



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL 66A, 67 & 68 OF 2020 (CONSOLIDATED)

BENSON NDIKWAE OPWORA.....1ST APPELLANT

HENRY MOMANYI.....2ND APPELLANT

NAOMI OSIBORI OKIBO.....3RD APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

AND

DAVID WAFULA KIRIMOJO.....INTERESTED PARTY

(An Appeal from the Order/Ruling in Original Kimilili Law Courts Criminal Case No. 65/2019 delivered on 22.6.2020 by Hon. G. Adhiambo, P.M)

JUDGEMENT

The interested party, David Wafula Kirimojo, filed an application dated 8th October, 2019 in the subordinate court seeking leave to commence private prosecution against the appellants on the grounds that he has registered a complaint at Kimilili Police station and the director of public prosecutions over an alleged forgery intended to defraud him of his parcel of land situate at Kimilili Market.

He averred that the parcel belonged to his deceased grandfather before devolving to his father and finally unto him. He states that there was a forgery on the allotment letters to indicate that the parcel has been transferred to the appellants.

The appellants herein opposed the application and filed their replying affidavits deponing *inter alia* that the parcel has been a subject of litigation between the parties and up to the court of appeal and another one still pending before the Environment and land Court.

The application was disposed of by way of written submissions culminating in a ruling where the learned trial magistrate allowed the application and granted leave to the interested party to commence private prosecution against the appellants. The order is as follows;

I hereby issue an order compelling the respondents to attend court on 6/7/2020 for purpose of being charged with the offence of forgery to defraud the applicant of a plot which charge shall be presented before court by the appellant.

Aggrieved by the Ruling, the appellants preferred an appeal to this court by their Petition of Appeal dated 1/7/2020 raising the following grounds;

1. That the trial magistrate erred in law and fact when she failed to find that there is a Land and Environment Case Number 63 of 2015 at Bungoma and which gave rise to Civil Appeal Number 114 of 2014 at the Court of Appeal at Kisumu and Environment and Land Case Number 175 of 2013 at Bungoma all touching on plot no. 1D Kimilili the subject matter before the learned magistrate and between the parties hence occasioning a miscarriage.

2. That the learned trial magistrate failed in both law and fact when she failed to determine that the submissions by the Director of Public Prosecutions before her were purely as a result of a conflict between the office of the Director of Public Prosecutions and the office of the National Police Service as to their mandate under Article 157 of the Constitution hence infringing upon the rights of the appellant.

3. That the trial magistrate erred in both law and fact when she relied upon the submissions of the Director of Public

Prosecutions and failed to hold that investigation is the sole role of the National Police Service hence infringing the basic rights of the appellant.

4. That the learned trial magistrate misapprehended the provisions of Section 88 of the Criminal Procedure Code chapter 75 Laws of Kenya when she granted leave to the interested party to carry out private prosecution against the appellant hence occasioning a miscarriage of justice.

5. That the learned trial magistrate erred in both law and fact when she failed to find that nothing was placed before her to show the outcome of the investigations if indeed the interested party lodged a complaint with the National Police Service.

6. That the learned trial magistrate erred in both law and fact when she failed to find that the National Police Service who have constitutional mandate to investigate, their views were not placed before her over the interested party's alleged complaint against the appellant before arriving at her decision hence occasioning a miscarriage of justice.

7. That the learned trial magistrate erred in both law and fact when she failed to draw a clear distinction between the mandate of the Director of Public Prosecutions and the National Police Service under Article 157 of the Constitution 2010 hence occasioning a miscarriage of justice.

8. That the learned trial magistrate erred in law and fact when she failed to properly analyse the submission and case law placed before her by the appellant hence occasioning a miscarriage of justice.

9. That the ruling/order by the trial magistrate is poorly reasoned.

10. That the honourable magistrate erred in both law and fact when she failed to explain to the appellants of their right of appeal against the ruling hence occasioning a miscarriage of justice.

The appeal was disposed of by way of written submissions. All the parties complied.

The appellants submit that the issues raised in the suit touches on plot 1D Kimilili Township which dispute is pending in court being Bungoma ELC 63 of 2015 which gave rise to Kisumu Court of Appeal suit No. 114/2015 and Bungoma ELC 175/2013.

That the respondent's submission before the subordinate court were due to a conflict between the Director of Public Prosecutions and the National Police Service. Relying on the decisions in ***Shamsher Kenya Ltd Vs Director of Public Prosecution & Another (2017)eKLR*** and ***R Vs Attorney General & 4 Others Ex-Parte Diamond Hashim Lalji & Another (2014)eKLR***, the appellants urge this court to find merit and allow the appeal.

The respondent submits that the appeal is frivolous and vexatious for being preferred to this court by way of appeal instead of revision or an appeal challenging the unfavourable outcome of the proceedings. The case of ***Hassan Ali Joho Vs Inspector General of Police & 3 Others (2017)eKLR*** has been cited.

The respondent submits that the appeal is irregular since the order sought to be appealed against was made pursuant to the provisions of Section 88 and 89 of the Criminal Procedure Code.

It is submitted that the appeal is a delaying tactic as it will delay the commencement and conclusion of Kimilili Criminal Case No. 65 of 2019 involving an immovable property which may be alienated or wasted.

The respondent submits that it is wrongly enjoined in the proceedings as this is a private prosecution notwithstanding the fact that the respondent is constitutionally mandated under the provisions of Article 157 of the Constitution and the Office of the Director of Public Prosecutions Act.

The law on private prosecutions is found in Section 88 of the Criminal Procedure Code Cap 75 which permits an individual to conduct private prosecutions. The section provides;

1. A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission.

2. Any such person or officer shall have the same power of withdrawing from the prosecution as is provided by section 87, and the provisions of that section shall apply to withdrawal by that person or officer.

3. Any person conducting the prosecution may do so personally or by an advocate.

Section 89 and 90 thereof provide the procedural aspect of private prosecution.

Article 157 of the Constitution donates the power of prosecution to the Director of Public Prosecutions. Sub-article (10) thereof provides;

“The Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal

proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

In respect of private prosecutions, **Section 28** of the **Office of the Director of Public Prosecution Act** provides:

“(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, within thirty days of instituting such proceedings, notify the Director in writing of such prosecution.

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

It is therefore clear that a private citizen has power to institute private prosecution whenever the citizen deems that his rights have been infringed and there is an inaction on the part of the law enforcement agencies and as such guidelines have been placed by case law on the conditions and or criteria that must be met by such citizen.

In the case of ***Floriculture International Limited and others High Court Misc. CIV App. No. 114 of 1997***, (The Floriculture case), Kuloba J gave the following conditions precedent to be met by the private prosecutor before leave can issue;

- 1. That a report of the alleged offence was made to the attorney General or the police or other appropriate public prosecutor, to accord either of them a reasonable opportunity to commence or take over the criminal process, or to raise objection (if any) against prosecuting; that is to say, the complainant must firstly exhaust the public machinery of prosecution before embarking on it himself; and*
- 2. That the Attorney General or other public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings; or that he has maintained a more than usual and reasonable reticence; and either the decision or reticence must be clearly demonstrated; and*
- 3. That the failure or refusal by the State agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued; and*
- 4. That unless the suspect is prosecuted and prosecuted at the given point of time, there is a clear likelihood of a failure of public and private justice;*
- 5. The basis for the locus standi, such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics, or some ulterior considerations devoid of good faith, and*
- 6. That demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous Attorney General or police force guilty of a capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counter act the act culpable refusal or failure to prosecute or to neutralize the attempts of crooked neutralize the attempts of crooked people to stifle criminal justice”.*

However with the promulgation of the 2010 Constitution, 2 other conditions must be met by the applicant as held by Kimaru J. in ***Victor Sambu & 5 Others Vs JSN (2020) eKLR***.

Firstly, such Applicant must establish that, apart from pursuing investigation of the complaint by the Police, he has also sought the intervention of the Office of the Director of Public Prosecution and failed to obtain satisfactory resolution of his complaint, because, since the promulgation of the **Constitution**, it is only the Director of Public Prosecution who can give consent for charges to be laid in court against the accused. The Applicant will not have meet the threshold if he only attempts to establish inertia or frustration to the resolution of his complaint by the Police alone. He must also establish that he sought the intervention of the Director of Public Prosecutions and got an unsatisfactory response.

Secondly, an application seeking leave to institute private prosecutions can only be competent if the Director of Public Prosecutions is one of the Respondents. This is due to the fact that, in all criminal proceedings, it is the Director of Public Prosecution who represents the Police in court.

On whether the interested party has satisfied the condition set out in above stated cases, the interested party wrote a letter to the DPP on 15th April, 2017 asking the DPP to compel the authorities to investigate with a view of having the appellants charged.

By letter dated 11/9/2017, the Respondent advised him to make a complaint at the Kimilili Police Station. He reported under OB Number 10/30/09/2017. There is no evidence of what happened after that.

The respondents in opposing the application deponed that there are civil actions before court touching on the subject matter and therefore the interested party is using a criminal process to advance a civil case. The 1st appellant deponed that there was Bungoma Environment and Land Suit No. 63 of 2015 where he had been sued by Mohammed Nyongesa Sichangi which was determined in his favour and thereafter to the Court of Appeal Kisumu Civil Appeal No. 114/2015 which was also dismissed.

From the pleadings in that case, the subject matter is similar, that is, Plot 1D Kimilili Township. The said Mohamed Nyongesa Sichangi claimed that he had bought the parcel from the interested party's grandfather. The interested party testified for the plaintiffs.

The 3rd appellant on her part averred that there is a pending suit in Bungoma Environment and Land Case No. 175/2013 where she has sued the interested party over the parcel of land forming the basis herein.

Having scrutinized the record, this court is satisfied that there is no evidence of the steps taken by the interested party after he had made his report to Kimilili Police Station.

On the 2nd condition, no material has been placed before this court or the subordinate court that a decision on the matter has been taken by the police or the Director of Public Prosecutions on whether to prosecute the respondents or not.

There was also no evidence that even after making his complaint, he followed up with the said Police Station or sought help from the Director of Public Prosecutions. The above cited authorities all establish that one must have received a conclusive answer from the prosecutorial and the investigative agencies on whether they intend to charge or not.

The interested party has not also pleaded that the police and the prosecutor are malicious in how they handled the matter. The interested admitted that a probe team was formed by the Governor to investigate the purported Plots Scam where the 2nd appellant worked as a clerk. No evidence was tendered whether the probe team had released its report or findings.

From the evidence and the submissions, it is clear that there are active civil processes between the interested party and the appellants over the same subject matter in the Environment and Land Court.

The purpose of a private prosecution as stated by Achode J. in *Isaac Aluoch Polo Aluochier Vs National Alliance & 440 Others (2017) eKLR* where the learned Judge held;

Private prosecution is a weighty matter that should only be allowed as a safeguard against extraordinary impropriety and capricious failure, or refusal to prosecute by the public prosecuting agencies. It is not intended to satisfy the whimsical fancy of parties who imagine that they can do the job better by taking matters into their own hands.

Considering the appeal and the material before this court, I find that the interested party had not met the threshold for grant of leave to file private prosecution.

I therefore allow the appeal and set aside the orders of the trial magistrate dated 22nd June, 2020.

DATED AT BUNGOMA THIS 25TH DAY OF JUNE, 2021.

S. N. RIECHI

JUDGE