



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 20 OF 2019

PRASUL JAYANTILAL SHAH.....1ST PETITIONER

MEGVEL CARTONS LIMITED.....2ND PETITIONER

VERSUS

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE..1ST RESPONDENT

THE OFFICER IN CHARGE ATHI RIVER POLICE STATION.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

DIESEL SELFCARE LIMITED.....4TH RESPONDENT

RULING

Introduction

1. This ruling is in respect of an application filed by the petitioners vide notice of motion dated 28th June, 2019 that is brought under Articles 22(1), 23(1) & (3) (b) & (c) of the Constitution of Kenya, 2010 and Rules 19 of the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 .
2. The 1st Respondent in the petition is the Inspector General of the National Police Service of the Republic of Kenya an independent office created under Article 245 of the Constitution of Kenya.
3. The 2nd Respondent is the Officer in charge, Athi River Police Station, sued in his capacity as the officer in charge of the Police station charged with handling the suit that is the subject matter of the petition.
4. The 3rd Respondent is the Director of Public Prosecutions an office established under Article 157 of the Constitution (hereinafter referred to as the DPP).
5. The 4th Respondent, Diesel Care Limited (hereinafter referred to as Diesel) is a limited liability company.
6. What provoked these proceedings was the criminal proceedings instituted by Diesel in the PM's Court against the 1st petitioner at Mavoko law courts *vide Criminal Case No. 238 of 2019 Republic v Prasul Jayantilal Shah* (hereinafter referred to as the criminal case).
7. Aggrieved by the vicissitudes of the criminal case, the Petitioners herein filed the instant petition in which they seek various orders which in principle seek to have their case in respect of Civil Appeal No 70 of 2018 recognized based on the fact that orders of stay of execution had been granted in favour of the petitioners, *a priori*, issues relating to the ownership of LR No. 25064 (I.R. 85088) situated at Mavoko sub County (the suit property).
8. On their part the petitioners seek the following orders:

(a) The application be certified as urgent and heard ex parte in the first instance.

(b) Pending the hearing and determination of this application *inter partes* a conservatory order does issue suspending the proceedings in the criminal case.

(c) Pending the hearing and determination of the application *inter partes*, a conservatory order of prohibition do issue prohibiting the respondents herein by themselves, their servants, agents from arresting, harassing or intimidating the applicants on issues touching the ownership of LR No. 25064 (I.R. 85088) situated at Mavoko sub County.

(d) Pending the hearing and determination of the petition a conservatory order does issue suspending the proceedings in the criminal case.

(e) Pending the hearing and determination of the petition, a conservatory order of prohibition do issue prohibiting the respondents herein by themselves, their servants, agents from in anyway interfering with the petitioner's peaceful possession of property LR No. 25064 (I.R. 85088) situated at Mavoko sub County.

1st Petitioner's Case

9. In support of its case, the 1st petitioner filed an affidavit sworn by the 1st petitioner who is the managing director of the 2nd petitioner on 28th June, 2019.

10. According to the deponent, the 2nd petitioner built a factory on the suit property and he and the 4th Respondent were embroiled in a property dispute over the suit property vide **Machakos High Court ELC No. 166 of 2011** that was decided against the petitioners prompting them to file **Civil Appeal Numbers 70 and 71 of 2018; Civil application Numbers 64 and 65 of 2018** all in the Court of Appeal.

11. It was deposed that the court of appeal allowed the applications and ordered stay of execution of the judgment and decree that stayed the findings and determination in ELC 166 of 2011 that nullified the petitioners' title to the suit property. According to the deponent, he was arrested and charged in the criminal case and the charges are in contempt of orders that were issued by the court of appeal. From the lens of the petitioners, these actions are unconstitutional, arbitrary, oppressive, unfair and unreasonable and the same have caused the petitioners to suffer prejudice.

12. The deponent disclosed to this court the said judgment and rulings of the court of Appeal vide annexures to his supporting affidavit.

13. The petitioner's case was represented orally by Counsel James Oduol who notified the court of the need to preserve the subject matter of the petition and that the petitioner was arrested in contravention of the court of appeal orders and that the court of appeal will in the fullness of time determine who is entitled to the suit property. Learned counsel submitted that the jurisdiction of the court is to prevent violation of rights and added that the actions of the DPP are intended to circumvent the stay orders and the DPP and the AG are being used as instruments to occasion the circumvention. Learned counsel added that during the hearing of the petition, they shall demonstrate how the 4th Respondent has infiltrated the offices of the AG and DPP with impunity.

14. In rejoinder, learned counsel for the petitioners further submitted that the issue of determination of title to land is vested in a civil court and not the police as per Article 162(2)(b) and Article 165(2) (d) (ii) of the Constitution. Further that in absence of a response from the DPP, the court should accept the facts by the petitioners as the correct position regarding the matters complained of.

1st and 2nd Respondent's Case

15. The 1st and 2nd Respondent's case was based substantially on the grounds of opposition filed by Thande Kuria, Senior State Counsel for the Attorney General.

16. According to Counsel, the application is intended to curtail the statutory obligation and duties of the 3rd Respondent and sought to inhibit accountability through the criminal process as per the case of **Kuria & 3 Others v A.G. (2002) 2 KLR 69**.

17. On behalf of the 1st and 2nd Respondents, it was submitted that there are three issues for determination, *to wit*; the questions of the legality of the commenced criminal proceedings against the petitioners; whether the petitioner's rights have been infringed with regards to the commenced criminal proceedings and in view of the decisions and actions of the respondents herein and more specifically the 1st and 2nd Respondents that have been complained of and whether the petitioners are entitled to the reliefs sought in the substantive notice of motion application.

18. On the 1st issue it was submitted that the criminal case should not be suspended because the proceedings were commenced in accordance with the law: the accused persons are facing charges that are prescribed by the law: that the chief magistrates court is not biased neither has it acted ultra vires the constitution or in excess of constitutional or statutory jurisdiction and that it is within the jurisdiction of the magistrates court to determine whether the petitioners have been properly and lawfully charged. Learned counsel cited a number of authorities and submitted that the petitioners have failed to present convincing reasons that would warrant interference by the court over the criminal trial of the applicants in the magistrate's court.

19. While appreciating the case of **Republic v Director of Public Prosecutions & Another Ex Parte Chamanlal Vraijal Kamani & 2 Others (2015) eKLR**, it was submitted that the application seemed to preempt the presentation of evidence and is presumptive of the findings by the trial court and that the petitioners have an opportunity to present the evidence and arguments before the trial court.

20. It was further submitted that public interest forbids the quashing and prohibiting of criminal prosecutions.

3rd Respondent's case

21. On behalf of the DPP it was submitted by Mr Machogu that article 243 of the Constitution granted the National Police Service powers of investigation. Learned counsel submitted that Article 157 of the Constitution granted the DPP powers to institute criminal proceedings and the DPP is independent and not subject to the control of anybody. He further submitted that the stay that was granted in the Court of Appeal related to the ELC matter whereas the criminal proceedings related to the outcome of investigations and that the stay did not prevent the DPP from exercising its functions. Further that during the criminal proceedings, evidence shall be tendered and there will be no prejudice because the petitioners shall be granted the opportunity to defend themselves. Learned counsel invited the court to consider Section 193(A) of the Criminal Procedure Code that provides that criminal proceedings may be instituted despite the pendency of a civil matter related to it and urged the court to dismiss the petition.

4th Respondent's Case

22. The 4th Respondent's case was based substantially on the grounds of opposition filed by Kibera and Associates Advocates as well as an affidavit sworn by Joseph Karuoro Claudio, the managing director of the 4th Respondent.

23. According to the learned counsel, the petitioners have failed to disclose any specific violations of their fundamental rights and that the finding of the ELC court prompted the criminal proceedings and as such the sufficiency of evidence of forgery and conspiracy to defraud shall be determined by the court handling the criminal case. Further learned counsel found that the petitioners have failed to demonstrate that the 1st petitioner shall not be accorded a fair trial in the Criminal Case. The affidavit sworn by John Karuoro Claudio essentially reiterated the grounds of opposition and sought that the application be dismissed with costs.

24. On behalf of the 4th Respondent, it was submitted by its counsel Mr. Kibera that at this stage the petitioners have failed to demonstrate that they have fundamental rights that have been violated and the replying affidavit sworn on behalf of 4th Respondent has given status of this matter. Counsel submitted that though the court of appeal stayed the judgement, the same has not been overturned. Counsel cited the case of Constitutional Petition 330 of 2018 (**Speedex Logistics Limited & 2 Others v Director of Criminal Investigations & 3 Others (2018) eKLR**) where it was held that at interlocutory stage, there must be demonstration of violation of rights.

Determination

25. I have considered the application the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited.

26. Before delving into the merits of the application, an issue of jurisdiction in my view was alluded to though not specifically. The issue was to the effect that this Court has no power to determine whether or not the petitioners were constitutionally charged. **Nyarangi, JA** in the case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** while citing **Words and Phrases Legally Defined** – Vol. 3: I-N page 13 held:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

In that case the Court further held:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

27. I would have to be satisfied on the issue of the requisite jurisdiction because without jurisdiction I have no option but to lay down my tools.

28. In support of this contention, reliance was placed on the Magistrates Court Act, 2015 and the Criminal Procedure Code, though no provision was cited.

29. 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.” 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.

30. 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 1995 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”

Article 157(10) of the constitution is to the effect that;

In exercise of the functions conferred on him/her by this Article, the DPP shall not be subject to the direction or control by any person or authority.

31. Article 245 establishes the command of the National Police Service and states that:

“no person may give a direction to the Inspector-

General with respect to—

(a) the investigation of any particular offence or offences;

(b) the enforcement of the law against any particular person or persons; or

(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service”

32. Nevertheless 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).

33. The applicants/petitioners in this case are mainly asking the court to interfere with the authority of the DPP’s office and the IGP’s office on grounds that the DPP and IGP have propagated the 1st Petitioner by being charged and has alleged that their actions have prejudiced the petitioners.

34. Irrationality was defined by Lord Diplock in **Council of Civil Service (1984) AC 110** as “Wednesbury reasonableness” he cited the decision in **Associated Provincial Pictures Houses Ltd vs Wednesbury Corporation (1984) K.B 223** wherein it was stated that irrationality is born out instances when the decision making authority acts so unreasonably that in the eyes of the court hearing the application, no reasonable authority properly directing itself to the facts and the law would make such decisions.

35. This would mean that the decisions of DPP and the IGP are subject to review by the court. In exercise of their powers under the Constitution the DPP and the IGP is in effect performing an administrative act in nature akin to exercise of a quasi-judicial function, which it must be presumed will be exercised fairly and honestly within the ambit of the wide discretion bestowed on him by the Constitution, but he must keep within the legal limits of the exercise of his powers as laid down by the Constitution. See **Matalulu v Director of Public Prosecutions [2003] 4 LRC 712; Sharma v Browne-Antoine et al [2006] UKPC 75 [2007] 1 WLR 780.**

36. In light of the above authorities, it is clear that this court has jurisdiction to allow an application for judicial review when appropriately brought against the decisions of DPP and IGP. Again the moment an applicant approaches the court on grounds of violations of rights, the court will not fail but to address those grievances as appropriate. The petitioners’ complaints relate to violation of rights. Therefore I am satisfied that the court has jurisdiction to entertain the instant application.

37. The next issue for determination is whether the orders sought should be granted and 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 the propriety of criminal proceedings in a criminal court or whether the evidence is sufficient to sustain the charges brought against the applicant. There is an appeal system in criminal trial system through which the applicant can challenge proceedings in the criminal court. The House of Lords held in **Imperial Tobacco Ltd vs Att. Gen. [1981] A.C 718** held 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.

38. This would mean that the petitioner would have to satisfy the court that they meet the requirements for grant of the orders sought and in this case are primarily conservatory orders pending the determination of the petition.

39. The circumstances under which conservatory orders may be granted were discussed in **Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR:**

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute *in situ*. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

40. This position was reinforced by the Supreme Court in Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others (supra) where the Supreme Court held:

“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

41. Whereas it is true that an application seeking to suspend pending criminal proceedings care must be taken to ensure that no one is condemned unheard. At this stage the first condition the applicant is required to establish is a *prima facie* case with a likelihood of success. From the evidence on record, there is a petition that has been filed and is yet to be heard.

42. Without preempting the outcome of the petition, the issues which the petitioners intend to canvass at the hearing of the petition are the contention that the respondents are harassing the petitioners and acting in breach of rights as listed in the petition. The duty to be cognizant of whether or not any continued prosecution of the petitioners has demonstrated that during the proceedings, the human rights of the petitioners has been violated to the extent described in their petition. No matter how strong the evidence against them may be, no fair trial can be achieved and any subsequent trials would be a waste of time and an abuse of court process. There is dicta and holdings from cases in the United Kingdom which provide persuasive guidance to this court in determining whether it has power to issue the orders sought and when such an order may be issued.

43. Lord Griffiths in R vs 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.”

44. I have considered each and every authority cited though I have not specifically reproduced them and is not out of disrespect or lack of appreciation for their industry, however I view that it is up to the petitioners to satisfy that they fall within the provisions of the law to warrant being granted conservatory orders and I would only be satisfied if I hear them and as such to deny a grant of the orders at this stage would not be fair to them. Already there is evidence that the court of appeal has issued stay of execution of the judgement of the ELC case pending the hearing and determination of the appeal. Both the petitioners and respondents appear to rely on the said ELC judgement to advance their standpoints. It would be fair and just to grant a conservatory order pending the determination of the petition. Even though the 3rd Respondent is entitled to mount criminal prosecutions, I find the circumstances of this case warrants a grant of conservatory order so as to preserve the subject of the pending petition. There will be no prejudice suffered by the respondents if the stay is granted as they will commence the prosecutions once the petition fails to succeed. It is noted that most of the petitions are disposed of by way of written submissions and hence the same can be wrapped up quickly without undue delay. To this end therefore the court will ensure that the matter is canvassed on priority basis.

45. In the result I find the petitioner’s application dated 28th June 2019 has merit. The same is allowed in terms of prayers 3, 4 and 5 pending the hearing and determination of the petition. The parties herein are directed to set down the petition for hearing on priority basis. The costs hereof shall be in the cause.

It is so ordered.

Dated and delivered at Machakos this 2nd day of August, 2019.

D.K. Kemei

Judge