



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 19 OF 2017**

**MARK KAZUNGU MRAMBA.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner, Mark Kazungu, has filed the petition dated **3rd May 2017** to challenge the decision of the respondents to prosecute him with the offence of forcible detainer contrary to section 91 of the Penal Code in Kilifi Senior Principal Magistrate Court Criminal Case No. 422 of 2016. The proceedings relate to the alleged forcible detainer of land parcel. L. R. No. 20252/3 Kilifi which the petitioner alleges is the subject of ELC Case No.98 of 2017(O.S) – Mark Kazungu Mramba vs. Benedette Mwikali Mugambi.

2. The petitioner alleges violation of his constitutional rights by the respondents as a result of the institution of the said criminal proceedings against him in light of the existence of a civil case in which he and the complainant in the criminal proceedings are parties. He prays to the Court to stop the criminal proceedings and to grant him the following orders:

- a. An order that the criminal proceedings against the petitioner before the Kilifi Senior Principal Magistrate Court Criminal Case No. 422 of 2016, are a nullity and should be quashed.*
- b. The respondents be permanently restrained from prosecuting the petitioner or any member of the public in respect of offences related to parcel no LR. 20252/3 situate in kilifi .*
- c. A declaration that Section 91 of the penal code is unconstitutional*
- d. A declaration that the continued enforcement of section 91 of the penal code by the 1<sup>st</sup> Respondent against the Petitioner would be unconstitutional.*
- e. Any other further relief that the Court shall deem just and fit to grant.*
- f. Costs of this petition.*

**The Petitioner's Case**

3. The petitioner's case is set out in his petition, the affidavit in support of the petition sworn on **3rd may 2017**; his further affidavit sworn on 6<sup>th</sup> June, 2018, and written submissions dated 11<sup>th</sup> June, 2018.

4. The petitioner deposes that sometime in 2010 one Richard Simon Kakwili sued him as a 3<sup>rd</sup> defendant for vacant possession in Kilifi case no.540 of 2010 but the suit was dismissed on the **19<sup>th</sup> June 2012**

5. The Petitioner further contends that the complainant in Criminal case no.422 of 2016 is the wife to the late Richard Simon Kakwili and is the registered owner of LR.No.20252/3 Kilifi.

6. The petitioner avers that the criminal proceedings of Forcible Detainer against him are an abuse of the court process and waste of judicial

time since civil proceedings had already been initiated against him and there has to be an end in litigation. The petitioner avers that the criminal case is meant to harass him as the matter can be conclusively determined by the Environment and Land Court.

7. In his Further affidavit sworn on 6<sup>th</sup> June 2018, the petitioner avers that there is ELC Case no.98 of 2017 (O.S) pending between himself and the complainant in the Criminal case no.422 of 2016 and there is an injunction against the Complainant.

8. The petitioner contends that the complainant in Criminal case no.422 of 2016 has exhausted all her civil remedies.

9. In his submissions, the petitioner argued that Section 91 of the penal code is unconstitutional and would only be sustainable if it were consistent with the provisions of the constitution namely Articles 24, 39 and 40.

10. The petitioner also in response to the Respondent's submission on the powers of the Director of public prosecution averred that even though the law gives the DPP discretion to decide whether to prosecute or discontinue criminal proceeding, that discretion is not absolute and can be checked by this Court where there is abuse. He relied on the decision in **Kuria & 3 others vs. Attorney General and Peter D'Costa vs. Attorney General & Another No.83/2010(u.r)** to support his submission that this Court has powers to intervene and interfere with the 1<sup>st</sup> Respondent constitutional mandate.

11. The Petitioner also relied on the decision in **Lee Mwathi Kimani vs The Director of public prosecution and Other PETITION NO.161 of 2014** to argue that in as much as section 193A of the Criminal Procedure Code allowed for civil and criminal proceedings based on the same subject matter to run concurrently, the court is bound to ensure that its process is not abused and also to protect itself against the abuse. It was his submission that it is an abuse of the court process for the 1<sup>st</sup> Respondent to mount criminal prosecutions to secure civil claims when such cases can be easily resolved in civil processes without putting his liberty at risk.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Case.**

12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents both relied on their Grounds of Opposition to the Petition dated **31<sup>st</sup> may 2018** and **3<sup>rd</sup> May 2018** respectively and the 1<sup>st</sup> Respondent submissions dated 2<sup>nd</sup> July 2018.

13. Mr. Isaboke for the DPP submitted that the present petition is defective, incompetent, misconceived, without merit, frivolous and an abuse of the Court process. The DPP's case is that the petition is a mere attempt to subvert justice and a dilatory tactic with regard to criminal proceedings in kilifi.

14. The DPP also submitted that the Petitioner is ignorant of the Constitutional mandate and the doctrine of separation of powers.

15. In his submission counsel for the 1<sup>st</sup> Respondent submitted that the DPP acted within its constitutional mandate guaranteed under Article 157(4), 157(6) (a) and Article 157(11) by charging the Petitioner in Criminal case no.422/16.

16. The counsel for the 1<sup>st</sup> Respondent submitted that **Annexure MKM 3(a)(b) and (c)** of the Petitioner's Further affidavit sworn on the **6th June 2018**, is crystal clear that the petitioner moved the Malindi Environment and Land Court on the **3rd May 2017** which is the same day this instant petition was filed in this Court yet the criminal proceedings in **422 of 2016** were initiated on the 23rd November 2016 which is before the civil proceedings in **ELC OS 98 of 2017** being relied on currently were instituted.

17. Counsel relied on the provisions of section 193A of the Criminal Procedure Code to submit that there is no bar to civil and criminal proceedings on the same subject matter proceeding simultaneously and in any event the petitioner has recourse in the form of Appeal, review or revision in a superior court should he be aggrieved by the trial court decision.

#### **Determination**

18. I have considered the petition and submissions I raise the following issues for determination

A. Whether the section 91 of the penal code is unconstitutional.

B. Whether the prosecution of the petitioner amounts to a violation of his Constitutional rights.

#### **a. Whether the prosecution of the petitioner amounts to a violation of his constitutional rights.**

19. In **Anarita Karimi Njeru vs Republic [1979] 1 KLR 154** where a party alleges breach of fundamental rights, he has an obligation to identify with precision the rights violated and how they have been violated. The petitioner has alleged violation of several of their Constitutional rights under Articles 24, 39 and 40. The petitioner has not established how these violations have occurred and with regard to the offence he is charged with. The Petitioner in his supporting affidavit sworn on the **3rd May 2017** avers in paragraph 8 that the complainant is the registered owner of the subject property and a title deed has been annexed to that effect.

20. The temporary injunction being relied on by the petitioner was entered into by the consent of both the complainant and the petitioner and was issued on the **11<sup>th</sup> May 2017** when the criminal case was ongoing. The issue now is whether the DPP acted in breach of his Constitutional mandate in charging the petitioner. The Constitution empowers the DPP to exercise prosecutorial powers in criminal cases. Article 157(11) of the Constitution directs that in exercising his powers the DPP "shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process". The powers of the DPP are thus exercisable within

the parameters of the Constitution and statute. Where the powers are exercised in a manner that abuses the legal process, and violates public interest or are contrary to the administration of justice, the courts will step in and quash the DPP's actions.

21. The petitioner has averred that there exists the civil case that is pending determination and in the same suit there are orders of injunction against the Complainants from interfering with the status quo of the subject property. Going through Annexure **MKM 3(a)** in the Petitioners Further affidavit sworn on the **6<sup>th</sup> June 2018**, it is crystal clear that the petitioner moved the Malindi Environment and Land Court on the **3<sup>rd</sup> May 2017** which is the same day this instant petition was filed in this court yet the criminal proceedings in 422 of 2016 were initiated on the **23<sup>rd</sup> November 2016** which is before the civil proceedings in ELC OS 98 of 2017 being relied on currently were instituted.

22. The Petitioner is therefore misleading this Court by alleging that there existed civil proceeding when the criminal proceeding were preferred against him under section 90 of the Penal code.

23. The petitioner's position is not supported by the law. As correctly pointed out by the Respondents, Section 193A of the Criminal Procedure Code, Cap. 75 legitimizes concurrent criminal and civil proceedings by providing that:

***“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”***

24. The law with regard to the circumstances under which a court can interfere with a prosecution has been echoed in the case of **Michael Monari and Another vs Commissioner of Police and 3 Others Miscellaneous Application No. 68 of 2011**.

25. In refusing to stop a prosecution against the applicant in the matter, **Warsame J** expressed the following view:

***“It is not the duty of the Court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”***

26. In **Republic v Director of Public Prosecutions & 2 others Ex-parte Joseph Gathuku Kamuiru & another [2014] eKLR** it was stated that:

***“Whether a prosecution will be quashed or prohibited will therefore depend on the facts of each case. The existence of civil proceedings arising out of the same set of facts is, however, not in itself a bar to commencement or continuation of criminal proceedings. Section 193A of the Criminal Procedure Code, Cap 75 is clear on this.”***

#### **1. Whether the section 91 of the penal code is unconstitutional.**

27. **Section 91 of the Penal Code provides as follows:**

***“91. Any person who, being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanor termed forcible detainer.”*** (Emphasis added)

28. The provisions of section 91 require a person to be in possession of land and to hold onto it “*without colour of right*” against a person “*... entitled by law to the possession of the land*” in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace.

29. In constitutional interpretation, there is a rebuttable presumption that legislation is constitutional, the onus of rebutting the presumption rests on those who challenge that legislation's status. See **Ndyanabo v Attorney General [2001] 2 EA 485** and **South Dakota v North Carolina [1940] 192 US 268**.

30. Further, in the case of **Hambarda Wakhana v Union of India AIR (1960) AIR 554** cited with approval in the case of **Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Of Nairobi Government & 3 others [2013]eKLR**, the Indian Supreme Court observed that:

***“In examining the constitutionality of a statute it must be assumed the legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment.”***

31. The Petitioner has totally failed to demonstrate to this Court why it believe section 91 of the penal code is unconstitutional. I consequently find nothing unconstitutional with Section 91 of the penal code.

32. From the foregoing it is the finding of this Court that the 1<sup>st</sup> Respondent has neither violated the petitioner's rights nor abused its constitutional powers under Article 157 of the Constitution. Further there is no evidence of the alleged unconstitutionality of section 91 of the Penal Code. For these reasons the petition herein is dismissed with costs to the Respondents.

33. Orders accordingly

**Dated, Signed and Delivered in Mombasa this 24<sup>th</sup> day of January, 2019.**

**E. K. O. OGOLA**

**JUDGE**

In the Presence of:

M/s Kipsang holding brief Nyange for Petitioner

M/s Kiti for A.G.

M/S Kiti holding brief M/s Mutua for DPP

Court Assistant Kaunda