



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 173 OF 2018

IN THE MATTER OF ARTICLES 20, 21, 22, 23, 47, 48 & 50 OF

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER ARTICLE 47, 48 & 50 (1)

AND

IN THE MATTER OF THE ADVOCATES ACT

BETWEEN

PETER KAIMBA KIRIMO.....PETITIONER

-V-

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. Before me is a Constitutional Petition brought pursuant to **Articles 20, 21, 22, 23, 47, 48 and 50 of the Constitution of Kenya** in which the Petitioner seeks various declarations. His case is that he is an Advocate of the High Court of Kenya and that in the course of his business as such, and particularly on 24/4/2018 while in his chambers, he had the occasion of drawing a sale agreement of a parcel of land described as **KIRIMARA/KITHITHINA/BLK 1/102** between one **Erastus M'ikirimania M'Kiuga** (vendor) and **Erick Ngunyi Muriuki** (purchaser).
2. It was his case that the parties were not known to him before the transaction and that they only became known to him through their identification cards at the time of the transaction and in the course of his business and practice as an advocate. That the parties agreed on the consideration of Kshs 6,000,000/= and a deposit of Kshs 4,200,000/= was paid to the vendor with the parties agreeing that the balance of Kshs 1,800,000/= would be paid upon transfer on or before 30th May, 2018.
3. He further contended that the purchaser confirmed to him that he had visited the land with a view to ascertain the beacons and boundaries whereupon, the petitioner drew the agreement, witnessed and duly stamped the same in authentication thereof. Two weeks later, police officers attached to the DCI Timau police station visited his chambers and informed him that they were investigating an issue to do with the said transaction. They subsequently told him that he was to be charged in court on 17.9.2018 with a charge of conspiracy to defraud.
4. He therefore wondered why he was being charged for a crime he had no idea about since his duty was that of drawing the agreement. He contended that in the circumstances, the Respondent was acting arbitrary. That the predominant purpose of the decision to charge him was to embarrass and malign him and satisfy the complainant and not because he had committed any offence.
5. The Petition was opposed by the Respondent vide a replying affidavit sworn by **Gitonga Muriuki**, a Senior Principal Prosecution Counsel on 2nd November 2018. He deposed, inter alia, that upon completion of investigations, it was established that **Isaac Kinyua**, the purported vendor, had impersonated one **Erastus M'ikirimania M'Kioga** the real owner of the land in question. That the said impostor was not acting alone but in cahoot with others who included the petitioner.

6. That investigations had disclosed that the impostor and the petitioner were not only known to each other but had previous dealings between them prior to the agreement date, the subject of this Petition.

7. On 18th December, 2018, the court allowed the purchaser, **Eric Ngunyi Muriuki**, to be enjoined in these proceedings as an interested party. The court directed him to respond to petition within 7 days and the petitioner to respond to his contestations, if any. The parties were further directed to file their respective submissions.

8. Despite as aforesaid, the interested party did not file any response to the petition. Further, only the petitioner and the respondent who filed their written submissions. Since the interested party failed to respond to the petition to allow the petitioner respond thereto, it will be highly prejudicial to refer to any of his contentions that were contained in his application for joinder as the petitioner was not accorded any opportunity to respond thereto. Accordingly, the court will not refer to them.

9. **Mr. Mwanzia, Learned Counsel** for the petitioner took issue with the fact that the Replying Affidavit was sworn by a Prosecution Counsel and not the investigations officer. He submitted that it was in bad faith and malicious to state that the petitioner knew the vendor only because he drew the agreement. He submitted that the parties came to the petitioner's office together looking for a lawyer and that it was a matter of judicial notice that a duly qualified advocate, such as the petitioner, has known chambers a matter that is in the public domain.

10. Counsel further submitted that the predominant purpose of the intended criminal proceedings was to harass and embarrass the petitioner which was an abuse of court process at the whims of the complainant. Learned Counsel relied on the authorities of **Chuka HC PET. No. 1 of 2015 Lucy Karauki Kirambia vs. DPP & Anor (UR)** and **Jadiel Karithi vs. OCS Meru Police Station & 2 Others (2016) eKLR** in support of his submissions.

11. For the respondent, **Mr. Gitonga, Learned Senior Public Prosecution counsel** submitted that, the petitioner and the other suspects were well known to each other prior to the transaction. This was on the allegation that the interested party was introduced to the impostor for the first time inside the petitioner's office.

12. He further submitted that at all material times, the land certificate was in the possession and custody of the petitioner and that the whole transaction was stage managed at the petitioner's office with his knowledge and with the intention to swindle the complainant. He relied on the Court of Appeal decision in **Director of Public Prosecutions vs. Martin Maina & 4 Others [2017] eKLR** in support of his submissions.

13. **Mr. Kirimi, Learned Counsel** for the interested party appeared at the hearing and addressed the court. He associated himself with the submissions by the respondent and observed that, the privilege of being an advocate could not be used to bar a criminal charge. That the petitioner was privy and complicit in the scheme to defraud the interested party.

14. I have carefully considered the petition, the rival submissions by the parties and the authorities relied on by Learned Counsel. The issue before court is whether in deciding to charge the petitioner with an offence of conspiracy to defraud, the respondent is acting in abuse of his powers.

15. From the onset, it should be noted that the respondent enjoys unlimited power in the execution of duties of his office. He is not to be under the direction of anyone nor does he require anyone's consent to institute criminal proceedings. **Article 157 (1) of the Constitution of Kenya** which establishes the office of the respondent is crystal clear on this.

16. In the case of **Director of Public Prosecutions vs. Martin Maina & Others [2017] eKLR**, the Court of Appeal held:-

“There is no dispute that under Article 157 (10) of the Constitution the Director of Public Prosecutions (DPP), the appellant herein, does not require the consent of any person or authority to commence a criminal proceeding and is not under the direction or control of any person or authority in the exercise of his constitutional powers or functions. The DPP is only subject to the Constitution and the law.

However, in exercising his powers, the DPP should 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”.

17. In the case of **State of Maharashtra & Others vs. Arun Gulab & Others Cr. A. No. 590 of 2017**, the court sated:-

“The power of quashing criminal proceedings has to be exercised sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of allegations made in the I.F.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extra-ordinary and inherent powers of the court does not confer an arbitrary jurisdiction to the court to act according to its whims or caprice. However, the court, under its inherent powers, can neither intervene at an uncalled stage nor can it ‘soft pedal the course of justice’ at a crucial stage of investigations or proceedings”.

18. In **Musyoki Kimanthi –vs- Inspector General of Police & 2 others [2014] eKLR**, after setting out the provisions of Article 157 (4)(6) and (11) of the Constitution, Majanja J. held: -

“In light of the mandate conferred upon the DPP in Article 157 of the constitution, the High Court therefore ought not to

interfere with the above mandate unless cogent reasons are given thus, that the DPP has acted without due regard to public interest, against the interest of the administration of justice and has not taken account of the need to prevent and avoid abuse of the court process. Although the DPP has the discretion to determine which complaint should lead to criminal prosecution, the High Court may intervene where that discretion has been abused or where the effect of the proceedings results in the abuse of the court process.”

19. In Justus Mwenda Kathenge vs Director of Public Prosecutions and 2 Others, High Court Petition No 372 of 2013 the court stated:-

“It is now trite law that Courts cannot interfere with the exercise of the above mandate [exercise of prosecutorial powers] unless it can be shown that under Article 157(11);

(i) he has acted without due regard to public interest,

(ii) he has acted against the interests of the administration of justice,

(iii) he has not taken account of the need to prevent and avoid abuse of Court process”.

20. Such is therefore how sparingly will the courts interfere with the exercise of the powers of institution and prosecution of criminal proceedings by the respondent. That protection is well entrenched in the Constitution. The instances when such powers are to be interfered with are very limited.

21. The case before court is simple; on 24th April, 2018, the petitioner was in his office when the interested party and other people came to his office. They indicated they required his services as an advocate as they wanted to enter into a land sale transaction. He confirmed their particulars from their identity cards and the particulars of the subject whereupon he prepared a sale agreement. The same was executed in his presence and a sum of KShs. 4,200,000/= exchanged hands in cash. He was paid for his services. Later he was called to the Timau Police Station where he recorded his statement. He was subsequently advised that he would be charged with a charge of conspiracy to defraud.

22. In a detailed affidavit filed on 2nd November, 2018 sworn by Gitonga Muriuki a Senior Principal Prosecution Counsel, it was contended that the respondent had perused the police case file and that investigations revealed that the vendor and the petitioner were known to each other. That they had previous dealings between them prior to the said sale agreement. That before execution of the subject sale agreement, the forged land certificate bearing parcel number **Kirimara/Kithithina/Block 1/102** was in the possession and custody of the petitioner. The deponent did not however, disclose the source of his information. Neither was it disclosed the sort of dealings the petitioner and the vendor had had therebefore.

23. On the other hand, the petitioner contended that the parties were not known to him prior to the material date. That he only knew them through their identification cards and the nature of his business and practice as an advocate when they presented themselves before him on the material date. His sentiments were supported by **Onesmus Mwigirwa**, then a legal assistant cum clerk in his law firm. **Onesmus Mwigirwa** stated that the parties came together and the title deed was given to him on 23.4.2018, by the vendor who picked it from his coat and that he was carrying it with him. These positive averments were not denied by the interested party who the court had given the opportunity to file a response to the petition.

24. I am aware that it is not within the purview of this court to minutely examine the parties’ contestations with a view to resolve them here. That is the jurisdiction of the trial court. All that this court need to satisfy itself is that there is a probable cause for the respondent to charge the petitioner.

25. In the circumstances of this case, where an advocate contends that the parties came to his office in search of his legal services which fact is not denied; where the advocate vouches that he was at all times ready to co-operate and be a prosecution witness; where no evidence whatsoever has been placed before court by either the investigations officer by way of statements or the report originally made by the complainant to the police, where all the court has are bare statements from the prosecutor, can it be said that there is a probable cause for the respondent to charge the petitioner? I doubt it.

26. The Petitioner’s contention that the parties in the agreement were not known to him before the agreement and that he satisfied himself over their identification through their national identity cards was not rebutted by the respondent.

27. The petitioner stated that the charges are meant to harass him and not for the cause of justice. That if he takes a plea, his career as an advocate and legal business will irreversibly be affected. These allegations were never denied or challenged. It is common knowledge that once such a charge is preferred against an advocate with the sensational reporting that goes with it, a career can be ended. By the time such advocate is cleared, there may be no practice to talk of. In any event, the sensational reporting at plea may never be there at acquittal.

28. To my mind, there should be more than just the contention that the scene of crime was the advocates’ office. What was to be undertaken was a legal transaction that will ordinarily take place in an advocate’s office. Save for mere statements by the learned Senior Public Prosecution Counsel, there is nothing to connect the petitioner to the impostor. Once again, it must be had in mind that undergoing a prosecution proceeding is not a walk in the park for a public figure such as an advocate. It can have devastating consequences.

29. The Court of Appeal in the case of DPP vs. Maina Martin & 4 Others (Supra) cited with approval the principles set in the State of Maharashtra Case (Supra) when criminal proceedings will be prohibited to be as follows: -

“1) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or the quashing of the impugned proceedings would secure the ends of justice;

2) ...

3) Where the allegations in the First information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the alleged offence; and

4) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge”.

30. As earlier stated, there was no evidence produced of the nature of ‘first information report’ that was made to Timau Police Station or complaint for the court to satisfy itself whether they constituted the offence of conspiracy. Secondly, the evidence that was produced under oath was that of the petitioner. That he did not know the vendor and the purchaser in the transaction or the people they came with. If his role was purely that of an advocate, how would he have conspired with a party he did not know to defraud the other?

31. It should be recalled that, while the court enjoined the complainant in these proceedings as an interested party, he failed to file a response to the petition as directed. This denied the petitioner an opportunity to answer any allegations that the complainant might have had as had been evinced in the affidavits in support of the application for joinder. The person who should have connected the petitioner with the alleged conspiracy is the interested party. He failed to do so.

32. As was rightly stated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001:**