



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO.16 OF 2017**

**IN THE MATTER OF: AN APPLICATION BY ENOS MATANGWE  
SIKOYO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW UNDER  
ORDERS OF MANDAMUS, CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF: ARTICLES 22(1) 23(1) 24(1) 40 50 OF THE  
CONSTITUTION OF KENYA 2010 THE BASIC AND FUNDAMENTAL  
RIGHT OF THE APPLICANT TO INSTITUTE THIS PROCEEDINGS FOR REDRESS OF A DENIAL**

**AND**

**IN THE MATTER OF: SECTIONS 5, 107, OF THE EVIDENCE  
ACT AND SECTION 123 OF THE CRIMINAL PROCEDURE**

**CODE**

**AND**

**IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT AT MUMIAS LAW  
COURTS CRIMINAL CASE NO.1170 OF 2016 INVOLVING REPUBLIC VS ENOS MATANGWE SIKOYO**

**BETWEEN**

**ENOS MATANGWE SIKOYO.....1<sup>ST</sup> APPLICANT**

**ERNEST TWABWALABA.....2<sup>ND</sup> APPLICANT**

**EUNICE KHALITAVA KHISA.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**THE CHIEF MAGISTRATE'S COURT**

**AT MUMIAS LAW COURTS.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF**

**PUBLIC PROSECUTIONS REPUBLIC OF KENYA....2<sup>ND</sup> RESPONDENT**

THE INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT

THE HONOURABLE ATTORNEY GENERAL

REPUBLIC OF KENYA.....4<sup>TH</sup> RESPONDENT

**RULING**

1. The applicants have filed an application dated 21<sup>st</sup> February 2016 seeking for orders that:-

(a) spent

(b) THAT, this Honourable Court be pleased to issue an order of Certiorari to remove and quash the decision of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to charge and prosecute the applicants before the 1<sup>st</sup> respondent in Mumias Criminal Case No.2016.

(c) THAT, this Honourable Court be pleased to issue an order of prohibition directed to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents prohibiting and/or restraining them from prosecuting and/or continuing to further prosecute the applicant in Mumias Criminal Case No.783 of 2016.

(d) THAT, this Honourable Court be pleased to issue an order of prohibition directed to the 1<sup>st</sup> respondent or any other magistrate prohibiting and/or restraining him/her from hearing and/or further hearing and/or determining the proceedings in Mumias Criminal Case No.783 of 2016.

(e) THAT, the order granted to the applicant to operate as a stay of the proceedings of the Criminal Case No.783 of 2016 to the said proceedings which involves the Criminal Trial of the Applicants herein.

2. The application is premised on the grounds that on the 3<sup>rd</sup> November, 2016, the High Court sitting at Bungoma (actually the Environment and Land Court) restrained the police from interfering with land reference **No.East/Wanga/Mung'ang'a/1352** and **1437**. That the investigating officer in the case Sgt Rashid Mwalukunda was ordered to release title documents to the 3<sup>rd</sup> applicant for the two parcels of land. The investigating officer released the documents. The police however went ahead to charge the applicants at Mumias Law Courts with criminal offences relating to the said parcels of land in **Criminal Case No.783 of 2016**. The advocate for the applicants Mr Getanda argues that police had no legal basis for charging the appellants. He submitted that the police should have waited for the High Court to determine the civil case and if any criminal liability was elicited, then they could charge the appellants.

3. The application was opposed by the State. The State Counsel Mr Juma submitted that the applicants are seeking for judicial review orders. That **order 54** of the Civil Procedure Rules requires for leave of the court to be obtained before an application for judicial review is made. That the applicants have not obtained such leave.

The State Counsel further submitted that the applicants have not availed proceedings of the lower court to prove the matters at hand. That the applicants have attached to the application two photocopies of the charge sheets one for court file **No. 1170 of 2016** where the accused is Matangwe Sikoyo Enos and the other for court file **No.882 of 2016** where the accused is Eunice Khatava Khisa. That it is not clear as to which of the two charge sheets the applicants are seeking to be quashed.

4. The State counsel further submitted that there are two parcels of land that were referred to in the application – East/Wanga/Mung'ang'a/1437 and 1352. That the charge sheet attached refer to land Parcel No. East/Wanga/Mung'ang'a/222.

5. The State Counsel submitted that under **Article 159** of the Constitution of Kenya 2010, the office of the Director of Public Prosecutions has the sole mandate to prosecute Criminal Offences. That he exercises this mandate without direction from any other authority. The State Counsel asked the court to dismiss the application.

6. In reply Mr Getanda stated that though leave of the court is required under **order 53** of the Civil Procedure Act, the said rule cannot override the provisions of **Article 159** of the Constitution that requires courts to determine matters not based on legal technicalities but on substantive law. He further urged that the powers of the Director of Public Prosecutions to prosecute are not absolute. That courts have power to check on the DPP's powers to prosecute especially where the power is abused. That the order issued by the Environment and Land Court (ELC) curtailed the DPP's power to prosecute the applicants.

The State Counsel maintained that the provisions of **Article 159** of the Constitution are not meant to do away with procedural law.

7. The applicants are seeking for judicial review orders of certiorari and prohibition. **Order 53 Rule 1(1)** states as follows:-

***“No application for an order of mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule.”***

**Article 159(2)** of the Constitution of Kenya 2010 states that in exercising judicial authority, the courts and tribunals shall be guided by the following principles –

- (a) .....
- (b) .....
- (c) .....
- (d) justice shall be administered without undue regard to procedural technicalities.

8. Though Mr Getanda admits that leave of the court should have been sought before the applicants sought for judicial review orders, he argues that the provisions of the Constitution override those provisions of an Act of Parliament . Therefore that the requirement for leave is a procedural technicality that cannot override the provisions of **Article 159** of the Constitution.

9. In my view there are good reasons why the leave of the court has to be sought before judicial review orders are filed. The rule is meant to seave out those kind of orders that are meant for judicial review. The provisions of **Article 159(2)(d)** of the Constitution were not meant to do away with such procedural law. In **Abdul Aziz Juma vs Nikisulu Investment & 2 others ELC Suit No.291 of 2013**, Mutungi J had the following to say in respect of **Article 159** of the Constitution:

**“Article 159 of the Constitution was never intended to override clear provisions of any statute unless such provisions of the statute are found and held to be unconstitutional ... Courts have held that article 159(2)(d) cannot be applied to do away with all rules of procedure but it is intended to ensure that adherence to strict rules of procedure do not lead to a miscarriage of justice.”**

10. The argument by Mr Getanda that leave in this application was not mandatory cannot stand. The applicants did not comply with **order 53 Rule (1)** of the Civil Procedure Rules and therefore the application is a non-starter.

11. The applicants attached to their application an order of the Environment and Land Court dated 3<sup>rd</sup> November, 2016 that restrained the police from interfering in any manner with the 3<sup>rd</sup> applicant’s proprietorship of land reference Nos. East/Wanga/Mung’ang’a/1352 and 1437. However the order indicates that it was issued on an interim basis pending hearing and determination of the application. There are no orders to indicate whether the interim orders were confirmed or not. Interim orders have an expiry date. The applicants cannot rely on the interim orders as the ground of this application.

12. The applicants are seeking to quash criminal proceedings in **Mumias Criminal Case No.783 of 2016**. They have not attached any court documents for the said case to show that they are being prosecuted in that case. Instead they only attached charge sheets for Criminal Cases Nio.1170 of 2016 and 882 of 2016. The applicants have thereby not established that they are being prosecuted in Mumias Criminal case No.783 of 2016.

13. The Environment and Land Court restrained the police from interfering with the 3<sup>rd</sup> appellants in land reference No. East/Wanga/Mung’ang’a/1352 and 1437. The attached photocopies of charge sheets indicate that the appellants were charged over land reference No. East/Wanga/Mung’ang’a/222. Mr Getanda explained that the applicants were charged separately and that the files were consolidated. There were no proceedings produced to show that there was consolidation of the charges. The applicants have not established that the police contravened any court order by charging them over land reference Nos. East/Wanga/Mung’ang’a/222.

14. It was contended that the courts cannot question the powers of the DPP in prosecuting cases. However this has been settled by the courts that have asserted that they have powers to check on the DPP’s abuse of power to prosecute. The argument that courts cannot interfere with the DPP’s application of powers to prosecute is untenable.

15. In view of the foregoing I find that the applicants have not sought leave of the court as required by order **53 Rule 1** of the Civil Procedure Rules. They have not shown that they are being prosecuted in **Mumias Criminal Case No.783 of 2016**. They have not established that the police in charging them have contravened any court order. The application is accordingly dismissed.

**Delivered, dated and signed at Kakamega this 20<sup>th</sup> day of July, 2017.**

**J. NJAGI**

**JUDGE**

In the presence of:

Mr Getande ..... for appellant

Juma ..... State counsel

Paul ..... court assistant