



**Firstlings Supplies Limited v Director of Public Prosecutions (Civil Appeal
318 of 2020) [2022] KECA 979 (KLR) (26 August 2022) (Judgment)**

Neutral citation: [2022] KECA 979 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 318 OF 2020
F SICHALE, J MOHAMMED & A MBOGHOLI-MSAGHA, JJA
AUGUST 26, 2022**

BETWEEN

FIRSTLINGS SUPPLIES LIMITED APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(An appeal from the judgment of the High Court at Nairobi
(Ngugi, J.) dated 21st August 2020 In ACEC Petition No. 3 of 2020)*

JUDGMENT

1. The appellant filed a petition before the High Court, being ACEC Petition No. 3 of 2020 seeking the following orders:
 - a. A declaration that the initiation, maintenance and prosecution of the Petitioner in Milimani Magistrate’s Court Criminal Case No. 8 of 2018, *Republic v Lilian Omollo & Others* contravenes article 157 (11) of the Constitution and violates the Petitioner’s rights under articles 27, 28, 29 and 50 of the Constitution.
 - b. A judicial review order of prohibition, prohibiting the Respondents from continuing with the prosecution of the Petitioner via Milimani Chief Magistrate’s Court ACC No. 8 of 2018.
 - c. An order of compensation for violation of each of the above rights more so for subjecting the Petitioner to an unfair trial.
 - d. That the costs of this suit Petition be borne by the Respondents.
 - e. Any other/further relief that this Honourable Court may deem fit to grant.
2. In that petition the appellant stated that it is a limited liability company whose directors are Yvonne Wanjiku Ngugi and James Thuita Nderitu, and that James Thuita Nderitu runs a separate business



known as Firstlings Supplies which is not owned by either Yvonne Wanjiku Ngugi or the appellant Firstlings Supplies Limited. That the appellant and Firstlings Supplies hold different accounts at Standard Chartered Bank and both of them have conducted business with the National Youth Service (NYS) in the past.

3. The appellant stated that sometime in May 2018, its directors were arrested and arraigned in court for allegedly fraudulently acquiring public property from the NYS as directors of Firstling Supplies Limited. In Petition No. 18 of 2018, one of the appellant's directors, Yvonne Wanjiku Ngugi, challenged her prosecution on the basis that she was not actively involved in the day to day running of the appellant company but her petition was dismissed. Following the determination of that petition, the respondent amended the charge sheet sometime around February 2019 to introduce the entity whose payment from NYS is the subject of the criminal case, The Republic v James Thuita Nderitu T/A Firstling Supplies. The said James Thuita Nderitu is also a director of Firstling Supplies Limited, an entity which the appellant asserts is distinct from James Thuita or James Thuita Trading as Firstling Supplies.
4. The appellant contended that since James Thuita Nderitu confirmed to the respondent that he has been trading as Firstling Supplies, there was no legal basis to charge the appellant. The appellant also protested the respondent's freezing of its bank accounts at the instance of the Asset Recovery Agency. The appellant contended that it has not only experienced hardship trying to obtain legal representation, but its directors have also been subjected to similarly impugned proceedings.
5. It was the appellant's contention that, as a result of the said actions, the respondent countermanded Article 157 (11) of the Constitution, as the prosecution of the appellant constituted an unfair trial within the meaning of Article 50 of the Constitution. It argued that there is no agency relationship between various directors of a company, and while criminal acts of a company can be attributed to a director, acts of another director cannot be attributed to a company.
6. The appellant argued that the respondent also fell afoul of Article 157 (11) by failing to take into account relevant matters before instituting criminal proceedings against it. It contended that the proceedings in Milimani Chief Magistrate's ACC No. 8 of 2018 are unfair to it and constitute a violation of its rights to fair trial, dignity and security of person of its director, Yvonne Wanjiku Ngugi. Further that, there is an apparent failure on the part of the respondent to judiciously exercise his powers. It was further argued that, the appellant's prosecution unjustifiably abridges its right to equal benefit and protection of the law, a violation of Article 27 (1) of the Constitution, and is unreasonable and irrational.
7. The petition was supported by an affidavit of its director Yvonne Wanjiku Ngugi dated 17th January 2020. She averred that she was an inactive director of the appellant, having participated in the appellant's incorporation in 2006 with James Thuita Nderitu; and was its minority shareholder holding 10% of the total shares of the company. That James Thuita Nderitu also trades in his personal capacity as Firstling Supplies.
8. She averred that, pursuant to her arrest and arraignment in court contemporaneously with James Thuita Nderitu, it was claimed that on diverse dates between 9th December 2016 and February 2017, the petitioner had fraudulently acquired a sum of Kshs. 115,534,000/= purportedly as payment for supply of goods by the appellant, Firstling Supplies Limited. That as a matter of fact, no such amount had been paid to the appellant during alleged period. Instead, the said amount had been paid to James Thuita Nderitu trading as Firstling Supplies, through account number 010xxxxxxxxx and not to the appellant, Firstling Supplies Limited. That the respondent later amended the charge sheet to introduce James Thuita Nderitu T/A Firstling Supplies, deleted the claim that the money had been



paid to Firstling Supplies Limited, but still elected to subject the appellant and herself to the impugned proceedings.

9. The respondent opposed the petition vide Grounds of Opposition dated 3rd February 2020. The respondent's response was that it acted within the confines of the Constitution, particularly Article 157, and all other laws incidental thereto. Under Article 157 (6), the DPP exercises State powers of prosecution and may institute or undertake criminal proceedings against any person without the consent, direction or control of any person or authority. That the investigations and subsequent prosecution were instituted with the intention to serve justice without extraneous or ulterior purposes; the appellant had not demonstrated that the respondent acted without or in excess of their powers; have infringed, violated, contravened or in any other manner failed to comply with or respect the provisions of the Constitution or any other provision thereof. That the appellant filed a similar Petition No. 18 of 2018 for grant of similar orders before the Anti-Corruption and Economic Crimes Division, Milimani which was dismissed by Onyiego J on 7th December 2018 hence the petition before the court was res judicata. The accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court. That the appellant had not demonstrated a prima facie arguable case on breach of any Constitutional provision or fundamental human right or any other provision of the law by the respondent; or that the respondent exceeded his jurisdiction, breached the rules of natural justice or considered extraneous matters.
10. The respondent filed a replying affidavit sworn by Berryl Marindah, a Prosecution Counsel at the Office of the DPP, sworn on 26th May 2020 reiterating the Grounds of Opposition. She averred that the allegations in the petition were false and misleading since investigations revealed that Yvonne Wanjiku Ngugi was actively involved in the transactions of the appellant's Standard Chartered bank account No. 010xxxxxxxxxx and could therefore not claim to be an inactive Director. That bank statements showed various instances where Ms Ngugi withdrew large sums of money indicating her active involvement between July 2016 and January 2018. That there were transfer of funds from the appellant's bank account to a business entity named Ellwyn Supplies solely owned by Ms Ngugi in which she had filed a Criminal Revision No. 12 of 2018 seeking unfreezing orders of the entity's bank account.
11. Ms Marindah averred that the amendment of the charge sheet in February 2019 was tailored to rectify the recipient of some of the fraudulent funds, and not to exonerate the appellant's participation in the several offences pending in Milimani Chief Magistrate's ACC No. 8 of 2017. That there are payment vouchers to be adduced indicating that the payee's name and address is MS. Firstling Supplies Ltd P.O. BOX 8906-00200 NRB, and there is sufficient evidence to establish a prima facie arguable case against the appellant.
12. In response to the replying affidavit, the appellant filed a supplementary affidavit sworn by James Thuita Nderitu on 23rd June 2020. Mr Nderitu reiterated that Firstling Supplies Limited is different and distinct from Firstling Supplies which is a sole proprietorship under his stewardship. He averred that the money constituting the subject matter of Milimani Chief Magistrate's ACC No. 8 of 2017 was not paid to the appellant's account but an account No. 010xxxxxxxxxx owned by him trading as Firstling Supplies.
13. Mr Nderitu averred that both he, trading as Firstling Supplies, and the appellant conducted different businesses with the NYS for which they were separately paid for the various works done. Regarding the payment vouchers referred to by Ms Marindah, he averred that they were not documents made by the appellant; makes reference to MS. Firstling Suppliers Limited which is not the name of the appellant; and that because both the appellant and Firstling Supplies conducted different businesses with the NYS, the use of different names was likely an error or oversight on the part of the NYS officials; and



that payment was nonetheless made to Firstling Supplies and not the appellant which has different IFMIS details.

14. In her judgment, the learned judge noted that the first task of the court would be to establish whether the petition was *res judicata*, and if the answer was in the negative, the second issue to address would be whether the appellant had presented a case that would justify the exercise of the court's discretion to prohibit its prosecution in the matter pending before the lower court in Milimani ACC No. 8 of 2018.
15. The learned judge observed that the petition before the court was a rehash of Petition No. 18 of 2018 where Ms Ngugi sought, almost word for word, the same orders as sought in the petition before her. That from a full reading of the judgment in Petition No. 18 of 2018, it was evident that the matters raised in the petition before her were within the knowledge of the appellant and should have been pleaded with the other issues in the earlier petition. That a consideration of the pleadings and averments in the petition suggested that the petition was a second attempt to shield a director of the appellant, to the extent that the DPP conflated the two petitions and seemed to be responding to the earlier petition by Ms Ngugi.
16. The learned judge held that even if the court were to find that the petition was a genuine attempt on the part of the limited liability company to protect its interests as a separate legal entity from its directors, she would still be constrained to find that the petition is *res judicata*. The parties to the petition were essentially the same, as were the facts relied on. The orders sought were essentially the same. The only difference is that in Petition No. 18 of 2018, the petition was by a director of the appellant in her personal capacity. A determination of the issues raised was made by a court of competent jurisdiction and nothing prevented the parties from raising the issues raised in the petition regarding the appellant before the court seized of the earlier petition. The learned judge held that the petition fell afoul of Section 7 of the *Criminal Procedure Code*, was unsustainable and *res judicata*.
17. Even without the necessity to consider the second issue, of whether the appellant had presented to the court a case that would justify the exercise of the court's jurisdiction to prohibit its prosecution in Milimani ACC No. 8 of 2018, the learned judge nonetheless made the observation that the emerging jurisprudence was that the court will interfere with the exercise of prosecutorial discretion only in the clearest of cases. She cited *Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others* [2018] eKLR in which this Courts observed that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise of discretion sparingly; and *Philomena Kavinya Nzuki v DPP* Petition No. 33 of 2019 for the proposition that, in order for the court to enter into such an inquiry, the petitioner must first satisfy it that there are reasonable grounds to believe that the proceedings, the subject of challenge before the court, are a vehicle for a purpose other than a true pursuit of criminal justice.
18. The learned judge found that what the appellant presented before the court is that, it should not be prosecuted because it is not the one that received funds from the NYS; that the funds were received by its Director, James Thuita Nderitu, trading as Firstling Supplies. According to the learned judge, this was a distinction without a difference and did not demonstrate a failure on the part of the respondent to exercise his discretion in accordance with the dictates of the *Constitution*.
19. Dissatisfied with the judgment, the appellant filed the present appeal seeking to set aside the judgment and allow the petition on the grounds that:
 - i. The learned judge erred in law and in fact by finding that the petition before it was *res judicata*.
 - ii. The learned judge erred in law and in fact by finding that James Thuita Nderitu trading as Firstlings Supplies is one and the same thing as Firstlings Supplies Limited.



20. Counsel for the appellant in submissions urged the court to find that the matters in Petition 3 of 2020 were not res judicata considering the matter in Petition 18 of 2018. That the issues in the two petitions were not the same or substantially the same. Counsel cited *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR and *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR for the proposition that among the objects in determining whether a suit is res judicata is to determine whether the issue was heard and finally determined in the former suit; and that in deciding what questions of law and fact were determined in the earlier judgment, the court is entitled to look at the Judge's reasons for his decision, and his notes of the evidence and is not restricted to the record. Counsel reiterated the same submissions made before the trial court relating to the status of the parties which we have set out above extensively and do not consider it necessary to repeat.
21. On the second ground, Counsel submitted that the general principle of law is that a company is distinct from its shareholders and directors. That in this case, the issue was whether criminal culpability of a director or shareholder of a company can be directed at that company. Counsel argued that the circumstances of this case do not fall under any exceptions of corporate veil lifting criteria because James Thuita Nderitu admitted that he has been trading under sole proprietorship as Firstling Supplies, bid for NYS tenders as the appellant did, and has different tax and other statutory obligations from the appellant. That Section 23 of the Penal Code as well as Common law contemplates criminal culpability where acts of a company can be attributed to the director or its official and not the other way around where the criminal culpability of a director arises out of a completely different set of circumstances. That allowing the appeal would not preclude the respondent from sustaining charges against either Ms Ngugi or Mr Nderitu in their own individual capacity as well as James Thuita Nderitu trading as Firstling Supplies.
22. Solomon Njeru Prosecution Counsel filed submission for the respondent. On the first ground of appeal, Counsel submitted that the ingredients for a finding of res judicata were met in the appellant's petition in that the prayers in both petitions are identical as they sought to prohibit the respondent from prosecuting the appellant and its directors. The rest of the submissions are the same as presented before the trial court and which we have set out above.
23. Regarding the second ground, Counsel submitted that it is clear that the appellant and its directors conducted business and received payments from the NYS. That upon comprehensive investigations by the DCI, the respondent perused the evidence and was satisfied that indeed the appellant as a separate entity and its directors were criminally liable. That the appellant is contending that it should not be prosecuted because it is not the one that received funds from NYS but that they were paid to its director. Counsel contended that the principle of vicarious liability is applicable to corporations and on the basis of the principle there should be no difficulty in finding a corporation responsible for the acts of its directors' negligent or fraudulent behaviour.
24. Counsel submitted that the accuracy or correctness of the evidence gathered in the investigation can only be assessed and tested by the trial court which is the best avenue to deal with the quality and sufficiency of the evidence. That the issues raised by the appellant amount to a defence which the appellant shall be accorded an opportunity to present at trial. Counsel cited *Republic v Kenya Revenue Authority & 2 others* [2013] eKLR for the proposition that whether the charges preferred by the DPP can be sustained is a matter of law and fact for the trial court to decide. Counsel also relied on *Philomena Kavinya Nzuki v DPP* Petition No. 33 of 2019 for the proposition that an inquiry in to the DPP's decision to prosecute should be based the existence of reasonable grounds to believe that the proceedings, the subject of challenge before the court, are a vehicle for a purpose other than a true pursuit of criminal justice.



25. Section 7 of the *Civil Procedure Act* sets out the principle of res judicata as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

26. In *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR it was held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

27. In *Alka Roshanlal Harbanslal Sharma & another v Theresa Constabir* [2020] eKLR, the Court also noted that:

“Similarly, this Court has severally held that res judicata is not confined to issues which a court was actually asked to decide upon, it also covers issues or facts which are clearly part of the subject matter of the litigation and therefore could have been raised in earlier proceedings between the parties, and would be an abuse of the court process to allow new proceedings to be commenced. See *Hudson Kelly A. Agalov Telkom Kenya Limited* [2016] eKLR.”

28. In the present case, the central issue in Petition 18 of 2018 was whether the prosecution of Ms Ngugi in her private capacity was not justified based on her allegation that she was an inactive director of Firstling Supplies Limited. The central issue in the later Petition 3 of 2020 was whether the prosecution of Firstling Supplies Limited (the appellant) was not justified based on the appellant’s allegation that the subject matter of the criminal proceedings concerned business conducted by a different entity apart from it, James Thuita Nderitu t/a Firstling Supplies, which was later included in the charges preferred against the appellant and its directors after the determination of Petition 18 of 2018.

29. While the parties in the two petitions appear to be the same, and it also appears that the facts relied upon overlap, the central issue in Petition 3 of 2020 was not directly and substantially in issue in the earlier petition. The main fact relied on in the later petition, namely the inclusion of a separate entity in the charge sheet, occurred after the determination of the earlier petition. The issue could not have been raised in the earlier petition. The reliefs sought in the later petition, even though they were framed in exactly the same manner as the reliefs in the earlier petition, were for the benefit of the appellant company and not Ms Ngugi in her private capacity. Petition No. 3 of 2020 could therefore be considered res judicata.



30. Under Article 157 (6) of the *Constitution*, the authority to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed lies solely with the Director of Public Prosecution. Article 157 (11) however provides that in the exercise of prosecution powers, the DPP 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.
31. The High Court can exercise its review powers to interfere with the DPP’s decision to prosecute a person if it is demonstrated that the intended or commenced criminal proceedings constitute an abuse of the legal process. The High Court interference with the DPP’s discretion of prosecute should be exercised sparingly and in the clearest of cases where the evidence does not disclose a legal and factual basis for prosecution and a realistic prospect of conviction. This Court in *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR held:
- “The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.... The categories of abuse of process are not closed. Whether or not an abuse of power of criminal process has occurred ultimately depends on the circumstances of each case. One of the important factors at common law which underlie a prosecutorial decision is whether the available evidence discloses a realistic prospect of a conviction.... In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which DPP’s decision is made establishes a prima facie case necessitating prosecution. At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end in conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative.”
32. An analysis of the evidence availed in the petition does not reveal a failure of the respondent to judiciously exercise his powers as provided under Article 157 (11), and thereby constituting an unfair trial of the appellant. The only reason for this allegation by the appellant is the inclusion of another entity tied to its director in the charges preferred against it and its directors. The appellant has not demonstrated that the amendment of the charge sheet was for any other purpose than to fully capture the recipients of the funds said to have been acquired fraudulently and to fully capture all the persons and entities involved in the alleged offence. Furthermore, the presence of payment vouchers indicating the payee name and postal address closely matching those of the appellant demonstrates some substance in the respondent’s decision to prosecute the appellant. The issue of conflation of the appellant’s and James Thuita Nderitu’s involvement in the impugned transactions and the extent of participation of the appellant and its directors is a matter of evidence that can only be resolved by the trial court.
33. Having said so, we have come to the conclusion that this appeal is lacking in merit and is therefore dismissed. We make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

F. SICHALE

JUDGE OF APPEAL

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J. MOHAMMED



JUDGE OF APPEAL

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A. MBOGHOLI MSAGHA

JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

