



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW**

**MISCELLANEOUS APPLICATION NO 206 OF 2014**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT**

**THE RESIDENT MAGISTRATE COURT, TAWA.....2<sup>ND</sup> RESPONDENT**

**EXPARTE.....JOSHUA KILONZO MUTISYA**

**JUDGMENT**

**INTRODUCTION**

1. The Ex-parte applicant herein filed chamber summons dated 18<sup>th</sup> December 2014 seeking Judicial Review Orders against the Director of Public Prosecution as the 1<sup>st</sup> Respondent and the Resident Magistrate's Court Tawa as the 2<sup>nd</sup> Respondent. The application for leave was supported by the affidavit of Joshua Kilonzo Mutisya sworn on 18<sup>th</sup> December 2014. On 31<sup>st</sup> December 2014, leave was granted to the Ex-parte Applicant which also operated as stay to the proceedings in Criminal Case No. 403 of 2014 until the hearing and determination of the substantive Judicial Review Application.

**THE APPLICATION**

2. On the 20<sup>th</sup> January 2015, the Ex-parte applicant filed the substantive Judicial Review Application through Notice of Motion dated 12<sup>th</sup> January 2015 supported by the Statement of Joshua Kilonzo Mutisya dated 12<sup>th</sup> January 2014.

3. The application sought orders for:

i. ***AN ORDER OF CERTIORARI***: to remove into this Honourable court and Quash the decision, recommendations and /or directions of the Director of Public Prosecution through the Resident Magistrate's court at Tawa to charge the Applicants in Criminal Case No.403 of 2014 and the subsequent proceedings arising therefrom.

ii. ***AN ORDER OF PROHIBITION***; directed at the Director of Public Prosecution prohibiting him from prosecuting or proceeding with the prosecution of the Applicant in the Criminal Case No.403 of 2014.

iii. ***AN ORDER OF PROHIBITION***; directed at the Resident Magistrate court at Tawa prohibiting the said court from proceeding or further proceeding with the hearing and all proceedings against the Applicants on the charges preferred in Criminal Case No.403 of 2014.

iv. ***AN ORDER OF CERTIORARI***; to remove into this Honourable court and quash the decision of the Resident Magistrate court at Tawa for forfeiture of cash bail in Criminal Case No.403 of 2014.

v. ***THAT*** the cost of this Application be provided for.

vi. ***THAT*** this Honourable court does grant any other or further relief that it may deem fit to grant.

**THE EVIDENCE**

4. The Applicant averred in his affidavit that the charges leveled upon him in criminal case no.403 of 2014 were malicious and trumped up and that he did have personal issues with his brother and that a police officer by name Anthony Kapairo was taking advantage of this to institute criminal proceedings against him. The issues between the brothers was brought up by a sale of property initially known as property number Mutitu Adjudication section parcel No. 2572 after subdivision there was a new number 4876. The parcel was to be sold for Ksh 16,000. He bought the land on 30/5/1991 and he had the sale agreement and adjudication proceedings.
5. The time of signing the sale agreement Kivengele Kimeu had an old man as a witness by the name Mutua Mutiso though he was not a witness at the adjudication proceedings dated 21/10/1994. Three (3) days after the agreement, while at the land adjudication, the Applicant herein met a cousin of Kivengele called Ndeto Isika who wanted to refund purchase price but he refused. He went to see Kivengele who told him his cousin had refused the sale and wanted to refund the money. He went to the Assistant Chief who directed him to the D.O (Mbooni) Mr. Odundo who allowed the land to be sold to him. The D.O had a balance of the purchase price. The D.O together with elders visited the land in dispute and planted boundaries in the presence of Ndeto, the cousin to Kivengele who was absent who had also been summoned.
6. Joshua Kilonzo Mutisya had been summoned on 15/11/2014. He had been receiving calls through Mobile No. 0727886830 from a person who introduced himself as CID Mbooni Kilima. The complainant was Mutua Mutisya Munyau who also happens to be the blood brother of the Applicant/Complainant at Mbooni Police Station and thus causing the Applicant herein to be charged with forcible detainer contrary with section 91 of the Penal Code (Chapter 63 of the Laws of Kenya).
7. The Applicant herein made a complaint on 15th November 2014 vide OB No. 24/15/11/2014 for extortion and abuse of power by a police officer by the name Anthony Kapairo. The Applicant further states that he had reported the said officer to the Independent Policing Oversight Authority IPOA and the Ethics and Anti-Corruption Commission. He had also reported him to the OCPD Mbooni West for abuse of office and extortion vide OB/24/15/11/2014.
8. The Applicant filed a Supplementary Affidavit dated 25<sup>th</sup> June, 2015 further stating that he was charged in absentia in criminal matter No.403/2014. He also alleged that the bail and bond form produced in criminal case No.403 of 2014 was forged and produced a report by a document examiner. There is a Forensic Document Examination report dated 12/3/2015 for bond of Ksh.50,000 dated 15/11/2014 by Global Forensic Security Services Ref GFS/20E/1/2/06/2015. This was attached to the Supplementary Affidavit filed on 26/6/2015.
9. The verifying affidavit attached a confirmation by Ministry of Lands recognizing his portion in letter dated 19/11/2014 that the Applicant herein was the registered owner of p/no.4876-MUTITU ADJUDICATION SECTION.
10. The Respondent's Submissions refer to a Replying Affidavit of 14<sup>th</sup> December 2015 but the same was not on the court file. The court has however considered the rival contentions submitted by the parties in their respective written Submissions.

#### **SUBMISSIONS BY THE APPLICANT**

11. The applicant submitted that the issues to be determined are as enumerated below:-
  - a. *Whether the police officers stationed at Mbooni Police Station are abusing their constitutional and statutory powers by using a criminal process to resolve an ownership dispute of parcel No.4876 owned by the Applicant which was excised from parcel No.2572 plot.*
  - b. *Whether there was a blatant and flagrant infringement of the applicant's Fundamental Rights and Freedoms enshrined under Article 50(2) of the Constitution of Kenya 2010.*
  - c. *Whether the institution of the criminal proceeding by the 1<sup>st</sup> Respondent in criminal case No.403 of 2014 at Resident Magistrate court Tawa is contrary to Article 157(11) of constitution of Kenya 2010 and the guiding principles espoused by section 4 of the office of the Director of Public Prosecutions Act (ACT NO.2 OF 2013)*
  - d. *Whether the purported forfeiture of the cash bail in criminal case No.403 of 2014 at Resident Magistrate court Tawa is legal.*
  - e. *Whether the applicant has a right to redress against the actions of the Respondents by seeking redress through Judicial Review.*
  - f. *Whether the orders for Judicial Review are the sufficient remedies in the circumstances.*
12. The Applicant submitted that the acts by the mentioned police officers were illegal, draconian and/ or exercised in bad faith without jurisdiction through harassment and intimidation hence oppressive, vexatious and mischievous. They submitted that the acts of the officers were in contravention of Article 244 (1) of the Constitution of Kenya which provides:

*“The National Police Service shall-*

*strive for the highest standards of professionalism and discipline among its members.”*

13. Counsel for the Applicant cited the case of *Republic Inspector General, National Police Service & 3 Others Ex-Parte Stephen Somba Kathima* [2014] eKLR where ODUNGA, J. held that:

*“I also agree with the decision in **R. v. Attorney General ex p. Kipngeno Arap Ngeny**, High Court Civil Application No. 406 of*

2001 that: “A criminal prosecution which is commenced in the absence of the proper factual foundation or basis is always suspect of 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 of mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

14. Counsel submitted that the police should not be involved in such matters as it falls within the jurisdiction of the Environment and Land Court under section 4 of the Environment and Land Court Act (Chapter 12A Laws of Kenya). Counsel cited **Republic v Director of Public Prosecution & 2 Others Ex-Parte Nyaboga Mariaria** [2014] eKLR where ODUNGA, J relied on **Republic v. Chief Magistrate Court at Mombasa Ex-parte Ganijee & another** (2002) eKLR 703 and held:

*“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustration of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charge may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of, a civil cause of the one or both parties in a civil dispute, but it should be impartially exercised in the interest of the general public interest”.*

15. On the exact role of the Police in investigation of crime, the learned judge said:

*“In exercising their discretion to charge a person both the police and the DPP’s office must take into account and must exercise the discretion on the evidence of sound legal principles”. As was held by Ojwang. J. (as he then was) in Nairobi HCCC No. 1729 of 2001 – **Thomas Mboya Olouch & another v. Lucy Muthoni Stephen & Another**:*

*“Policemen and prosecutors who fail to act in good faith or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in Judicial immunities when their victims rightfully seek recompense.....i do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the states’ prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes.”*

*“Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice however, can either be express or can be gathered from the circumstances surrounding the prosecution.”*

16. Counsel also cited **R. v Attorney General for and on Behalf of Inspector General of Police & 3 others ex-parte Thomas Ng’ang’a Munene** [2014] eKLR where Odunga, J said:

63. *“ It is therefore clear that whereas the discretion given to the 3<sup>rd</sup> respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.*

17. The Applicant submitted that the institution of criminal proceedings against him by the 1<sup>st</sup> Respondent was contrary to Article 157 (11) of the Constitution of Kenya 2010 and guiding principles of section 4 of the Office of the Director of Public Prosecution Act (Act No. 2 of 2013). Article 157 (ii) of the Constitution of Kenya provides that:

*“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process”.*

18. The Applicant contends that his rights as provided by Article 50 of the Constitution of Kenya were infringed and particularized the same as follows:

Article 50 (2) – every accused person has the right to a fair trial which includes the right:-

- a. To be informed of the charge, with sufficient detail to answer it;
- b. To have adequate time and facilities to prepare a defence.
- c. To a public trial before a court established under this Constitution
- d. To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.
- e. To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

He further cited the case of **Stephen Nendela v. County Assembly of Bungoma & 4 others** [2014] eKLR.

19. In support of the Applicant's right to Judicial Review reliefs, it was submitted that this court is vested with jurisdiction to grant the prayers sought and the following authorities cited:

***Meixner & Another v. Attorney General [2005] 2 KLR, Kuria & 3 Others v. Attorney General [2002] 2 KLR; Rumba Kinuthia v. Inspector General of Police & Another [2014] eKLR; Cape Holdings Limited v. Attorney General & Another [2012] eKLR.***

### **RESPONDENTS' SUBMISSIONS**

20. The Respondents filed their submissions on 16<sup>th</sup> February 2016 where they submitted that the Respondents did not abuse the powers and cited the case of ***Republic v. Commissioner of Police and Another Ex-parte Michael Monari & Another*** [2012] eKLR where the court held that:

*“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. The Respondents submit that they independently reviewed and analyzed the evidence contained in the investigation file including the witness statements and documentary exhibits as required by law and thus made the decision to prosecute as provided by Article 157 of the Constitution of Kenya.

22. They cited the case of ***Musyoki Kimanathi v. Inspector General of Police & 2 others*** [2014] eKLR where Majanja, J. held:

*“In light of the mandate conferred upon the DPP in Article 157 of the Constitution, the High court therefore ought not to interfere with the above mandate unless cogent reasons are given thus; that the DPP has acted without due regard to public interest, against the interest of the administration of justice and has not taken account of the need to prevent and avoid abuse of the court process”.*

23. The Respondents submit that the allegation by the Applicant that the charges preferred upon him are intended to serve ulterior motives is without merit, evidentiary or legal reasons or backing and further, the petitioners averment that the Respondents are ment on harassing and intimidating him is misconceived unfounded, unmeritorious and baseless.

24. On the issue on whether the court should prohibit prosecution of the applicant the Respondents submit the correctness of the facts or evidence gathered by the investigating officer can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered in support of the charges.

25. The Respondents submit that the applicants right to fair trial was never infringed as the hearing has never commenced due to a stay order and that he was released on a personal bond of Ksh. 100,000/-.

26. On the issue of sanction of charges the Respondents relied in the case of ***Ronald Leposo Musengi v. Director of Public Prosecutions & 3 others*** [2015] eKLR at page 17 paragraph 46 where the court held that:

*“The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal. Where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the petitioner demonstrates that the circumstances of the impugned process render it impossible for the petitioner to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the petitioner's chances of being acquittal are high. In other words, the High Court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited”.*

27. The Respondents further submit that proceedings of this nature ordinarily, do not deal with the merits of the case but the process. In other words, these proceedings determine *inter alia* whether the decision makers had the jurisdiction, whether the persons affected by the decisions were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.

28. It was the Respondents' submission that the court in this proceeding is concerned with the question of fairness and continuation of criminal proceedings and whether such proceedings amount to a violation of his rights and fundamental freedoms and once the court is satisfied that is not the case, the High Court ought not to usurp the jurisdiction of the trial court and trespass onto the arena of trial determining the sufficiency or otherwise of the evidence to be presented against the Applicant.

### **ISSUES FOR DETERMINATION**

29. The following broad issues arise for determination:

i) *Whether the Respondents acted maliciously, unfairly or out of their jurisdiction in preferring charges against the Applicant.*

ii) *Whether the reliefs sought in the Application are available to the Applicant.*

## DETERMINATION

30. The principles upon which the Court shall interfere with the prosecutorial mandate of the DPP, the respondent herein, or with the antecedent investigatorial powers of the Police are now well settled. The applicant must show that the criminal process was being abused in an unreasonable, malicious manner to serve motives ulterior to the objectives of the criminal justice to investigate, prevent and punish crime, or that the prosecution is an infringement of the rights or fundamental freedoms of the individual or otherwise against public interest. In **Commissioner of Police & The Director of Criminal Investigation Department & Another v Kenya Commercial Bank Limited & 4 Others** [2013] eKLR, Maraga JA (as he then was), Ouko & Murgor, JJA) held follows:

**“We now turn to the crux of this appeal – whether or not the court can prohibit the police from conducting investigation into an alleged crime. From the provisions of the Constitution, and the National Police Service Act, as a key agency of the criminal justice administration, the police are responsible for performing multi-faceted functions such as the prevention of crime, maintenance of law and order, and conduct of investigation of crimes.**

For the purpose of this appeal, we shall focus on the role of police in the investigation of crime and the extent, if at all, to which the court can interfere with this function bearing in mind that police efforts to investigate crime and collect evidence represent the very foundation of the criminal justice system. Article 157 (4) and (11) of the Constitution underscores this point. It provides that:-

**“4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.**

.....

**11. In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”** (our emphasis supplied).

Article 245 (4) (a) of the Constitution on the other hand provides that:-

**“245(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to-**

a. **The investigation of any particular offence or offences.”** (Emphasis).

**Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.**

By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. **If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution. See Githunguri V. Republic [1985] LLR 3090.**

**It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R. [2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR 69.”**

[Emphasis added]

On the facts of the case, the Court of Appeal found that the police were abusing their power in their “belated involvement of the police in this purely civil dispute”, which had been the subject of “previous and present civil cases”.

31. The Applicant herein admits that there has been a land dispute between himself and his brother (MUTUA MUTISYA MUNYAO) where it is alleged he is trespassing on land parcel No. 2572 MUTITU ADJUDICATION SECTION. The said brother is alleged to have made a complaint at Mbooni police station vide O.B No. 11/14/10/14 in relation to forcible detention of land and CIP Anthony Kapairo was the investigating officer. After completion of investigations, the Applicant was taken to court and charged in criminal case No. 2014, the subject to this Application, which the Applicant contends is malicious and a counter-reaction to his complaints against the investigating officer

made vide OB 24/15/11/2014. It is noted that although a lot of allegations were made against the investigating officer by the Applicant, the said Police Officer and or the Inspector General of Police were not joined as Respondents herein.

32. While there is no direct evidence to show how the criminal process of the court is being abused to ensure an advantage or benefit for the applicant's alleged contender in the civil dispute, or to defeat the applicant's interest therein, the circumstances of the case as disclosed in the exhibits in the Statement point to a long standing civil dispute between the applicant herein and his brother who is the complainant in the charge of forcible detainer facing the applicant.

33. The offence of forcible detainer exists in criminal statute at section 91 of the Penal Code as follows:

**91. Forcible detainer**

*Any person who, being in actual possession of land **without colour of right**, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanour termed forcible detainer."*

34. Section 193A of the Criminal Procedure Code contemplates parallel criminal and civil proceedings arising from the same transaction as follows:

*"193A. Concurrent criminal and civil proceedings*

*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. [Act No. 5 of 2003, s. 79.]"*

35. However, for the criminal trial court to determine the guilt or otherwise of the applicant on the charge of forcible detainer, it must first consider whether the applicant has **a colour of right** to the possession of the suit property the subject of the charge. This is the very question which had been adumbrated through the civil process of the adjudication committee under Land Adjudication Act commencing with the ownership objection OBJ 344 P/No. 2572 for coming up hearing before the Land Adjudication Officer for Mutitu Adjudication Section of Mbooni Location on 21/10/94 and Judgment entered in favour of the applicant as follows:

**"Mutitu Adjudication Section**

**OBJ. 344 P/No. 2572**

**Judgment**

*The Objector Joshua Kilonzo Mutisya said that he bought a portion of land P/No. 2572 from Kivelenge Mueke Isika and he paid the money through the D.O. Mbooni Office after Kivelenge refused to take the money from him. He finished by saying that Kivelenge had taken the money because he had a letter from D.O. Mbooni confirming that Kivelenge had collected the money. His witnesses also confirmed that Kivelenge had taken the money and there was no reason to change his mind.*

*The respondent kivelenge Isika accepted Joshua to get the P/No. but he insisted that he did not take the money as it was alleged. His uncles accepted also that Joshua Kilonzo Mutisya to get a parcel number. They all agreed that the D.O. to be summoned through the D.C. Makueni to come and confirm that he gave the money.*

*I heard evidence from the both parties and their witnesses and I accepted their views that Joshua Kilonzo Mutisya to get his own parcel number. I sent surveyor to the land with the owner of ht eland and he is the one who showed the portion that he had sold to Joshua. I would not write to D.O. by the Mr. Odundo because there was a rumour that he had left the job with the administration.*

*Since the parties have agreed the land to be given to Kilonzo, I have no objection. So, Joshua Kilonzo Mutisya has to get his parcel number 4876. If the Objector was aware that Kivelenge did not take the money from D.O. then he should know what he can do with the owner has accepted to give the land that he has sold.*

**Judgment:**

**Objection No. 344 allowed. The new parcel number 4876 given to Joshua Kilonzo Mutisya.**

**Signed by LAO."**

36. It is trite that the judicial review court will not delve into the merits of the case as held in **Meixner & Another v. Attorney General** (2005) 2 KLR 189 -

*"Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial Review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to Judicial Review".*

37. While it is true that judicial review is not concerned with the merits of the impugned decision herein, the DPP's decision to prosecute the

applicant for forcible detainer of the suit parcel of land, the evidence presented by the applicant demonstrate that the dispute between the parties – the complainant and the applicant – is purely one of ownership of the suit parcel of land which had done its course through the civil process for over twenty years before the purported criminal charges.

38. The Charge against the appellant in Criminal case No. 403 of 2014 is as follows:

**“Charge: Forcible Detainer contrary to section 91 as read with section 36 of the Penal Code.**

**Particulars of the offence: Joshua Kilonzo: On the 14<sup>th</sup> day of October 2014 at Mutitu at Mutitu area, Mbooni Wst District in Makeni County being in possession of land parcel no. 2572 Mutitu Adjudication Section of Mutua Mutisya Munyau without colour of right, held possession of the said land in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace against Mutua Mutisya Munyau who was entitled by law to the possession of the said land.”**

39. Clearly, the complainant in the charge sheet only seeks to recover his interest in the suit property by charging the applicant with criminal detainer. It is the same remedy that the complainant should have obtained through the civil proceedings under the Land Adjudication Act or by a civil suit filed in that behalf in the Environment and Land Court or the predecessor civil courts. To now use the criminal process to obtain the possession of the suit property is unlawfully to challenge the determinations of the civil process of the Land adjudication Committee. The Land Adjudication Act has specific procedure for the redress of grievances in the adjudication process including an appeal to the Minister and subsequent appeal to the High Court. See sections of the Land Adjudication Act.

40. By a letter dated 19<sup>th</sup> November 2014, the District Land Adjudication and Settlement Officer for Makeni Adjudication Area confirmed as follows:

**“Ref: Confirmation P/No 4876 – Mutitu Adjudication Section**

*This is to confirm that according to the records held in this office the above mentioned parcel of land in Mutitu Adjudication Section of Mbooni West Sub-County is recorded in the names of Joshua Kilonzo Mutisya.”*

From the judgment of the land adjudication Committee, set out above, it is clear that the parcel of land P/No. 4876 is a subdivision of the parcel of land subject of the criminal charge P/No. 2576.

41. In such circumstances, a criminal prosecution for the offence forcible detainer of land of the person in possession of land pursuant to his claim to the land and who has been adjudged right owner by a statutory process under the Land Adjudication Act is an unadulterated abuse of process. Having determined that the respondent is in abuse of process, the court does not have to consider the allegations of breach of fair trial rights of Article 50 (2) of the Constitution by the Respondents or the events alleged to have happened in the criminal case following the filing of the charges against the applicant as deponed to in the Supplementary affidavit of the Applicant sworn on 25<sup>th</sup> June 2015. However, the complaint of charge *in absentia* is without merit as once a charge is filed, an accused is presented for plea and subsequent trial before a decision on the charge is made. The trial in this case was stayed upon grant of leave herein pending determination of this judicial review proceedings.

42. The dispute between the parties giving rise to the criminal prosecution herein is the proper subject of civil proceedings; it has already been subject of such civil litigation through the adjudication process of the Land Adjudication Act which commenced in 1994, twenty years before the criminal process was invoked; and the court, consequently, finds this matter to be on all fours with the situation in the leading case of **Commissioner Of Police & The Director Of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others** [2013] eKLR where the Court of Appeal halted the criminal prosecution and ruled that:

*“While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? **It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court.** Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power.”*

43. For avoidance of doubt the judgment in this case does not adjudge the applicant to be the lawful owner of the suit property; it only determines that the dispute between the parties is the proper province of the civil jurisdiction of the appropriate competent court, and not suitable for criminal prosecution.

## **ORDERS**

44. Accordingly, for the reasons set out above, the court makes the judicial review orders of Certiorari and Prohibition to quash and prohibit the criminal trial in **Tawa Resident Magistrate’s Court Criminal Case No. 403 of 2014** for the prosecution of the applicant on a charge of forcible detainer of the land subject of this proceedings, as prayed.

45. Each party shall bear its own costs.

*Order accordingly.*

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 3<sup>RD</sup> DAY OF DECEMBER 2018.**

**G.V. ODUNGA**

**JUDGE**

**Appearances:-**

M/S Maingi Musyimi & Associates Advocates, for the Applicant.

M/S Rono for Respondent.