



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPLICATION NO.48 OF 2017

FRANDIK NYAMWARO OGORA.....APPLICANT

VERSUS

ELKANA OBWAYA NYANDIKA

OCS ITUMBE POLICE STATION

DPP.....RESPONDENTS

RULING

1. This ruling is in respect to the application dated 30th May 2017 brought under Article 50 of the Constitution in which the applicant seeks orders that the 2nd and 3rd Respondents be directed to arrest and prosecute the 1st respondent for a criminal offence or in the alternative, the applicant be allowed to open up private prosecution against the 1st respondent.

2. The application is supported by the applicant's affidavit sworn on 30th May 2017 wherein he avers that he is the beneficial owner of part of LR. NO. BASSI/BOGETAORIO II/341 (hereinafter, "the suit land") by virtue of the fact that he is the son of one OGORA OMANGO (deceased) the actual registered owner of the suit land. He states that on 28th April 2017, the 1st respondent destroyed his fence and he made a report to that effect to the police after which he recorded his statement and the statements of his witnesses, but that the 2nd and 3rd respondents did not act on his report by arresting and bringing the first respondent to book thereby prompting him to file the instant application.

3. The respondents opposed the application through the replying affidavit of No. 95665 PC Eddy Odhiambo Ageke filed on 17th October 2017 who avers that he investigated the applicant's report on the alleged destruction of his property/fence which investigations established that the applicant and the 1st respondent are step brothers who are both entitled to inherit the suit land but that a succession case had not been filed so as to determine each beneficiary's share in the said suit land. He further states that he also established that there had been numerous attempts by the local administration to resolve the land/boundary dispute which attempts did not bear any fruits as in all the instances, a definite resolution could not be made because the suit land was still in the deceased's name.

4. The investigating officer further avers that he was, in the circumstances of the case, unable to determine who exactly owned the fence in dispute after which he forwarded the file to the 3rd respondents' office for further action/advice and that the 3rd respondent recommended that the dispute between the parties could only be solved in the Land Court or through a succession case where proof of land ownership could be ascertained. The officer maintained that it was the 3rd respondent's view that the

filing of a criminal case against the 1st respondent would not have been a viable option in the absence the applicant's proof of ownership of the suit land.

5. When the application came up for hearing on 9th November 2017, Mr. Abobo learned counsel for the applicant submitted that there was proof that a criminal offence had been reported to the 2nd and 3rd respondents and therefore, the applicant was entitled to the orders sought.

6. Mr. Otieno, learned counsel for the state, on the other hand submitted that the 2nd and 3rd respondent had explained, through the replying affidavit, the reasons why they did not deem it appropriate to institute criminal proceedings against the 1st respondent.

7. I have carefully considered the instant application and the respondents' response. I note that the main issue for determination is whether the applicant is entitled to the orders sought.

8. It was not in dispute that the applicant made a report to the 2nd respondent about the alleged destruction of a boundary/fence and that the said report was acted upon by the 2nd respondent who investigated the case and thereafter sought the advice of the 3rd respondent on the viability of instituting criminal proceedings against the 1st respondent/suspect. It was also not disputed that the 3rd respondent's advice was that the applicant's complaint could best be addressed through a civil/land case or a succession case.

9. It was further not disputed that the 1st respondent and the applicant are step brothers who have had a long standing boundary disputes and that all attempts by the local administration to resolve the same have not been successful. It has not escaped the attention of this court, going by the undisputed averments of the investigating officer, that the instant case has both civil and criminal angles and that in the considered view of the said officer, the matter could best be handled as a succession case so as to establish each beneficiary's interest in the disputed land. The question which then arises is whether the 2nd and 3rd respondents can, under the above circumstances, be compelled by this court to institute criminal proceedings against the 1st respondent.

10. Courts have, in several cases, held the view that criminal investigations should not be initiated with the aim of advancing parties' interests in civil cases and I am in agreement with that holding in as far as the facts and the circumstances of this case are concerned. It is clear to me that the applicant's family members are not able to agree on how to deal with the estate of the deceased through a succession case thereby generating squabbles relating to boundary disputes such as the one before this court. One may be tempted to ask how the prosecution would have proved the applicant's complaint that his fence was destroyed by the 1st respondent in the absence of his proof of ownership of the suit land. In the case of **Republic vs Chief Magistrates Court at Mombasa ex parte Ganijee & Another [2002] 2 KLR 703** it was held:

"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purposes is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...when a remedy is elsewhere provide and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the

sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

11. Turning to the issue of whether the 2nd and 3rd respondents can be compelled to launch criminal investigations and institute criminal proceedings against the 1st respondent, I note that **Article 245 of the Constitution** stipulates as follows on the independence of the office of the Inspector General of police:

“245. (1) There is established the office of the Inspector-General of the National Police Service.

(2) The Inspector-General—

(a) is appointed by the President with the approval of Parliament; and

(b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.

(3) The Kenya Police Service and the Administration Police Service shall each be headed by a Deputy Inspector-General appointed by the President in accordance with the recommendation of the National Police Service Commission.

(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but 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.

(5) Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.

(6) The Inspector-General shall be appointed for a single four-year term, and is not eligible for re-appointment.

(7) The Inspector-General may be removed from office by the President only on the grounds of—

(a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;

(b) gross misconduct whether in the performance of the office holder’s functions or otherwise;

(c) physical or mental incapacity to perform the functions of office;

(d) incompetence;

(e) bankruptcy; or

(f) any other just cause.

(8) Parliament shall enact legislation to give full effect to this Article.”

12. The above Article is clear on the independence of the office of the Inspector General through the 2nd respondent herein when dealing with investigation of offences or in the enforcement of the law. The independence granted to the 2nd respondent by the Constitution is akin to the independence granted to the 3rd respondent under **Article 157 (10) of the Constitution** which stipulates as follows:

“(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

13. Having regard to the above provisions of the constitution, I am persuaded that this court is precluded, by the said provisions, from making the orders sought by the applicant. However, even assuming for arguments sake, that the court had powers to direct the respondents in the performance of their investigative functions. The facts, which have not been disputed by the ex-parte applicant, clearly show that the said investigations were properly carried out, concluded and recommendations made as shown in the 1st respondent’s replying affidavit and the attachments thereto. In effect therefore, the orders sought by the ex-parte applicant have already been overtaken by events in view of the fact that the investigations that he seeks orders to compel the respondents to conduct have already been concluded.

14. On the prayer to be allowed to institute private prosecution against the 1st respondent I note that Article 157(6) of the constitution stipulates as follows:

**(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).

(7) If the discontinuance of any proceedings under clause (6)

(c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.

15. Prior to the promulgation of the Constitution in 2010 with regard to private prosecutions, the power to carry out prosecutions was vested in the Attorney General (AG) under the former Constitution which at Section 26 thereof provided as follows:

“26. (1) There shall be an Attorney General whose office shall be an office in the public service.

(2) The Attorney General shall be the principal legal advisor to the Government of Kenya.

(3) The Attorney General shall have power in any case in which he considers it desirable so to do;

(a) to 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 by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

(4) The Attorney-General may require the Commissioner of Police to investigate any matter which, in the Attorney-General's opinion, relates to any offence or alleged offence or suspected offence, and the Commissioner shall comply with that requirement and shall report to the Attorney-General upon the investigation.

(5) The powers of the Attorney-General under subsections (3) and (4) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.

(6) The powers conferred on the Attorney-General by paragraphs (b) and (c) of subsection (3) shall be vested in him to the exclusion of any other person or authority: Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court."

16. As can be observed from the above provisions of the old and the current Constitution, the powers granted to the offices of the AG under the old Constitution and the Office of the Director of Public Prosecutions(ODPP) under the new constitution are essentially the same save for the fact that the while the AG combined, under the former constitution, the function of chief legal advisor of the government and the powers of prosecution, the Constitution of Kenya 2010 has now separated these two functions. However, it can be noted that the functions and powers of prosecution given to the AG, including powers related to taking over and terminating private prosecutions are virtually identical to those given to the Director of Public Prosecutions.

17. The law with regard to the procedure to be adopted by a private citizen who desires to initiate private prosecution against another citizen, as is the case in the instant application, is contained in section 88 of the Criminal Procedure Code which requires that the party should approach the Magistrates Court to permit him to carry out the prosecution. I however do not believe that the intention of the said section was to give parties a blank cheque to unilaterally decide that an offence has been committed and to initiate private prosecution against another citizen without reference to the police or the office of the DPP.

18. Courts have, in various decisions, set out the conditions to be met by a party who seeks to be permitted to carry out a private prosecution, which is now the constitutional responsibility of the ODPP and formerly, the AG. In the case of **Otieno Clifford Richard vs Republic High Court at Nairobi (Nairobi Law Courts) Misc Civil Suit No. 720 of 2005**, the High Court (Nyamu, Emukule and Wendoh, JJ), observed as follows with regard to the circumstances under which a party could be permitted to carry out a private prosecution:

"Section 85 to Section 88 of the Criminal Procedure Code deal with "Appointment of Public Prosecutors and conduct of prosecutions". On the other hand Section 89 to Section 90 of Criminal Procedure Code deal with the "Institution of proceedings and making of complaint". We think that in the case of a private prosecution an application must first be made under Section 88(1) of the Criminal Procedure Code for the Magistrate trying the case to grant or refuse to grant permission to the Plaintiff to conduct a private prosecution. It is after permission has been granted for the private prosecution to be conducted that Section 89 and Section 90 of the Criminal Procedure Code can be brought into effect and the criminal proceedings instituted.

We believe that the principles set out in the KAHARA CASE at page 89 are good law and provide guidance to a subordinate court when determining the question whether to allow a private prosecution since it spells out certain issues which must be addressed by the court when considering the application for permission to private prosecute before granting it.”

19. The Court then set out the principles to be applied in determining whether an applicant should be allowed to institute private prosecution and adopted the view that upon such an application being made, the Magistrate before whom the application is made should question the applicant to **“ascertain whether a report has been made to the Attorney General or to the Police and with what result. If no such report has been made the magistrate may either adjourn the matter to enable a report to be made and to await a decision thereon or in a simple case of trespass or assault proceed to grant permission and notify the Police of that fact.”**

20. The Court placed reliance on the principles enunciated by Kuloba J (as he then was) in the case of **Floriculture International Limited and Others High Court Misc. Civil Application No 114 of 1997** wherein the Court set out six principles that the Magistrate’s Court should consider before granting a party leave to carry out a private prosecution. The Court stated as follows:

“For all these reasons criminal proceedings at the instance of a private person shall be allowed to start or to be maintained to the end only where it is shown by the private prosecutor;

1. that a report of the alleged offence was made to the Attorney General or the Police or other appropriate public prosecutor, to accord either of them a reasonable opportunity to commence or take over the criminal process, or to raise objection (if any) against prosecuting; that is to say, the complainant must firstly exhaust the public machinery of prosecution before embarking on it himself; and

2. that the Attorney General or other public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings; or that he has maintained a more than usual and reasonable reticence; and either the decision or reticence must be clearly demonstrated; and

3. that the failure or refusal by the State agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued; and

4. that unless the suspect is prosecuted and prosecuted at the given point of time, there is a clear likelihood of a failure of public and private justice; and

5. the basis for the locus standi, such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics, or some ulterior considerations devoid of good faith, and

6. that demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous Attorney General or police force guilty of a capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counter act the culpable refusal or failure to prosecute or to neutralize the attempts of crooked people to stifle criminal justice”.

21. I take the view that even under the new Constitution, with perhaps the exception of principle No 5, with regard to locus standi, these are reasonable requirements to demand that a citizen who takes the view that a private prosecution is called for must fulfil which requirements accord, to some extent, with the principles enunciated by the court in the case of **Rufus Riddlebarger vs. Brian John Robbison [1959] EA 841** also relied on by the respondent in this case. The court observed at page 845 thereof as follows:

“This being so, a private prosecution can only be given legitimacy and allowed by the court to be

instituted or maintained if it serves as a remedy against a culpable inertia or partiality on the part of the public prosecuting authority. It must be shown to be taken only as a safeguard against extraordinary impropriety, capricious, corrupt or biased failure or refusal to prosecute by the public prosecuting agencies. The court will therefore, require to be satisfied by the private prosecutor, that the private proceedings are necessary because the Attorney General and his officers or the Police, do not wish to act on the complaint, and that they have declined to act or refused to take action, for culpable reasons.”

22. What emerges from the above-cited statutory provisions and case law is that private citizen can only institute private prosecutions in those cases where he or she satisfies the Magistrate’s Court before whom he or she wishes to carry out the prosecution that there has been a failure by the bodies charged with prosecution to carry out their mandate. (See **Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 others [2013] eKLR**).

23. Taking a cue from the dictum in the above cited cases, I find that the applicant’s instant application for leave to institute private prosecution against the 1st respondent has been brought before the wrong forum as such an application ought to have been made before the Magistrate’s Court before whom he wishes to carry out the prosecution on condition that he satisfies the said magistrates court that the bodies mandated to conduct the prosecution have failed to do so. In that regard therefore, the prayer for leave to open up private prosecution against the 1st respondent is hereby struck out, but with a rider that the applicant is still at liberty to file the said application before the right court should he deem it necessary.

24. Having found that this court has no powers to direct the respondents in the performance of their investigative functions I dismiss the prayer for orders to compel the 2nd and 3rd respondents to arrest and prosecute the 1st respondent. I make no orders as to costs having regard to the nature of this case and taking into account the fact that the applicant and the 1st respondent are members of the same family.

Dated, signed and delivered in open court this 25th day of January, 2018

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr.Otieno for the State
- Mr. Okioma for the applicant
- Omwoyo court clerk