



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CRIMINAL APPLICATION NO. 82 OF 2018

JAMES SAFARI

ALI KENGA MWAKAMSHA

SAMSON KALUME..... APPLICANTS

VERSUS

REPUBLICPROSECUTOR

RULING

1. The applicants filed a Notice of Motion application dated 4th July, 2018. The same was amended on 4th March, 2019, with leave of the court. They seek the following orders:-

(i) Spent;

(ii) Spent

(iii) That the proceedings in Shanzu Criminal Case No. 915 of 2018 be terminated and the accused persons be set at liberty; and

(iv) That this Honourable court be pleased to make such orders as shall be appropriate and as the justice of the case shall demand.

2. The application is anchored on the grounds in support of it and the affidavit in support of the amended application and further affidavit of the 1st applicant sworn on his own behalf and that of his co-applicants, on 4th March, 2019 and 13th December, 2018, respectively. The respondents filed a replying affidavit sworn on 8th October, 2018, to oppose the application.

3. On 13th December, 2018, Mr. Mwawasi, Learned Counsel for the applicants filed his written submissions. He submitted that the applicants were protesting their continued prosecution for the offence of forcible detainer contrary to Section 91 of the Penal Code. He indicated that the applicants were alarmed and spurred into the action of filing the current application after issuance of a demolition order by the Trial Magistrate which was made almost at the commencement of the proceedings in the lower court.

4. The applicant's Counsel argued that their prosecution was discriminatory, selective and was on a matter that was civil in nature. He further argued that the said criminal proceedings gave police space to continually harass people leading to an abuse of the criminal justice system. It was submitted for the applicants that a practice has emerged whereby courts have begun to take judicial notice of instances where people are resorting to the use of the Police and the criminal justice system to acquire rights over land and/or gain an unfair advantage over others. He gave examples of offences such as trespass, forcible detainer and the offence of obtaining money by false pretences.

5. Mr. Mwawasi posited that the applicants had raised pertinent points which were confirmed by a Surveyor's report, which ought to be properly canvassed and argued in a civil case. He added that the applicants had also referred to another case No. 1333 of 2017 whose existence had not been denied by the Prosecution. Counsel for the applicant relied on the case of **Joseph Wanyonyi Wafukho vs Republic** [2014] eKLR where the charge was one of obtaining money by false pretences. He submitted that the court therein held that the criminal justice system should not be used to settle a civil claim or to avail a party in a commercial transaction undue or collateral advantage over the other. The applicant's Counsel concluded his submissions by submitting that the continued prosecution of the applicants is improper and irregular. He prayed for their prosecution or be halted and for the complainant to be advised to seek remedies in a civil action.

6. Ms Marindah, Prosecution Counsel in her oral submissions stated that the complainant in the lower court case has valid titles to the 2

properties in issue as per annexure 2 of the Investigating Officer's affidavit which constitute postal searches. She submitted that the said documents confirm that the applicants had encroached into the complainant's plots which amounts to a criminal act.

7. She submitted that the applicants were charged with the offence of forcible detainer after a report was made to Bamburi Police Station. Further, that on 22nd June, 2018 the Hon. Magistrate ordered the applicants to demolish the structures built on the plots in issue, under the supervision of the OCS of the said Police Station.

8. In making reference to paragraph 9 of the lower court proceedings at page 2, Ms Marindah stated that the applicants informed the lower court that they were tenants paying Kshs. 1,000/= rent. She prayed for the decision of the trial court to be upheld since the applicants failed to identify the owner of the structures. She urged this court to dismiss the application.

9. In response to the submissions made by the Prosecution Counsel, Mr. Mwawasi took the position that the order issued by the lower court was vague as it did not state the parcels of land where the structures that were to be demolished were situated. He referred the court to the survey report attached to the applicants' further affidavit, whose contents he said were unchallenged by the prosecution.

ANALYSIS AND DETERMINATION

10. This court has been moved under the provisions of Section 362 of the Criminal Procedure Code (CPC) to settle 1 issue, namely;

(i) If this court should terminate proceedings in Shanzu Criminal Case No. 915 of 2018 and set the applicants at liberty.

11. The initial application that was filed on 4th July, 2018 lacked a substantive prayer which necessitated the filing of the amended application. The applicants' contention is that they should not have been charged with the offence of forcible detainer contrary to Section 91 of the Penal Code as their prosecution is an abuse of the criminal justice system and an unfair, unlawful and illegal shortcut. They argued that the matter in the lower court is essentially civil in nature. They stated that an order which was made for demolition of the structures on the plots in issue did not specify the plot number on which the structures are situated. They contended that the land in question is vast and large and that they too have an interest in it. They feared that the order made by the lower court may be used to demolish people's houses over a wide area. The applicants also contended that only the 3 of them were singled out for prosecution whereas thousands of people have lived on the land for decades. They stated that criminal case No. 1333 of 2017 at Shanzu Law Courts is based on the same parcel of land. The applicants herein claimed to have lived on the land in issue for decades.

12. The applicants alleged that the Police were being used by the complainant to terrorize them on the strength of criminal proceedings which, in their view, are an unlawful way of obtaining land illegally and unlawfully. They expressed doubt that the titles relied on by the complainant in criminal case No. 915 of 2018 were obtained lawfully.

13. The further affidavit contains more averments as to why this court should terminate the lower court proceedings. Most of them are assertions of what is contained in the supporting affidavit. One of the observations made by the applicants is that whereas the complainant in the lower court case is Carolyne Nyakio Karimi, the certificates attached to the replying affidavit and marked as NK2 give the name of the registered owner of the two plots as one Jabali Chondo Kavuu.

14. The respondent relied on a replying affidavit filed by No. 39246 PC Michael Kithome of Bamburi Police Station who deposed that the certificates of postal search show the plots in issue belong to the complainant. That his investigations took him to the land in issue where he found the 3 applicants in occupation of the same. He further deposed that they failed to produce documentation or to give a justification as to why they had occupied the said plots.

15. It is on the basis of the foregoing averments that this court has been requested to terminate the lower court proceedings. The powers of the High Court on revision are provided in Article 165(6) of the Constitution of Kenya. It provides as follows:-

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

16. The Criminal Procedure Code makes provisions for the powers of the High Court on revision. Section 364 (1)(a) and (b) state as follows:-

“In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –

(a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by Sections 354, 357 and 358 and may enhance the sentence;

(b) In the case of any other order other than an order of acquittal, alter or reverse the order.” (emphasis added).

17. The Penal Code in Section 91 of the Penal Code makes provision for the offence of forcible detainer in the following terms:-

“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 possession of the land is guilty of a misdemeanor termed as forcible detainer.”

18. The law as it is, recognizes the offence the applicants have been charged with. The averments contained in their affidavits are issues that the applicants should canvass before the Trial court in Shanzu Senior Principal Magistrate's Court Criminal Case No. 915 of 2018.

19. It is the finding of this court that as long as the provisions of Section 91 of the Penal Code remain in the said statute book, nothing prohibits the Director of Public Prosecutions from charging alleged offenders with the offence of forcible detainer.

20. Issues such as who the rightful owner of the two plots of land namely No. CR 62094 and CR 62095 is, between the complainant, Carolyne Nyakio Karimi and Jabali Chondo Kavuu, are matters of evidence for the Trial court. Although the applicants argued that they had been singled out for prosecution amongst many other people who are in occupation of other parcels of land in the neighbourhood from where they were arrested, the complainant's case in the lower court is against the 3 of them, who are alleged to have encroached on her plots of land.

21. A perusal of the lower court proceedings indicate that on 22nd June, 2018 the applicants informed the Trial court that they were tenants who were paying rent in the sum of Kshs. 1,000/=. This court wishes not to make any inference with regard to said information.

22. The authority that was relied on by the applicants was decided by the High Court in its appellate jurisdiction. The appellant therein had gone through a trial for the offence of obtaining money by false pretences. The said case is distinguishable from this one, as the Judge therein had the opportunity to analyze and re-evaluate the evidence that had been adduced before the Trial court. He found that the evidence disclosed a civil claim rather than a criminal case.

23. In this instant, the Trial court has not heard the evidence of the prosecution and the defence. No Judgment has been delivered as yet to warrant this court to interfere with the proceedings of the lower court. This court notes that the complainant was directed to demolish the structures that had been erected on what is alleged to be her plots of land. The applicants in their amended application of 4th March, 2018 sought no order on revision with regard to the lower court's decision of 25th June, 2018 on demolition of the said structures. The said order therefore stands.

24. My finding is that the applicants have put the cart before the horse by prematurely moving to this court to seek a termination of the lower court case against them. I decline to do so.

25. The file for Shanzu Senior Principal Magistrate's Court Criminal Case No. 915 of 2018 shall be transmitted to Shanzu Law Courts. The said case shall be mentioned in the said court on 4th October, 2019 for directions to be given for further hearing of the case. The applicants shall attend court on the said date without fail.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of September, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Khisa holding brief for Mr. Mwawasi for the applicants

Mr. Muthomi, Prosecution Counsel for the respondent

Ms Peris Maina - Court Assistant