



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISC. CIVIL APPLICATION NO. 8 OF 2016

DAVID KIMATHI WACHIRA.....1ST APPLICANT

VERSUS

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

DOUGLAS KAMIRI MUHATHIA.....2ND RESPONDENT

RULING

1. The Applicant filed a Notice of Motion under a Certificate of Urgency dated 25th April, 2016; the application was brought under the provisions of Articles 22(c), 22 (1), 50, 157(6) and 165(6) of the Constitution 2010; the Applicant prayed for the following Orders;

a) Spent

b) A declaration that the proceedings of the Principal Magistrates Court at Mukuruweini Criminal Case No. 570 of 2014, R vs David Kimathi Wachira contravenes the applicants right to fair trial under Article 50 of the Constitution and therefore a nullity in law;

c) A declaration that the dominant purpose for the institution and maintenance of the criminal case is to exert pressure on the applicant to settle a civil suit claim between himself and the 2nd respondent and is an abuse of the criminal justice system.

d) An order of stay of the criminal proceedings pending the hearing and determination of the constitutional application/ petition;

e) Costs.

FACTS

2. The applicant entered into a Sale Agreement with the 2nd respondent for the sale of the property known as Parcel No. **Gikondi/Thimu/1175**; the applicant is alleged to have received the sum of Kshs.380,000/- from the 2nd respondent; the sale was not completed and consequential thereto the applicant was arrested and charged with the offence of obtaining by false pretenses contrary to Section 313 of the Penal Code;

3. Hereunder is a summary of the rival submissions made by Counsels for the applicant and the respondents;

APPLICANTS SUBMISSIONS

- (a) The applicant relied on the grounds on the face of the application, his supporting affidavit dated the 25/04/2016 and the supplementary affidavit dated 17/05/2016; he contends that the institution and maintenance of the Mukuruweini Criminal Case No. 570 of 2014 is an abuse of the criminal justice system as the basis of the suit is a Sale Agreement which is civil in nature;
- (b) That the remedies for breach of the agreement were provided for in the Sale Agreement; that in case of any breach by either side 30% of the purchase price would be payable; that the applicant encountered problems when obtaining approvals and was thus unable to perform and complete his part of the agreement;
- (c) That the 2nd respondent caused the applicant to be arrested and charged with the offence of obtaining by false pretenses; that the proceedings before the Mukuruweini Court were purely an abuse of the court process; and also malicious as it was not brought to pursue the alleged offence that the applicant is alleged to have committed but calculated to pressurize the applicant into settling the matter.
- (d) That the criminal case should be stayed permanently as it was an abuse of the court system; proceedings be declared a nullity as they contravene the applicants rights to a fair trial; the authorities relied upon by the applicant are Patrick Kinyua [2012] eKLR; Samuel Kamau Macharia [2010] eKLR;
- (e) That unless the orders sought are granted the applicant stands the risk of being deprived of his right to a fair trial;
- (f) The applicant prayed that his application be allowed.

RESPONDENTS SUBMISSIONS

- (g) In responding the respondent stated that it was not in dispute that the parties entered into an agreement for the sale of the parcel of land known as **Gikondi/Thimu/1175**; that at the time of entering into the agreement the 2nd respondent believed that the applicant was the owner of the land parcel; that he later discovered that the land was family land and that the applicant had all along misrepresented to the 2nd respondent that he was in a position to sell the land; that the applicant knew that this was false and intended to defraud the 2nd respondent of his money;
- (h) That the 2nd respondent reported the matter to the police at Mukuruweini Police Station and the applicant was properly charged with the offence of obtaining money by false pretence; that the criminal proceedings at Mukuruweini Law courts were properly before that court and were not maliciously instituted; and the case ought to proceed to its logical conclusion;
- (i) That the prayers sought should not be granted.

ISSUES FOR DETERMINATION

4. Taking into consideration the above submissions this court has framed the following issues;

- (i) Whether the application has been properly brought before this court;
- (ii) Whether the criminal proceedings ought to be stayed pending the determination of the application/petition.
- (iii) Costs

ANALYSIS

Whether the application has been properly brought before this court:

5. Upon perusal of the court record this court has noted that the applicant initiated this action by way of a Miscellaneous Application which is titled as an '**Originating Notice of Motion**'; it is trite law that every suit that is instituted must be commenced in the manner prescribed by law; a plaint, a petition or an originating summons are examples of methods prescribed by law; Reference is made to renowned Court of Appeal case of **Board of Governors, Nairobi School vs Jackson Ileri Geta (1999) KLR** which held that;

"Pleading is defined in Section 2 of the Civil Procedure Act to include a petition or summons....."

.....which rule provides that every suit shall be instituted by presenting a plaint to the court, or such other manner as may be prescribed.

The use of the term "summons" in the definition of the term "pleading" must be read to mean "originating summons" as that is a manner prescribed for instituting suits.

6. It is reiterated that in this instance the applicant has commenced his case by way of a miscellaneous application titled **Originating Notice of Motion**; maybe this could have been a typographical error and it ought to have read "**Originating Summons**"; that may have been the case but as it stands the application is not brought in a manner prescribed for instituting Petitions either under the Practice and Procedure Rules 2013, that has been correctly cited, nor can it be described as a form of a pleading as prescribed by the aforementioned Section 2 of the Civil Procedure Act.

7. The use of the words "**...pending hearing and determination this constitutional application/petition**" as one of his prayers is also the applicants undoing; in that the prayer sought is interlocutory in nature and therefore must be supported by a substantive pleading in the form of a petition; in short once the application is disposed of there is nothing that remains to be heard and determined; this court again reiterates that there is no pleading instituted by the applicant in the form of a Petition therefore there is nothing to support the interlocutory application;

8. This court is satisfied that the application is not properly before this court and warrants to be dismissed.

9. The above notwithstanding this court will nonetheless proceed to address the main prayer sought as captured in the next issue;

Whether the criminal proceedings ought to be stayed;

10. The applicant contends that the claim the 2nd respondent has against him is civil in nature and the criminal proceedings instituted in the Mukuruweini Law Courts are malicious, an abuse of the court process as it is being used to coerce the applicant into settling the claim; he therefore seeks to have the criminal proceedings stayed pending the hearing and determination of this application;

11. For this court to interfere with the lower courts proceedings the applicant must demonstrate that the material in possession of the 1st Respondent does not disclose an offence and that the prosecution is being used for other purposes other than proving the alleged criminal offence; this would be sufficient evidence to demonstrate that the prosecution is actuated by malice and that he would therefore also not receive a fair trial thereat;

12. But upon hearing the submissions made by both parties this court is satisfied that the facts of the case disclose and constitute a criminal offence; no evidence has been placed before this court by the applicant to demonstrate that the criminal charges were instituted to achieve an ulterior purpose other than proof of the offence;

13. The law also does not hold that a person should not be prosecuted in criminal proceedings in lieu of a

civil suit that may be brought against him which relates to matters in the criminal case; reference is made to case of **Vincent Kibiego Saina vs The AG Misc. App. No. 839 and 1088 of 1999** where it was so held by Kuloba J.

14. Section 193A of the Criminal Procedure Code also allows for concurrent criminal and civil proceedings which can run parallel to each other; which would then mean that the 2nd Respondent is not estopped from initiating civil proceedings against the applicant notwithstanding the existence of the current criminal case and both can run parallel to each other;

15. It is reiterated that the applicant has not placed before this court any evidence to demonstrate malice or ulterior motive by the respondents in initiating the criminal proceedings; and is satisfied that the orders for stay of the criminal proceedings would not have been merited.

FINDINGS AND DETERMINATION

16. For the forgoing reasons this court makes the following findings;

(i) The miscellaneous application is found incompetent and it is hereby dismissed;

(ii) The application for stay of the criminal proceedings in any event would have been found lacking in merit and would have been dismissed; the subordinate court is found to be properly seized of the criminal matter and has jurisdiction to hear and determine the matter;

17. The respondents shall have the costs of this application.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 23rd day of March, 2017.

HON.A. MSHILA

JUDGE