dismissed with costs to the 2nd Respondent.

12. The basic question presented in this Judicial Review Application is whether, in the circumstances of this case, the decision by the DPP to withdraw the criminal case herein is amenable to judicial review by virtue of its being un-procedural, administratively unfair, unreasonable, irrational, illegal, disproportionate or otherwise illegal.

13. The principle that emerges from our decisional law, is that while the Court has the duty and authority to review the charging decisions of the DPP, the Court is extremely cautious in performing that duty because of the danger of usurping the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecutions and, where, appropriate, withdraw charges. Hence in the *Kuria Case (supra)*, the Court expressed itself thus:

There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.

14. More recently in *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR* the Court held thus:

The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court....As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

15. After reviewing our decisional law, in *Peter Ngungiri Maina v Director of Public Prosecutions & 2 others [2017] eKLR*, I concluded thus:

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.

16. Is there anything in the present case that demonstrates that the ODPP made its decision to withdraw the case against the Interested Party whimsically or was actuated by motives other public interest in prosecuting a reported crime or that it is oppressive or an abuse of its constitutional mandate?

17. The Applicant points to the fact that it was not consulted before that decision was made. While it would be prudent for the DPP to hear an alleged victim's representations before withdrawing a case, there is no requirement that the consent of the alleged victim be sought before such a withdrawal. Mativo J. said it best in the *Ex Parte John Wacira Wambugu Case*:

64. The ex parte applicant states that he was not consulted prior to the decision to terminate the criminal case being made. There is no requirement under the law that the DPP consults a complainant before deciding to prosecute or withdrawal a trial. More significant is the fact that an official who has discretionary powers must, naturally exercise them within the limits of the Constitution and the authorizing statute, read in the light of the Bill of Rights. Rights here will include the rights of the ex parte applicant and the accused persons. The DPP is required to balance the two and make the right decision. No material has been presented before me to show that the DPP failed to exercise his functions or abused his discretion in making the decision. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated, conducted or terminated. No such illegality or irregularity has been established.

18. But the Applicant also faults the DPP's decision as being unreasonable or irrational. How could the DPP have considered all the evidence in 2016 and permitted the criminal cases to commence and continue only for him to perform a diametrically opposed analysis a year later, the Applicant asks. Mativo J. supplies the answer in the *Ex Parte John Wacira Wambugu Case*:

56. Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution. In deciding whether or not to institute criminal proceedings against an accused person, prosecutors must assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. [28] There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued. This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. The review of a case is a continuing process. [29] Prosecutors must take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute or not to prosecute has been made. [30] This may occur after having heard and considered the version of the accused person and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused person has pleaded or in the course of the trial in spite of an initial decision to institute a prosecution.

19. In the present case, the DPP had given his go-ahead for the prosecution to begin and proceed. He had based his information on the evidence collected by that time – including evidence presented by the Applicant. That evidence tended to show that the Applicant was the *bona fide* owner of the subject parcel of land; and that the Interested Party had acted maliciously when he “invaded” the property. The Applicant hangs their case on that narrative. It has produced agreements and title documents to show that it owns the property. And they may well be genuine. But that is not the issue at trial. In the same vein, the DPP says that it received information showing that the National Land Commission was conflicted on the question whether the subject parcel of land was public property grabbed by the Applicant or whether it was *bona fide* private property. The DPP, further, got information, and recommendations from the National Assembly recommending thorough investigations and possible prosecution of the persons who allegedly sold the subject parcel of land to the Applicant. The Applicant denies that it bought the land from those persons. Again, it is not for this Court to determine the veracity of those claims. The only question for this Court is whether it can be said that the DPP abused his powers or discretion under the Constitution in withdrawing the charges.

20. As our case law has now uniformly held, the Court never performs a straight-up merit review of the decision by the DPP in his charging or terminating decisions. The furthest the Court goes in that direction is a proportionality analysis which involves a determination whether the decision is disproportionate in the sense of being unnecessary or unsuitable for the purpose. The other question the Court asks is whether the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker.

21. In asking the Court to re-evaluate the reasons given by the DPP in the present case and re-weigh them, the Applicant is asking the Court to perform a merits review not a judicial review. A merits review is wider than correcting legal error. It extends to a reconsideration of discretionary matters – of the merits of the original decision. To undertake this reconsideration would be to undermine the constitutionally-protected independence of the DPP. This Court must decline that invitation.

22. The upshot is that the Notice of Motion dated 19/03/2018 has no merits. It is hereby dismissed in its entirety.

23. Due to the nature of the case, each party will bear its own costs.

24. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 7TH DAY OF OCTOBER, 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.