



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

PETITION NO. 40 OF 2019

BENJAMIN NGILA NDETI.....1ST PETITIONER/APPLICANT

JOSEPHINE NDUNGE NDETI.....2ND PETITIONER/APPLICANT

VERSUS

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

DIRECTOR OF CRIMINAL INVESTIGATIONS MACHAKOS.....2ND RESPONDENT

THE CHIEF MAGISTRATES COURT-MACHAKOS.....3RD RESPONDENT

RULING

1. This ruling is in respect an application filed by the Petitioners vide notice of motion dated 8.11.2019 that is brought under Articles 23 (3) of the Constitution of Kenya.
2. What provoked these proceedings was the criminal proceedings instituted in Machakos Chief Magistrate's Court upon the complaint of one Agnes Mwikali Musyoka against the petitioners *qua*, ***Machakos Criminal Case No. 772 of 2016 Republic v Benjamin Ngila Ndeti & Josephine Ndeti*** (hereinafter referred to as the criminal case).
3. Aggrieved by the institution of the criminal case, the Petitioners herein filed the instant petition in which they seek various orders which in principle seek to have the criminal suit in respect of the issues relating to the plot Mavoko Municipality LR 19150/114 Mlolongo (the suit property).
4. On their part the petitioners seek the following orders:
 - (a) Spent.
 - (b) Spent.
 - (c) **Pending the hearing and determination of the petition, the criminal proceedings in Chief Magistrates Court Machakos (CRCC 772 of 2016) be stayed.**
 - (d) **The costs of the application be in the cause**
5. In support of its case the 1st petitioner filed an affidavit sworn by the 1st petitioner, and with authority of the 2nd petitioner on 8.11.2019.
6. According to the deponent, the petitioners were arrested and arraigned in Machakos Chief Magistrates Court in CRCC 772 of 2016 and were charged with the offence of obtaining money by false pretence. It was averred that the complainant in the criminal case was Agnes Mwikali Musyoka who was a widow to the late Godwin Musyoka Kasoa; that she presented the complaint on behalf of her deceased husband even though she did not hold grant of representation.
7. It was deponed that the trial did not commence due to the ill health of the complainant and it was reported that on 16.7.2018 the

complainant succumbed to her illness. It was averred that during his lifetime, the late Godwin Musyoka Kasoa (deceased) offered to purchase the deponent's plot, the price was never agreed but the deceased advanced to him a total sum of Kshs 120,000/-. It was disclosed to the court that the sale never materialized by the time the deceased died in March 2016. The deponent averred that after the demise of the deceased, his wife demanded the transfer of the suit plot and she reported the matter to Machakos Police station which led to the petitioners being arrested. It was averred that the deceased was entitled to a refund of the money paid, however his widow refused to accept the same and opted to make a report to the police. The deponent averred that the suit plot had already been disposed to another person. It was averred that the prosecution had opted to proceed with the prosecution yet the complainant is deceased. It was averred that the facts of the case did not disclose the offence of obtaining money by false pretence and that the prosecution of the petitioners is intended to criminalize a civil dispute.

8. The deponent disclosed to the court the charge sheet and documents to be relied upon by the prosecution, copies confirming his ownership of the suit land, a copy of the cheque offered and a copy of minutes of a meeting held on 7.8.2019 vide annexures to the affidavit in support of the petition; he sought to rely on the same in his application.

9. Vide supplementary affidavit deponed on 28.2.2020, the 1st petitioner averred that the insistence of the family of the deceased that the suit land be transferred to them was a dispute that ought to be handled by a Civil Court or the Environment and Land Court.

10. The petitioners' case was canvassed vide written submissions dated 29.2.2020 sought to address the court on whether the facts supported the charge that the petitioners were facing. Counsel in placing reliance on the case of **Republic v DPP & Chief Magistrates Court Milimani (2017) eKLR** submitted that the issue in contention was a civil matter that could be handled by a Civil/ ELC court.

11. It was submitted that the ongoing prosecution of the petitioners is in breach of the petitioners' fundamental rights.

1st and 2nd Respondents' Case

12. The 1st and 2nd Respondents' case was based on the replying affidavit sworn by **C.I. Isaiah Mwiranga**, the investigating officer in the subject criminal suit.

13. According to the deponent, the 2nd petitioner received Kshs 120,000/- from the complainant as consideration for the suit property. It was averred that the suit property was instead transferred to another person and not to the deceased and his wife prompting the deceased to place a restriction on the suit land. It was averred that the complainant had given evidence in the Criminal case 776 of 2016 before her death. It was averred that the complainant had a right to refuse refund of money that was offered to her; that the petitioner ought not to use the death of the complainant as an opportunity to defeat justice. The deponent averred that the DCI and the ODPP should be left to proceed with the criminal case that is pending before the Magistrates Court. The court was urged to dismiss the application. A copy of the death certificate of the complainant, sale agreements and conveyance documents in respect of the suit property were annexed to the affidavit.

14. On record is a replying affidavit deponed on 8.6.2020 by Martin Mwangera, a prosecution counsel in the Office of the Director of Public Prosecutions. It was averred that the core issues in the subject criminal matter are of contractual nature and that Article 157(6) of the Constitution empowers the DPP to discontinue proceedings at any stage before judgement is delivered. It was averred that it was an abuse of the criminal process for the Criminal Case 772 of 2016 to proceed in the Chief Magistrates Court, Machakos.

15. On behalf of the ODPP counsel conceded to the petition and cited Article 157(6)(c) and 157(11) of the Constitution. It was submitted that the defence counsel ought to have done a letter to the Head of Station, Machakos County to have the matter handled internally. It was submitted further that the appropriate court for the gravamen of the complainant is the Environment and Land Court.

16. There is no indication of any response by the Chief Magistrates Court, Machakos.

Determination

17. I have considered the applications the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited. The singular issue to be determined is whether the petitioners have satisfied the court for grant of the orders sought.

18. Article 21(a) of the Constitution provides that "it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights."

19. Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and must perform their functions in accordance with the Constitution.

20. The office of the DPP is established by Article 157 of the constitution with a mandate to be in charge of all criminal prosecutions save for those in the court martial. Article 157(11) of the 2010 constitution is to the effect that;

"In exercising his or her powers under this Article, the DPP shall have regard to the Public interest, the interest of administration of justice and the need to prevent abuse of legal process"

21. Article 23 grants the High Court power to uphold and enforce the bill of rights. A public authority will be found to have acted unlawfully and or unconstitutionally if it has made a decision or done something; without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on

the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness).

22. The applicants/petitioners in this case are principally asking the court to interfere with the authority of the DPP's office and the Chief Magistrates office on grounds that the DPP, DCI and Chief Magistrate have propagated the petitioners being subjected to criminal proceedings and have alleged that their actions have raised issues of breach of the applicants' constitutional rights.

23. It should be noted that a Constitutional court has been warned against challenging criminal proceedings in a civil court. This court being a civil court cannot delve into propriety of criminal proceedings in a criminal court or whether the evidence is sufficient to sustain the charges brought against the applicant. The House of Lords held in **Imperial Tobacco Ltd v Att. Gen. [1981] A.C 718** that where criminal proceedings have been properly instituted and are not vexatious or an abuse of the court process, it is not a proper exercise of the court's discretion to grant a declaration to the defendant in those proceedings that the facts alleged by the prosecution do not in law prove the offence charged.

24. In addition, the court of Appeal in the case of **Francis Gathungu v Kenyatta University [2018] eKLR**, observed that "*We think, with respect, that a willy-nilly attempt at constitutionalizing every common dispute must be discovered, named and rebuffed. This is by no means a manifestation of hostility towards upholding the Bill of Rights or fundamental of freedoms but rather a pragmatic approach to adjudication. The courts must be vigilant to confine constitutional determination to disputes that raise and invoke authentic and genuine constitutional questions.*" The court went ahead to cite the South African decision of **CARMICHELE vs. MINISTER OF SAFETY AND SECURITY [2001] [4] SA 938, 2001 [10] BCLR**, where the court gave guidance on the demarcation between constitutional grievances and contractual or common-law grievances, with which the court respectfully agreed;

"Where the Court determines rights asserted by a Party do not relate directly to the Bill of Rights, it may still apply the Bill of Rights to the dispute. It must always infuse any law with the general spirit, purport and objects of the Bill of Rights. The Court is not confined by the Pleadings filed by the Parties; it must be prepared to raise of its own accord constitutional issues that may affect a legal relationship, interpretation of legislation or the development of the common-law. Simply because an interpretation of a statute, or common law rule, would in the abstract raise some kind of constitutional issue does not mean Parties adopt constitutional argument in every dispute. The Court likewise need not provide a constitutional analysis of the status of common-law or piece of legislation in every case which such rule is dispositive."

25. Where a civil court has taken cognizance that the criminal proceedings before the trial court amount to abuse of process of law, proceedings pending before the trial court in such circumstances ought to be stayed till the disposal of the civil suit(s)". Lord Griffiths in **R v Horseferry Road Magistrates Ex parte Bennet [1994] 1 A.C. 42** the House of Lords stated:

".....the Judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. ... [Authorities in the field of administrative law contend] that it is the function of the High Court to ensure that the executive action is exercised responsibly and as Parliament intended. So also it should be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it. ... The Courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution."

In the same case the House of Lords held that:-

".....the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of the jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the Court's process has been abused."

26. Criminalizing land disputes has been held to be an abuse of court process and perverts the course of justice. See **Francis Kirima M'ikunyua & 2 others (suing as the Chairman, Secretary and Treasurer on behalf of Zimman Settlement Scheme Society) v Director of Public Prosecutions & 4 others [2017] eKLR**.

27. Article 157(11) of the Constitution requires the office of the DPP and his representatives to be mindful of cases that would appear to be abusing the legal process, which is very common in land disputes. This court has noted that there are instances where the state criminalizes a land dispute and an attempt to look for possible charges under the Penal Code to criminalize a civil land matter. It is true that disagreements in land matters especially land ownership have also led to commission of crimes in either defence of the land or in an effort to grab the land. It is therefore the responsibility of the court to execute its constitutional mandate of resolving disputes between the parties following the well laid legal principals of the law and procedure. Where evidence adduced before court shows that it is purely a land matter that was criminalized, by the officers of the DPP working in cahoots with the complainant, the court should pronounce itself on the criminal matter using the known standard and burden of proof and where necessary award damages for malicious prosecution against the complainants. This might deter instances of criminalizing land or civil matters because there is no justification whatsoever for criminalizing civil matters when we have functioning civil courts, delays and challenges notwithstanding.

28. This matter is even more peculiar because the complainant is deceased. In the case of **Issa Timamy v Republic [2006] eKLR**, Justice Emukule stated that "*notwithstanding the absence of any provision in law, where a complainant, pursuant to the provisions of section 88 and 89 of the Criminal Procedure Code dies, his complaint "dies" with him or it abates if he were a dead appellant" under section 360 of the said Criminal Procedure Code. I consequently direct that the Applicant and his co-accused be discharged of the charges under Nairobi Chief Magistrate's Criminal Case No. 2 of 2005.*"

29. Whereas it is true that the application seeks to suspend pending criminal proceedings until the petition is heard, I do note that a necessity has arisen to make orders that would dispense with the petition and also accord justice to the parties. This is because in view of the response by the 1st respondent, the continuance of the petition would serve no useful purpose. Indeed, the learned counsel for the 1st Respondent vide his replying affidavit castigated the prosecution of the petitioners over a civil matter which ought to be resolved in the civil courts or the Environment and Land Court.

30. In the result, the application dated 8.11.2019 is allowed as prayed in terms of prayer 3 thereof. The Petitioners are directed to approach the 1st Respondent with a view to the withdrawal and or discontinuance of the criminal case now pending before the Machakos Chief Magistrate's court and which will then inform whether the pending petition would be prosecuted or left to remain in the court shelves. Each party to meet their own costs.

It is so ordered.

Dated and delivered at **Machakos** this **30th** day of **July, 2020**.

D. K. Kemei

Judge