



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIVASHA
CONSTITUTIONAL PETITION NO. 16 OF 2016
IN THE MATTER OF THE CONSTITUTION OF KENYA 2010
IN THE MATTER OF CONTRAVENTION OF THE FUNDAMENTAL
RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES 22, 23,
40, 31, 48, 50, 159 AND 160 OF THE CONSTITUTION OF KENYA 2010
BETWEEN
JULIUS KANDIE CHESANG.....PETITIONER
-VERSUS-
DIVISIONAL CRIMINAL INVESTIGATION
OFFICER, NAIVASHA DCIO.....1ST RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT
THE ATTORNEY GENERAL.....4TH RESPONDENT
NAKURU COUNTY LAND REGISTRAR.....5TH RESPONDENT
PETER KAMAU MUGO.....6TH RESPONDENT

R U L I N G

1. The Petitioner's Motion filed on 6/12/2016 under certificate of urgency, contemporaneously with the Petition, was prompted by the events of 7th April 2016. On the said date, **Julius Kandie Chesang** (the Petitioner) was arrested by officers working under the oversight of the **Divisional Criminal Investigation Officer** (DCIO) Naivasha and the **Director of Criminal Investigations** (DCI) (1st and 2nd Respondents). He was, pursuant to instructions issued by the **Director of Public Prosecutions** (DPP, 3rd Respondent), arraigned before the Chief Magistrate's court at Naivasha where he was charged with two offences.

2. The first charge is Forgery of Title to land contrary to Section 350 of the Penal Code. The particulars state that on the 17th day of July 2008 at Nakuru town within Nakuru County, with intent to defraud, he forged a document of title to land namely, **TITLE DEED** for land parcel number **NAKURU/MOI NDABI/1243** in the names of **Julius Kandie Chesang** purporting it to be a genuine title deed issued to the said **Julius Kandie Chesang** by the Land Registry Nakuru.

3. The second charge is Stealing contrary to Section 268 as read with Section 275 of the Penal Code. In that on the 5th day of November 2014 at Kongoni area in Naivasha Sub-County within Nakuru County, jointly with others not before court, he stole 166 rolls of barbed wire and 375 posts all valued at KShs 1,300,000/= the property of **Peter Kamau Mugo**.

4. Through the pleadings, affidavits filed, and submissions made by the parties, in particular by the Petitioner and **Peter Kamau Mugo** (the 6th Respondent), it is evident that the prosecution was the culmination of a tussle between the Petitioner and the 6th Respondent, over the ownership of the land parcel number **NAIVASHA/MOI NDABI/1243** (the suit property). On his part, the Petitioner has claimed that he was the rightful owner of the said property having been allotted the same in the year 2001, and obtaining a title thereto in 2008.

5. And that when he discovered in 2013 that the 6th Respondent was also laying claim to the suit property, he filed a suit namely **Nakuru ELC Suit No. 314 of 2014** against the 6th Respondent, the **County Land Registrar Nakuru County** (5th Respondent herein) and the **Attorney General** (4th Respondent herein) to assert his title. The said suit is yet to be heard and determined.

6. For their part, the Respondents assert that the Petitioner's alleged title document was, pursuant to investigations found to be a forgery and that the 6th Respondent is the holder of the *bonafide* title to the suit property. The 3rd Respondent therefore directed that the Petitioner be charged for the offence of Forgery and Stealing the latter offence relating to an alleged incident on the property, concerning which the 6th Respondent also complained to the police.

7. The key prayers in the Motion expressed to be brought under Articles 22(1), 23, 24, 159 and 160 of the Constitution are as follows:-

“a) THAT this application be certified urgent and service of the same be dispensed with in the very first instance.

b) THAT in view of the urgency of hereof, this Honourable Court be pleased to issue an order staying the proceedings in Naivasha Chief Magistrate Criminal Case Number 1680 of 2016, Republic Versus Julius Kandie Chesang pending the hearing of this application interpartes and subsequently until the Petition herein is heard and determined.

c) THAT this Court do issue an order in the interim barring the 1st and 2nd Respondents from arresting, harassing and/or detaining the Applicant in relation to issues affecting the parcel described as NAKURU/MOI NDABI/1243 and subsequently the said order to stay in place until this Petition is heard and determined.

d) THAT the costs herein be in cause.”

8. I must state at this point, that the Respondents answers and submissions seemed to primarily target the Petition itself, and in some respects the Motion, the latter which is the subject of this ruling.

9. What then is the Petitioner's complaint in this matter? In his Petition, he cites the contravention of Articles 40 (1), 31, 48 and 50 of the Constitution. It seems to me that the gravamen of the Petitioner's complaint is articulately captured at paragraph 17 of the Petition which also carries the prayers sought. It stated therein that:-

“In the premises, your Petitioner seeks a declaration whether the actions of the 1st, 2nd, 5th and 6th Respondents are wrongful and unlawful and an abuse of the law and due process denying and infringing on the Petitioner’s rights guaranteed by Articles 40, 48 and 50 of all respects and that:

a. **The issues pertaining to parcel number NAKURU/MOI NDABI/1243 also described as NAIVASHA/MOI NDABI can and should be properly ventilated, canvassed and determined in Nakuru H. C. No. 314 of 2014.**

b. **That the 3rd Respondent in his wisdom has ruled that the matter is a case of double allocation and should be subject of civil proceedings.**

c. **That the charges in Naivasha Chief Magistrate’s Criminal Case No. 1680 of 2016 expose the Petitioner to double jeopardy.**

d. **That the said criminal charges contravene the Petitioner’s protection of ownership and quiet possession as envisaged in the constitution.**

e. **That the arrest and detention of the Petitioner was malicious, uncalled for and amounted to harassment, intimidation, mental and psychological torture.” (sic) (emphasis supplied)**

10. In the affidavit the Petitioner swore in support of the instant Motion, he depones at paragraph 16 to 19 that the charges facing him are malicious, **“trumped up”** and intended to harass and intimidate him regarding his civil claim. Further, that the said charges are unconstitutional, expose him to **“double jeopardy”** and constitute an infringement of his rights. He emphasizes the time lapse between his acquisition title in 2008 and the prosecution, resulting from a change of heart by the office of Director of Public Prosecutions (ODPP) who earlier in 2016 declared the dispute a case of **“double allocation”**, suitable for determination through a civil process.

11. The Petitioner’s brief submissions in respect of the Motion reiterate his claim concerning the suit property and his reason for seeking the stay of the criminal proceedings. The said reasons, so far as I can make out from the submissions, are as follows:

a. the criminal prosecution is malicious.

b. the dispute herein belongs to the civil jurisdiction.

c. the Petitioner is at risk of suffering “double jeopardy”.

d. the Respondents’ actions constitute a violation of the Petitioner’s Constitutional rights.

12. The 1st Respondent filed an affidavit in opposition to the Motion and Petition, through the incumbent, **SSP Maritim Mbaya**. Therein he depones *inter alia* that the 6th Respondent reported to police in Naivasha in November 2014 vide **Occurrence Book No. 17/5/11/2014** and **33/17/11/2014** concerning encroachment upon the suit property, which he said he owned, but upon which the Petitioner had also laid a claim. That in the course of investigations, documents furnished by the two contenders to the suit property were subjected to forensic and other examinations, with the outcome being that the Petitioner’s title and related documents were alleged to be forgeries or suspect.

13. Subsequently, the 3rd Respondent revised his earlier directions on the matter and directed that the Petitioner be arrested and appropriately charged. That further, the charges do not constitute a violation of the Petitioner’s constitutional rights or an abuse of the criminal process by the Respondents. Moreover criminal charges must be processed via the criminal and not civil process.

14. The submissions by the 1st to 3rd Respondents, represented by Mr. Mutinda reiterate the contents of

Mr. Mbaya's affidavit. Citing Section 193A of the Criminal Procedure Code, Mr. Mutinda submitted that the concurrent impugned prosecution and the ELC Suit is not a ground for stay or prohibition of criminal proceedings. That pursuant to the results of the criminal investigations, the 3rd Respondent in due exercise of his constitutional independent mandate directed that the impugned charges be laid against the Petitioner.

15. Moreover, the Petitioner has not demonstrated sufficient reason to justify the orders sought. Asserting that the charges were lawfully preferred against the Petitioner, and were based on criminal investigations, Mr. Mutinda contended that the 3rd Respondent in due exercise of his independent mandate directed that the same be laid against the Petitioner. He relied on the judgment in **Attorney General -Vs- Director of Public Prosecutions & 3 Others ex parte Thomas Nganga Munene [2014] eKLR**.

16. The 4th and 5th Respondents filed grounds of opposition and submissions. They exhorted the court to exercise caution while considering the exercise of the DPP's independent mandate and cited the provisions of Section 193A of the Criminal Procedure Code. In regard to the latter, reliance was placed on **Republic -Vs- Attorney General & 4 Others ex parte Diamond Hashim Lalji & Another [2014] eKLR**.

17. Further relying on the case of **Meixner & Another -Vs- Attorney General [2005]1 KLR** and others authorities, they contended that the trial court and not this court, is best placed to weigh the evidence marshalled in respect of the charges. In the Respondent's view, the criminal proceedings will not determine the question of land ownership, which is a question for the ELC court, rather they are in respect of criminal offences of forgery *inter alia*. Several authorities including **Sanghani Investment Limited -Vs- The Officer in Charge Nairobi Remand and Allocation Prison Miscellaneous No. 99 of 2006** were relied on for this proposition.

18. Accusing the Petitioner of primarily dwelling on issues of land ownership, the Respondents argue that the Petitioner has not brought a prima facie case of contravention of any rights or freedoms as the complaints in the Petition do not go beyond listing various Articles to particularising the rights and freedoms violated and how. The decision in **Anarita Karimi Njeru -Vs- Republic (No. 1) [1979] 1 KLR 154** and **Kenya Bus Service & 2 Others -Vs- Attorney General [2005] eKLR**, *inter alia* are cited. Further, it was argued that the Petitioner has not demonstrated likelihood of prejudice.

19. The 6th Respondent's submissions also open with the foregoing attack on the Petitioner's case. In addition, the 6th Respondent asserts that the allegation that the Petitioner stands to suffer double jeopardy is misplaced as he has not previously been charged for similar offences.

20. Concerning the application of Section 193A of the Penal Code, the 6th Respondent relied on the decision of **Paul Mwangi Nderitu -Vs- Principal Magistrate Nairobi, High Court Miscellaneous Application No. 90 of 2001**. He asserts that there is no evidence that the Respondents acted in an unconstitutional manner – see **George James Kangethe & Another -Vs- Inspector General of Police & Others [2013] eKLR**.

21. Contending that forgery is a criminal offence, the 6th Respondent emphasized the obligation placed upon the police to investigate complaints [**Miscellaneous Application 519 of 2005 Surjit Singh Hunjan -Vs- The Principal Magistrate Kibera [2005] eKLR**], and argued that the criminal process is the correct forum for the determination of the criminal culpability after hearing the defence, if any, offered by the Petitioner (See **Brian Yongo -Vs- Attorney General [2006] eKLR**).

22. I have considered all the material canvassed in respect of the Motion. The Petitioner herein is seeking conservatory orders which, this court is empowered to grant pursuant to Article 23 (3) of the Constitution which states:

“(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including:-

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.”

23. In order for the court to grant the orders sought, it must be satisfied firstly, that the Petitioner has demonstrated a *prima facie* case with a probability of success; and secondly, that he stands to suffer prejudice if the prayers are not granted. **Musinga J** (as he then was) observed in the case of **Centre for Right Education and Awareness (CREAW) & 7 Others –Vs- Attorney General [2011] eKLR** that:

“It is important to point out that the arguments that were raised by counsel and that I will take into account in this ruling relate to the prayer for a Conservatory order.....

At this stage, a party seeking a Conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as result of the violation or threatened violation.”

24. In addition to the foregoing principles, the Supreme Court’s decision in **Gatirau Peter Munya -Vs- Dickson Mwenda Githinji & 2 Others SCK [2013] eKLR** highlighted the consideration of the public interest principle by the court, while determining whether or not to grant conservatory orders. The court observed that:

[86] “Conservatory orders” bear a more decided *public-law* connotation: Conservatory orders, consequently, should be granted on the *inherent merit of a case*, bearing in mind the *public interest*, the *constitutional values*, and the *proportionate magnitudes*, and *priority levels attributable to the relevant causes*.

[63] Thus where a conservatory order is sought against a public agency like a legislature assembly that is mandated to carry out certain fictitious in the normal cause of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislature body should take into account the need to allow for their ordered function in public interest.”

25. The substance of the Petitioner’s complaint herein is that the impugned charges are malicious, having come too late in relation to the year (2008) when he obtained title to the suit property, thus there has been inordinate delay. That the DPP had in his earlier instructions advised, that the matters raised in this dispute are civil in nature and all relevant issues will be determined in the pending civil suit that he has filed. He takes the position that the criminal prosecution was mounted with a view to intimidating him. Thirdly, that the criminal proceedings will expose him to double jeopardy. Ultimately, he complains, he will suffer an infringement of his constitutional rights.

26. The rights cited in the Petition herein are those guaranteed under article 40 (1), 31, 48 and 50 of the Constitution. These Articles relate to protection of the right to property, to privacy, access to justice and the right to a fair trial, respectively. The case of **Anarita Karimi Njeru** is settled authority for the proposition that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and particulars of such infringement, or threat:-

“We would however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he shall set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

27. In this case, it is uncontested that there exists a civil suit in connection with the suit property, pitting the Applicant against the 6th Respondent. And that ultimately, the outcome of that case, and the criminal case may determine which is the *bonafide* title in respect of the suit property. However, I am unable to see how the impugned criminal case is a violation of the Applicant’s right under Article 40 (1) of the Constitution in this instance. Such an assertion appears at this stage untenable, in light of the dearth of evidence by the Applicant and the countering affidavit of Martin Mbaya and material canvassed by the 4th to 6th Respondents.

28. Section 193A of the Criminal Procedure Code envisages the concurrent existence of civil and criminal proceedings in respect of the same transaction. The complaint that the prosecution is malicious or amounts to double jeopardy against the Applicant has barely been demonstrated. The fact that the criminal case was brought eight years since the Applicant obtained title, is neither here nor there. After all he too filed his suit in 2014. Unless it is shown that the delay will somehow affect his trial, it is hard to see how the delay breaches his right to fair trial under Article 50 of the Constitution.

29. Moreover the question of double jeopardy does not arise, because the Applicant has not been previously charged in respect of the same matters. Similarly, that the DPP had a change of heart and decided to pursue a criminal prosecution is a discretionary matter within his rights in the exercise of his mandate under Article 157 of the Constitution and Section 6 of the Office of the Director of Public Prosecutions Act. Unless it is clearly shown that the change of heart was actuated by malice or an illegitimate consideration, this court would hesitate to interfere. More so because there is no evidence that the DPP had ever informed the Petitioner directly that he would not prosecute on the matter, in the first instance.

30. The proffered justification for the prosecution in the affidavit of Martin Mbaya though not tested appears to dispel the unsubstantiated assertion of malice and illegality on the part of the 1st to 3rd Respondents.

31. It is in the public interest that the DPP should be allowed to exercise his mandate without undue impediment through unjustifiable injunctions and similar orders, save where a proper case is made out. This the exhortation of the Court of Appeal in **Manilal Jamnadas Ramji Gohil –Vs- Director of Public Prosecutions, Nairobi Criminal Appeal (Application No. 57 of 2013)** namely that:-

“We are mindful that an order staying criminal proceedings would be granted only in the most exceptional circumstances. See Goddy Mwakio & Another –Vs- Republic [2011] Eklr where this court in illustrating this point, stated that:

“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances.”

(See also **Githunguri -Vs- Republic [1986] KLR 1 and Julius Kamau Mbugua -Vs- Republic [2010] eKLR**).

32. In my considered view, no trial related prejudice or likely prejudice has been demonstrated in this case, there being no evidence that the Petitioner will not receive a fair trial. The court cannot make such an assumption before the trial has commenced or that the criminal case will determine the actual merits of the pending civil case. The Applicant will have an opportunity to present his side of the matter by way of defence, at the criminal trial and the evidence in support of his civil claim.

33. The Constitution must be read as a whole, and in so far as the bill of rights is concerned, it is imperative to bear in mind the provisions of Article 24 (1) of the Constitution to the effect that:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:-

(a);

(b);

(c);

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e)”

34. The Petitioner’s right to protection of property or privacy is not absolute and cannot be used as a bar save where good cause is shown, to thwart a prosecution, where material evidence gathered though untested, leads investigators to believe there may be a case of fraud in the acquisition of such property. The rights of the Applicant must similarly be balanced against societal interest to have a suspected offender to account for his actions. The Constitutional Court of South Africa in **Sanderson -Vs- The Attorney General, Eastern Cape 1988 (2) S. A. 38 CC, (Kriegler J)** made what I consider useful remarks concerning questions of trial-related prejudice, appropriate remedies and public interest in a case where a Petitioner sought to bar his prosecution *inter alia*, for delay.

35. The court stated that:

“Even if the evidence he (Petitioner) has placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case - is far-reaching. Indeed it prevents the prosecution from presenting society’s complaint against an alleged transgressor of society’s rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.

Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a range of “appropriate” remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay.”

36. In the instant case, not only has the Petitioner failed to establish a *prima facie* case in respect of alleged violations, he has also not demonstrated any prejudice flowing from the criminal prosecution against him. The Motion seeking conservatory orders must therefore fail and is dismissed accordingly.

Delivered and signed at Naivasha, this **28th** day of **April, 2017**.

In the presence of:-

Mr. Chege holding brief for Mr. Thiong’o for the Petitioner/Applicant

Mr. Mutinda for the 1st to 3rd Respondent

Mr. Kariuki holding for Mr. Wachira for the 4th to 5th Respondent

Mr. Kariuki for the 6th Respondent

Court Assistant – Quinter

C. MEOLI

JUDGE