



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL REVISION NO. 70 OF 2019

BETWEEN

HON. STEPHEN KIPYEGO SANG.....APPLICANT

AND

REPUBLIC.....RESPONDENT

RULING

Background

1. On 10th June, 2019, the Applicant and 2 others filed **Eldoret High Court Petition No. 11 Of 2019 Hon.Stephen Kipyego Sang & 2 Others Versus the Inspector General of Police & 3 Others**.
2. Concurrently with the Petition, the Applicant and 2 others filed a chamber summons seeks prayers among others to restrain the Respondents from charging, prosecuting, arresting, continued harassment, questioning, intimidating, apprehending the Applicants concerning the alleged possession/use and development of a cattle dip on that property known as **Nandi Hills/ Kapsimotwa Block 2(Kettchem)/ 234** which order was granted on 10th June, 2019 pending the fixing of a hearing date in the registry.
3. On 10th June, 2019, the Applicant was arrested and was arraigned in court in **Kisumu Criminal Case No. 301 Of 2019 Republic V Stephen Sang** on 11th June, 2019. The lower court record demonstrates that the Applicant's attempt to block the charges was thwarted by the trial court and the Applicant proceeded to take plea in which he denied the three charges preferred against him.

Notice of Motion

4. Aggrieved by the decision by the trail court, the Applicant moved this court by way of a notice of motion dated 20th June,2019, brought under Sections 123 (3), 362 and 364 of the Criminal Procedure Code, Articles 165(6), (7), 21(1), 29(a) and (b), 49 (1) (g), 159 and 259 of the Constitution, Applicant seeking orders **THAT**:

- i. The Honourable Court be pleased to call and examine the record of Hon. Magistrate in Kisumu Criminal Case No. 301 Of 2019 Republic V Stephen Sang for the reason of satisfying itself as to the correctness, legality and propriety of the orders issued on 11th June, 2019**
- ii. The Honourable Court be pleased to the proceedings of 11th June, 2019 are an impropriety and an illegality in light of orders issued by Hon. Justice S.M. GITHINJI in Eldoret High Court Petition No. 11 Of 2019 Hon.Stephen Kipyego Sang & 2 Others Versus the Inspector General of Police & 3 Others.**
- iii. Any other the court may deem fit to grant**
- iv. Costs be provided for**

5. The application is supported by an affidavit sworn by the Applicant on 20th June, 2019 in which he reiterates the grounds on the face of the application. Annexed to it is the Petition and chamber summons dated 10th June, 2019 in **Eldoret High Court Petition No. 11 of 2019 Hon.Stephen Kipyego Sang & 2 Others Versus The Inspector General of Police & 3 Others** and an order of same date restraining the Respondents from prosecuting the Applicant concerning the alleged possession/use and development of a cattle dip on that property known as **Nandi Hills/ Kapsimotwa Block 2(Kettchem)/ 234**.

6. The application is opposed on the basis of grounds of opposition filed on 15th July, 2019 where it is asserted that the restraining order alluded to by the Applicant does not hold for the reason that the application on which it was grounded has been withdrawn and further that the subject matter in the Petition **Eldoret High Court Petition No. 11 Of 2019** and **Kisumu Criminal Case No. 301 Of 2019 Republic V Stephen Sang** are not the same.

Applicant's submissions

7. The Applicant holds the view that the criminal charges in **Kisumu Criminal Case No. 301 Of 2019 Republic V Stephen Sang** are a violation of the orders issued in **Eldoret High Court Petition No. 11 Of 2019**. He asserts that this application has been brought timeously and urges the court to grant the orders sought.

8. The Applicant further asserts that this court has power to grant the orders sought and places reliance on **Livingstone Maina Ngare v Republic [2011] eKLR** where the court held that:

The High Court can and should exercise its jurisdiction if it was satisfied that any finding, sentence or order recorded or passed; or the regularity of any proceedings of any court subordinate to the High Court, did not meet the required standards of correctness, legality or propriety

9. Reliance was also placed on **Director of Public Prosecutions v Samuel Kimuchu Gichuru & Another [2012] eKLR** where the court cited with approval a decision of the High Court of Malaysia in **Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735** where the court held:

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

Respondent's submissions

10. The Respondent reiterates that the order sought is unmerited for the reason that the subject matter in the **Eldoret High Court Petition No. 11 Of 2019** and in **Kisumu Criminal Case No. 301 Of 2019 Republic V Stephen Sang** are not the same.

11. The state reiterated the powers of the Director of Public Director of Public Prosecutions under Article 157 of the Constitution which provides:

(6) The Director of Public Prosecutions shall exercise State powers

of prosecution and may—

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

Analysis and Determination

12. The powers of the High court in revision cases are contained in Section 362 through to 366 of the Criminal Procedure Code (Cap.75).

Section 362 specifically provides as follows: -

“362. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.

13. Applicant seeks a review of the trial magistrate's order dated 11th June, 2016 by which the court ruled that the restraining orders in **Eldoret High Court Petition No. 11 of 2019** relate to **Nandi Hills/ Kapsimotwa Block 2(Kettchem)/ 234** and not **L.R. number 6075 property of Kibware Tea Estate** that is the subject of **Kisumu Criminal Case No. 301 Of 2019 Republic V Stephen Sang**.

14. A perusal of **Eldoret High Court Petition No. 11 of 2019** and the restraining orders issued on 10th June, 2019 in respect thereof undeniably discloses that the subject matter to be **Nandi Hills/ Kapsimotwa Block 2(Kettchem)/ 234** whereas the subject in **Kisumu**

Criminal Case No. 301 Of 2019 Republic V Stephen Sang is L.R. number 6075 property of Kibware Tea Estate.

15. With the foregoing set of facts, I hold that the trial court's finding that the High Court in Eldoret did not restrain the Respondent from arresting and prosecuting the Applicant in respect of **L.R. number 6075 property of Kibware Tea Estate** was well founded and cannot be faulted. I am indeed surprised that the State conceded to a stay of proceedings in **Kisumu Criminal Case No. 301 Of 2019 Republic V Stephen Sang** thereby delaying its hearing which was scheduled to commence on 19th September, 2019.

16. Consequently, I hold that the Applicant has not demonstrated that there exists any impropriety or illegality in the *proceedings, finding and order passed by the subordinate court on 11th June, 2016 to warrant revision. The proceedings, finding and order were correct* and any order to the contrary would amount to interfering with the constitutional powers of the Director of Criminal Prosecutions under Article 157 (6) of the Constitution.

17. As a result, the application for revision dated 20th June, 2019 is considered and found to have no merit and it is disallowed.

DATED AND DELIVERED AT KISUMU THIS 26th DAY OF September 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - **Amondi/Okodoi**

For the Applicant - Present in person

For the State - Ms. Gathu