



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL REVISION NO. 3 OF 2015

REPUBLIC PROSECUTOR/APPELLANT

VERSUS

RAMADHAN MATHENGE KAMOSI & 3 OTHERS ACCSED/APPELLANT

JUDGMENT

1. By a letter dated 2nd April 2015 addressed to the Duty Judge at Voi Law Court the Office of the Director of Public Prosecutions (DPP), Voi sought Revision by the High Court of the Resident Magistrate's Court decision of the same date in Criminal Case No. 152 of 2015, **Republic v. Ramadhan Mathenge and 3 Others**.

2. The terms of the letter seeking revision are as set out below:

"The above matter refers,

We wish to place the above matter before the duty judge for direction in respect of the ruling and orders of Hon. E.M. Kadima sitting in Voi on the 2nd day of April, 2015.

Being aggrieved by the ruling, the Director of Public Prosecutions invokes the provisions of section 362 as read with section 364 of the Criminal Procedure Code and Articles 165 (6) of the constitution of Kenya 2010 and urges this Honorable court to evaluate and satisfy itself as to the legality, propriety, judiciousness and correctness of the ruling and to consider revising the same legality, propriety, judiciousness and correctness of the ruling and to consider revising the same to prevent a miscarriage of justice the following reasons: -

1. The orders were issued by the learned trial magistrate without the court or the prosecution being furnished with the application for contempt referred to by counsel for the accused persons.

2. Justice Isaac Lenaola's order issued on 30th January 2015 specifically referred to the principal, magistrate's court in Taveta and not Voi where the present matter is filed.

3. The present case is not among the cases stayed by Justice Isaac Lenaola's order, the current offence having been committed on the 26th of February, 2015.

GIOCHE KIBUI

SENIOR PROSECUTION COUNSEL

FOR: OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS

3. On 14th April 2015, when the application for revision was presented before this Court, I made an order that the Registry:

“Pursuant to section 364(2) of the Criminal Procedure Code issues a hearing notice to the DPP and the Accused’s counsel and a Production Order for the accused in remand custody for the 15th April 2015.”

Section 364 (2) of the Criminal Procedure Code is in the following terms:

“(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:”

4. By the Charge Sheet dated 27th February 2015, the accused persons in the Criminal Case No. 152 of 2015 under reference faced three counts of Malicious damage to property, forcible detainer and unlawful assembly as follows:

5. In the decision of 2nd April 2015, the Resident Magistrate, Hon. E. M. Kadima ruled as follows:

“RULING

The application herein stems from the rival oral submissions by the parties. One by the state to proceed and prosecute the case and the counter application by the defence that they have yet to be supplied with witnesses statements and two there exist a constitutional petition acting as a stay barring the hearing of any suit till the substantive case is heard and determined before Hon. Justice Lenaola Issac and also the accused have filed contempt proceedings against the contemnors for disregarding a court order though it has yet to be filed in court.

The state opposed the application saying they had not been served with the application and the order in question referred to the Principal Magistrate’s Court in Taveta and their witness came from Taveta.

I have considered the rival arguments by both parties and make the following finding.

A reading of the charge sheet reveals that the offence in question occurred on 26th February 2015 at Taveta Scheme Phase II in Taveta subcounty within Taita Taveta County. The High Court in Civil case No. 325 of 2011 gave a direction to that effect on 30th January 2015. There can only be one logical inference that in ordinary terms this was a case that was within the competence of the Principal Magistrate Taveta to handle until the conservatory orders were issued touching on the disputed Land No./L.R. 5865/2 formerly (Taveta L.R. 2097) where the property claimed as damaged was. It can be safely deduced were it not for the prohibition this matter would have proceeded in Taveta Law court.

I find that it was not in good faith that the police or D.P.P elected to have the matter transferred to Voi when the ingredients point out where it occurred. That is tantamount to forum shopping.

It is also not disputed that two of the accused persons are in custody [and] have not been supplied with witness statements. It would be a travesty of justice to proceed with such a glaring admission

The opposing argument by the prosecutor that the wording of the order says Taveta is true but that is just looking at it from a procedural sight.

If the police had just allowed the order in 325 of 2011 to subsist and await its finding this matter would have never been filed in Voi and thus the wordings of the orders would have been given its full meaning. Its probably the only logical explanation the Principal Magistrate Hon. Ondieki refused to listen to the matter and it found itself in Voi Law Courts.

I therefore allow the application and order the matter be adjourned until the prohibitory orders issued by Justice Lenaola be lifted or vacated thereof and matter shall be heard in Taveta. It is so ordered.

ISSAC LENAOLA

JUDGE

2ND APRIL 2015”

6. The issue in contention between the parties is whether the order of Lenaola, J in Nairobi High Court Constitutional Petition No. 325 of 2011 of 17th December 2014 barred courts other than the Magistrate’s Court at Taveta from entertaining criminal cases arising from or concerning the suit property a parcel of land situate at Taveta, which was the subject of the petition before the High Court and the Magistrate’s Court in Voi SPMCC CR. Case NO. 152 of 2015.

7. Counsel for the DPP, Ms. Nyakoni, urged the view that as the order did not include courts other than the Taveta Magistrate Courts, the Voi Magistrate’s Court could properly entertain the charges though relating to the suit property, and that the High Court order could not effect a blanket cover from all prosecution even for malicious damage to property and unlawful assembly committed subsequent to the High Court order.

8. Counsel for the Accused, Mr. Mwinzi advocate, contended that the terms of the order of the High Court in effect barred all magistrate’s courts from proceeding with criminal charges relating to the suit property, and it would be unreasonable to suggest that an order would have to be sought to bar each and every magistrate’s court in the country.

9. The said Order of the High Court is set out in full below:

“REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 325 OF 2011

IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 27, 28, 40, 43, 48, 60, 62, 63, 159, 232, 234, 258 & 259 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 27, 40, 62 AND 63 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT – CHAPTER 265,
REGISTRITON OF TITLES ACT – CHAPTER 281, THE ANTI-CORRUPTION AND
ECONOMIC CRIMES ACT – ACT NO. 3 OF 2003, THE AGRICULTURE ACT –
CHAPTER 318, PUB LIC OFFICERS AND ETHICS ACT – 2003**

BETWEEN

**MATHENGE RAMATHANI KAMOZU 1ST
PETITIONER**

**WILSON ABUYA 2ND
PETITONER**

**ATHUMANI MOZE MSAFIRI 3RD
PETITIONER**

VERSUS

**THE HON ATTORNEY GENERAL 1ST
RESPONDENT**

**SETTLEMENT FUND TRUSTEES 2ND
RESPONDENT**

**KENYA ANTI-CORRUPTION COMMISISON 3RD
RESPONDENT**

THE COMMISSIONER OF LANDS4TH RESPONDENT

**TAVETA TOW COUNCIL 5TH
RESPONDENT**

**PUBLIC SERVICE COMMISSION 6TH
RESPONDENT**

THE DIRECTOR LAND ADJUDICATION AND

**SETTLEMENT 7TH
RESPONDENT**

**THE MINISTER FOR LOCAL GOVERNMENT 8TH
RESPONDENT**

**KENYA NATIONAL CAPITAL CORPORATION 1ST INTERESTED
PARTY**

**BASIL CRITICOS 2ND INTERESTED
PARTY**

IN COURT ON 17TH DECEMBER, 2014

BEFORE THE HON. MR. JUSTICE LENAOLA

ORDER

THIS MATTER coming up for hearing on 17th December, 2014 before the Hon. Mr. Justice Lenaola AND UPON READING the application presented to this Court on 26th March, 2014 by Counsel for the Petitioners under Articles 22, 23, 61, 66, 67, 68 and 159 the sixth Schedule. Article of the Constitution, Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and freedoms of the Individual), Sections 3, 5 and 6 of the National Land Commission Act No. 5 of 21012 and the inherent Jurisdiction of the Court and all enabling provisions of Laws as set out in the various statutes cited in support of the petition AND PUPON READING the Affidavit of MATHENGE RAMADHANI KAMOUZU sworn on 26th March, 2014, together with annexures thereto AND UPON HEARING Counsel for the Petitioners, Counsel for the 2nd Respondent, Counsel for the 1st Interested Party and Counsel for the 5th Respondent;

IT IS HEREBY ORDEED: -

1. ***THAT hearing of the Petition on 2nd March, 2015.***
2. ***THAT parties to finalise submissions.***
3. ***THAT a conservatory order be and is hereby issued restraining the Principal Magistrate's Court (TAVETA) from continuing with or hearing the following criminal cases more particularly;***
 - a. ***Republic vs. Mwangi Mbwika, criminal Case No. 495 of 2013. Charged with forcible detainer contrary to Section 91 of the Penal Code.***
 - b. ***Republic vs. Ema Muthoki Ndinda Criminal Case No. 22 of 2014 Charged with creating disturbance contrary to Section 95/1b of the Penal Code.***
 - c. ***Republic vs. Mary Mueni Criminal Case No. 17 of 2014. Charged with forcible detainer contrary to Section 91 of the Penal Code.***
 - d. ***Republic vs. Justin Mkoy Mzalendo Criminal Case No. 32 of 2014. Charged with creating disturbance contrary to Section 95/1b of the Penal Code.***
 - e. ***Republic vs. Agnes Mutua, Muli Mumo, Elizabeth John, John Gusta Forqus Antony, Edward Maina, Muteti Wambua, Mehsack Kasika Mutungi, Michael Muthiani, Mwangangi Kavele, Shadrack Mutisya, alias Mburu, Nyange Mwakima Francis, Michael Mulinga Bondo, Francis Muteti Kuamwa, Ian Chalo, Amina Saba, Elijah Chege, Mwirabu Gaudizia, Josphine Munjiua, Rose Ngele Kitogo, Mutinda Makau, Jeremiah Muli Wambua, Fedrick Zirani Tore, William Mwakasi Mwaki, Martine Ndun'u Mwachia, Albert Wambua Mutiso Criminal Case No. 629 of 2012 and 643 of 2012. All charged with Forcible detainer contrary to Section 91 of the Penal Code.***
 - f. ***Republic vs. Amos Mutuki Criminal Case No. 2013 charged with making a document without lawful authority c/s 357a of the Penal Code. And more particularly in regard to the orders of the court made on 29th September, 2012.***
4. ***THAT an order of prohibition be and is hereby directed at the Principal Magistrate's Court Taveta Restraining him or any other Judicial Officer in Taveta from hearing or in any other way handling any criminal matter arising from dispute in ownership of Land relating to L.R. 5865/2 formerly (Taveta L.R. 2097).***

GIVEN under my hand and seal of this Honourable Court this 17th day of December, 2014.

ISSUED at Nairobi 30th day of January, 2015.

DEPUTY REGISTRAR

HIGH COURT OF KENYA, NAIROBI

10. From the context and terms of the order No. 4 “*THAT an order of prohibition be and is hereby directed at the Principal Magistrate's Court Taveta Restraining him or any other Judicial Officer in Taveta from hearing or in any other way handling any criminal matter arising from dispute in ownership of Land relating to L.R. 5865/2 formerly (Taveta L.R. 2097)*” it would be absurd that a court or any judicial officer outside Taveta would properly deal with a criminal matter arising from dispute in ownership of the parcel land subject of the Petition merely because the court or that judicial officer were sitting outside Taveta.

11.As shown in Order No. 3 “*THAT a conservatory order be and is hereby issued restraining the Principal Magistrate's Court (TAVETA) from continuing with or hearing the following criminal cases more particularly...*” the order was made in a constitutional petition challenging the constitutionality of pending criminal prosecutions. How would it be permissible to launch similar charges against the petitioners or other persons in other courts such to defeat the object of the order in the Constitutional petition?

13. The mischief sought to be addressed by the order of the High Court was to preserve the status quo and protect the accused persons pending determination by the constitutional court of their challenge on the constitutionality of their prosecution. To permit the prosecution of the accused persons by the Taveta or any other trial court before the determination of the constitutional petition would likely render the petition nugatory. Hence, the Order staying any related prosecution.

14. Even if the High Court Order did not include all magistrates in the country, the same would be inferred from the Order when the object of the Order is considered. Although the resident magistrate's court has jurisdiction over criminal cases committed throughout the country in terms of **section 3 (2)** of the Magistrate's Court Act, the conventional practice is for criminal charges to be filed in the courts within the locality where the offences are alleged to have been committed. Bearing this practice in mind, the High Court judge in the Constitutional petition may not have reasonably foreseen that charges arising from the suit property situate at Taveta would be instituted in courts outside the local Taveta Law Courts. The pinpoint order against the courts in Taveta must be understood in this context.

15. Of course, as urged by the State, the order is no bar to criminal prosecution for general offences unrelated to the suit property. But the charges in the Criminal Case No. 152 of 2015 were clearly related, and hence the attempt to file them outside the Taveta Court to circumvent the order of the High Court. Otherwise, the DPP would have filed what it considers are criminal charges unrelated to the suit property at the Taveta Court.

16. The whole idea of the DPP seeking to side step an Order of the High Court to, unusually, file criminal proceedings contrary to established court practice in a court outside the local geographical limits where the suit property is situate is objectionable as an affront to the due administration of justice. The DPP is obliged to obey the terms of court orders issued in respect of charges that the Office has preferred or is minded to prefer. If the Office of the DPP thought the order of the High Court was unduly restrictive of its authority and mandate, it ought to have moved the High Court to review or discharge the Order. Without prejudging any application for contempt for court filed or to be filed by the accused persons, an attempt to make the Voi Magistrate's Court an accomplice in disobedience of the High Court Order cannot be countenanced. The Resident Magistrate is to be commended for his call to adjourn the criminal proceedings.

Accordingly, for the reasons set out above, the application for Revision dated the 2nd April 2015 is declined with costs to the Accused.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 5TH DAY OF MAY 2015.

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JUDGE

In the presence of: -

Appellant in person

Mr./ Ms. Karani for the Respondent

Mr./Ms. Linda - Court Assistant.