



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 24 OF 2020

**IN THE MATTER OF: ARTICLES 165, 23 3) (F), 40 and 22 OF THE
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOM PRACTICE AND PROCEDURE RULES 2013)**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 40 OF
THE CONSTITUTION OF KENYA AND AN APPLICATION FOR ORDERS
OF JUDICIAL REVIEW IN CRIMINAL CASE NO. 2272 OF 2019**

AND

**IN THE MATTER OF: HARASSMENT, INTIMIDATION, ARREST AND
ARRAINGMENT IN COURT FOR REASON ARISING FROM SUBDIVISION
OF PLOT MOMBASA XVI/1113 PURSUANT TO AN ORDER OF KADHIS
COURT WHICH CONTRAVENS ARTICLE 40 OF THE CONSTITUTION OF KENYA**

BETWEEN

HAMADAN FARAJ ABED EL KITHIRI.....PETITIONER

VERSUS

- 1. YUSUF KARAMA TIMIMI**
- 2. MOSES MWANIKI (POLICE CONSTABLE URBAN POLICE STATION
MOMBASA)**
- 3. THE NATIONAL POLICE SERVICE COMMISSION**
- 4. THE DIRECTOR PUBLIC PROSECUTION**
- 5. THE CHIEF MAGISTRATE MOMBASA**
- 6. THE HON. ATTORNEY GENERAL.....RESPONDENTS**

JUDGMENT

The Petition

1. By petition herein dated 7/4/2020 the Petitioner avers that on 20/4/2016, the 1st Respondent together with other beneficiaries and heirs to the estate of the late FARAJ ABED sued the Petitioner and his brother ABDALLA FARAJ in Succession Cause No. 86 of 2016, where they sought for determination of the deceased's estate, the heirs and their respective shares according to Islamic law. The Petitioner avers that the court rendered its judgement on 13/9/2017 where the 1st Respondent's petition was allowed and the court ordered that the estate be valued and the determined heirs to file their proposals on the best mode of distributing the estate. The Petitioner further avers that the 1st Respondent and indeed others were allowed to file valuations of the properties including Plot No. MOMBASA /BLOCK XVI/1113 which the Petitioner complied with but the 1st Respondent did not. The Petitioner states that after the valuations were filed the Petitioner made a request to court to be allowed to buy the estate property in question and particularly Plot No. XVI/1113 which place happened to be where the Petitioner has a small business.

2. The Petitioner states that the court on hearing the application dated 6/2/2018 allowed the Petitioner to buy the property and further ordered that **Plot No. XVI/1113** be subdivided into three portions and titles be issued in conformity to distribution of the shares to the beneficiaries. The Petitioner states that the 1st Respondent being dissatisfied with the Judgement of the Kadhis Court filed a Miscellaneous Application seeking for orders of Judicial Review which application he withdrew soon thereafter with no orders as to costs after the Petitioner revealed to court that the 1st Respondent is also a party in a pending appeal which seeks to challenge the same Judgement of the Kadhis Court. The Petitioner avers that the 1st Respondent, determined to continue harassing the Petitioner decided to take another action and reported a criminal complaint to the Police which the 2nd Respondent purportedly investigated being a complaint of forgery and alteration of documents leading to subdivision of Plot No. XVI/1113. The Petitioner was arrested and arraigned in court to face a criminal charge in Criminal Case No. 2272 of 2019 where the 1st Respondent is indicated as the complainant and the 2nd Respondent as the Investigating Officer.

3. The Petitioner states that he is facing a criminal charge as part of 1st Respondent's campaigns to harass him which efforts have been given a boost by the 2nd Respondent who has failed to appreciate the constitutional powers of the Kadhis Court to determine issues of succession and particularly in this matter where it is the 1st Respondent who has sued the Petitioner and the Petitioner believes that the criminal process is being used unfairly in a matter which is purely civil to aid the 1st Respondent illegal imaginations. The Petitioner states that the issues on plot No. XVI/1113 are yet to be ventilated in the appeal which is pending before the High Court, therefore it is premature for the 4th Respondent give consent to charge and prosecute the Petitioner with forgery and altering documents with regard to Plot No. XVI/1113. Further the Petitioner states that the subdivision with regards to the property No. XVI/1113 was ordered by the court and the court also ordered that for purposes of the subdivisions among the heirs, the production of the original title of Plot No. XVI/1113 be dispensed with and as a result of the orders given by the court, a survey was done creating three titles and the land registrar Mombasa issued the titles and two of the titles are in the name of the 1st Respondent.

4. The Petitioner states that with the order of the court stating the above, the Petitioner did not need to sign any documents to facilitate the subdivision for reason that the same was being done pursuant to a court order and the surveyor acted on the said order to do the subdivisions.

5. The Petitioner avers that the 1st Respondent knowing that the Petitioner has a business in this particular property has resolved to frustrate him and disturb his quite possession and enjoyment of his property subjecting him to several suits and abusing the court process and the 2nd Respondent has been roped into this to assist the 1st Respondent to accomplish his ill motives.

6. Further, the Petitioner avers that the Respondents herein are limiting the inherent right of the Petitioner to own property, enjoy and have quite possession of the same which is provided for under Article 40 of the Constitution.

7. The Petitioner therefore prays for the following orders:

(a) A declaration that the 1st, 2nd, 3rd 4th and 5th Respondents are limiting

and contravening the rights of the Petitioner in regard to Plot No. XVI/MOMBASA BLOCK/1536 original XVI/Mombasa Block/1113 in breach of Article 40 of the Constitution.

(b) An order for Certiorari quashing the decision of the 4th Respondent to

charge and quash the charges preferred on the Petitioner in Criminal Case No. 2272 of 2019.

(c) An order for prohibition prohibiting the 3rd Respondent from acting on

the complaint by the 1st Respondent in regard to the subdivision of Plot No. Plot No. XVI/1113 or its subsequent subdivisions.

(d) An order for prohibition against the 4th Respondent from prosecuting

the Petitioner in criminal case no. 2272 of 2019 with regards to subdivision on Plot No. XVI/1113.

(e) An order for prohibition against the 5th Respondent from hearing

Criminal Case No. 2272 arising from subdivisions Plot No. XVI/1113.

(f) An order for Certiorari quashing the proceedings in Criminal; Case No.

2272 of 2019 pending before 5th Respondent

(g) The court to be pleased and award compensation in terms of general

damages to the Petitioner to be paid by the respondents jointly and severally.

(h) The court to award costs of the Petition

(i) The court to award any other remedy and/or order it considers fit in the

circumstances of this case

The Response by 1st Respondent

8. The 1st Respondent opposes the petition vide a Replying Affidavit sworn by himself on 22/5/2020.

9. The 1st Respondent's case is that whilst the Petitioner has opted to seek refuge to this court, he has at the same time opted to deliberately conceal from this court the actual factual basis upon which his prosecution in **Criminal Case No. 2272 of 2019 Republic vs. Hamdan Faraj Abeid E. Kithiri** stands; that to hoodwink this court, the Petitioner has intentionally concealed to this court the basis of the 1st Respondent's complaint to Makupa Police Station and the subsequent investigation, arrest and prosecution of the Petitioner being the documents alleged to have been signed by the 1st Respondent and his deceased grandfather who died way back in 1983; that the Petitioner has also deliberately chosen to conceal to this court the fact that, it is through the aforesaid documents marked YKT1 and YKT2 that the Chief Land administration officer, Mombasa acted upon to sub divide the parcel of land known as MI/XVI/1113 into three portions; that the Petitioner has further failed to disclose to this court that he, the Petitioner, is a beneficiary to the aforesaid illegal sub division as he is now the holder of title known as Mombasa/Block XVI/1536 issued on the 5/11/2018; that the Petitioner/Applicant has further concealed from this court that, the 1st Respondent and his late brother Mohamed Katama Abeid are the owners of the parcel of land known as MI/XVI/1113 that was subjected to the illegal subdivision and in which the 1st Respondent's signature was forged and the Petitioner herein benefited from the said subdivision.

10. The 1st Respondent states that the Petitioner's prosecution has nothing to do with Kadhis Court Succession Cause No. 86 of 2016 and Family appeal No. 30 of 2017 as the same are civil matters which the 1st Respondent is legally pursuing, and that the Petitioner has not demonstrated an imminent danger or actual threat to his fundamental rights if the orders sought are not granted; that the Petitioner is only making omnibus allegations of harassment, intimidation and arrest without specification on which of his rights are in actual danger of being violated; that the Petitioner has failed to disclose to this court that upon arrest he was granted police bond and subsequently a cash bail upon arraignment which indeed confirms that the due process of law was followed; that the 1st Respondent's complaint was based on forgery and has nothing to do with the ongoing succession matter.

11. The 1st Respondent also filed a notice of Preliminary Objection on 22/5/2020 stating that the petition does not raise any constitutional issues to warrant the exercise of this court's constitutional jurisdiction.

Response by 4th Respondent

12. The 4th Respondent filed Grounds of Opposition on 19/6/2020 stating that the orders sought by the Applicant/Respondent are premature in nature; that the 2nd and 4th Respondents have powers under Article 157 and Article 245 of the constitution to investigate and prosecute any criminal offence; that courts cannot stop the 4th Respondent from charging the Petitioner where there is clear evidence, and that the orders sought vide this petition precisely seek to do so; that there is no material evidence presented by the Petitioners to demonstrate that the Respondents have violated the constitutional rights of the Petitioner; that the orders sought if granted would ground investigations and prosecution of a matter of great public interest and that any action so far taken by any of the 4th Respondent does not contravene the constitution or any other law and therefore the petition/application is brought without merit, is calculated to interfere with enforcement of criminal law and the protection of the rights of the complainant.

13. The 2nd, 3rd and 6th Respondents did not file a response to the petition but filed their submissions.

Submissions and Determination

14. Parties filed submissions which were briefly highlighted. I have carefully considered the submissions. In my view, the only issue for determination is whether this court can stop a criminal process founded on allegation of fraud, and especially if that allegation of fraud appears discernable on the face of the record before the court.

15. From the record herein, the following facts emerge:

A complaint was made by the 1st Respondent to the police vide OB 69/02/08/2019 to the effect that his signature and that of his deceased father had been forged by the petitioner herein to facilitate subdivision of Land Parcel No. MOMBASA / BLOCK XVI / 113. Investigations which were conducted by Police revealed that land parcel No. MOMBASA/BLOCK XVI/113 was subdivided in the year 2018. Among the documents submitted to the director of survey by the Petitioner was a scheme of plan dated 14/7/2018 referenced C/CAD/4895 which bore signatures against the names of MOHAMED KARAMA ABEID and YUSUF KARAMA TIMIMI. The signatures on document reference No. C/CAD/4895 and dated 14/7/2018, were compared with the known signatures of Yusuf Karama Timimi and Mohamed Karama Abeid and found to have been made by authors other than Yusuf Karama Timimi and Mohamed Karama Abeid. The investigation file was forwarded to the 4th Respondent who subsequently reached the decision that the Petitioner forged the signature of Yusuf Karama Timimi and Mohamed Karama Abeid. According to the record, the Petitioner procured and/or caused the subdivision of land parcel No. MOMBASA/BLOCK XVI/113; Mohamed Karama Abeid died on 3/10/1983 yet the document reference No. C/CAD/4895 is dated 14/7/2018. The signatures on the Scheme Plan referenced C/CAD/4895 and dated 14/7/2018, were compared with the known signatures of Yusuf Karama Timimi and Mohamed Karama Abeid and found to have been made by authors other than Yusuf Karama Timimi and Mohamed Karama Abeid; the Petitioner is the beneficiary of the subdivision process.

16. Clearly, the above facts establish a criminal process which must be determined on its own facts, and which this court should be reluctant to interfere with.

17. It is not prudent to interfere with what on the face of record is a properly founded criminal process. Such interference can only be allowed where there is no justification for the prosecution, or where an otherwise justified prosecution process has been hijacked for ulterior motives. Under Article 157 of the Constitution the 4th Respondent has power to among others: -

- a) Institute and undertake criminal proceedings against any person before any court (other than a Court Martial) in respect of any offences alleged to have been committed;
- b) Take over and continue any criminal proceedings against any person before any court that have been instituted or undertaken by another person or authority, with the permission of the person or authority;
- c) With permission of the court, discontinue at any stage before Judgment is delivered any criminal proceedings instituted by the Director of Public Prosecution under paragraph b of Article 157(6) of the Constitution.

18. The Petitioner herein seeks to use these proceedings to usurp the 4th Respondents Constitutional mandate to investigate and undertake prosecutions. In **Bitange Ndemo vs. Director of Public Prosecutions & 4 others [2016] eKLR** the court while dealing with a similar attempt held that:

“... a court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecutions in the exercise of the discretion conferred upon that office.”

19. The court in **Bitange Ndemo vs. Director of Public Prosecutions & 4 others (supra)** went on to restate Article 157 (10) of the Constitution of Kenya which provides that: -

“10) The Director of Public Prosecutions is also empowered to work without being under the direction of or control of any person or authority and to apply all principles and values of the Constitution and to be subject only to the Constitution.”

20. While this court is unable to gauge the merits of the criminal prosecution, and strength of the prosecution’s case, the said prosecution is lawfully founded on allegations of fraud and the matter shall proceed for determination in the criminal court.

21. From the foregoing it is the finding hereof that the petition has not been proved. The same lacks merit and is dismissed with costs to the Respondents.

Dated, Signed and Delivered at Mombasa this 29th day of July, 2020.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Ms. Mwanzia holding brief Oddiaga for Petitioner

Mr. Fedha for DPP

Mr. Mwadzogu for 1st Respondent

Mr. Makuto for 2nd and 3rd Respondents

Mr. Kaunda Court Assistant