REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINALREVISIONNO.20 OF 2014

BRYAN YONGO…….APPLICANT

VERSUS

JACOB JUMA……..…….RESPONDENT

RULING

By a letter dated 11th March, 2014, Bryan Yongo, the applicant herein, asks that the court calls for and examines the record in Nairobi Private Prosecution Case No.2 of 2014 so as to the satisfy itself as to the legality, correctness or propriety of the ruling of Honourable Cherono, magistrate delivered on 11th day of March, 2014 with regard to whether he acted judicially and judiciously by dismissing his application dated 15th January, 2014.

The private prosecution proceedings were commenced by way of a Notice of Motion which sought the following orders:-

1. **That the applicant, BRAN YONGO acting in person be granted permission to conduct the intended private prosecution.**
2. **That the Honourable Court be pleased to admit the charge sheet drawn out of the complaint on oath of the applicant sworn and filed contemporaneously herein.**
3. **That the Honourable Court be pleased to issue summons compelling the attendance of the respondent/accused person named therein to appear before the Honourable Court on a date specified in the said summons to enable the Honourable Court deal with the charges.**
4. **That the said summons be served on the respondent/accused person by the complainant through the office of the Provincial Criminal Investigations Officer, Nairobi Area or any other police station.**
5. **That this Honourable Court makes any other orders it deems fair, just and equitable.**

The revision letter requests that the following issues be addressed.

a. **Did the Honourable Magistrate exercise his discretion judiciously by declining to grant leave for commencement of the intended private prosecution and did he fail to appreciate the public interest test herein?**
b. **Did the Honourable Magistrate misapprehend Section 193 A of the Criminal Procedure Code by holding that the letter by the DPP dated 4th June, 2013 did not constitute inertia and/or bias to prosecute?**
c. **Did the Honourable Magistrate take into consideration the relevant law while arriving at his decision?**
d. **Did the Honourable Magistrate fail to appreciate the legal threshold warranting issuance of**

leave and totally ignore the intended prosecutor's submissions?

e. **The Honourable Magistrate did not exercise his discretion judicially and judiciously and went against the principles set out in <u>Kimani –Vs- Kihara (1985) KLR 79</u> wherein the High Court laid down certain rules in form of questions that a magistrate should ask and be satisfied on before granting permission for private prosecution to wit;-**

i. **Has any complaint been made to the Attorney General or the Police and if so, what was the result? If no such report has been made the magistrate may either adjourn the matter to enable a report to be made and await a decision thereon or in simple cases like assault or trespass proceed to grant permission and notify the police of that fact.**
ii. **How is the complainantinvolved – what is the comp-lainant's locus standi?**
iii. **Has he personally suffered any injury or danger?**
iv. **Is he motivated, actuated or impelled by malice or political considerations?**

f. **Did the Honourable Magistrate have jurisdiction to make any findings of law and fact at the stage of seeking leave as to the propriety or otherwise of the alleged double allocation or otherwise of the title deeds held by the competing parties without the benefit of evidence being adduced as he did herein?**
g. **Did the Honourable Magistrate parry all the issues central to the Notice of Motion, the submissions made by the applicant and the authorities in support thereof in arriving at his decision?**
h. **Did the Honourable Magistrate take into consideration extraneous factors in refusing to grant leave herein and did he depart from the principles set out in <u>Nunes –Vs- Republic e KLR 126</u> and <u>Thomas Patrick Cholmondley –Vs- Republic (2008) e KLR</u> (Criminal Appeal No.116 of 2007).**
i. **Is the letter dated 4th June, 2013 by the DPP contra-statute by dint of Section 193 A of the Criminal Procedure Code?**
j. **The Honourable Magistrate totally failed to appreciate the holding in Misc. Application No.898 of 2013 <u>Republic –Vs- The Hon. The Attorney General at Principal Magistrate's Court at Makadara</u> relied on by the applicant.**
k. **The Honourable Magistrate totally failed to appreciate the letter dated 1st October, 2009 by the Commissioner of Lands authenticating the title held by Ashok Rupshi Shah and Hiten Kumar A. Raja.**

This court is now asked to make the following orders:-

1. **That the decision of the Honourable Magistrate delivered on 11th March, 2014 be quashed and leave be granted and the matter be remitted for trial.**
2. **Any other declarations this Honourable Court may deem just and expedient in terms of the grounds set out herein.**

Under Section 88(1) of the Criminal Procedure Code, an applicant in private prosecution proceedings must seek permission from a magistrate before instituting the prosecution. The said section provides as follows:-

> **"A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission."**

My understanding of the said provision is that, the magistrate must be satisfied that the applicant has exhausted all the avenues of having a suspect prosecuted by the office of the Director of Public Prosecutions and those have failed. That is why, the magistrate must satisfy himself or herself that there are sufficient reasons to believe that the suspect should be prosecuted by a private person because the Director of Public Prosecutions has willfully declined to prosecute him/her. In that case, an applicant seeking permission to conduct private prosecution must laybefore the magistrate evidence of such willful

refusal by the DPP to prosecute the suspectdespite availability of sufficient evidence.

The applicant in the Notice of Motion dated 15th January, 2014 presented his case on why he thought that the respondent therein, Jacob Juma ought to have been prosecuted by him. He argued before the court that the Director of Public Prosecutions had failed or neglected to exercise his Constitutional mandate or obligation to prosecute the proposed suspect Jacob Juma despite overwhelming evidence brought to his attention. The issue surrounding the proposed private prosecution revolved around title to land. Various documents were produced beforethe court mitigating the need for the intended private prosecution.

The respondent in that application vehemently opposed the same and laid before the magistrate reasons why the private prosecution could not be sustained.

The court also framed the issues for determination upon evaluating the application and the respective submissions. I replicate them as under:-

a. **Does the complainant have the *locus standi* to lodge this application for leave to institute private prosecutionagainstthe proposed suspect?**
b. **Has the Director of Public Prosecutions failed in his mandate and statutory obligation to prosecute the proposed suspect or any other persons suspected to have committed criminal offence (s) in respect to land title No.18485?**
c. **Has the claimant conducted any independent reliable and conclusive investigations demonstrating that the proposed suspect is culpable for the commission of any criminal offence(s) therefore warranting the grant of the orders sought?**
d. **Whether the application by the claimant is actuated by mala fides or any other extraneous factors?**
e. **Has the Director Public Prosecutions or any other Government Law enforcement agencies conducted any investigations into the allegations raised by complainant?**
f. **Whether the complainant has made any report to the police as to the commission of an offence by the proposed suspect and whether he availed any materials in support of his investigation into the matter?**

The duty of this court, pursuant to Section 362 of the Criminal Procedure Code, is merely to satisfy itself as to the correctness, legality or propriety of the finding in the ruling delivered on 11th March, 2014. See the case of **Uganda –Vs- Polasi (1970) EA 638** in which the court stated as follows:-

> **"……once this state of affairs has come to the notice of the High Court what must it do when it is by Section 3 of the Judicature Act 1967, enjoined to exercise general powers of supervision and control over a magistrate's court, coupled with specific powers of revision under Section 341 of the Criminal Procedure Code? The court is clothed with authority to correct errors…… I would hold that in the circumstances of the case, even if the court is *funtus officio*, it has jurisdiction under its revisional powers to correct the formidable error of the trial magistrate, which has clearly occasioned a miscarriage of justice…."**

In light of the above, this court only needs to satisfy itself that the learned magistrate addressed himself to the relevant issues that he was required to consider in arriving at his decision. In this application, the applicant argues that the said magistrate failed to exercise his discretion judiciously by declining to grant leave for commencement of the intended private prosecution by addressing himself to extraneous matters that were not before him for his consideration. He argues that the magistrate was, at that preliminary stage, required to address himself to issues as laid down in the case of **Kimani –Vs- Kihara (1983) e KLR**. which were:-

a. **Whether the DPP had been informed of the matter.**
b. **Whether the DPP has or had previously declined to institute the proceedings.**

In his submissions filed on 6th May, 2015 at page 3, second last paragraph (albeit submissions not paginated), he submits as follows:-

> **"My Lord, a careful consideration of the trial magistrate's ruling and the proceedings show that the he has enumerated a veritable list of documents presented in support of the request for permission to prosecute, and which documents have all been availed to the DPP. The magistrate does not state what he feels is lacking that would require holistic investigations as prayed by the DPP."**

In the last paragraph on the same page the applicant submits that he faults the magistrate for misdirecting himself by concluding that the evidence of the applicant is comprised mainly of correspondence between various parties and entities and particularly in very '***bizarre proposition questions'*** why the applicant has not interrogated certain police investigating officers. He submits that in doing so the magistrate took it upon himself in deciding the sufficiency and admissibility of the evidence which ought to be a preserve of the trial court.

I have had an opportunity of perusing through the material that was presented before the learned magistrate and the ruling he delivered. In dismissing the applicant's application the magistrate noted that the DPP was right in failing to commence prosecution against the respondent because he had to await the findings in the Civil Case No.312 of 2009 and CA No.40 of 2013. He observed that it was inappropriate to sanction the prosecution of the respondent while the ownership of thetitle in issue had not been determined. He arrived at a finding that the application was premature and lacked merit.

From the onset, the following charges were intended to be preferred against the respondent:-

Count I

Forgery of title deed contrary to Section 347(a) and (d) of the Penal Code being that the respondent jointly with others not before court forged title deed of land parcel marked I.R.64011(LR No.18485) valued approximately Kshs.400,000,000/- the property of Ashok Rupshi Shah and Hiten Kumar Amritlal Raja.

Count II

Making a document without authority contrary to Section 357 of the Penal Code in that the respondent with intent to defraud and without any official authority made a document namely title deed of the aforestated parcel of land knowing the same to be the property of Ashok Rupshi Shah and Hiten Kumar Amritlal Raja.

Count III

Perjury contrary to Section 108 (1) of the Penal Code in that the respondent knowingly gave false testimony by swearing an affidavit dated 17th July, 2009 filed in the High Court at Nairobi in ELC Suit No.312 of 2009 knowing the contents thereof and annextures thereto to be false.

Count IV

Perjury contrary to Section 108(1) of the Penal Code in that the respondent gave false testimony vide an affidavit dated 9th November, 2009 filed in the High Court of Kenya at Nairobi in High Court JR Petition No.652 of 2009 knowing the contents thereof and annextures thereto to be false.

Count V

Uttering a false document contrary to Section 353 of the Penal Code in that the respondent uttered a false document namely land title deed of the aforestated parcel of land I.R.64011 in respect of LR No.18485 which document was a forgery and was presented to the High Court in ELC Civil Suit No. 312 of 2009 and High Court JR Petition No.652 of 2009.

Counts I, II and V relate to the genuity of title deed to land parcel I.R.64011(LR No.18485) which issue is

subject of ELC Civil Suit No.312 of 2009.The said title is also a subject in JR Petition No.652 of 2009.

Whereas I agree with the applicant that a criminal case can run alongside a civil suit, in this case, the civil suits precede the intended private prosecution. It is only in the civil suit that a determination on the ownership of the said title deed shall be made. Such determination is intended to comprise part of the evidence in the criminal prosecution. Therefore, unless and until that determination is made, in my view, it would be premature to prosecute the respondent on assertion that he forged the aforestated title deed. Accordingly, and with respect to the applicant, he should await the determination of the suit which will determine who the genuine owner of land parcel No.I.R.64011(LR No.18485) is. Inthat case, it is my view that the magistrate arrived at the correct decision and that he addressed himself with keenness to all the matters raised before him. He also did not address himself to extraneous matters as alluded by the applicant. This is so because in an application for leave to commence private prosecution, the magistrate must be satisfied that there is sufficient ground to warrant the private prosecution and that the DPP was unwilling to take it upon himself as his mandate under the Constitution and the Criminal Procedure Code to prosecute the intended suspect. And as rightly stated by the magistrate, the DPP was right in observing that he could not commence criminal prosecution against Jacob Jumafor the aforestated charges unless and until the issue of the true ownership of the subject title deed had been determined. Let me also emphasize that at the stage of seeking leave to conduct private prosecution, it isnot the duty of the learned magistrate, ***suomoto***, to interrogateany persons who may be called as persecution witnessessuch as investigating officers. In contrast, the applicant is at liberty to call any witnesses who he thinks may give any information or evidence that is of value to the court in mitigating the need for private prosecution. There is no evidence on record that the applicant proposed to call such witnesses and wereturned down by the court. In all, I am convinced that the learned magistrate was right in holding that the DPP did not deliberately decline to prosecute the respondent herein. There was also no miscarriage of justice occasioned in declining the application. Accordingly this application must fail. The same is dismissed with no orders of costs.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 6th day of July, 2015.

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:-

1. The applicant in person - present

2. M/S Kimiri for the respondent.