



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**JUDICIAL REVIEW APPLICATION NO. 7 OF 2017**

**IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS IN THE NATURE OF ORDERS OF PROHIBITION**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, NO. 2 OF 2015**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA**

**BETWEEN**

**LAWRENCE CHARLES KURIA GITAU.....1<sup>ST</sup> APPLICANT**

**JOHN KWENDO KUBE.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**CHIEF MAGISTRATE KIAMBU LAW COURTS.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDENT**

**AND**

**FREDRICK OGAMBA ONGERA.....INTERESTED PARTY**

**JUDGMENT**

1. The Notice of Motion under consideration is the one dated 15/09/2016. It seeks a single substantive prayer: An order of prohibition stopping the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from prosecuting, continuing with the hearing and determination of *Kiambu Chief Magistrate's Criminal Case No. 3525 of 2014: R v Lawrence Charles Kuria Gitau & Joseph Kwendo Kube*.
2. The Application was originally filed in Nairobi but subsequently transferred to Kiambu for disposal.
3. As is often the case in such cases, parties tend to ventilate a lot of factually contested issues in an application of this nature. However, in a Judicial Review Application, often, the question does not turn on contested questions of fact – but on the outer limits of use of administrative discretion.
4. The basic facts of this case are as follows.
5. The *Ex Parte* Applicants were arrested and charged at the *Kiambu Chief Magistrate's Court Criminal Case No. 3525 of 2014* with the offence of malicious damage to property contrary to section 339 of the Penal Code. The particulars of the charge were that on the 21<sup>st</sup> and 23<sup>rd</sup> November, 2016, the *Ex Parte* Applicants wilfully and maliciously damaged a perimeter wall, the property of the Interested Party.
6. The *Ex Parte* Applicants were arraigned in Court to answer to the charges on 04/12/2014.

7. It is not in dispute that after the criminal charges were instituted against the *Ex Parte* Applicants, the 1<sup>st</sup> *Ex Parte* Applicant proceeded, on 24/12/2014 to file a civil suit being ***Milimani Civil Suit No. 7874 of 2014***. The suit prayed for a declaration that the Interested Party's perimeter wall and canopy erected on the boundary between Kongo Settlement Scheme Kahawa Soweto – Plot No. 720 and Kongo Settlement Scheme Kahawa Soweto – Plot No. 728 had unlawfully encroached on the 1<sup>st</sup> *Ex Parte* Applicant's property. It further prayed for an order directing the Interested Party herein to immediately destroy the perimeter wall and canopy erected on the said boundary of the two plots.

8. Needless to say, the perimeter wall which is the subject matter of ***Milimani Civil Suit No. 7874 of 2014*** ("Civil Case") is the same one the *Ex Parte* Applicants are accused of maliciously destroying in the Criminal Case.

9. It would appear that the Civil Case moved faster than the Criminal Case as on 09/02/2016, the Trial Court in that case appears to have issued the orders sought – hence determining the case in favour of the 1<sup>st</sup> *Ex Parte* Applicant.

10. The Interested Party has pointed out that the judgment and decree were entered illegally and *ex parte* and has annexed documents to demonstrate that he has appealed against the decision to the High Court – and that, further, he has obtained stay orders against execution of the judgment.

11. There is, however, controversy about what transpired in the Civil Case. The exact nature of the controversy is not important for the resolution of the case. The *Ex Parte* Applicants contest that there is a live appeal against the decision – stating that all there is an application to file an appeal out of time.

12. The primary argument the *Ex Parte* Applicants make is that a Court of competent jurisdiction has made a conclusive finding on the rights of the 1<sup>st</sup> *Ex Parte* Applicant and the Interested Party (who is the complainant in the Criminal Case) on the perimeter wall and made a declaration that the perimeter wall is an illegal encroachment on his land. Hence, he argues, the continuation of the criminal matter against him remains "an academic exercise, a waste of judicial time, and might occasion great embarrassment to the process of justice." The embarrassment the *Ex Parte* Applicants speak of would arise, they say, if the Court in the Criminal Case arrived at different conclusions from those reached by the Trial Court in the Civil Case.

13. The *Ex Parte* Applicants contend that if the 2<sup>nd</sup> Respondent had conducted thorough investigations, they would have known that the subject wall lays squarely in the 1<sup>st</sup> *Ex Parte* Applicant's property and that the criminal case facing the *Ex Parte* Applicants cannot stand in the face of the ownership of the land. The question of ownership, the *Ex Parte* Applicants insists, has been settled by a Court of concurrent jurisdiction.

14. The Interested Party has strongly opposed the Application. He points out that the criminal charges were instituted before the civil case and that the civil case was filed with the sole aim of circumventing the wheels of justice twenty days after the 1<sup>st</sup> *Ex Parte* Applicants were arraigned in Court.

15. The Interested Party insists that the ODPP made a proper charging decision and that the proper recourse for the *Ex Parte* Applicants would be to mount their defence in the Criminal Case. He quotes with approval the holding by Odunga J. in ***R v Director of Public Prosecution and 2 Others Ex Parte Francis Maina & Another (2016) eKLR*** that the concurrent existence of a civil suit and a criminal trial is not necessarily a pointer to an abuse of the process of the Court.

16. The DPP, similarly, opposed the Application. State counsel argued that there has been no showing that there was an ulterior motive in pursuing the criminal prosecution. Mr. Kinyanjui pointed out that section 193A of the Criminal Procedure Code expressly envisages that there could be concurrent civil and criminal proceedings over the same subject matter – and that such concurrence does not of itself mean that there is an abuse of prosecutorial policy in preferring criminal charges.

17. The principles applicable in reviewing the charging decisions of the DPP are now firmly established by our decisional law. It is true that "the Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation." (***Kuria & 3 Others v Attorney General [2002] 2KLR 69.***) Indeed, this position, although now expressly scripted into our Constitution is of vintage judicial ancestry in Kenya. As early as 2001, the High Court uttered the following iconic words on the subject:

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 a criminal prosecution otherwise the prosecution will be malicious and actionable.

18. Odunga J. held similar views in ***R v Director of Public Prosecutions & 2 Others Ex Parte Praxidis Nomoni Saisi [2016] eKLR***, when he stated that "where it is clear that the [prosecutorial] discretion is being exercised with a view to achieving certain extraneous goals other than those recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would....constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion."

19. 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. 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.*

20. 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.*

21. 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.*

22. Is there anything in the present case that demonstrates that the ODPP made its charging decision 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? The *Ex Parte* Applicants offer no such evidence. The only “smoking gun” they present is the existence of a (contested) judgment in a related Civil Case. The claim is that by continuing with the Criminal Case, the Court risks reaching different conclusions than those reached by the Court in the Civil Case.

23. The answer to that contention has been provided by the ODPP and the Interested Party in the following paragraph in **Republic Vs Attorney General & Four Others Ex-parte Kenneth Kariuki Githii (2014) eKLR**:

*The mere fact that the intended or on-going criminal proceedings are in all likelihood bound to fail, it has been held time and 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 with the decision making process. That an applicant has a good defence in the criminal process is not a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that 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 constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceedings may similarly be a basis for civil suit, is no ground for staying the criminal process if the same can similarly be a basis for criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration.*

24. The underlying charge in the Criminal Case is malicious damage to property. The essence of the charge is that the *Ex Parte* Applicants took it upon themselves to forcefully remove the subject wall without a Court order or authorization. The question of the exact location of the boundary may or may not be a defence to the charge. The fact that the *Ex Parte* Applicants have a favourable judgment to the effect that the perimeter wall has encroached on the 1<sup>st</sup> *Ex Parte* Applicant’s land may or may not aid in their defence in the criminal matter. However, neither facts obviates the need for the criminal trial. I find no abuse of prosecutorial policy in the ODPP’s decision to continue with the charges. In all this analysis, one important factor is that the institution of the criminal charges pre-dated the institution of the Civil Case. That fact not only speaks to the alleged question of motive in instituting the criminal charges but also, potentially, to the legal question of *mens rea* in the criminal case.

25. In the **Kuria Case**, the Court urged that “it would be in the interests of the Applicants, the Respondents, the Complainants, 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 Applicant the chance to clear his name.” So it is here. Let the *Ex Parte* Applicants robustly mount their defence in the Criminal trial.

26. **For these reasons, the Notice of Motion dated 23/08/2016 is hereby dismissed with costs.**

27. Orders accordingly.

**Dated and delivered at Kiambu this 7<sup>th</sup> day of June, 2018.**

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**JOEL NGUGI**

**JUDGE**