IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, F. SICHALE & S. Ole KANTAI, JJA)

CIVIL APPEAL NO. 77 OF 2017

BETWEEN

FRANCIS WANGURU MWITHUKIA.....APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

NATHANIEL NJOROGE KAMAU.....2ND RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Naivasha (Meoli, J.) dated 31st March, 2017

in

H. C. J. R. NO. 1 of 2016)

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JUDGMENT OF THE COURT

In a considered judgment delivered on 31st March 2017 in the High Court at Naivasha, **C. Meoli, J.** dismissed Judicial Review proceedings in Cause No. 1 of 2016 in which the ex-parte applicants, **Francis Wanguru Mwithukia** and **Stephen Njenga Mungai** had sought orders of certiorari and prohibition to stop their prosecution by the Director of Public Prosecutions (DPP) (named as the 1st respondent) in the Chief Magistrate's court (named as the 2nd respondent).

The background to the prosecution against the ex-parte applicants related to criminal offences regarding abuse of office contrary to **Section 101** as read with **Section 102A** of the Penal Code and conspiracy to make a false document contrary to **Section 393** as read with **Section 357 (A)** of the Penal Code. The particulars of the offence of abuse of office stated that Francis Wanguru Mwithukia, the 1st ex-parte applicant on 15th November 1984 at Nakuru Lands Office in the County of Nakuru, being a Senior Lands Officer abused his position in favour of Stephen Njenga Mungai of ID [particulars withheld] by issuing him an allotment letter reference Number 19447/XVI/25 dated 15th November 1984 in respect of residential **Plot No. LR 2/Lakeview Naivasha** to which he has no Title thereby denying Stephen Njenga Mungai of ID No. [particulars withheld] who has title to the said plot. The particulars of the offence of conspiracy stated that Francis Wanguru Mwithukia and Stephen Njenga Mungai on the 15th day of November 1984 at Nakuru Lands Office within Nakuru County, conspired with an (sic) intent to defraud Stephen Njenga Mungai of ID No. [particulars withheld] his entitlement to plot NO. LR2/Lakeview Naivasha made (sic) an application letter and a letter of allotment referenced 19447/XVI/25 dated 15th November 1984 without lawful authority.

The two ex-parte applicants were arraigned in the Chief Magistrate court on 12th March 2014 in Criminal Case No. 415 of 2014 to answer the two charges aforementioned. They pleaded not guilty to the charges and their case was fixed for hearing on 15th May 2014.

They moved to the High Court on 17th July 2014 in an application No. 1 of 2016 for Judicial Review in which they sought :-

> ***(1) An order for certiorari to quash the decision of the DPP, the 1st respondent, made on or about 16th January 2014 to institute and/or commence criminal proceedings against the ex-parte applicants.***
>
> ***(2) An order of prohibition directed at the DPP prohibiting him and his officers from prosecuting the ex-parte applicants on the said charges in the said criminal case.***

(3) ***An order of prohibition to restrain the Chief Magistrate court from proceeding with the hearing of the criminal case against the said ex-parte applicants on the said charges in the said criminal case.***

The Judicial Review application was heard and in a considered judgment delivered on 31st March 2017, the High Court (Meoli, J.) dismissed the application with no order as to costs. The ex-parte applicants were aggrieved by the judgment. It is this decision that provoked this appeal by Francis Wanguru Mwithukia, the appellant, Stephen Njenga Mungai having died.

The appellant gave a Notice of Appeal on 4th April 2017 pursuant to Rule 75 of this Court's Rules and lodged the Record of Appeal on 30th May 2017 in Appeal No. 77 of 2017. In the Memorandum of Appeal dated 29th May 2017, the appellant proffered ten (10) grounds of appeal in which he contended that the learned Judge erred in fact and in law in that she failed to find that the prosecution was not independent; in exhibiting bias against the appellant; in attributing blame to the appellant for the long delay in the prosecution of the criminal case and failing to find that the delay was prejudicial to the appellant; in shifting the burden regarding the delay to the appellant; in treating the Judicial Review proceedings as a criminal trial and arriving at conclusions; in failing to discern bad faith on the part of the police; in failing to find that the appellant had legitimate expectations that he would not be prosecuted; in wrongly concluding that the prosecution was brought in public interest although the DPP failed to show that there was public interest; in failing to appreciate that Nakuru HCCC No. 219 of 2008 filed by Stephen Njenga Mungai and Nathaniel Kamau Njoroge as the 1st and 2nd plaintiffs respectively against Stephen Njenga Mungai and the Commissioner of Lands as 1st and 2nd defendants respectively (which suit was subsequently withdrawn under Order 25 Rule 1 of the Civil Procedure Rules) had a direct bearing on the appellant's prosecution and that the learned Judge further erred in misinterpreting the application of Section 193 (A) of the Criminal Procedure Code. The appellant urged us to review the proceedings and reverse the decision of the High Court and grant the orders sought in the application dated 16th July 2014 or make such further or other orders that we may deem fit, and that costs of the appeal be provided for.

The appeal came up for hearing before us in Nakuru on 7th November 2017. Learned counsel **Mr. Lutta** appeared with **Ms Leitoro** for the appellant and learned counsel **Mr. Sebastian Mutinda, Senior Assistant Director of Public Prosecutions** appeared for the DPP. There was no appearance by or for Nathaniel Njoroge Kamau named as the 2nd respondent who was an accused person in the criminal case No. 415 of 2014 in the Chief Magistrate court but was otherwise involved as a buyer in the sale transaction relating to Land No. Plot RN 21, Naivasha Town in respect of which the criminal offences related.

The brief background to this litigation as reflected by the record of appeal shows that Stephen Njenga Mungai as a "vendor" (who is now dead) entered into a sale agreement with Nathaniel Kamau Njoroge to whom he agreed to sell Plot No. LR 2/Lakeview, Naivasha. The "vendor" whose P. O. Box No. was 50840 bore the same name of Stephen Njenga Mungai as the true legal owner of the said plot. The latter's postal address was Box No. 51976 and he was, along with the Commissioner of Lands sued by the "vendor", in NKU HCCC No. 219 of 2008 for purported fraud and for cancellation of the grant relating to the said plot. The fraud in procurement of the documents of title was said to have been facilitated by the appellant who was a Land Officer. After investigations, the aforementioned criminal charges were crystallized and the appellant and Stephen Njenga Mungai of Box 50840 were arraigned in court as aforesaid.

Before the appeal came up for hearing, the appellant's advocates, **Lutta & Company** had filed on 30th October 2017 written submissions dated 28th October 2017, and on the same date a list of authorities without case digest in breach of the Court of Appeal Practice Directions. **Counsel for the DPP,** filed on 2nd November 2017 Notice of Grounds for affirming the decision and List of Authorities.

Learned counsel for the appellant, **Mr. Lutta,** relied in his written submissions and List of Authorities and submitted that the DPP, by commencing the criminal proceedings against the appellant and Stephen Njenga Mungai (of Box 50840), now deceased, abused the power of his office. He contended that the police were being used by the 2nd respondent to obtain revocation of the title to the said plot. He told the Court that the 2nd respondent pestered the DPP and the police and that Stephen Mungai Njoroge of ID No. [particulars withheld] was charged along with the appellant. He informed the Court that both Stephen Mungai Njenga of ID No. [particulars withheld] and Stephen Mungai Njoroge are now dead.

It is for this reason that learned counsel contended that the DPP did not act independently. Moreover, contended counsel, the manner in which the proceedings were brought can show abuse of power. This is because, said counsel, the prosecution was intended to put pressure with a view to seeing that title to the plot of land was secured as civil litigation had failed to do the trick. Counsel pointed out that an Investigation Officer known as Mwaura demanded the title to the plot and recommended its issuance to the 2nd respondent. In counsel's view, that was abuse of power. Counsel also addressed the applicability of Section 102A of the Penal Code under which the appellant was charged and contended that when the offence of abuse of office was allegedly committed, in 1984 it was the 1970 edition of the Penal Code that was in existence and that the offence was a misdemeanor. The section was amended by 'Act No. 7 of 2007' and the offence was made a felony punishable by jail term not exceeding 3 years. It was counsel's view that the Court has an obligation to stop the DPP from abuse of court process. Learned counsel for the appellant further submitted that the prosecution was for an offence allegedly committed 30 years ago but no explanation had been proffered by the DPP regarding the delay which, in counsel's view, was unreasonable. We were urged to find merit in the appeal and allow it and reverse the decision of the High Court.

On behalf of the DPP, learned **Senior Assistant Director of Public Prosecutions, Mr. Sebastian Mutinda** submitted that the appellant was merely putting forward a defence in respect of the criminal case. He contended that the appeal should focus on the impugned judgment by Meoli, J. The learned SADPP contended that the DPP exercised his mandate in accordance with the Constitution and further, that it was not shown that he acted on account of pressure exacted on him by any party. Counsel submitted that no malice was shown either and that the learned trial Judge made correct findings with regard to concurrent criminal and civil proceedings. It was Mr. Mutinda's further submission that the authorities referred to by the appellant's counsel were irrelevant. In his view, the cases that were relevant were those cited in his List of Authorities, namely, **MANILAL JAMNANDAS RAMJI VS. DPP [CRI (APPLICATION NO. 57 OF 2013] (CA) [2014]eKLR.**

As regards delay, Mr. Mutinda contended that the investigations took a long time to conclude and at any rate there is no bar to prosecute in respect of a matter such as is in this case. The learned SADPP associated himself with the 2nd respondent's grounds for affirming the decision of the trial court.

Nathaniel Njoroge Kamau, the 2nd respondent, filed on 2nd November 2017 Notice of Grounds for affirming the decision. In the said Notice, he submitted that the learned Judge did not find any evidence of bad faith on the part of the 1st respondent which was only discharging its mandate in accordance with the applicable law. As to the alleged bias on the part of the DPP, it was submitted that there was no evidence to prove bias and that the learned Judge correctly found as much. In his view, the trial Judge correctly interpreted and applied the law and came to the correct finding including the finding that the appellant had no legitimate expectation that he would not be prosecuted.

As regards the issue whether the prosecution was brought in public interest, it was contended that the learned Judge correctly analyzed the evidence and correctly found that it was in public interest to bring the charges against the appellant and his co-accused, now deceased. As regards Section 193 (A) of the Criminal Procedure Code, it was submitted (in response to the contention that the trial Judge failed to appreciate the direct bearing of NKU HCCC No. 219 of 2008 on the prosecution) that the trial court correctly captured the spirit of the provision of Section 193 (A) which envisages concurrent litigation of criminal and civil proceedings arising from the same facts. It was the 2nd respondent's submission that the learned trial Judge was correct in his decision in dismissing the Judicial Review Notice of Motion.

We have carefully perused the record of appeal, the written and oral submissions and the authorities cited by counsel. We are alive to the fact that in this first appeal from the decision of the High Court made in exercise of the High Court's original jurisdiction as a trial court, we are enjoined to give the parties a re-trial of the matter.

The issue involved in this appeal boils down to the question whether the appellant as applicant in the Notice of Motion dated 16th July 2014 and filed in Court on 17th July 2014 adduced sufficient evidence before the trial Judge to warrant the grant of the orders sought in the said motion. The allegations made in the motion as shown in the verifying affidavit show that the appellant alleged that the DPP abused his discretion as he did not commence the prosecution independently, but rather at the behest of the interested party. In effect, his independence in the matter was being impugned. It was also alleged that the DPP was biased and was driven by ulterior motive and that he acted irrationally, unreasonably and unfairly. It was also contended that the delay in the prosecution spanning close to 30 years was prejudicial to the appellant's rights.

The DPP is vested with power under **Article 157** of the Constitution to constitute 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. Under sub article 10 of Article 157 of the Constitution, the DPP does not require the consent of any person or authority for the commencement of criminal proceedings and shall not be under any direction or control of any person or authority. The DPP is required under sub article 11 of Article 157 in exercising the powers granted to him, to 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. Parliament has enacted The Office of the Director of Public Prosecution Act whose provisions are in consonance with the Constitutional provisions.

In discharging his functions, the DPP is enjoined to follow the fundamental principles set out in Section 4 of the said Act which include the need to serve the cause of justice, prevent abuse of legal process and public interest; observe importantly, rules of natural justice and promotion of constitutionalism.

The appellant contends that the learned Judge (Meoli, J.) erred in her decision dated 31st March 2017 for the reasons stated in the Memorandum of Appeal as hereinabove shown. What was before the learned Judge was a Judicial Review application. It was not an ordinary suit and the learned Judge was not supposed to act as a "Court of Appeal" from the decision of the DPP which was being challenged. The appellant as an applicant in the Judicial Review application impugned the decision of the DPP.

In dealing with these allegations, the learned Judge should have had regard to the fact that the issues raised were in the realm of public law and the court would not be concerned with whether the DPP was right or not or whether he made a correct decision or not. The remedy of Judicial Review is stated to be 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. The object and purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected always remembering that it is no part of that purpose to substitute the opinion of the Judge for that of the authority constituted by law to decide the matter in question (see **Supreme Court Practice 1997 Vol. 53/1-14/6).**

The role of this Court as an appellate Court dealing with appeals from the High Court; the Environment and Land Court and the Employment and Labour Relations Court or other bodies whose decisions are under our law appealable to this Court, is to correct mistakes in the impugned decisions. This Court has the power to reverse, or vary or confirm the impugned decision or to remit the proceedings to the lower court with directions as may be appropriate or to order a new trial and to make any necessary incidental or consequential orders, (see **Rule 31 of the Court of Appeal Rules)**. We are by dint of **Rule 29** of the **Court of Appeal Rules** enjoined to re-appraise the evidence and to draw inferences of fact; and may take additional evidence where there is sufficient reason to do.

In this appeal, the learned trial Judge dismissed the Judicial Review application on the ground that the appellant did not prove the allegations made against the DPP. In our view, the correct approach was not whether the appellant had cogent evidence to prove the allegations made against the DPP, but rather, in light of the evidence adduced by the appellant, whether the DPP acted independently and reasonably and without malice in his decision to prosecute and whether he was within the law in doing so. It was not open to the trial Judge to place herself in the position of an appellate Court in relation to the impugned decision and to examine as she did wehther it was meritorious and correct. This is how the learned Judge dealt with the matter as shown in paragraphs 41, 49, 51, 50, 52, 54, 59, 60, 61, 63, 66, 67, 69, 70, 71, 77, 78, 80, 83, 84, 92 of her judgment.

> ***"41. I propose to deal with all the identified issues together, because the respective facts and arguments relied on by the Exparte Applicants, the Respondents and Interested Party appear to overlap.....***
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> ***49. …....There might be some merit in the exparte Applicant's complaint that the prosecution was brought some 30 odd years since the offence was committed. And further that several investigations carried out over 7 years between 2007 and 2013 appeared to exonerate the Applicants. However, it must be recalled that the 1st Respondent is not bound by the determination of***

the DCI or his junior prosecutors all who are his subordinates under the law (see Article 157 and Section 6 of the ODPP Act).

50).....Delay per se, unless it affects a fair trial cannot be a ground for prohibiting a prosecution especially where fraud is alleged.....

51) This case as I see it involves for the large part official documentation emanating from different offices. And the fact that none of the relevant Ministries have complained in respect of the matter is irrelevant.....

52).....While the Applicant therein had been notified publicly by the Attorney General six years before of the decision not to prosecute him, that is not true in this case. The recommendations or views of junior or senior police investigators or prosecution counsel cannot amount to a promise made to the exparte Applicants herein that they would not be prosecuted.

54) From the multiplicity of documents and evidence adduced by the exparte Applicants in this case, that scenario does not apply. Under Article 50(2)(e) every Accused person is entitled to be tried without undue delay – or unreasonable delay. This is an element of fair trial. The parties herein claimed support for their respective cases from the unanimous decision of the Constitutional Court of South Africa in the Sanderson case (Chaskalson P, Langa DP, Ackermann J, Goldstone J, Madala J, Mokgore J, O'Reagan J, Sachs J and Kriegler J).

59).....I would endorse the position that though period of delay, herein emphasized is important, it is not a consideration to be taken in isolation, but must be considered in view of the nature of the case, the systemic delays (both investigative and prosecutorial) the possible trial related prejudice to an Applicant as well as the demands of public interest to bring to justice those charged with serious offences.

60) I have not seen anything in the Exparte Applicants' material to indicate that their delayed arraignment will adversely impact upon their ability to make a defence, which has nevertheless been robustly presented herein. The Applicant(s) cannot anticipate that Article 50 of the Constitution which safeguards the right to fair trial will be beached in the trial.....

61) It is not entirely true as asserted by the Applicants however that all such inquiries terminated in the Exparte Applicants' favour.....

62) …..The oft repeated complaint of delay by the Applicants' own delay to seek court intervention. For a period of about 6 – 7 years, the Applicants were allegedly "co-operating" with police investigators as and when called upon. It seems that they were happy to continue with the motions so long as nothing adverse to them came out of the investigations. Thus they too must take some responsibility for the delay in this case. Admittedly however, post charge delay is eminently more prejudicial than pre-charge. Hence the Applicants' apparent complacency in the 7 year period.

63) On the question whether the decision of the 1st Respondent is unreasonable, I have been referred to the Wednesbury Principle as enunciated in Associated Provincial Picture House Limited -Vs- Wednesbury Corporation [1984] KB 223.....

66) Considering the material placed before me in his case, the DPP's letter containing the impugned decision in light of the foregoing, I am not persuaded that the decision is out rightly unreasonable.....

67) Concerning alleged abuse of discretion and malice, the Exparte Applicants had charged that the real motive behind the prosecution is the desire to exert pressure on the Accused person to give up the title documents to the suit property....Thus the prosecution has been instituted with ulterior motives.

69) The explanation given by the Interested Party that the proof of forgery necessitated a criminal process is a weak one too. However, there is no evidence that the 1st Respondent has any personal interest in the suit property. Secondly, the 1st Exprte Applicant has no title to surrender to the Interested Party, if the facts of this case are believed.....

70) .....Unless it is demonstrated that the Office of Director of Public Prosecutions has "buckled" under undue influence from the Interested Party or third parties thus bringing the prosecution, I believe that all circumstances notwithstanding, his actions may well be a vindication of his office as anticipated in Section 4 (a), (b) and (e) of the Officer of the Director of Public Prosecutions Act. It is, after all, the DPP's duty to prosecute for public interest and in defence of the rule of law.

71) Allegations that Office of Public Prosecutions was 'pressured'.....are to my mind mere speculation as no proof thereof has been laid before the court.....

77) .....I am not satisfied that the impugned prosecution represents an abuse of discretion or that it has been brought by Director of Public Prosecutions solely for the achievement of ulterior motives.

78) Finally, on the complaint that the Director of Public Prosecutions is guilty of breaching the rules of natural justice and that the exparte Applicants legitimate expectation was breached.....

80) However as regards the proceedings of the lower court on 27/2/2014 I am not certain whether the complaint made here is against the court or the Director of Public Prosecutions.....

83).....The mere failure by the Office of Director of Public Prosecutions to give notice, of the impending charges, without more cannot be the basis for finding that there was a breach of the audi alteram partem rule.

84) Similarly, as regards legitimate expectation,.....no basis has been laid for the invocation of the doctrine of legitimate expectation in so far as notice is concerned.

92) In light of the findings above, it is my view that the Substantive Motion herein must fail.....”

It is clear that the learned Judge assumed the role of an appellate Court and examined the correctness or otherwise of the decision by the DPP to prosecute. That was a fundamental error. Her role ought to have been examination of the process relating to the decision to prosecute and not the merits of the decision or whether the DPP was justified in his decision to prosecute the appellant.

We have examined the evidence proffered by the appellant in support of the application for Judicial Review and the orders sought in the application.

Glaringly, there is complete paucity of evidence to support the allegations of bias, malice, ulterior motive and unreasonableness and breach of rules of natural justice on the part of the DPP in making the decision to prosecute. The allegation that the DPP was in breach of the appellant's legitimate expectation had no basis as no evidence of promise was shown. The learned Judge correctly was well served with the authorities on the point particularly the case of **Kaplana H. Rawal vs. JSC & Others [Petition No. 386 of 2015 [2015] eKLR.** The judicial review application was bereft of evidence to support the allegations made and fell far too short of what is required to make out a case for the orders sought. Although the learned Judge arrived at the correct decision, her focus and approach was wrong. We have no hesitation in stating that the appeal is devoid of merit and we dismiss it and order that each party shall bear its own costs.

***Dated at Nairobi this* 20th *day of December, 2017*.**

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR