



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CONSTITUTIONAL PETITION NO. 14 OF 2017

RAPHAEL WAWERU KUNG'U.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioners herein are charged, in various permutations, in three different criminal cases at the Thika Chief Magistrate's Court of various offences primarily obtaining money by false pretences and cheating. The three criminal cases are *Thika Chief Magistrates Criminal Cases Numbers 7351 of 2015; 5909 of 2016; and 5910 of 2016*.

2. The Petitioners are persuaded that there is no proper basis for the criminal trials; that no proper investigations were carried out before the charges were preferred; and that the Director of Public Prosecutions and the Police are acting at the best of the Interested Parties in misusing the Criminal Justice System for the private gain of the Interested Parties. Convinced that their prosecution is a misuse of the criminal justice process and a violation of their constitutional rights, the Petitioners want certain orders issued against the respondents. Primarily, the Petitioners want a declaration that their prosecution in the three criminal cases is arbitrary, unreasonable, irrational, unconstitutional and in violation of their various constitutional rights; a prohibition against the continued prosecutions; and orders prohibiting the Police from arresting them or charging them with offences related to the subject matter of the present three criminal trials. The Petitioners also want a declaration that, in essence, their dispute with the Interested Parties can only be resolved through the application of the Memorandum and Articles of Association of Mahiira Housing Company Limited. Finally, they want compensation for alleged violation of their constitutional rights.

3. The pleadings in this case are unnecessarily voluminous and lengthy. As far as I can glean from the Petition and the Supporting Affidavit, the Petitioners' complaint is the following. The 1st Petitioner is the Chairman and Director of Mahiira Housing Company Limited ("Mahiira Company"). The 2nd and 4th Petitioners are directors of Mahiira Company. The 3rd Petitioner is a receptionist at Mahiira Company. The four are charged with various offences verging on obtaining by false pretences. As far as I can tell from the attached Charge Sheets, it is alleged that the Petitioners obtained, by false pretences, certain amounts of monies from the Interested Parties, by pretending that they could sell some parcels of land in Ruiru which fact, it is alleged, was false.

4. So, primarily, the charges revolve around allegations that the Petitioners falsely pretended that they could sell property to the Interested Parties; relieved them of their cash; and, ultimately, failed to do convey the property. The Interested Parties responded by reporting the matter to the Police who prepared the necessary documentation from which the ODPP, Kiambu made the charging decision.

5. As aforesaid, the Petitioners' primary complaint is that the Interested Parties are misusing the criminal justice system to settle what is, in essence, a civil claim. They insist that the disputes should be handled in civil suits before the Environment and Land Court and not through the criminal process. The Petitioners insist that the Complainants are members of a group called Mahiira Welfare Association – "an entity which is not even registered and had been all over the [Mahiira] company making all manner of allegations, 'bad mouthing' the company and the Petitioners in a tactic called 'poisoning the well'." They believe that the aim of the group is to "manufacture" grievances against Mahiira Company with the sole aim of gaining property dishonestly.

6. The Petitioners also claim that one of the Complainants (Peter Kabitu) is not an original land purchaser – but is merely claiming under his father's name yet his father has already been settled on his purchased land. As for the other Complainants, the Petitioners insist that they bought their land from third parties and that it is curious that those third parties are not charged with any offences hence raising the spectre of selective and malicious prosecution.

7. In short, the Petitioners believe that the criminal prosecutions are for extraneous and illegal purposes and therefore an abuse of Police powers since, in their words, "the issues have been mixed up and hijacked in a sense made 'muddier and poisoned' to achieve a certain extraneous agenda in a tactic called 'poisoning the well'." They believe that the charges are "not only premised on the lack of investigation

but of no investigations at all leave alone an efficient and fair investigation...”

8. The Petition is opposed.

9. The Director of Public Prosecutions (DPP) filed Grounds of Opposition on behalf of all the Respondents and later filed Written Submission opposing the Petition. In essence, the Grounds of Opposition state that the DPP considered the recommendations forwarded by the 2nd and 4th Respondents and, in exercise of his constitutional mandate made a decision to charge the Petitioners based on sufficiency of evidence and the public interest underlying prosecution of corruption cases. The Respondents position is that in reaching the charging decision, the Respondents did not abrogate, breach, infringe or violate any provision of the Constitution or any human and fundamental right of the Petitioners or any written law or regulations made thereunder.

10. The 1st Interested Party is Peter Kabit Mwangi. He is the father of the 2nd Interested Party. He filed a detailed Replying Affidavit opposing the Petition. His story is that he bought four plots from Mahiira Company in 1988 and was allocated share certificates for them – and assigned title deed numbers. He paid for title deeds for two parcels which were duly processed. However, the 1st Interested Party says that he was unable to get the other two titles process since when he sent the 2nd Interested Party on the ground to fence the two plots, the fences were demolished. Later on, the 1st Interested Party says he visited the offices of Mahiira Company where he was advised to pay for the two titles. He did, and after some back and forth, he was given two titles. However, on the ground, he found they belonged to someone else a fact confirmed by an official search. The 1st Interested Party says that when he informed the Petitioners, they advised him to sell the plots. It was at this point that he became convinced that he had become a victim of fraud and reported the matter to the Police. When the 1st Interested Party was later able to obtain copies of the Green Cards for the two plots, he was able to confirm that the plots had originally been allocated to him but that that they were fraudulently sold by the Petitioners to third parties in 2012 and 2014.

11. Both the 1st and 2nd Interested Parties are persuaded that the Petitioners have acted criminally in selling the plot they owned to third parties and yet still induced them to pay more funds for processing title deeds for the plots.

12. The 3rd Interested Party filed a Replying Affidavit in response to the Petition. In it she alleges that she and her husband made inquiries about the availability of parcels of land within the scheme administered by Mahiira Company. At the Company offices, she alleges, she was introduced by the Petitioners to a Mr. George Kibunja Ngaga. The Petitioners allegedly confirmed from the “Company books” that Mr. Ngaga’s ownership was genuine upon which the 3rd Interested Party paid for the parcel. The Petitioners also asked her to pay for transfer fees and money to process the title deed. She did. Later on, however, it turned out that the said Mr. Ngaga did not own any property and that there was no title to process to her. She is convinced that this was a fraudulent scheme by the Petitioners to dishonestly relieve her of her money. When she began making inquiries, she says the Petitioners disappeared and became unreachable prompting her to report the matter to the Police.

13. The 5th Interested Party filed a detailed Replying Affidavit in which she has chronicled her dealings with the Petitioners with regard to a parcel of land she bought within the land buying scheme operated by Mahiira Company. Basically, her claim is that she bought a parcel of land from a third party but when she went on the ground to claim possession she found that the Petitioners had fraudulently sold the same property to another person – the 4th Interested Party. She also alleges that upon uncovering this “double allocation”, the Petitioners promised to give her a new title and asked her to pay Kshs. 40,000/-. However, after she paid the amount and got a receipt for it, the Petitioners disappeared, closed their offices and made themselves unavailable leading to her conclusion that they were carrying out a fraudulent business. She therefore reported the matter to the Police which led to the charges against the Petitioners.

14. In their written submissions, the Petitioners pivot from the position that the process of the criminal court is not being used properly, honestly or in good faith but rather that it is being used as a “means of vexation, oppression, intimidation, blackmail and to achieve a collateral advantage for which the law does not allow” and that all “this will impact on the Petitioners’ right to a fair trial in a criminal court.” They, thus, urge the Court to stop what they see as an abuse of the justice system.

15. The Petitioners are correct that our case law has now firmly established that “*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.*” (**Kuria & 3 Others v Attorney General [2002] 2KLR 69.**) Indeed, this position, although now expressly scripted into our Constitution is of vintage judicial ancestry in Kenya. As early as 2001, the High Court uttered the following iconic words on the subject:

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 probably cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.

16. Similarly, in the more recent **R v Director of Public Prosecutions & 2 Others Ex Parte Praxidis Nomoni Saisi [2016] eKLR**, Justice Odunga, after analysing a long history of similar cases concluded that “*where it is clear that the [prosecutorial] discretion is being exercised with a view to achieving certain extraneous goals other than those recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would...constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion.*”

17. Indeed, in this and other cases, Justice Odunga, with whom I entirely agree, located the duty and authority of the Court in reviewing the exercise of the unfettered discretion of the DPP in the same mould as the exercise of any other executive discretionary power to which Judicial review is available. Hence, he states:

It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive, the

Court may interfere. The Court can only intervene in the following situations:

- 1) Where there is an abuse of discretion;
- 2) Where the decision-maker exercises discretion for an improper purpose;
- 3) Where the decision-maker is in breach of the duty to act fairly;
- 4) Where the decision-maker has failed to exercise statutory discretion reasonably;
- 5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
- 6) where the decision-maker fetters the discretion given;
- 7) where the decision-maker fails to exercise discretion;
- 8) where the decision-maker is irrational and unreasonable.

18. Hence, our decisional law is clear that the Court has the duty and authority to review the charging decisions of the DPP. However, what also emerges from the same precedents is that the Court is extremely cautious in performing that duty. Hence in the *Kuria Case (supra)*, the Court expressed itself thus:

There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.

19. And more recently in *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR* thus:

The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

20. The position that emerges law and practice, then, are quite clear: while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the Court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the Court can review the DPP's decisions for rationality and procedural infirmities, it cannot review them on merit.

21. The Petitioners' Written Submissions in large measure repeat the iterations in the Supporting Affidavit and passages from case law to the effect that the Court has a duty to stop improper prosecution. That legal position is already treat in Kenya's decisional law. The Petitioners make the following specific points:

a. They allege that the arrests and criminal prosecutions in the instant case are for an extraneous and illegal purpose and are therefore an abuse of Police powers since the issues have been "mixed up and hijacked in a sense made 'muddier and poisoned' to achieve a certain extraneous agenda in a tactic called 'poisoning the well'." The Petitioners cite *R v Attorney General Ex Parte Kipngeno Arap Ngeny* for the proposition that a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior or improper purpose. However, beyond the rhetoric, the Petitioners do not demonstrate how the charges they face was began without proper foundation or basis. On the contrary, the witness statements filed as well as the Replying Affidavits filed by the Complainants in the criminal cases suggest that there are at least a prima facie grounds for believing possibly criminal offences were committed.

b. The Petitioners allege that no investigations at all were conducted before the decision to charge them. Again, there is no ground to substantiate this allegation. Rather the Petitioners' position is argumentative: they simply disagree with the charging decision and proffer the argument that the facts disclose a dispute of a civil nature and not a matter for criminal prosecution. However, the same set of facts could give rise to both a civil action and a criminal action. A decision by the DPP to bring criminal charges in a case where a civil claim could also lie does not in any way detract from the propriety of the charges.

c. The Petitioners also allege that the fact that the third parties who allegedly sold the land to the Complainants were not charged with them is demonstration of selective prosecution. They rely on *Ronald Musengi v DPP* to argue that this, in itself, is sufficient for the Court to stop the prosecution. I am not persuaded that the facts here disclose that there has been selective prosecution at all. The Petitioners are charged primarily because they allegedly played an active role in inducing the Complainants to part with their money or are specifically accused of selling plots of land already allocated to the Complainants to other third parties. These are full blown criminal offences which do not involve third parties. Indeed, there is no indication in the facts disclosed in the case that the third

parties who sold the plots to the Complainants were, in any ways fraudulent. The gist of the criminal charges seem to be that the Petitioners used the offices of Mahiira Company to re-sell plots of land which had already been sold; and that they did this fraudulently.

d. In my view, this last sentence responds to the complaints by the Petitioners that if any criminal offence has been committed then it should be Mahiira Company to face the music and not them.

22. From a review of the material placed before me using the appropriate standard, I am unable to conclude that the decision to charge the Petitioners in the three criminal trials they face are flimsy, in bad faith and without proper foundation. Nothing has been placed before me to demonstrate the ulterior motives alleged.

23. Consequently, like in the *Kuria Case*, I find that “*it would be in the interests of the Applicants, the Respondents, the Complainants, and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the [Petitioners] the chance to clear [their] name.*”

24. In the *Michael Monari Case*, the Learned Judge remarked that “*as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.*” This is one case where the Court is reluctant to intervene.

25. **In the result, the Petition dated 22/08/2016 is dismissed with costs.**

26. Orders accordingly.

Dated and delivered at Kiambu this 2nd Day of August, 2018.

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JOEL NGUGI

JUDGE