



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 3 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF CRIMINAL CASE NO. 4899 OF 2015 AT CHIEF MAGISTRATE'S COURT THIKA, CRIMINAL CASE NO. 4499 OF 2016 AT CHIEF MAGISTRATE'S COURT THIKA, CRIMINAL CASE NO. 4629 OF 2015 AT CHIEF MAGISTRATE'S COURT THIKA, CRIMINAL CASE NO. 627 OF 2017 AT CHIEF MAGISTRATE'S COURT KIAMBU, CRIMINAL CASE NO. 242 OF 2017 AT CHIEF MAGISTRATE'S COURT KIAMBU, CRIMINAL CASE 1695 OF 2016 AT CHIEF MAGISTRATE'S COURT KIAMBU & CRIMINAL CASE NO. 1577 OF 2014 AT CHIEF MAGISTRATE'S COURT NAIROBI.

AND

IN THE MATTER OF VIOLATION OF THE EX PARTE APPLICANTS' CONSTITUTIONAL RIGHTS: ARTICLE 22, 49, 50 CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 129, 353 & 357 OF THE CRIMINAL PROCEDURE CODE

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

AHMED CHEGE GIKERA1st Ex Parte Applicant

HENRY WAINAINA WAKIHORO.....2nd Ex Parte Applicant

JUDGMENT

1. By their Notice of Motion filed on 13th February, 2018 and expressed to be brought *inter alia* under Order 53 Rule 1(1), 1(2) and 1(4) of the Civil Procedure Rules, Article 22, 49, 50 of the Constitution of Kenya and Section 129, 353 & 357 of the Criminal Procedure Code ,the ex Parte Applicants sought the following order:-

a) An order of Certiorari to remove to this court for quashing , the proceedings of Criminal Case No. 4899 Of 2015 at Chief Magistrate's Court Thika, Criminal Case No. 4499 Of 2016 at Chief Magistrate's Court Thika, Criminal Case No. 4629 Of 2015 at Chief Magistrate's Court Thika, Criminal Case No. 627 Of 2017 at Chief Magistrate's Court Kiambu, Criminal Case No. 242 Of 2017 at Chief Magistrate's Court Kiambu, Criminal Case 1695 Of 2016 at Chief Magistrate's Court Kiambu, Criminal Case No. 1577 Of 2014 at Chief Magistrate's Court Nairobi.

2. The application is premised on the ground that the Applicants are members of **Githunguri Constituency Ranching Company Limited** who were arrested and arraigned in the criminal cases the subject of their prayers and have been prosecuted on matters that are purely of a civil nature. Further, the application is supported by the statutory statement of the ex parte Applicants, **Ahmed Chege Gikera & Henry Wainaina Wakihoro**.

3. In addition, **Henry Wainaina Wakihoru** swore a verifying affidavit on his own behalf and on behalf of his co-Applicant. He deposed that he is a director and Secretary of **Githunguri Constituency Ranching Company** which is allegedly wracked with leadership wrangles and that the complainants in the criminal cases facing him and his co-Applicant commenced criminal proceedings with the sole intention of intimidating shareholders. He contended that the said criminal cases amount to an abuse of the criminal justice system by the said complainants and the Respondent and that in any case, **Odunga J** had quashed similar proceedings in Kiambu Criminal Case No. 2779 of 2014.

4. The Respondent herein, filed his grounds of opposition on 5th March 2018. To the effect that the Applicants are guilty of inordinate delay as some charges were preferred over three years ago. It was further contended that the decision in Judicial Review No. 384 of 2014 is not binding on this court.

5. Through his affidavit in reply, **Inspector Joseph Ngewa**, the investigating officer responsible for the criminal cases outlined the brief facts pertaining to the criminal cases facing the Applicants. He contended that the application is an attempt to defeat the cause of justice; that the Applicants have not demonstrated abuse of court process through continued prosecution and how the Respondent acted irrationally in deciding to prosecute the Applicants. It was deposed that the Respondent considered the evidence gathered in investigations in deciding to prosecute the Applicants and as such, the Application amounts to an invitation to the court to interfere with and/or usurp the mandate and functions of the Director of Public Prosecutions (DPP).

6. **John Maina Mburu**, who described himself as the Chairman of **Githunguri Constituency Ranching Company**, the Interested Party in this case (hereinafter the Company) swore a replying affidavit on behalf of the Company. He denied the existence of leadership wrangles in the Interested Party asserting that previous disputes have been settled by the court. He set out the basis of the criminal charges against the Applicants. He further deposed that the Police and the DPP have the mandate to investigate complaints and to prefer criminal charges and that the Applicants have failed to demonstrate any unfairness or illegality on the part of the DPP.

7. The court directed the parties to canvass the motion by way of written submissions. The Applicants in their submissions detailed the background of the case in their endeavour to demonstrate that the dispute between the complainants and the Applicants is civil in nature arising from leadership contests within the Company and that the criminal cases against the Applicants are intended to intimidate the Applicants. Reliance was placed in the case of **Republic vs Ex parte Applicant Ahmed Chege Gikera & anor (2015) eKLR** where **Odunga J.** censured the use of criminal proceedings for the ulterior purpose of intimidating shareholders.

8. On her part, Miss Ndombi for the DPP sought to rely on Inspector Ngewa's replying affidavit and adopted paragraph 1-6 of the Interested Party's submissions.

9. The Interested Party submitted that no basis had been established by the Applicants for the court to bar the ongoing criminal cases and that in any case, such an order would not be in the public as the Police and the office of the DPP are authorised by law to investigate complaints and to prosecute where necessary pursuant to Article 157(6) of the Constitution. Counsel cited the case of **Lameck Okeyo & Another vs Inspector General of Police & 2 others (2016) eKLR** where it was held that for an application of this nature to succeed, it must be shown that the investigations were motivated by ulterior motives, the purpose being the achievement of some collateral result not connected with the vindication of the alleged commission of a criminal offence. It was submitted that the Applicants have not demonstrated any instance of violation of their constitutional rights hence the orders sought should not be granted. Counsel for the Interested Party contended that matters pertaining to the directorship and management of the company are not issues for determination in this matter and that in any case, the Registrar of companies is the custodian of a company's register. He cited the case of **Republic vs Attorney General & 2 others Ex parte Xplico Insurance Company Limited (2014) eKLR**. The court was urged to dismiss the application as it constituted an abuse of the court process.

10. The court has considered the material canvassed in respect of the motion by the parties herein. Certain facts pertaining to the case are not in dispute. The ex parte Applicants face several criminal charges in the criminal proceedings which are the subject of this motion. Undoubtedly, this is not the first litigation between the ex parte Applicants or their proxies and the officials/members of the Interested Party. The parties have belabored this fact in their respective affidavits and the submissions.

11. The courts have stated on many occasions that the DPP's exercise of his mandate under **Article 157** of the Constitution and the ODP Act is not to be lightly interfered with. I associate myself entirely with the sentiments of **Odunga, J** in **Republic v Attorney General & 4 others ex parte Kenneth Kariuki Githii [2014 eKLR]** as reproduced below:

“The court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing proceedings are in all likelihood bound to fail, it has been held time and time again, is not a ground for halting those proceedings by way of judicial review since, judicial review proceedings are not concerned with the merits but the decision making process. That an Applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal proceedings. However, if the Applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings.”

12. The ex parte Applicants' key contention is that the criminal proceedings against them were brought for the ulterior or illegal purpose of intimidating the said Applicants who are engaged in “leadership wrangles” engulfing the different factions of the Interested Party and that the dispute is of a civil nature. There is uncontroverted material suggesting that the 2nd ex parte Applicant, **Henry Wainaina Kihoro** previously held the position of a director before being removed from office prior to the commencement of the criminal cases. There is however no evidence to show that he is a current member or shareholder of the Interested Party. As for the 1st ex parte Applicant, **Ahmed Chege Gikera**, although he has evidently engaged in a multitude of legal skirmishes with the officials of the Interested Party in the past, there is no evidence that he is/was a member, shareholder or official of the Interested Party at any time. Despite being challenged to tender such evidence he has not.

13. In his judgment delivered on 25th May 2016 in **Nairobi JR No. 512 of 2015 R V Registrar of Companies ex parte Ahmed Chege Gikera** [attached to the Replying affidavit of the Interested Party) **Korir J** observed as follows:

“38. There is however a disturbing pattern which the members of the company (Interested Party) must bring to a halt for their own benefit. The many cases before the courts are indeed clear evidence of how parties can abuse the court process. The main thing about these matters is a fight over the management of the affairs of the company. I think that fight was clearly resolved by Mutungi J through the order dated 10th November, 2014 in Nairobi ELC Misc. Application No 12 of 2014 when he gave orders directing the holding of an annual general meeting of the company. The elections were to be supervised by the Registrar. In my view, the order was complied with when the elections were held on 17th December, 2015. Any person dissatisfied with the manner in which the elections were held ought to revert back to Nairobi ELC Misc. Application No. 12 of 2014. Filing of a multiplicity of suits in an attempt to go around that order is simply a waste of the court’s time and the resources of the company

41. The elections of 17th December 2015 were held by the persons and in the manner directed in Nairobi ELC Misc. Application No.12 of 2014 and any issue concerning the holding of such elections could only be scrutinized in the matter in which the orders were issued

.....Those orders cannot be overturned by this court and neither could they be overturned through proceedings before a subordinate court

44. There was also an averment by the Respondents that the Applicant (Ahmed Chege Gikera) is neither a shareholder nor director of the company. That averment has not been disputed by the Applicant. I however do not wish to say more as the issue of membership of the company will be better addressed by the Registrar.”

14. Annexures **JM1** and **JM2** to the Replying affidavit of the Interested Party contain two copies of letters from the Registrar of Companies, dated 19th April 2017 and 31st July 2015 reflecting the list of directors of the Interested Party before and after the December 2015 elections. In none of these records do the *ex parte* Applicants appear. Significantly, one of the charges facing the 1st *ex parte* Applicant in Cr. Case No. 4899/15 relates to the forging of the letter in annexure **JM2** dated 22nd May 2015, purporting to be from the Registrar of Companies and reflecting the *ex parte* Applicants herein, among others, as directors of the Interested Party. So that, while it is true that there have been civil proceedings, or disputes and possibly conflict over the leadership of the Interested Party, the onus lay with the Applicants herein to prove that the cases brought against them were actuated by an ulterior motive and that the DPP’s decision to prosecute the Applicants was therefore illegal. Evidently, neither the DPP nor the investigators have been shown to be involved in any of the alleged wrangles in the Interested Party.

15. Equally, the court will be slow to interfere with police investigations carried out in exercise of their mandate because they are duty-bound to investigate any complaint made to them. So long as they act reasonably the High Court will be hesitant to intervene – see **Republic v Commissioner of police & Another ex parte Michael Monari & Another [2012] e KLR**. The onus lies upon the *ex parte* Applicants to demonstrate that there are grounds to justify the court’s interference with the discretion conferred by law upon the DPP and the investigative agencies.

16. The existence of a civil dispute between parties does not oust the application of the criminal justice system where contemporaneous offences are detected in the same transaction(s). That is the gist of Section 193 of the Criminal Procedure Code. While the Applicants have recounted the alleged wrangles in the Interested party and accuse the Complainants of seeking to intimidate them through the criminal cases, it is only indirectly implied by the Applicants that the DPP in bringing charges against them, has not acted properly because the charges have been brought to achieve a collateral purpose .

17. In **Lameck Okeyo and Another v Inspector General of Police and 2 Others, [2016] e KLR** the court stated:

“In order for the Applicant to succeed it must show that not only are the investigations which were being undertaken are laced with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. Although it was alleged that the criminal investigations have been commenced with a view to achieving collateral and extraneous purposes, that is to aid the interested party recover a civil debt, I am not satisfied based on the evidence on the record that this is so . It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and 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. Therefore whereas a matter may constitute both civil and criminal offence, the mere fact that the police intends to charge the persons against whom the complaint is made with a criminal offence notwithstanding the pendency of civil proceedings will not warrant a stay... This is the effect of section 193A of the Criminal Procedure Code”. (emphasis added)

18. It is not enough for the *ex parte* Applicants to merely recount the long history of disputes in the Interested Party and assert that despite the said disputes being of a civil nature, the criminal justice system has been activated against them for the purpose of intimidating them. The alleged ulterior motive has not thereby been established against the DPP or the Interested Party. The *ex parte* Applicants probably have solid defences to the charges facing them. I agree with the submissions by the Interested Party that the proper forum for the ventilation of such defences is the various trial courts seized of the criminal cases.

19. For my part, I have considered the allegations and counter allegations contained in the various affidavits placed before the court. Without going into the finer details of the issues raised, it seems to me that there were grounds to justify the bringing of criminal charges against the Applicants and that there are serious issues raised on both sides for determination by the criminal courts seized of the criminal trials against the Applicants. In such a case, it is in the public interest that those charged are brought to account for their alleged actions. This is in no way

a comment on the adequacy or otherwise of the evidence; that is a matter for determination by the criminal courts. This court cannot and should not attempt to answer the question relating to the culpability or innocence of the *ex parte* Applicants for the offences facing them.

20. In the case of **Kuria and 3 others V Attorney General (2002) 2 KLR 69**, the court considered the requirement for proof of allegations of abuse of the process of the court and the necessity to balance the public and private interest considerations attending criminal proceedings, observing that:

“It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution...The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose on the society, which are immense. 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 bipolar 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 evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused to have a fair trial” (emphasis added)

21. In this case, no evidence has been furnished, and even if some sort of evidence had been tendered, the court would still have been reluctant to exercise its discretion in favour of the Applicants owing to the circumstances obtaining. There are instances where the conduct of an Applicant may well disentitle him to discretionary orders. Such conduct would include material non- disclosure, acquiescence to irregularity complained of, waiver of the right to object or undue delay.

As observed in my ruling delivered in this matter on 16th November 2018, there was undue and unexplained delay by the Applicants in bringing this action. The criminal charges which are the subject of this cause were brought in the period between 2014 and 2017. In some of the cases, hearing had commenced and the cases in advanced stages by the time of bringing this cause. In view of all the foregoing, the court finds no merit in the motion filed on 13th February 2018. The motion is dismissed with costs to the Respondent.

SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 12TH DAY OF MAY 2020

C. MEOLI

JUDGE