



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**PETITION NO 339 OF 2013**

**ISAAC ALUOCH POLO ALUOCHIER .....PETITIONER**

**VERUS**

**STEPHEN KALONZO MUSYOKA & 217 OTHERS.....RESPONDENTS**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS.....INTERESTED PARTY**

**RULING NO. 2**

1. In my ruling on this matter dated 17<sup>th</sup> October 2013, I made orders in response to the reference by the Magistrate's Court in Makadara with regard to the intended prosecutions by the applicant as follows:

***“A private citizen can only institute private prosecutions in those cases where he or she satisfies the Magistrate’s Court before whom he or she wishes to carry out the prosecution that there has been a failure by the bodies charged with prosecution to carry out their mandate. To do so, the private citizen must meet the requirements enunciated in the Floriculture case which are set out above.”***

2. In the course of my ruling, I observed that the applicant had not filed his written submissions in reply to the submissions by the respondent even though the Court had allowed him to do so. The observations of the Court contained at paragraph 10 of the Ruling were as follows:

***Ms. Kahoro applied and was granted leave to put in written submissions on the issues before the court, with leave to the petitioner to respond thereto. She duly filed written submissions dated 6<sup>th</sup> August 2013 which I shall refer to later in this ruling. It appears from the documents in the court file that the petitioner did not file submissions in reply.***

3. It is on the basis of this observation that the applicant filed his application seeking to review the ruling on the grounds that his submissions had not been considered before the Court rendered its decision.

4. The application dated 18<sup>th</sup> October 2013 is expressed in the following terms:

1. ***This application for a review of the ruling of Judge Mumbi Ngugi delivered on 17 October 2013 is made on the basis of Article 50(1) of the constitution, which reads:***

*“Every person has the right to have any dispute that can be resolved by the application law divided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”*

2. *The application also takes into account the principles inherent in the Civil Procedure Act, Order 45, Rule 1, which reads, in part:*

*“(1) Any person considering himself aggrieved –*

- a. *By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
- b. *By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge Or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record. Or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

*(2)...”*

3. *The applicant submits that the matter ruled upon on 17 October 2013 was not resolved in a fair manner, on account of some mistake or error apparent on the face of the record, or for other sufficient reason.*
4. *The applicant’s reasons are contained in the accompanying affidavit.”*
5. The application was argued before me on the 18<sup>th</sup> of November 2013 by the applicant in person and in the absence of Counsel for the respondent. Mr. Aluochier submitted that he was seeking a review of the ruling of the Court delivered on 17<sup>th</sup> October 2013 in which the Court noted that he had not filed written submissions. He stated that he had indeed filed written submissions dated 23<sup>rd</sup> August 2013 which were filed in Court on 27<sup>th</sup> August 2013.
6. Mr. Aluochier contended that the Court did not consider the provisions of the **Office of the Director of Public Prosecutions Act (ODPP) Act**, specifically sections 23, 24, 25 and 28 supplemented by section 57 of the ODPP Act which gives supremacy to the ODPP Act over any other law with regard to criminal matters; that section 23 deals with the function of the DPP and the taking over by the DPP of prosecutions by other parties; section 24 provides the procedure for taking over of prosecutions; while section 25 deals with how the Director of Public Prosecutions (DPP) is to deal with prosecutions and avoid abuse of the legal process, as well as protecting the public interest, which Mr. Aluochier submitted was previously the function of the Magistrate.
7. According to the applicant, section 28 deals with the institution of private prosecutions and requires that after 30 days, the private prosecutor must inform the DPP. He submitted that these provisions of the ODPP Act give to any person the right to institute a private prosecution subject to following the procedure laid out in the ODPP Act; that the procedures laid down for addressing public interest and abuse of legal process were not taken into account in the ruling; that whereas in the past this was the jurisdiction of the Magistrate, this has been transferred to the DPP, and it is for the DPP to take any action to consider the case and whether it is an abuse of process and not for the Magistrate to consider the principles laid out in the case of **Floriculture International Limited and Others High Court Misc. Civil Application No 114 of 1997 (The Floriculture case)**. He contended that if the previous position is upheld, then the ODPP cannot exercise the powers under the ODPP Act as the Magistrate will have retained those powers.

8. The applicant submitted that the process to be followed under the ODPP Act is that a private prosecution is instituted, followed by notification to the DPP; the DPP considers whether the prosecution is an abuse of process and is against the public interest; if any of those conditions apply the DPP makes an application to the Court for stay of the proceedings. He argued that section 88 of the Criminal Procedure Code is now rendered of no effect by the provisions of the ODPP Act, and that anyone can wake up and file a private prosecution provided they follow the procedure under the ODPP Act.
9. The applicant further contends that the provisions of sections 23, 24, 25 and 28 ‘as supplemented’ by section 57 of the same Act allow anyone, at any time, to present a criminal prosecution before a Court, and that the Court before which such prosecution is presented has no power to consider whether such prosecution should proceed but has to await action by the office of the DPP with regard to the said prosecution.

## **Determination**

10. Before making a determination of the issues raised by the applicant in the application before me, I deem it prudent to set out in full the provisions of the ODPP Act relied on by the applicant in support of his contentions.

11. Section 23 titled ‘**Control of Prosecutions**’ provides as follows:

### **23. Control of prosecutions**

*(1) Notwithstanding the provisions of any other law, it shall be the function of the Director to —*

*(a) decide to prosecute or not to prosecute in relation to an offence;*

*(b) institute, conduct and control prosecutions for any offence;*

*(c) carry out any necessary functions incidental to instituting and conducting such criminal prosecutions; and*

*(d) take over and conduct a prosecution for an offence brought by any person or authority, with the consent of that person or authority.’*

12. Section 24 is titled “**Takeover of criminal proceedings**” and provides as follows:

*(1) Subject to the Constitution, the Director may take over a prosecution or appeal for the purposes of this Act by giving notice in writing to the Magistrate before whom the matters is being heard or the Registrar and the affected persons, indicating the Director’s intention to take over the matter.*

*(2) Where the Director has taken over a matter pursuant to subsection (1), the Director shall become the prosecutor, appellant or respondent, as the case may be in such proceedings.*

13. At section 25, the Act states with regard to discontinuation of criminal proceedings as follows:

*(1) The Director may, with the permission of the court, discontinue a prosecution commenced by the Director any person or authority at any stage before delivery of judgment.*

***(2) Pending the permission by the court in accordance with subsection (1), the Director may apply orally or in writing to the court for a stay of proceedings with a view that such proceedings may be taken over by the Director to prevent and avoid abuse of the legal process and to protect the public interest.***

***(3) Nothing in this section prevents the Director from continuing to conduct proceedings in the name of the person or authority that instituted those proceedings.”***

14. At section 28, the ODPP Act states as follows with regard to private prosecutions:

***(1) Notwithstanding any provision under this Act or any other written law, any person may institute private prosecution.***

***(2) Any person who institutes private prosecution shall, within thirty days of instituting such proceeding, notify the Director in writing of such prosecution.***

***(3) In accordance with Article 157 of the Constitution and this Act, the Director may undertake, takeover or discontinue any private prosecution.’***

15. Finally, section 57 provides as follows with regard to the saving and transitional provisions:

***(1) The application of this Act to offences, prosecutions, appeals, revisions and any other proceedings extends to offences committed and prosecutions, appeals, revision and any other proceedings brought or commenced before the commencement of this Act.***

***(2) Upon commencement of this Act—***

***(a) all acts, matters and things lawfully made or done by or on behalf of or in the name of the Republic in relation to criminal proceedings shall be deemed to have been made or done by or on behalf of or in the name of the Office;***

***(b) all documents served on or by or on behalf of or in the name of any other person in connection with criminal proceedings shall be deemed to have been served on or by or on behalf of the Office; and***

***(c) all Public Prosecutors appointed under the Criminal Procedure Code Chapter 75 of the Laws of Kenya or whose appointments (sic)***

***(3) Notwithstanding the provisions of subsections (1) and (2) of this section, the operation of an authority, sanction or consent given before the commencement of this Act by the Attorney General, Director, or any other person so empowered, to commence proceedings in relation to an offence shall not be abated or affected thereby.***

***(4) This Act shall have the force of law throughout Kenya and shall in so far as the same is not inconsistent with the Constitution of Kenya, supersede any other law in force in Kenya in so far as that other law makes provisions regarding investigation, prosecution and any other matter relating to the enforcement of***

#### ***Criminal law in Kenya.***

***(5) If an officer or employee in the Office, or Public Service is appointed as the Director of Public Prosecutions, the period of his or her service as Director of Public Prosecutions shall be reckoned as part of and continuous with his or her employment in the Public Service, for purposes of leave, pension and any other conditions of service and the provisions of any pension law applicable to him or her as such officer or employee or, in the event of his or her death, to his or her dependants and which are not inconsistent with***

***this section, shall, with the necessary changes continue to so apply.'***

16. I have deliberately set out in full the sections of the ODPP Act relied on by the applicant so that the exact wording of the provisions in question is clear. This is because, in my view, even after taking into account the submissions by the applicant dated 23<sup>rd</sup> August 2013 which had been misplaced and were not on the court file when I made the ruling in this matter on 17<sup>th</sup> October 2013, I can find no basis for altering the views expressed in that ruling.
17. As I observed in the said ruling, the fundamental change wrought by the Constitution is to limit the powers of the DPP with regard to taking over and terminating prosecutions instituted privately. This, in my view, is the mischief that was intended to be corrected by the Constitution. The intention behind these constitutional provisions which have been given legislative effect in the ODPP Act was not to make the Magistrate's Court a powerless receptacle into which all and sundry can throw all manner of cases in the name of private prosecutions.
18. Had this been the intention, then the transitional provisions could easily have provided that the provisions of section 88 of the Criminal Procedure Act had been repealed. One must bear in mind that the Constitution is intended to put in place a clear and orderly system for the prosecution and trial of offences. To argue that a Magistrate's Court must accept every case that is presented before it as a private prosecution, whether or not there has been investigation of the alleged offence, and whether or not the institutions charged with the investigation and prosecution of offences have exercised their mandate with regard to the alleged offences that the private prosecutor intends to prosecute, is to invite chaos in the criminal justice system.
19. The applicant appears to read Section 28(1) as allowing an uncontrolled and unregulated right by private citizens to take up private prosecutions with no order or rules with regard thereto. Were this to be allowed, then the Magistrate's Court may well be inundated by prosecutions by citizens of claims that have not been investigated and whose prosecution is not informed by considerations of available evidence or what constitutes criminal offences.
20. The applicant has also argued at length in his written submissions that a complainant has the same rights under Article 50(2) of the Constitution as a person facing a criminal trial. I must respectfully disagree. Article 50(2) is clear that its provisions relate to the rights of an accused person. It provides, inter alia, as follows:
- (2) Every accused person has the right to a fair trial, which includes the right—***
- (a) to be presumed innocent until the contrary is proved;***
- (b) to be informed of the charge, with sufficient detail to answer it;***
- (c) to have adequate time and facilities to prepare a defence;***
- (d) to a public trial before a court established under this Constitution;***
- (e) to have the trial begin and conclude without unreasonable delay;***
- (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;***
- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;***
- (h)....***
21. While it is true that victims of criminal offences have certain rights, including the right to have

their impact statements considered prior to sentencing in some cases, it is to stretch things somewhat to assert, as the applicant does, that a complainant's rights include the right to choose not to have the criminal offence committed against him or her prosecuted by the office of the DPP.

22. It is also true that the Constitution has brought various changes in our system of governance and in the nature and protection of fundamental rights. It has not, however, dispensed with all those rules and principles, based on statute and judicial precedents, that are a fundamental component and essential to the efficient and effective functioning of our justice system.

23. At any rate, the core issue in the reference from the Magistrate's Court in Makadara pertains to the circumstances in which a party can institute private prosecutions. The response of this Court remains as it was in the ruling made on 17<sup>th</sup> October 2013 that:

***“A private citizen can only institute private prosecutions in those cases where he or she satisfies the Magistrate's Court before whom he or she wishes to carry out the prosecution that there has been a failure by the bodies charged with prosecution to carry out their mandate. To do so, the private citizen must meet the requirements enunciated in the Floriculture case....”***

24. Accordingly, the Chief Magistrate's Court at Makadara should be satisfied that the intended prosecution by the applicant in both ACC1/2013 and ACC2/2013 meets the conditions enunciated in the Floriculture case which are set out in the ruling dated 17<sup>th</sup> October 2013, and if so satisfied, permit the intended prosecutions to proceed.

**Dated, Delivered and Signed at Nairobi this 27<sup>th</sup> day of December 2013**

**MUMBI NGUGI**

**JUDGE**