



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO.165 OF 2018**

**IN THE MATTER OF MACHAKOS CHIEF MAGISTRATE’S COURT CRIMINAL CASE NO. 1677 OF 2015**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

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

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHIEF MAGISTRATE’S COURT MACHAKOS )**

**OFFICE OF THE DPP, MACHAKOS ).....RESPONDENTS**

**AND**

**SUSAN MUTUNGWA.....1<sup>ST</sup> INTERESTED PARTY**

**ROBERT MULI MATOLO.....EX- PARTE APPLICANT**

**RULING**

1. The Exparte Applicant herein filed a Notice of Motion dated 29/05/2018 seeking for the following reliefs namely:-

*(a) An order of certiorari to bring into this court for the purposes of being quashed the charges and proceedings in **Machakos CMCR. In 1677 of 2015 – Republic =Vs= Robert Muli Matolo.***

*(b) An order of prohibition restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from hearing, entertaining and or prosecuting the Applicant in **Machakos CMCR NO. 1677 of 2015 Republic =Vs= Robert Muli Matolo.***

*(c) Any other appropriate order or direction as this Honourable court may deem just and fit to grant.*

*(d) An order for costs.*

2. The Application is supported by the grounds set out in the statement and affidavit of the Exparte Applicant Robert Muli Matolo who deponed *inter alia* that the 2<sup>nd</sup> Respondent has preferred criminal charges against him vide **Machakos CMCR.1677 of 2015** which revolves around the Applicant’s extended family members who are all embroiled in various cases relating the estate of the deceased Wallace Mutungwa Matolo; that the complainant in the Criminal case is an Objector in **Nairobi Succession Cause No. 1521 of 2011** (formerly **Machakos Succession Cause No.275 of 2007**); that due to the several cases involving the family members in various courts the Applicant believes that the criminal justice system is being abused with a view to settling civil scores thereby causing injustice; that the Applicant is apprehensive that he is not likely to get justice before the trial court due to the family influence and that his rights have been violated warranting the orders now being sought.

3. The Respondents did not file replying affidavits to the motion. However, even if there is no response by the Respondents, I find it was upon the Exparte Applicant to avail the requisite evidence so as to justify this court to grant the orders being sought. The Applicant herein seeks judicial review orders of certiorari and prohibition. The vocal point of the Applicant is that the ongoing **criminal trial number 1677 of 2015 at the Machakos Chief Magistrate's Court** should be stopped and all the proceedings quashed and that the Respondents be prohibited from hearing, entertaining and or prosecuting the Exparte Applicant in that case. However, I note that the Applicant has not annexed the charge sheet or proceedings in **Machakos CMCR.1677 of 2015**. What has been annexed is a copy of a charge sheet in **Makueni Cr. No. 539 of 2009** relating to an assault case involving Robert Muli Junior and Another and in which the complainant is one Morris Matolo Nzyusyo. The complainant in the alleged **Criminal Case No. 1677 of 2015** is said to be one Susan Mutungwa. Clearly these are two different complainants. The proceedings in **Makueni Criminal Case No. 539 of 2009** appears to have been concluded as the trial court in Makueni acquitted the accused persons vide a ruling dated 25/08/2011. The Exparte Applicant has also shown that there are several other cases lodged before several courts and involve family members over the distribution of the deceased's property namely **MAKUENI/KIVANI/576**. There is a pending Succession Cause at Nairobi High court over the subject property and therefore if there are instances of intermeddling with the properties of the deceased, then the succession court would deal with the issues appropriately.

Turning to the case allegedly lodged at the Chief Magistrate's Court Machakos namely **Criminal No. 1677 of 2015**, copies of which have not been availed by the Exparte Applicant, this court will not be in a position to make a definite determination regarding the prayers sought. First and foremost, the copies of the charge sheet and proceedings have not been availed by the Applicant to this court. Secondly, there is no evidence presented that the alleged prosecution is tainted by malafides other than a genuine criminal trial presented by the relevant office of the Director of Public Prosecution. In any event the Director of Public Prosecution is mandated to commence criminal proceedings in any court as guided by the provisions of Article 157 of the Constitution of Kenya 2010. Further, there is no bar to the Director of Public Prosecution prosecuting a criminal case even where there is a pending Civil Case relating to the matter in question. The annexures availed by the Ex parte Applicant shows that several Criminal, Civil and Succession Causes have been lodged by the various family members of the late Wallace Mutungwa Matolo and that there is no evidence shown that the said cases had been lodged without any basis. In any case, the relevant courts as mandated by the Constitution are in a position to make the appropriate orders. The Exparte Applicant has not presented sufficient evidence to the effect that his rights have been violated or infringed vide **Criminal Case Number 1677 of 2015** details of which have not even been furnished to warrant the grant of the judicial review orders sought herein.

Finally I note that the Applicant appears apprehensive about the criminal case as he claims that he is not likely to get justice in the end. That apprehension might or might not be there but even if there was such apprehension, there is a clear remedy on appeal should the outcome not be favourable to the Applicant. Again the allegations of bias attributed to the trial court ought to be presented before the said trial court for a determination on the same.

4. In view of the foregoing observations, it is the finding of this court that the Ex parte Applicant's Application dated 29/05/2018 lacks merit. The same is ordered dismissed with no orders as to costs.

It is so ordered.

**Dated and delivered at MACHAKOS this 11<sup>th</sup> day of October, 2018.**

**D.K. KEMEI**

**JUDGE**