



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 2 OF 2018

IN THE MATTER OF JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 22 (1), 23, 25, (c), 50, 157 AND 245 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF CRIMINAL CASE NUMBER 662 OF 2017

IN THE CHIEF MAGISTRATE'S COURT AT KISUMU

BETWEEN

REPUBLIC.....PROSECUTOR

AND

ARTHUR AGORO SAOLA.....ACCUSED

AND

IN THE MATTER OF ARTHUR AGORO SAOLA.....APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

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

THE CHIEF MAGISTRATE'S COURT AT KISUMU.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

AND

THOMAS OLUOCH OLUM.....INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioner has moved the court to impugn the authority of the respondents to proceed with criminal proceedings against him in **CRIMINAL CASE NUMBER 662 OF 2017** in the Chief Magistrate's court at Kisumu result of a complaint lodged by one **THOMAS OLUOCH OLUM** in respect of a property known as **KISUMU/KASULE/704** ("the suit property").

Leave

2. Leave to apply for Judicial Review orders of certiorari and prohibition was granted on 26th February, 2018 at which point the court also granted an order staying the proceedings in **CRIMINAL CASE NUMBER 662 OF 2017** in the Chief Magistrate's court at Kisumu.

PETITIONERS' CASE

3. The petitioner's case is set out in the Notice of Motion dated 15th February 2018 and is supported by the petitioner's affidavit sworn on 1st March, 2018 and written submissions filed on 15th May, 2018.

4. According to the petitioner, he bought the suit property from one George Ngethe Simon Mburu sometimes in 1982 and he was issued with a title deed on 8th July, 1988 as shown on the green card annexed to his affidavit. On 8th July, 1996, he was charged jointly with another in **CRIMINAL CASE NUMBER 2088 OF 1996** in the Chief Magistrate's court at Nairobi with forgery of a letter of objection authorizing transfer of the suit property. That the charges were withdrawn under section 87(a) of the Criminal Procedure Code on 22nd November, 1996.

5. According to the petitioner, Justus Kipruto Sigilai and Joe Kariuki were subsequently charged in **CRIMINAL CASE NUMBER 3440 OF 1996** in the Chief Magistrate's court at Nairobi with forgery of a letter of objection authorizing transfer of the suit property and he testified in that case as PW2 and that accused were acquitted for the reason that investigations were poorly conducted.

6. The petitioner's case is that he has been in possession of the suit property since 1988 and was surprised when he was charged in **CRIMINAL CASE NUMBER 662 OF 2017** in the Chief Magistrate's court at Kisumu for allegedly acquiring the suit property fraudulently from Thomas Oluoch Alum whereas George Ngethe Simon Mburu had testified in **CRIMINAL CASE NUMBER 3440 OF 1996** in the Chief Magistrate's court at Nairobi that he had acquired the suit property from Thomas Oluoch Alum.

7. The charges in **CRIMINAL CASE NUMBER 662 OF 2017** in the Chief Magistrate's court at Kisumu triggered this case in which the petitioner argues that the court in **CRIMINAL CASE NUMBER 2088 OF 1996** in the Chief Magistrate's court at Nairobi has already made a determination regarding the acquisition of the suit property.

8. The petitioner faults the prosecution for failure to involve George Ngethe Simon Mburu in **CRIMINAL CASE NUMBER 662 OF 2017** in the Chief Magistrate's court at Kisumu whereas he had testified on oath in **CRIMINAL CASE NUMBER 3440 OF 1996** in the Chief Magistrate's court at Nairobi that he had acquired the suit property from Thomas Oluoch Alum who is now the complainant in **CRIMINAL CASE NUMBER 662 OF 2017** in the Chief Magistrate's court at Kisumu.

9. The applicant argues that the acts complained of occurred 30 years ago and he is unlikely to get witnesses to prove that complainant in **CRIMINAL CASE NUMBER 662 OF 2017** in the Chief Magistrate's court at Kisumu had transferred his interest in the land, being the people who testified in **CRIMINAL CASE NUMBER 2880 OF 1996** in the Chief Magistrate's court at Nairobi are impossible to find due to lapse of time.

10. The petitioner submits that the institution of **CRIMINAL CASE NUMBER 662 OF 2017** in the Chief Magistrate's court at Kisumu is designed to harass him at the behest and insistence of persons unknown to him. Petitioner cited the law and several cases to support his case among them:-

i. Article 50 of the Constitution

ii. Stanley Munga Githunguri v Republic [1986] eKLR

iii. Mills v Cooper [1967] 2 All ER 100

iv. R v Grays Justices, ex parte Graham [1982] 3 All ER

v. Kenya Commercial Bank Ltd & 2 Others v Commissioner of Police and the Director of Criminal Investigations Department & Another Interested Party Benjoh Amalgamated Ltd [2012] eKLR

vi. Joram Mwenda Guantai v The Chief Magistrate, Nairobi [2007] eKLR

vii. Rosemary Wanja Mwangiru & 2 others v Attorney General & 3 others [2013] eKLR

viii. Meme –vs- Republic & another [2004] 1 KLR 637

11. The petitioner prays for the following reliefs:-

i. This Honourable Court be pleased to grant judicial review orders in the form of Certiorari to bring into the High Court for purposes of being quashed the decision by the 1st Respondent by way of a charged sheet dated 22nd December, 2017 to charge the applicant in CRIMINAL CASE NUMBER 662 OF 2017 in the Chief Magistrate's Court at Kisumu

ii. This Honourable Court be pleased to grant judicial review orders in the form of Prohibition against the 1st and 2nd respondents preventing them, their agents, servants or anyone whosoever acting under their control, direction, or influence from proceeding with, or continuing the prosecution of CRIMINAL CASE NUMBER 662 OF 2017 in the Chief Magistrate's Court at Kisumu

iii. This Honourable Court be pleased to grant judicial review orders in the form of Prohibition against the 3rd respondent preventing it and its lawful agents from hearing, mentioning or in any other way proceeding with the determination of CRIMINAL CASE NUMBER 662 OF 2017 in the Chief Magistrate's Court at Kisumu

iv. The applicant be awarded costs.

1st respondent's case

12. The respondents oppose the petition based on a replying affidavit sworn by CPL Gilbert Okello on 1st April, 2018 and on written submissions filed on 20th April, 2018. The 1st respondent argues that the Limitation of Actions Act Cap 22 excludes criminal cases from its ambit and that delay alone is not enough to warrant the orders sought.

13. CPL Gilbert Okello depones that he was instructed to commence investigations by the Director of Criminal Investigation. In the course of the investigation he established that the applicant was charged jointly with another in CRIMINAL CASE NUMBER 2088 OF 1996 in the Chief Magistrate's court at Nairobi with forgery of a letter of objection authorizing transfer of the suit property and that the charges were withdrawn under section 204 of the Criminal Procedure Code on 17th December, 1996. That he also established that the applicant was not an accused in CRIMINAL CASE NUMBER 3440 OF 1996 in the Chief Magistrate's court at Nairobi and that his claim of double jeopardy does not arise. He depones that the statement of the complainant in CRIMINAL CASE NUMBER 662 OF 2017 in the Chief Magistrate's court at Kisumu in which he stated that he did not sell the suit property to George Ngethe Simon Mburu and evidence gathered from the adjudication office that the transfer to the applicant was fraudulent led him to the conclusion that there was sufficient evidence to mount a prosecution. These facts include the following:-

a. That Abraham Mang'ere who allegedly sold the sit property to the applicant is fictitious

b. The applicant claims to have paid Kshs. 10,000/- of the purchase price to Lucas Akinyi and the balance of Kshs. 70,000/- to Jumbo Kenya Limited

c. That Abraham Mang'ere and George Ngethe Simon Mburu did not receive any money from the applicant

d. That the adjudication records were manipulated

14. The 1st respondent urged the court to find that the discretionary orders sought can only be granted in exceptional circumstances where it is impossible by other means to prevent an abuse of the court process.

15. The 1st respondent submits that the applicant has been served with witness statements and documentary evidence to enable him prepare for his defence and that a fair trial remains possible in spite of the delay.

16. The 1st respondent denies misusing the process of the court and urges the court to find that the burden of proving prejudice to the extent that a fair trial cannot be held lies with the applicant.

17. The 1st respondent contends that the balance of harms weighs strongly against the orders sought since their effect would amount to denying the complainant the right to peaceful enjoyment of his ancestral land, deprive him of property and deny his equitable access to land.

18. The 1st respondent cited several cases to support its case among them:-

i. Republic vs Director of Public Prosecution & 2 other ex-parte Francis Njakwe Maina & another (2015)eKLR

ii. Regina v Horseferry Road Magistrates' Court, ex Parte Bennett (No 1): HL 24 Jun 1993

iii. R v Dunlop [2006] EWCA Crim 1354, [2007] 1 Cr. App. R. 8

iv. Kenya Country Bus Owners' Association & 8 others v Cabinet Secretary for Transport & Infrastructure & 5 others [2014] eKLR

v. *Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR*

vi. *Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR*

1st Interested Party's Case

19. The interested party opposes the application on the basis of grounds contained in written submissions dated filed on 21st June, 2018. It principally adopts the position taken by the respondent and submits that the applicant the withdrawal of **CRIMINAL CASE NUMBER 2088 OF 1996** in the Chief Magistrate's court at Nairobi under section 87 (a) of the Criminal Procedure Code does not shield the applicant from prosecution after further and better investigations have been carried out.

20. The interested party contends that he was not called as a witness in **CRIMINAL CASE NUMBER 2088 OF 1996** and **CRIMINAL CASE NUMBER 3440 OF 1996** both in the Chief Magistrate's court at Nairobi to shed light on how the suit property was transferred from him to the applicant and that he only learnt of the transfer in 2015 when he bequeathed the suit property to his son who was unable to transfer it on the ground that it was registered in the name of the applicant.

21. The interested party urged the court to find that there was no evidence that the subordinate court in Kisumu had overstepped its judicial mandate to warrant interference by way of judicial review proceedings and that this application is therefore premature.

22. The interested party cited several cases to support its case among them:-

i. *Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR*

ii. *Republic v Kenya Revenue Authority Ex- Parte Aberdare Freight Services Ltd & 2 others [2004] eKLR*

iii. *Republic v Director of Public Prosecutions & another Ex-Parte Wilfred Thiong'o Njau [2015] eKLR*

iv. *Reuben Musyoki Muli v Director of Public Prosecutions & another [2014] eKLR*

v. *Republic v Registrar of Societies & 5 others Ex-parte: Stephen O. Owino & 5 others (Suing in their capacity as officials of NHC Lang'ata Court Resident's Association) [2018] eKLR*

Determination

23. There is no dispute as to the nature and extent of the powers of the Director of Public Prosecutions ("the DPP") and the National Police Service and the extent of the Court intervention. The principles upon which the Court intervenes have been set out in several cases cited by the parties. The starting point for this inquiry is **Article 157** of the Constitution provides that:-

"The Director of Public Prosecution 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."

24. In view of the authority conferred by the Constitution on the DPP, the Courts should not ordinarily interfere with his discretion in deciding whether or not to institute criminal proceedings. In the case of **Kenya Commercial Bank Limited & 2 Others v. Commissioner of Police and Another, Nairobi Petition No. 218 of 2011[2013] eKLR**, Majanja J. held that:-

"The office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution."

25. The Court of Appeal set out the grounds upon which the judicial review reliefs of certiorari, prohibition and mandamus may be granted in **Kenya National Examination Council vs. Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996 [1997] eKLR** when it stated:

"That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue" It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol. 1 at pg.37 paragraph 128...The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS" Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of

Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

26. In the case of George Joshua Okungu and Another v Chief Magistrate’s Court Anti-Corruption Court at Nairobi and Another (2014) eKLR Korir J. stated:

“The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a good defence for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is always open to the Petitioner in those proceedings. However, if the petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the Petitioner’s Constitutional rights, the Court will not hesitate in putting a halt to such proceedings...”

27. I agree with the principles outlined in the decisions cited hereinabove but ultimately each case must be decided based on its own facts. The first question to be answered in this matter is whether the 1st respondent’s decision to charge the Applicant in CRIMINAL CASE NUMBER 662 OF 2017 in the Chief Magistrate’s court at Kisumu is oppressive and whether it amounts to abuse of court process.

28. Section 87 of the Criminal Procedure Code States:

“In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Attorney-General, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal -*

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

(b) if it is made after the accused person is called upon to make his defence, he shall be acquitted.”

29. Article 50 of the Constitution provides;-

(2) Every accused person has the right to a fair trial, which includes the right—

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted

30. In the case Republic vs Director of Public Prosecution & 2 other ex-parte Francis Njakwe Maina & another (Supra) the court stated:-

“... The High Court will interfere with criminal trial in the subordinate court if it is determined that the prosecution is an abuse of the process of the court and/or because it is oppressive and vexatious A prosecution that is oppressive and vexatious is an abuse of the process of the court: there must be some prima facie case for doing so. 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 complaint has a prima facie case. A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence. In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary and whether the case can be resolved easily by civil process without putting individual’s liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds.”

31. A plain reading of the said Section 87 (a) of the CPC clearly shows that the DPP is allowed to withdraw from the prosecution of any person but such withdrawal, if done before the person is placed on his defence, shall not operate as a bar to subsequent proceedings against the person on account of the same facts. The applicant in this case has neither been convicted nor acquitted of the same charges as are contained in CRIMINAL CASE NUMBER 662 OF 2017 in the Chief Magistrate’s court at Kisumu. The applicants claim that that he is exposed to double jeopardy is therefore without merit. The charges in the impugned criminal proceedings cannot be said to be flimsy, oppressive and or abuse of court process. Public interest demands that the complainant in the impugned criminal proceedings be given an

opportunity to be heard regarding the transfer of the suit property to the applicant. To deny the complainant that right will in my considered view diminish public confidence in the law.

32. The second question is whether the delay in instituting criminal proceedings warrants the halting of the criminal proceedings. The burden to demonstrate that the impugned criminal proceedings are oppressive and constitute an abuse of process and are being carried out in breach of or threaten to breach the Petitioner's Constitutional rights lies with the applicant.

33. Article 47 of the Constitution provides that:-

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

34. On the other hand, Article 159 provides that

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(b) justice shall not be delayed;

35. It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. The decision whether or not the action to charge was expeditiously taken must necessarily depend on the circumstances of a particular case.

36. The applicant has been accused of among others obtaining registration of the suit property into his name with intent to defraud the complainant. The issue of how the suit property was transferred from the complainant to the applicant is at the heart of the impugned criminal case. The complainant has denied selling the suit property to the applicant or anybody else or receiving payment for the sale thereof. The complainant was not party to CRIMINAL CASE NUMBER 2088 OF 1996 and CRIMINAL CASE NUMBER 3440 OF 1996 both in the Chief Magistrate's court at Nairobi. He states that he only learnt of the transfer in 2015 when he bequeathed the suit property to his son who was unable to transfer it on the ground that it was registered in the name of the applicant.

37. In the case of R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001, the court held:-

“.....Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay.....”

38. I have considered the material placed before this court by both parties. It is trite that there is no time limit to the prosecution of serious offences except where a limitation is imposed by statute. In the case of George Joshua Okungu and Another v Chief Magistrate's Court Anti-Corruption Court at Nairobi and Another (Supra), the court held that:-

“It is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted.”

39. In this case, the applicant argues he is unlikely to get the people who testified in CRIMINAL CASE NUMBER 2880 OF 1996 in the Chief Magistrate's court at Nairobi that the complainant in the impugned proceedings transferred his interest in the suit property due to lapse of time. The applicant's contention is however without merit since no witness testified against him in CRIMINAL CASE NUMBER 2088 OF 1996 in the Chief Magistrate's court at Nairobi the same having been withdrawn under section 87(a) of the Criminal Procedure Code on 22nd November, 1996 before the hearing commenced. And even if the applicant intended to refer to CRIMINAL CASE NUMBER 3440 OF 1996 in the Chief Magistrate's court at Nairobi where accused persons in that case were acquitted, the applicant and the complainant in the impugned criminal proceedings were not parties to that case. In any case the proceeding of the evidence adduced in CRIMINAL CASE NUMBER 3440 OF 1996 in the Chief Magistrate's court at Nairobi is readily available to the applicant and the same forms part of his application to this court. I therefore find that the applicant has not demonstrated that the delay has adversely affected his ability to defend himself.

40. The delay in mounting the prosecution against the applicant has been explained to the satisfaction of the court. The impugned criminal prosecution has not been shown to be based on ulterior motive or improper purpose and I therefore find that there exists material evidence on which the prosecution can be said to have a prosecutable case.

Disposition

41. My assessment of the facts I have outlined above lead to the conclusion that the impugned criminal proceedings should be permitted to continue so that both the applicant and the complainant can ventilate their cases conclusively before the Chief Magistrate's Court which has competent jurisdiction to settle the parties' grievances.

42. In the premises this application fails and is dismissed with costs to the 1st Respondent and the interested party.

DATED AND DELIVERED IN KISUMU THIS 29TH DAY OF NOVEMBER 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner -Mr Nyauchi

1st Respondent - Mr Muia

1st Respondent - N/A

1st Respondent - N/A

1st Respondent -N/A

Interested Party – Mr Isiji/Mr Githinji