



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA DISTRICT REGISTRY

MISCELLANEOUS CRIMINAL APPLICATION NO. E027 OF 2021

AKOTHEN PROPERTIES LIMITED (No. CPR/2013/101276).....APPLICANT

-V/S-

- 1. REPUBLIC OF KENYA**
 - 2. NOORDIN HAJI, OGW, CBS**
 - 3. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**
 - 4. GEORGE KINOTI, CBS**
 - 5. OFFICE OF THE DIRECTOR OF CRIMINAL INVESTIGATIONS**
 - 6. MR. JOSHUA NYAMBU SHAKO**
- THE DEPUTY COMMANDING POLICE DIVISION, MOMBASA**
- 7. INSPECTOR CHERUIYOT, CENTRAL POLICE, MOMBASA**
 - 8. THE INSPECTOR GENERAL OF POLICE**
 - 9. THE DIRECTOR GENERAL**

BUSINESS REGISTRATION SERVICE.....RESPONDENT

-AND-

ESTHER AKOTH KOKEYO.....INTERESTED PARTY/INTENDED ACCUSED

RULING

Application

1. The application dated 6th April 2021 was brought under Sections 66, 69, 76(1), 85(1), 88(1), 89, 90, of the Criminal Procedure Code (CAP. 75), Articles 19, 2021, 22(2), 23(3)(f), 27, 40, 47, 48, 50, 157(6)(a), 157(11) & 165(3)(a) of the Constitution of Kenya 2010, the ODPP Guidelines on the Decision to Charge (2019) and all other enabling provisions of the law.

2. The Applicant seeks for orders that the Honourable Court be pleased to grant leave to the Ex-parte Applicant to commence private prosecution of Esther Akoth Kokeyo (Kenya Passport: A2399746) for the criminal offences committed contrary to the provisions of the Companies Act (2015) that being the Managing Director of the Complainant company: failed to account for transactions undertaken and/or personal gains realised using company funds; failed to indemnify the Complainant company for transactions undertaken and/or personal gains realised using company funds; failed to declare the nature and extent of her personal interests in transactions undertaken and/or gains realised using company funds; failed to give notice to the nature and extent of her interests in diverse transactions undertaken and/or personal gains realised using company funds; she used company funds to enter into substantial cash/property transactions; failed to maintain a registered office, failed to display and/or have displayed the name of the company at the registered office; and failed to keep available for inspection at the registered office of the company mandatory records and documents required to be kept.

3. That pursuant to the leave as prayed above, the Honourable Court be pleased to further grant leave to the Ex-parte Applicant to present before the Honourable Chief Magistrate, Mombasa, its complaints in writing duly signed and sealed, for the purpose of the Chief Magistrate signing and/or countersigning the written complaint presented by the Ex-parte Applicant pursuant to Section 89 (3) of the Criminal Procedure Code, and drawing up and/or causing to be drawn up and signing a formal charge containing a statement of offence(s) with which the intended accused is to be forthwith charged pursuant to Section 89(4) of the Criminal Procedure Code.
4. That in the alternative to the above prayers and without prejudice thereto, the Honourable Court be pleased to issue orders of judicial review compelling the Respondents to investigate criminal offences set out in the prayer above and return their written decision, whether to charge or not to charge the Interested Party/Intended Accused Person within 30 days, or within such other timeframe as the Honourable Court may deem sufficient.
5. That pursuant to the Respondent returning their written decision to charge or not to charge the Interested Party/Accused Person, this Honourable Court be pleased to make such further or other orders regarding the Private Prosecution of the Interested Party/Intended Accused person as the Honourable Court may deem fit.
6. That the costs of the application be granted to the Applicant Company.
7. The application is supported by the Applicant's affidavit sworn by the co-director of the Complainant/Ex-parte Applicant Dr. Henning F. Klose and the grounds stated therein.

Response

8. The 9th Respondent opposed the application through Grounds of Objection dated 21.5.2021 and filed on 24.5.2021 on grounds that the application does not disclose a cause of action against the 9th Respondent, the Applicant has not disclosed an illegality on the part of the 9th Respondent, and the Respondent received a demand letter on 14.5.2019 addressed to the Applicant requesting for a set of documents. That the 9th Respondent has at no given time hindered access to the requested registers of members, directors and register of certified secretary that is accessible upon application for an official search (CR 12) on the Business Registration Portal, that the 9th Respondent has no investigative or prosecutorial powers under Companies Act, 2015, that the matters being raised in the application require a fact-finding before a court since it touches on private transactions undertaken by the Applicant internally and information is within the knowledge of the controlling minds of the Applicant, and that the application offends and seeks to defeat the provisions of parts XXIX and xxx of the Companies Act, 2015 on protection of members against oppressive conduct and unfair prejudice, and company investigations respectively that provide clear procedure for initiating investigations of company's affairs on application by members and reliefs to be sought therein.
9. The Interested Party/Intended Accused further opposed the application through Grounds of Opposition dated 25.5.2021 on grounds that the application dated 6.4.2021 contravenes the mandatory requirements of Order 4 Rule 1 of the Civil Procedure Rules, Cap 21, that the application has not been commenced with authority and/or mandate of the legal directors of the Applicant through an appropriate Board Resolution, that the application is an abuse of the court process as the prayers sought therein cannot be a basis of granting leave to institute private prosecution proceedings against the Interested Party/Intended Accused Person, that the purported grounds provided in the application are premised on breaches of the Companies Act (2015) which provide for specific remedies for such omission, and that the application has not been filed in the court of appropriate jurisdiction therefore fatally defective and should forthwith be struck out.

Applicant's Submissions

10. The Applicant submits that the DPP has not deemed it fit to appear formally herein by way of a duly filed Notice of Appointment informing the Honourable Court either that he represents himself, or that he represents any of the eight other Respondents. The Applicant submits that instead, the closest thing to a direct participation in these proceedings and/or pronouncement on record by the DPP, is a Replying Affidavit sworn on 21.5.2021 by the 3rd Respondent which purports on page 3 thereof that it is drawn and filed by the Director of Public Prosecutions, Kilindini Plaza, 5th Floor, Mombasa. The Applicant submits that the averment if it may at all be considered an averment in so far as it is not part of the matters actually sworn to, is not supported either by an advocate's stamp under the Advocate's Act or by any other official stamp of the DPP, and consequently this Honourable Court should not place any reliance on the truthfulness of this averment.
11. The Applicant submits that having been given Constitutional power to direct the police in their investigations that, the DPP ought to have placed evidence before the Honourable Court showing how he exercised and/or deployed his power to direct the police. In the event that there was resistance by the police to the DPP directing the investigation, the DPP ought to have tabled proof of the steps taken to ensure compliance with the directions. The Applicant further submits that in the event that the DPP is encountering problems in exercising this power to direct the police, the proper thing would have been for him to approach the court for an advisory opinion or in the alternative table a bill before parliament containing such amendments to the Office of the Director of Public Prosecutions Act, the National Police Service Act (2011), or even the Constitution of Kenya 2010 by means of which his constitutional power to direct the police may be enforced.
12. The Applicant submits that it is the responsibility of the 9th Respondent to ensure effective administration of among others the Companies Act (2015), and if as the Business Registration Act (2015) provides further at Section 4 (1) that the Business Registration Service shall be responsible for the implementation of policies, laws and other matters relating to the registration of companies, then by all means the application for private prosecution does disclose a cause of action against the BRS in so far as it discloses errors and/or omissions in the administration and enforcement of the Companies Act (2015). The BRS ought to have at least provided evidence that faced with lack of investigative or prosecutorial powers under the Companies Act, BRS has sought to initiate legal and policy amendments which would render the company registration regime properly enforceable.
13. The Applicant submits that firstly, a Limited Liability Company has a legal personality separate and distinct from that of its constituent Directors and/or shareholders, secondly, that under the Companies Act (2015), the witnessed signature of a single Director can issue valid instructions for and on behalf of a company, thirdly, the existence of alternative remedies does not oust the applicability of the remedies

sought in the Application for private prosecution, fourthly, and lastly, that having been granted an opportunity to make right the wrongs she committed, initially through execution of the Deed of Acknowledgement, and later through the letter first sent to her as a prelude to the filing of the application for private prosecution, and having omitted, neglected and or refused to make any or sufficient response, the Intended Accused Person is estopped from challenging and bringing of these proceedings.

1st to 3rd Respondents' Submissions

14. The 1st to 3rd Respondent Submits that the application dated 6.4.2021 is opposed. The Republic on its own behalf and on behalf of the 2nd and 3rd Respondents filed a Replying Affidavit averred by the Investigating Officer of the complaint in question. The said officer is listed as Respondent number 7. The 1st to 3rd Respondent further submits that when the matter came up for directions on 24.5.2021, counsel for the applicant clarified that it was not necessary to require the attendance of the 2nd, 4th, 6th, 7th, and 8th Respondents as their position is adequately covered by the Director of Public Prosecutions.

15. 1st to 3rd Respondent submits that the Republic confirms receiving a complaint at the Central Police Station Mombasa on 20.8.2019 which was issued with an OB number 70/20/08/2019 entered at 12.20pm. It is the Republic's contention however that the complaint was made by the firm of Steve Kithi & Co. Advocates and not by the Applicant or any other director of the suit company. Further, no director of the suit company or any witness has presented himself to the station to record statements to enable the station compile a proper investigation file.

16. 1st to 3rd Respondent submits that it is the Republic's firm belief that the application to conduct private prosecutions is premature and should not be allowed. The investigating officer confirmed in his affidavit that other than the two letters from the Applicant's counsel to the station, the complaint has not matured to having statements of the witnesses recorded to pave way for the documents to be verified.

17. The 1st to 3rd Respondent further submits that the Republic did write to the police station asking that the inquiry file over the complaint be forwarded to the office of DPP. This is vide a letter dated 26.9.2019 and attached to the Supporting Affidavit of the Applicant's notice of motion as APL-12. However, as averred in the Replying Affidavit, of the Investigating Officer, there were no statements in the file. The complainants had not presented themselves to record statements. All the police had was the complaint, the correspondences and the supporting documents delivered by the Applicant counsel.

Interested Party's Submissions

18. The Interested Party submitted that Order 4 Rule 1 (4) of the Civil Procedure Rules 2010 provides that where the Plaintiff is a corporation, verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company to do so. The Interested Party submits that in the instant application, the supporting affidavit lacks the company seal authorizing the deponent to swear the affidavit on behalf of the company. Further, the said authority to appear does not bear the company seal and the passport number of the person being granted authority is not indicated. There is no consent from the directors. This therefore makes it defective and inaccurate as there is no proper resolution granted by the company.

19. The Interested Party submits by citing the case of Kenya Commercial Bank Limited v Stage Coach Management Limited [2014] eKLR where Havelock J, in his decision relied on the case of *Assia Pharmaceuticals v Nairobi Veterinary Centre Limited* HCCC No. 391/2000 where it was held that *"it is settled law that where a suit is to be instituted for or on behalf of a company there should be a company resolution to that effect."*

20. The Interested Party submits that Article 245 (4) of the Constitution provides that 'The Cabinet Secretary responsible for Police Services may lawfully give a direction to the Inspector General of Police with respect to any matter of police for the National Police Services, but no person may give a direction to the Inspector General of Police with respect to the investigation of any offence, the enforcement of the law against any particular person or persons, and the employment, assignment, promotions, suspension or dismissal of any member of the National Police Service.'

21. The Interested Party submits that under Article 157 (6) of the Constitution 2010 provides that the Director of Public Prosecutions shall exercise state powers of prosecution and may 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. Also, under Article 157 (10) of the Constitution 2010, the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority. The Applicant has not exhausted all these mandated offices by the Constitution before asking for private prosecutions.

22. The Interested Party submits by citing the case of *Floriculture International Limited & Others*, High Court Miscellaneous Civil Application No. 114 of 1997 where the court set out six principles that the magistrates courts should consider before granting a party leave to carry out private prosecutions.

23. The Interested Party submits by citing the case of *Frandik Nyamwaro Ogora v Elkanah Obwaya & 2 Others* [2018] eKLR where it was held that *"what emerges from the above cited statutory provisions and case law is that private citizens can only institute private prosecutions in those cases where he or she satisfies the Magistrate's Court before whom he or she wishes to carry out the prosecution that there has been a failure by the bodies charged with prosecution to carry out their mandate."* Further, Okwany J in the same in dismissing the application held that *"the instant application for leave to institute private prosecution against the 1st Respondent has been brought before the wrong forum as such application ought to have been made before the Magistrate's court on condition that he satisfies the said Magistrates Court that the bodies mandated to conduct the prosecution have failed to do so."*

24. The Interested Party submits that in light of the foregoing circumstances, it is accurate to note that the application filed herein is

premature, inept, falls short of the requirements and precepts of granting orders sought. Further, that the grounds set forthwith for orders sought are breaches of the Company Act 2015 which Act specifically provides for remedies for such omissions. The applicant wants to use criminal justice instead of pursuing civil justice as remedies provided for in the Company's Act 2015.

25. The Interested Party submits that it is worth noting that the Director who purports to have authority to plead on behalf of the company was married to the Interested Party/Intended Accused person. They were both directors of the Applicant and carried out activities as husband and wife until the fallout of the relationship. That the other director was to execute a trust deed giving authority to the Interested Party to run the company which he did not execute. This is evidenced by the copy of the trust deed attached to the application.

Analysis and Determination

26. The Applicant seeks for orders that the Honourable Court be pleased to grant leave to the Ex-parte Applicant to commence private prosecution. However, the 1st to 3rd Respondent submitted that the investigating officer confirmed in his affidavit that other than the two letters from the Applicant's counsel to the station, the complaint has not matured to having statements of the witnesses recorded to pave way for the documents to be verified. Also, that the application to conduct private prosecutions is premature and should not be allowed. Further, the Interested Party submitted by citing the case of *Floriculture International Limited & Others*, High Court Miscellaneous Civil Application No. 114 of 1997 where the court set out six principles that the magistrates courts should consider before granting a party leave to carry out private prosecutions.

27. The law with regard to the procedure to be adopted by a private citizen who desires to initiate private prosecution against another citizen, as is the case in the instant application, is contained in **Section 88** of the **Criminal Procedure Code** which requires that the party should approach the Magistrates Court to permit him to carry out the prosecution.

28. Courts have, in various decisions, set out the conditions to be met by a party who seeks to be permitted to carry out a private prosecution, which is now the constitutional responsibility of the ODPP and formerly, the AG. In the case of *Otieno Clifford Richard vs Republic High Court at Nairobi (Nairobi Law Courts) Misc Civil Suit No. 720 of 2005*, the High Court (Nyamu, Emukule and Wendoh, JJ), observed as follows with regard to the circumstances under which a party could be permitted to carry out a private prosecution:-

“Section 85 to Section 88 of the Criminal Procedure Code deal with “Appointment of Public Prosecutors and conduct of prosecutions”. On the other hand Section 89 to Section 90 of Criminal Procedure Code deal with the “Institution of proceedings and making of complaint”. We think that in the case of a private prosecution an application must first be made under Section 88(1) of the Criminal Procedure Code for the Magistrate trying the case to grant or refuse to grant permission to the Plaintiff to conduct a private prosecution. It is after permission has been granted for the private prosecution to be conducted that Section 89 and Section 90 of the Criminal Procedure Code can be brought into effect and the criminal proceedings instituted. We believe that the principles set out in the KAHARA CASE at page 89 are good law and provide guidance to a subordinate court when determining the question whether to allow a private prosecution since it spells out certain issues which must be addressed by the court when considering the application for permission to private prosecute before granting it.”

29. In conclusion and after consideration of the above authorities, this court finds that the Applicant's application for leave to institute private prosecution against the Respondents has been brought to the wrong court as the application ought to have been filed in the Magistrate's Court to carry out the prosecution on condition that satisfies the said magistrates court and that the bodies mandated to conduct the prosecution have failed to do so. Therefore, the prayer for leave to institute private prosecution against the Respondents is hereby struck out. However, the applicant is at liberty to file the said application before the right court if necessary.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 9TH DAY OF DECEMBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Turuki- Court Assistant

Mr. Mulamula for the 1st to 3rd Respondent

Mr. Kithi for the Applicant – N/A

Mr. Deche for the Interested Party – N/A

Court: Notice of ruling to issue to Applicant and Interested Party

HON. LADY JUSTICE A. ONG'INJO

JUDGE