



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO.392 OF 2017

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

**IN THE MATTER OF THE INFRINGEMENT OF CONSTITUTION RIGHTS UNDER
ARTICLE 27, 28, 29, 31, 47, 48, 50**

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF CID.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

AND

RONALD MORARA NGISA.....EX PARTE APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 17th August, 2017, the *ex parte* applicant herein, **Ronald Morara Ngisa**, seeks the following orders:

1) An order of Certiorari to bring into this honourable court and quash the decision by the Inspector General Police and the Director Criminal Investigations office from intimidating, harassing and threatening to arrest at Home or work place on matters pending determination before court under Milimani HCCC No. 288 of 2016 and Milimani ELC No. 24 of 2017.

2) An order of Prohibition to issue against the 1st and 2nd respondent prohibiting the office of the Inspector General of Police and the Director of Criminal Investigations from intimidating, harassing and threatening to arrest at Home or work place on matters pending determination before court under Milimani HCCC No. 288 of 2016 and Milimani ELC No. 24 of 2017.

3) An order of Declaration that the decision of the 1st and 2nd respondents to keep issuing summons or sending police officers to harass and intimidate, and threaten to arrest the applicant causing mayhem at his office or elsewhere in the excuse of conducting investigations

on matters pending the court for determination under Milimani HCCC No. 288 of 2016 and Milimani ELC No. 24 of 2017. Is unlawful, *ultra vires* conducted in bad faith and the procedures used are bias against the applicant.

4) That costs of this application be provided for.

Applicant's Case

2. According to the applicant, between the period of the year 2012 to 2015 he received instructions to act for various purchasers who were interested in purchasing properties from buyers who had bought properties from the National Social Security Fund Scheme. He accordingly exercised due diligence on the Titles before he committed his clients to pay the purchase price to the vendors who had bought their properties from the NSSF. However as the sellers had not completed making payment to the scheme, the vendor in the said transactions was the NSSF.

3. According to the applicant, his clients met the purchase price to the vendor after which the directors of the vendor executed the transfers in favour of his clients upon a successful completion and the purchasers were later on issued with title deeds to their purchased properties.

4. It was averred that on various dates in the year 2015 and 2016 the vendor issued to the purchasers notices for repossession or rescission of the properties they sold and transferred to the purchasers. As a result of the said notices the purchasers filed suits against the vendor seeking for injunctive orders to restrain NSSF from repossessing their houses with which they have a clean title free from encumbrances.

5. The applicant averred that the vendor, NSSF, sensing defeat from the outcome of the pending suits resorted to dubious ways of using the 1st and 2nd respondents to harass and intimidate the applicant as the advocate who was in conduct of the purchases of the said transaction.

6. The applicant disclosed that on various days officers from the 1st and 2nd respondents showed up in the applicant's office threatening to arrest him for his role in the said transactions on matters currently pending before the courts of competent jurisdiction being Milimani HCCC No. 288 of 2016 and Milimani ELC No. 24 of 2017 in which the applicant a party.

7. The applicant averred that the conduct of the 1st and 2nd respondents at his office every time they make impromptu visits of causing mayhem, and commotion as they seek to arrest him has made him feel apprehensive, lack peace and fear for my life. In the applicant's view, the conduct of the 1st and 2nd respondents is unprocedural, is ultra-vires and in bad faith meant to satisfy the will of the complainant.

8. The applicant contended that the 1st and 2nd respondents have taken the investigators', prosecutors' and judicial role in finding him guilty of frivolous allegations launched by the said complainant. Apart from the foregoing the applicant averred that the office of the 1st and 2nd respondents has been calling him through his private phone issuing threats that unless he appear at their offices they will have no option but to arrest him at their own convenience.

9. It was the applicant's case that despite recording his statement with the 1st and 2nd respondents they have discredited (sic) his rights and instead continued to apply illegal procedures covering the truth to oppress him in the circumstances.

10. The application was not opposed.

Determination

11. In this case the applicant's case is in effect that the Respondents are misusing their power to give one of the parties leverage in the land dispute which dispute is pending before the court. I agree that the powers and discretion given to the police ought to be exercised lawfully and in good faith and purely for

the vindication of the commission of a criminal offence and the criminal justice system and where the same are being exercised for the achievement of some collateral purpose other than its legally recognised aim, the Court would be entitled to intervene.

12. **Majanja, J** in Petition No. 461 of 2012 – **Francis Kirima M’ikunyua & Others vs. Director of Public Prosecutions**, when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:

“It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State’s coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent.”

13. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute”.

14. In **Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate’s Court Nairobi & Another [2006] eKLR** Nyamu, J examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of **M. Devao vs. Department of Labour (190) in sur 464** at 481 as:

“The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice...the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression.”

15. The circumstances which the Court takes into consideration in deciding whether or not to halt a

criminal process were set out by **Musinga, J** (as he then was) in **Paul Stuart Imison Another vs. The Attorney General & 2 Others Petition No. 57 of 2009**, in the following manner:

“The instances in which a court can declare a prosecution to be improper were well considered in *Macharia & Another –vs- Attorney General & Another (2001) KLR 448*. A prosecution is improper if:

- (a) It is for a purpose other than upholding the criminal law;**
- (b) It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;**
- (c) It is an abuse of the criminal process of the court;**
- (d) It amounts to harassment and is contrary to public policy;**
- (e) It is in contravention of the applicant’s constitutional right to freedom.**

16. According to **Bennett vs. Horseferry Magistrates' Court (1993) 3 All E.R. 138, 151, HL**, an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

- a) where it would be impossible to give the accused a fair trial; or**
- b) Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.**

17. Therefore the people placed in charge of investigation and prosecution must in deciding whether to prefer criminal charges ask themselves whether in the circumstances, a fair trial is possible notwithstanding the material placed before them. In other words the police and the DPP ought not to conduct themselves as if they are an appendage of the complainants. In exercising their discretion to charge a person both the police and the DPP’s office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

“...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.

18. In this case the alleged complainant has not sworn any affidavit to explain the circumstances under which the applicant is alleged to be culpable. There is simply no basis upon which the Respondents decided to prefer charges against the ex parte applicant in respect of a conveyancing transaction in which his role was limited to legal representation and in which he was not a party. It is trite that based on **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra):

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal

prosecution otherwise the prosecution will be malicious and actionable”.

19. It follows that the burden is on the prosecutor to show by way of admissible evidence that he is in possession of material that disclose the existence of a prosecutable case since as was held in **Stanley Munga Githunguri vs. R [1986] eKLR** at page 18 and 19 by a three bench High Court constituted of Ag. Chief Justice Madan and Justices Aganyanya and Gicheru:

“A prosecution is not to be made good by what it turns up. It is good or bad when it starts.”

20. It is now clear that the mere fact that the applicant will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful and unfair trial to run its course. As was appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001:**

“Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case.”

21. The complainants themselves have not sworn affidavits to indicate the nature of the complaint which they lodged against the applicant, if any.

22. It is therefore my view that the applicant’s case is merited.

Order

23. In the result I issue the following orders:

1) An order of Certiorari is hereby issued removing into this Court and quashing the decision by the Inspector General Police and the Director Criminal Investigations office from intimidating, harassing and threatening to arrest at Home or work place on matters pending determination before court under Milimani HCCC No. 288 of 2016 and Milimani ELC No. 24 of 2017.

2) An order of Prohibition is hereby issued against the 1st and 2nd respondents prohibiting the office of the Inspector General of Police and the Director of Criminal Investigations from intimidating, harassing and threatening to arrest at Home or work place on matters pending determination before court under Milimani HCCC No. 288 of 2016 and Milimani ELC No. 24 of 2017.

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4) As the application was not opposed, the applicant will have half the costs of these proceedings to be borne by the Respondents.

24. Orders accordingly.

Dated at Nairobi this 27th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyaberi for the Applicant

CA Ooko