



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CIVIL MISC. APPLICATION NO. 68 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY KANINI KITILI MWENGI,**

**BENSON MWANZIA KITILI, KITILI MWENDWA, MWENGI KITILI AND ALEX SALMIN KITILI**

**AND**

**IN THE MATTER OF ARTICLE 10, 47, 50, 73 AND 157 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013**

**AND**

**IN THE MATTER OF CRIMINAL CASE NO. 1259 OF 2018 AND CRIMINAL CASE NO. 1357 OF 2018**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**1. THE DIRECTOR OF PUBLIC PROSECUTIONS**

**2. THE NATIONAL POLICE SERVICE**

**3. THE MAGISTRATE'S COURT, KITUI.....RESPONDENTS**

**AND**

**PAUL MULWA LUNGUI.....INTERESTED PARTY**

**1. KANINI KITILI MWENGI**

**2. BENSON MWANZIA KITILI**

**3. KITILI MWENDWA**

**4. MWENGI KITILI**

**5. ALEX SALMIN KITILI.....EXPARTE APPLICANTS**

**RULING**

**1. Kanini Kitili Mwengi, Benson Mwanzia Kitili, Kitili Mwendw, Mwengi Kitili and Alex Salmin Kitili who describe themselves as**

Exparte Applicants approached this Court by way of Chamber Summons dated **3<sup>rd</sup> May, 2019**, filed herein on the **7<sup>th</sup> May, 2019** seeking orders thus:

- That leave be granted to the Exparte Applicants to bring Judicial Review proceedings seeking an order of Prohibition to stop and prevent the Director of Public Prosecution, the National Police Service Commission from prosecuting the Exparte Applicants and/or the Magistrate's Court, Kitui from further continuing with the proceedings in Kitui Chief Magistrate's Criminal Case Number 1259 of 2018 and number 1357 of 2018 as consolidated and/or separately.
- That further and/or in the alternative, pursuant to the Constitution of Kenya and the inherent jurisdiction of the Court, leave be granted for extension of time for filing Judicial Review proceedings for an order of Certiorari outside the statutory 6 months' period to remove or bring to the High Court and quash the decision (made in October, 2018) and proceedings in Kitui Chief Magistrate's Criminal Case Number 1259 of 2018 and number 1357 of 2018 as consolidated or otherwise.
- That the grant of the said leave do operate as a stay of further prosecution and/or proceedings in Criminal Case Number 1259 of 2018 and number 1357 of 2018 as consolidated or otherwise.
- That costs to be provided for.

2. The application is supported by an affidavit sworn by **Kanini Kitili Mwengi** on her own behalf and that of her Co-Exparte Applicants, three (3) of whom she referred to as her children. She deposed that: she is a wife and legal representative of the Estate of **Kitili Mwengi Mwai** who died on **24<sup>th</sup> April, 1995** who was the registered proprietor of all the parcel of land known as Title Number **Kyangwithya/Tungutu/1124**; on or about **November, 2013** the Interested Party claimed the purchaser's interest over the property having purportedly purchased it from one of her children; on the **19<sup>th</sup> November, 2014**, she filed a case (**ELC 175/2014**) in **Machakos** where the Judgment was delivered in her favour, a Decree was issued declaring the property to belong to the Estate of the Deceased and the Interested Party was granted ninety (90) days within which to vacate the parcel of land; a Caveat filed in the Succession Cause (**No. 23 of 2013**) was considered and the Court issued her with a Certificate of Confirmation of grant.

3. That following dismissal of the suit by the ELC (Court), the Interested Party complained to the police that the Exparte Applicants had obtained money from him by false pretenses. She was summoned to appear before the Criminal Investigation Officer Kitui but caused her advocate to bring the facts to the attention of the police hence no action was taken. On **9<sup>th</sup> October, 2018** she sought assistance of the police in an endeavor to execute the Decree who promised to act once they confirmed the authenticity of the Decree but they delayed and enabled the Interested Party to obtain a stay of execution on **11<sup>th</sup> October, 2018**. On the same day the police arrested them and caused them to be charged with the offence of obtaining **Kshs. 2,100,000/=** from the Interested Party by falsely pretending that they were in a position to sell to him Land Parcel **Kyangwithya/Tungutu/1124**.

4. That on **22<sup>nd</sup> March, 2019** the Court declined to grant stay of execution sought by the Interested Party as he was in contempt of the Court order. And on the **17<sup>th</sup> April, 2019** the Interested Party was evicted from the property which makes the prosecution an abuse of the criminal justice system and allowing further proceedings amounts to an oppression.

5. Following an order certifying the application as urgent by **Hon. Justice Kemei** and directing the Exparte Applicants to serve the application upon the Respondent and the Interested Party, the Interested Party filed grounds of opposition arguing that the application is fatally defective as it is commenced in the name of the Republic which cannot seek leave therefore lacks a legitimate Applicant; The entire application for leave is founded on determination of **Machakos ELC No. 157 of 2014** which is not final as an Appeal has already been filed against the decision and stay or prohibition of the criminal case does not lie since criminal proceedings can be sustained concurrently or consecutively with civil proceedings over the same subject matter.

6. Following directions given by the Court the application was to be canvassed by written submissions but only the Applicant (Exparte) filed submissions.

7. Leave herein is sought to enable the Exparte Applicant to institute an order of prohibition and in the alternative to extend time within which an order of certiorari can be sought as the six (6) months within which it could have been sought have lapsed.

8. **Order 53 Rule (2)** of the **Civil Procedure Rules** provides thus:

*“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”*

9. In the case of **AKO vs. Special District Commissioner, Kisumu & Another, Civil Appeal No. 27 of 1989**, the Court of Appeal stated thus:

*“It is plain that under Sub-Section (3) of Section 9 of the Law Reform Act, leave shall not be granted unless application for leave is made inside six months after the hearing of the Judgment.”*

10. The Exparte Applicant was economical with reasons as to why he did not act within six (6) months after the decision of the Environment and Land Court. It is however, stated that an Appeal has been lodged against the impugned decision; an act that would behoove the Court to

await the decision as the decision complained of is not final.

11. Courts have deemed defiances that are apparent that inhibit constitutional aspirations which would even call for amendment of legislation (**Also see Republic vs. Kenya Revenue Authority Exparte Stanley Mambo Amuti (2018) eKLR**) but, without the amendment of the law the provision alluded to must be adhered to.

12. In the case of **James Muriithi Ngotho and 4 Others vs. Judicial Service Commission (2012) eKLR** where the Applicant sought leave to apply for Judicial Review after the stipulated statutory limitation the Court stated in *obiter dicta*, thus:

***“... the limitation of six months prescribed under Section 8(3) of the Law Reform Act is not a procedural technicality. It is a statutory limitation of time for the filing of applications seeking leave to apply for order of certiorari. It is therefore, a requirement imposed by substantive law and it cannot be said to be a procedural technicality that can be ignored ...”***

13. I am persuaded that the Applicant should have adhered to the provisions of the law. Therefore, the order sought in the alternative cannot stand.

14. With regard to the issue of the prerogative order of prohibition; I do appreciate the fact that moving the Court by any individual is a constitutional right, where the Court may be called upon to decide the case on its merit. But to grant leave, as correctly pointed out, the case must be an arguable one. To exercise the discretion, the Court must also be seen to have acted judiciously. The purpose of the leave required must be considered. This is because leave is sought so as to eliminate frivolous, vexatious or hopeless applications (**Also see Republic vs. County Council of Kwale & Another Exparte Kondo & 57 Others, Mombasa HCMisc. Application No. 384 of 1996**).

15. The Complaint raised by the Exparte Applicants is that the criminal proceedings brought against them amount to oppression since the Interested Party was aware that they were contesting the purported sale agreements. It is further argued that prosecutorial powers have been abused and such powers are not absolute. In this regard, the case of **Diamond Hasham Halji & Another vs. Attorney General & 4 Others (2018) eKLR** was cited where the Court of Appeal stated thus:

***“(33) From the foregoing, there cannot be any doubt that the prosecutorial discretion of DPP is not absolute. It is limited by Article 157(11) which stipulates the mandatory considerations that underlie the exercise of discretion; by the constitutional principles to which we have referred and by statute ...”***

16. In the case of **Republic vs. Director of Public Prosecutions & Another, Exparte Kamani and Others, Judicial Review Application No. 78 of 2015 (2015) eKLR, Odunga, J.** stated thus:

***“The mere fact that the intended or ongoing criminal proceedings are all likelihood going 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 commenced not with the merits but with decision making process. That an Applicant had a good defence in the criminal process is a ground that ought not to be relied upon by a Court ... to halt the criminal process undertaken bonafides since the defence is open to the Applicant in those proceedings. However, if the Applicant demonstrates that the criminal proceedings that the police intend to carry out are an abuse of process, the Court will not hesitate in putting a halt to such proceedings.”***

17. **Section 193A** of the **Criminal Procedure Code** provides thus:

***“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”***

18. The Exparte Applicants argue that by exercising the discretion to prosecute them the DPP had no regard to public interest of administration of justice which was an abuse of the legal process.

19. It is apparent that the law allows concurrent litigation of civil and criminal proceedings that arise from an issue. It is admitted that the E & L Court having rendered itself and questioned the critical issue of whether a sum of **Kshs. 2,100,000/=** was received as the advocate who commissioned the agreement for sale was not called to testify, the Interested Party being aggrieved appealed to the Appellate Court. This being the case, the question has not been finally determined. Therefore, prohibiting the Magistrate from continuing with proceedings where he has a right of exercising his discretion to come up with an appropriate decision will be looking into the merit as opposed to the process. The Exparte Applicants will be given the opportunity of putting up a defence and a considered Judgment will be made by the Court.

20. From the foregoing, I am of the view that this is not a case which calls for granting of leave sought. Accordingly, the application is dismissed with no orders as to costs.

21. It is so ordered.

**Dated, Signed and Delivered at Kitui this 2<sup>nd</sup> day of December, 2019.**

**L. N. MUTENDE**

**JUDGE**