



REPUBLIC OF KENYA

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HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION OF THE HIGH COURT

CRIMINAL REVIEW NO. 55 OF 2020

REPUBLIC.....COMPLAINANT

-VERSUS-

DOMENICK WAMBUGU GATHUKU.....PETITIONER/APPLICANT

-VERSUS-

THE OCS NYANYUKI POLICE STATION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

RULING

1. The subject of the ruling herein, is a notice of motion application dated; 31st January, 2020, brought as stated, under the provisions of; Article 165 (6) of the Constitution of Kenya 2010 and alleged contravention of; fundamental rights and freedoms under the constitution (supervisory jurisdiction and protection of fundamental rights and freedom of individual); High Court Practice and Procedure Rules 2006.

2. The application is premised on the grounds on the face of it and the affidavit in support therefore sworn by the Applicant's counsel herein. The applicant is seeking for orders as here below reproduced:

a) That, pending the hearing and final determination of the application herein, the Honourable court be pleased to order a stay of proceedings in; Nairobi Milimani Chief Magistrate's court criminal case No. 1432 of 2018; Republic vs Domenick Wambugu Gathuku;

b) That, the Honourable court be pleased to permanently terminate the proceedings and trial of; Nairobi Milimani Chief Magistrate's court criminal case No. 1432 of 2018; Republic vs Domenick Wambugu Gathuku;

c) That, the charges under; Nairobi Milimani Chief Magistrate's court criminal case No. 1432 of 2018; Republic vs Domenick Wambugu Gathuku; be declared a nullity;

d) That, costs of the application be provided for.

3. In a nutshell, the applicant's learned counsel; Susan Nyang avers that, the applicant was arrested and charged vide; criminal case No. 1313 of 2016; Republic vs Domenick Wambugu Gathuku; with two counts of the offences of; malicious damage to property contrary to; section 339(1) as read with section 339 (3) (b) of the Penal Code and stealing contrary to; section 268 as read together with; section 275 of the Penal Code. That, the case was fully heard and the applicant, convicted and fined Kshs 40,000. He paid the fine.

4. The deponed avers that, the dispute revolves around to a property known as; plot No. 277, registered as; LR No. 12062/959; situate at Kariobangi River Bank within Nairobi City County. That, despite the conviction and sentence; he has been arrested again and charged with the offence of; fraud relating to the same subject matter; vide the aforesaid case; Milimani criminal case No. 1432 of 2018,

5. It is averred that, both the applicant and complainant have filed civil suits; vide, Chief Magistrates civil cases numbers; 5426 of 2017 and 1415 of 2018, consolidated into; civil case number; 1415 of 2018; which involve the same issues in the criminal case no. 1432 of 2018.

6. That, the criminal proceedings are an abuse of the court process and aimed at intimidating and/or exert pressure or compel the applicant, to drop the civil case filed against the complainant. Further, the criminal proceedings amount to double jeopardy; which prohibits re-litigation

of same issues already dealt with in court. Similarly, the fresh charges offend the principle of Res judicata and are violating his constitutional right and legal process.

7. The Applicant filed a further affidavit, dated 13th February 2020, similarly, sworn by the learned Counsel; Susan Nyang. The contents thereof are a reiteration, or “a duplicate” of the first affidavit in support of the application, save for the fact that, the further affidavit has annexures thereto.

8. Be that as it were, the Respondent filed a replying affidavit dated 2nd February 2021, sworn by; Chief Inspector Wilson Mwita, who averred that, the complainant in criminal case number; 1432 of 2018, lodged a complaint through the Governor of Nairobi City County, to the effect that, there was an allegedly a dispute of the ownership of; Plot No. 277 Kariobangi Riverbank Scheme.

9. That, preliminary investigation indicated that, the plot in question was initially allocated to; Florence Wanjiru in 1992 and thereafter it was sold to Stephen Muchiri Waiganjo, the complainant in; Milimani Criminal Case Number; 1432 of 2018 in the year 2009. That, the allotment letter was issued by then; Nairobi City Council, alongside the Beacon certificate. Subsequently, Stephen Muchiri Waiganjo, requested the Nairobi City Council to issue him with a lease agreement and discovered that, a lease agreement had been given to the applicant.

10. The Respondent denied the allegations that, the criminal case was subsequently filed, to compel the applicant drop the on-going civil case. It averred that, the Director of Public Prosecution has the power, to institute criminal proceedings without the consent of any person nor subject to the control or authority of any person or authority. That, the applicant has not showed evidence that, the respondent acted outside its constitutional mandate, nor with malice or abuse of the court process, in instituting the subject criminal proceedings. Therefore, the application should be dismissed.

11. The application was disposed of, vide written submissions filed by the parties. The submissions filed by the applicant mirror the averments in the affidavit and further affidavit in support of the application. However, in a nutshell, the applicant reiterated that, the complainant, “should pursue his claim vide civil case number; 1415 of 2018. If not (sic), then the same will go against the provisions of; section 47, 48, 49 and 50 of the Constitution which will be violated.” (Though, I believe it should be “articles” and not “sections”; 47, 48, 49, and 50 of the Constitution of Kenya, 2010). Further, the applicant submitted that, the Respondent’s replying affidavit fails to respond to the issues of double jeopardy and criminal proceedings in; criminal case numbers; 1313 of 2018.

12. However, the respondent reiterated in its submissions that, it acted within its constitutional and statutory mandate, pursuant to the provisions of; Article 157 (b) of the Constitution of Kenya 2010, in preferring the charges complained of against the applicant. The respondent further relied on; section 193A of the Criminal Procedure Code, (cap 75), laws of Kenya, and the cases of; Nicolas Kipsigei and Others (2016) eKLR, and Karimi Njreu Vs Republic (1979) eKLR.

13. I have considered the application in total and I find that, first and foremost, the basis and/or foundation of any application is laid, in the grounds and/or affidavit(s) in support thereof. The averments in the affidavit are treated as evidence in chief. The veracity thereof is presumed by the fact that, the deponent takes responsibility for any false averments and is subject to perjury.

14. Further, pursuant to; Order 19 Rule 3(1) of the Civil Procedure Rules, 2010, an “*affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.*” Thus, as held in; Simon Isaac Ngugi vs Overseas Courier Services (K) Ltd 1998 eKLR, “*it is not competent for a party’s advocate to depose to evidentiary fact at any stage of the suit*”. Thus, generally, an advocate should not swear an affidavit, on behalf of his client, when the client is available to swear and prove the facts of his or her own knowledge. Indeed, such affidavits may be declared defective, struck out or given little or no evidential value at all.

15. However, in the interest of and/or substantive justice under; Article 159 of the constitution of Kenya, 2010, I shall not strike out the subject affidavits and consider their contents only as far as, issues of law are concerned and in particular the issues or concepts of; double jeopardy, res judicata and violation of the applicant’s constitutional rights. It also suffices to note that, the respondent did not raise the issue of the validity of the subject affidavits.

16. Be that as it were, secondly, before delving in other issues, with utmost due respect, the annexures to the further affidavits, were rather challenging in that; they were not properly arranged and/or marked as a bundle and not explained and incomplete in some cases, in particular, the documents allegedly marked as “S03” was missing.

17. For the court to determine whether, the subsequent proceedings are res judicata or amount to double, the proceedings in criminal cases; 1313 of 2016 and 1432 of 2018, had to be availed. The only proceedings availed was for case number 1313 of 2016, and a charge sheet only in 1432 of 2018. The comparison would not be possible in the given circumstances. It does appear case number 1432 of 2018, has not commenced. In fact, it’s not clear from the documents availed whether plea has been taken. It is only when evidence is adduced in that case, that the similarity of issues can be perceived and/or whether the applicant will suffer prejudice.

18. However, thirdly, and most importantly, is whether, the court can grant the orders sought. The applicant seeks for orders that, the proceedings in criminal case 1432 of 2018, be permanently terminated and charges therein declared a nullity. It is noteworthy that, the two prayers cannot be granted at the same time, for if the proceedings are terminated, the charges will be automatically terminated. But importantly does the criminal division of the high court have jurisdiction to grant the orders sought?

19. It suffices to note that, there are two respondents to this application; however, the presence of the OCS Nanyuki Police Station, was not explained and neither did that Respondent participate in the hearing of the application and it is not clear whether, that party was served. Be that as it were, the application relates to the manner in which the Director of Public Prosecution, is carrying out its mandate. That is a constitutional and/or statutory function. It is not a judicial function.

20. I note that, the applicant has relied on the provisions of; Article 50 of the Constitution. These provisions do not give this court the power

or mandate to grant the orders to terminate proceedings. The Director of Public Prosecutions has powers under Article 157 (6) of the Constitution of Kenya, 2010 as stipulated here below: -

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may--

(a) 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;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

21. Further the provisions of sub- article (10) provides that: -

“(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority”.

22. In my considered opinion, the applicant is seeking for an order to quash the decision of the Director of Public Prosecution and/or declare the decision to charge him unconstitutional. The appropriate application should have been filed in the Constitutional and Judicial Review division of the High Court and on that ground alone I strike out the application with no orders to costs, and save the issues raised to be canvassed in an appropriate court.

Those then are the orders of the court.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 30TH DAY OF MARCH 2021

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Susan Nyang' for the Applicant

Ms Ndombi for the 2nd Respondent

Edwin - Court Assistant