



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**Judicial Review 107 of 2011**

**REPUBLIC.....**  
**.....APPLICANT**

**VERSUS**

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

**CHIEF MAGISTRATE, LAW COURTS, NAKURU.....**  
**.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE**

**CYRUS CHEBOI ROTICH.....**  
**.....SUBJECT**

**AND**

**SAMUEL NGIGE THIGA.....**  
**INTERESTED PARTY**

**RULING**

By the Notice of Motion dated 11/10/2011, the ex-parte applicant (subject) seeks an order of prohibition to prohibit the Director of Public prosecution and the Chief Magistrate, Nakuru (1<sup>st</sup> and 2<sup>nd</sup> respondents) from prosecuting or continuing with the prosecution of the applicant in **Nakuru Chief Magistrate’s Criminal Cases Nos. 7160/08 and 2173/2011**, between **Republic V Cyrus Cheboi Rotich**. Secondly the 2<sup>nd</sup> respondent be prohibited from proceeding with the trial of the applicant in the above mentioned cases. The application is predicated on the grounds found in the statement of facts, both the verifying/supplementary affidavits of Cyrus Cheboi Rotich dated 28/9/2011 and 24/5/2012 respectively. The respondents were represented by the learned state counsel Mr. Omwega who informed the court that the applicant was charged contrary to their instructions to the Attorney General. He did not file any response. The Interested Party, Samuel Ngige Thiga, the complainant in the criminal cases opposed the application and filed a replying affidavit dated 29/11/2011, a supplementary affidavit dated 22/2/2012 and a further supplementary affidavit dated 30/5/2012. Both the applicant and Interested Party filed submissions.

The applicant is charged in Criminal Cases 2173/2011, **R V. Isaac Kiptarbei and Cyrus Cheboi Rotich** and 7160/2009, **R V. Isaac Kiptarbei and Cyrus Cheboi Rotich** as evidenced by the charge sheet (CR2). He faces offences of; (1) Forgery contrary to **Section 340** of the **Penal Code**. It is alleged that on

1/9/2008 in Nakuru, forged a Log Book No.2007221261 purporting it to be a genuine original logbook of motor vehicle KAX 304M Toyota Corolla; (2) Making a document without authority contrary to **Section 357(a)** of the **Penal Code**. It is alleged that in company of others not before court, he made a logbook of motor vehicle KAX 304M. (3) An offence of uttering a document without authority contrary to **Section 353** of the **Penal Code**; in that he uttered the logbook of motor vehicle KAX 304M; (4) Obtaining money by false pretences contrary to **Section 313** of the **Penal Code** in that he falsely received Kshs.330,000/- from the Interested Party pretending that he had documents for motor vehicle KAX 304M; (5) Conspiring to commit a felony contrary to **Section 393** of the **Penal Code** in that with others not before court conspired to obtain Kshs.330,000/- from the Interested Party.

It is the applicant's contention that the charges are an abuse of the due process of the court; that the respondents' actions are ultra vires the process of the Criminal Procedure Act; that the respondents are in violation of the rules of natural justice; that the charges are actuated by malice and are premature; that the charges are not justified, are unreasonable and against the applicant's legitimate expectation. The applicants' case is that on 27/7/08, he hired out his motor vehicle KAX 304M, Toyota Corolla, to Martin Kibet as per written agreement (CCR 2) for three days but the hirer kept on extending the time till 2/9/2008 when he received a text message on his phone that he should pick his car from Ngige, opposite Bontana Hotel in Nakuru. On going there, Ngige, the Interested Party, informed him that he had purchased the vehicle from Julius Kipngetch Bii as per sale agreement dated 1/9/2008 (CCR 3). They went to the police station where they recorded statements and he was also shown an agreement between Silus Rotich and Julius Kipngetch Bii for the sale of the said vehicle on 12/3/07 (CCR 5). He disagreed with the Investigating Officer on how he was handling the matter and the Investigating Officer turned against him and charged him with CM Cr. 7160/09 (CCR 6); that the officer was deployed to the court as prosecutor and he did not release the file. After the applicant complained, the State Law Office Nakuru, entered a *nolle prosequi* in the matter (CCR 8) and the case was withdrawn under **Section 87(c)** on 8/12/2010. To his dismay he was arrested again on 18/6/2011 and arraigned in court for the same charges.

The Interested Party who is the complainant in the criminal cases vehemently opposed the application. He deponed that being the complainant in the criminal cases, having been defrauded of Kshs.330,000/-, he stands to suffer irreparably if the applicant is immunized from prosecution; that the applicant has concealed material facts from the court in that there is a document examiners report connecting the applicant with the offences he faces in the criminal court; that an earlier report connects him with Samson Kiptum Lagat in Cr. Case 3304/2011, **Republic v Samson Kiptum Lagat**; that the said reports are the basis of the charges in the trial court and they can not be heard without the applicant; that one suspect is still at large i.e. Martin Kibet Kitur; that Samson has just been arrested and charged based on the document examiners report; that the agreement dated 12/3/2007 was made by the applicant which has been verified by the document examiner; that the Interested Party will suffer prejudice if the applicant is immunized from prosecution and investigation.

In his further affidavit, the Interested Party deponed that the nolle prosequi was irregularly entered and as a result, he lodged a complaint with the Commissioner of Police and later the Director of Public Prosecution (DPP) who called for the file; it is as a result of the complaints that the applicant's accomplices were arrested and if prosecution is stopped in Cr. Case 7160/08, then of Isaac Kiptarbei Serem will also be halted. The Interested Party exhibited an affidavit sworn by the Investigation Officer, PC Oyier, who was the Investigating Officer whom the applicant accuses of malice. PC Oyier has explained that he carried out the investigations and found the applicant culpable. That the allegations against him are untrue because he was exonerated from any of the charges of malice after an inquiry.

I have now considered the rival arguments by both parties, affidavits and annexures thereto. I do agree with the applicant's submission that Judicial Review is a special jurisdiction and it lies not to review the merits of a decision, but reviews the decision making process itself. I adopt the decision of the court in **Rep. V Judicial Service Commission, Ex-parte Pareno, 2004 KLR 1 at pg 212** where the court quoted the **Supreme Court Practice 1997 Vol. 53/1-14/6**, which states:-

**“The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process**

**itself. It is important in every case that the purpose of the remedy of Judicial Review is to ensure the individual is given a fair treatment by the authority to which he is subjected and that it is no part of the purpose to substitute the opinion of the Judiciary or the individual judges for that of the authority constituted by law to decide the matters in question.”**

The applicant brought this application on two grounds, that the respondents are abusing the court process and that his prosecution is against the applicant's legitimate expectation to a fair trial. The applicant's counsel has referred to several authorities which have dealt with the issue of whether or not the High Court should intervene and stop criminal prosecution. The courts have generally treaded cautiously when exercising the said jurisdiction. In **R v AG ex-parte Pattni, Benard Kalove & 7 Others 1296/1998**, the court observed that the power of the High Court to intervene and stop criminal prosecution should be exercised sparingly. But the court should not hesitate to intervene to stop any prosecution which is vexatious, oppressive, mala fides or taken up for improper purposes or for purposes of harassing a party which amounts to an abuse of the court process.

The applicant was initially charged before the Chief Magistrate's Court, Nakuru in Cr. 7160/08 and 1132 of 2008 but a nolle prosequi was entered on 26/7/2010 as a result of which the applicant was discharged under Section 87(a) of the Penal Code. The **nolle prosequi** was entered after the applicant wrote several letters of complaint to the State Law Office, Nakuru in relation to the charges. I have seen the **nolle prosequi** and the letter from Mr. Omutelema, Senior Principal State Counsel Nakuru, which the Interested Party says was not genuine because it does not bear the signature of the author. The applicant did not respond to that allegation. What is important is however that when a **nolle prosequi** is entered and one is discharged, it does not amount to an acquittal. It does not insulate one against prosecution based on the same set of facts. Even assuming that the nolle prosequi presented to the court was genuine and properly signed, the state had the discretion to charge the applicant if there was found to be sufficient evidence to do so. That is why the applicant was discharged but not acquitted. It is however always remembered that the entry of a **nolle prosequi** should be exercised judiciously.

After the withdrawal of the case against the applicant on 12/11/2010, the Interested Party lodged a complaint with the DPP who referred the matter to the Commissioner of Police and on 9/8/2011 he was charged again for the same offences he had been discharged of. The then Investigation Officer PC Oyier has sworn an affidavit exhibited by the Interested Party in which he sets out the investigations that he carried out and how the applicant came to be linked to the charges that were preferred against him. The applicant did not disclose the existence of the Document Examiner's report linking him to the offences. The applicant counters the allegations in the said report with another report from a private Document Examiner, one Hezron Wamalwa (CCR II). Ordinarily the state will rely on the evidence of the Government Document Examiner to prove their case when it relates to documentary evidence. To sustain a criminal prosecution one only needs to demonstrate that there is a probable or reasonable cause. In the decision in **R v AG ex-parte Kipngeno Arap Ngeny HCM Apl. 406/2001**, the court observed that:-

**“A criminal Prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for 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 for wanting a criminal prosecution otherwise the prosecution will be malicious and actionable.”**

In the instant case, there is evidence from the Government Document Examiner. Infact the applicant has gone ahead to try and counter that evidence by getting a report from an independent document examiner. Can it be said that the prosecution lacks any basis? I think that if this court were to start examining the two reports to consider which one is correct, it would be going into the merits of the prosecution which is not within its jurisdiction. The only court that can determine the sufficiency of the evidence in the reports is the trial court. The sufficiency or otherwise of the evidence to found a conviction or an acquittal can only be determined by the trial court.

The applicant's complaints were basically leveled at the Investigating Officer. But even after the

Investigating Officer was removed from the investigations, the DPP went ahead to have the applicant charged for the same offences on the available evidence. The Investigating Officer claims to have been exonerated in an inquiry. I believe the inquiry was undertaken by the police and that is why the DPP sustained the charges against the applicant. So far, I have not found any evidence of abuse of due process by the Investigation Officer or the 1<sup>st</sup> respondent to warrant the stoppage of the criminal charges. I have also noted that one of the charges that the applicant faces is conspiracy contrary to **Section 393** of the **Penal Code**. If the charges against the applicant are removed, it means that automatically, the charges against the co-accused are determined. Having found that the 1<sup>st</sup> respondent had reasonable and probable cause to mount the prosecution, the applicant has not been locked out of the seat of justice. He will be able to ventilate his case through cross examination of the witnesses and his defence.

The 2<sup>nd</sup> respondent is the Chief Magistrate's Court which is seized with hearing the criminal charges. It is a competent and independent court. The applicant's legitimate expectation that he will get a fair trial before that court has not been thwarted in any way as no allegation of incompetence, bias, malice or caprice have been leveled against the court. The orders of Judicial Review that have been sought cannot therefore lie against the trial court.

In the end it is my considered view that the applicant has not demonstrated that he is entitled to the orders sought. His explanation as to what happened will form his defence in the trial court and that is the best forum for addressing all the issues he raised in this judicial review application. I therefore decline to grant the orders sought and dismiss the application dated 11/10/2012 with the applicant bearing the costs.

**DATED and DELIVERED this 5<sup>th</sup> day of October, 2012.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Ms Seiling holding brief for Mr. Ogola for the applicant

N/A for the 1<sup>st</sup> respondent

N/A for the 2<sup>nd</sup> respondent

N/A for the subject

Mr. Maragia for the Interested Party

Kennedy – Court Clerk