



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CRIMINAL APPLICATION NO. 54 OF 2016

ANGLEO OWINO.....PETITIONER

VERSUS

G.C.I.O. KILIFI COUNTY & 3 OTHERS.....RESPONDENT

RULING

The application dated 30.11.2016 seeks the following orders:-

- 1. That the 1<sup>st</sup> respondent be restrained from charging and or arresting the applicant pending the hearing and determination of the application.***
- 2. That the 1<sup>st</sup> respondent do carry out proper investigations in this matter in respect to the sale of KILIFI/MTWAPA/978.***
- 3. That any preferred charges against the applicant in respect to the sale of KILIFI/MTWAPA/978 be vacated.***

The application is supported by the affidavit of the applicant sworn on 30.11.2016 and a supplementary affidavit sworn on

13<sup>th</sup> March, 2017. The 3<sup>rd</sup> respondent, Kennedy Machuka filed a replying affidavit sworn on 24<sup>th</sup> February, 2017, the 2<sup>nd</sup> respondent filed a replying affidavit sworn by Gabriel Njoroge Gakuo on 24<sup>th</sup> February, 2017.

Mr. Mwadilo, Counsel for the applicant, submit that there was a sale agreement in relation to plot No. Kilifi/Mtwapa/978. The applicant acted for the vendor while the 2<sup>nd</sup> respondent acted for the purchaser. A deposit of Ksh.1.5million was paid to the applicant. Under the terms of engagement, the deposit was to be released to the vendor. The applicant complied with those terms and released the money to the vendor. It was late found that the applicant's client was not the owner of the property. The 2<sup>nd</sup> respondent called for a refund for the deposit and threatened legal action.

Counsel submit that the applicant undertook a search at the Lands Registry and obtained a copy of the title deed, the vendor's identity card and all relevant documents. The search showed that the person who appeared on the title deed was the owner. There was likelihood of criminal charges being preferred against the applicant yet it was agreed in writing that the deposit be released to the vendor. The 2<sup>nd</sup> respondent insisted on being supplied with proof of payment to the vendor inform of RTGS money transfer. It is contended that the vendor was paid by cash and an acknowledgement of receipt was annexed. The applicant tried to get in touch with the vendor but he switched off his phone.

Mr. Gakuo, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents opposed the application. Counsel contends that the application is pre-mature and is brought in bad faith. No report has been made to the police. The respondents do not oppose the prayer for investigations to be carried out. A request for proof of payment was made. The respondents do not dispute that the deposit sum of Ksh.1.5 million was to be released to the vendor. All what was required was proof of payment. No bank statement was given.

Mr. Fedha, Prosecuting Counsel, appeared for the 1<sup>st</sup> and 4<sup>th</sup> respondents. Counsel submit that the application is pre-mature as the 1<sup>st</sup> and 4<sup>th</sup> respondents cannot act in a vacuum. No report has been made to the Police.

The application herein mainly seeks an order stopping any intended prosecution of the applicant. The facts of the dispute are quite clear. The applicant acted for the vendor who later turned out not to be the real owner of the land. There are two different title deeds to the same land which have been annexed. The title deeds have different feature in some aspects although the names of the registered owner and acreage of the land is similar.

It is clear from the pleadings that the 2<sup>nd</sup> respondent sought to be provided with proof that the applicant indeed paid the vendor. The land was being sold for Ksh.6.5million and a deposit of Ksh.1.5million was paid to the applicant. The money was paid through an RTGS on 30.9.2016. The applicant annexed an acknowledgement of receipt document dated 6.10.2016 indicating that the vendor SIMON KAGIRI KAMATU received the sum of Ksh.1.5 million.

It is clear from the dispute that no investigations have been conducted. It is the applicant who persecuted the vendor as the owner of the land. The purchaser is well within its rights to demand a refund of the money. The applicant drafted a commission agreement between the vendor and two other people dated 6.7.2016. The agreement is for payment of 10% commission out of the purchase price. It would be premature for this court to make an order to the effect that the applicant should not be prosecuted. A decision as to whether the applicant will be prosecuted or not will be made after the investigations. If the investigations reveal that the applicant is culpable, then the Police will make their own objective decision. The applicant would have been brave enough and provide the purchaser with proof that money was drawn from the account and subsequently paid to the vendor. The acknowledgement of the receipt document cannot be held to be conclusive proof of payment. The applicant runs a clients account. A cheque must have been drawn to withdraw the money. That kind of information could have at least made the purchaser understand the applicant's predicaments. The applicant must have communicated with the vendor and the agents who were to be paid their commission.

Since no report was made to the Police, no charges could have been preferred against the applicant. The Police were not aware of the dispute by the time the application was filed. The application is based on the applicant's anticipation that criminal charges are likely to be preferred. This court cannot conclude at this stage that indeed criminal charges will be preferred against the applicant. The purchasers are at liberty to make a report to the Police. The applicant can as well make a report to the police so that the Police can investigate and arrest the fraudulent vendor. Instead of notifying the Police that money has been paid to a fraudster, the applicant opted to come to Court. I do find that option to be unwise. The police could have moved with speed and apprehend the vendor had the applicant reported the matter.

In the end, I do find that the application dated 30<sup>th</sup> November, 2016 lacks merit and is hereby dismissed with costs.

**Dated and Signed at Marsabit this ..... day of ..... 2017**

**SAID CHITEMBWE**

**JUDGE**

**Dated, Signed and Delivered at Malindi this 20<sup>TH</sup> day of JUNE, 2017**

**WELDON KORIR**

**JUDGE**