



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

JR MISC CIVIL APPLICATION NO. 69 OF 2016

1. NICHOLAS AMUNGA.....1ST APPLICANT
2. EDITH MIRIAM ADHIAMBO.....2ND APPLICANT

VERSUS

1. MORIS MALOBA1ST RESPONDENT
2. RHODA NGALA2ND RESPONDENT
3. THE PUBLIC TRUSTEE.....3RD RESPONDENT

AND

DCIO CHANGAMWE POLICE STATION.....INTERESTED PARTY

RULING OF THE COURT

Application

1. The application before this Court is a Notice of Motion dated 13th March 2017 filed under Article 165 (7) of the Constitution of Kenya by the 1st Applicant who seeks the following orders:

- a. THAT** leave be granted to the Applicant to join the intended Interested Party herein the DCIO Changamwe.
- b. THAT** this Honourable Court do issue an Order directed at the intended Interested Party restraining him by himself and or officers under him from any further summoning, investigation, detention of the Applicant or in any manner dealing with the proceedings in **Miscellaneous CIVIL Application No. 69 of 2016 (JR)** and **CMCC No. 1912 of 2013 (Mombasa) Rhoda Ngala vs. Nicholas Amunga & Others.**
- c. THAT** the 1st Respondent herein be condemned to pay costs of this Application.

2. This application is premised on the grounds set out in the application and is supported by the affidavit of **NICHOLAS AMUNGA** sworn on 13th March 2017.

3. The Applicant alleges that by virtue of an Order dated 20th September, 2016 in **Miscellaneous Civil Application No. 69 of 2016 (JR)** there exists an operational Stay of Proceedings in **CMCC No. 1912 of 2013 (Mombasa) Rhoda Ngala vs. Nicholas Amunga & Others** pending the hearing and determination of the aforesaid application.

4. The Applicant further alleges that the 1st Respondent has from the start of the dispute (**CMCC No. 1912 of 2013 (Mombasa)**) sought to force his way by manipulation and abuse of the court process, and most recently, the 1st Respondent has colluded with the intended Interested Party to harass, threaten and intimidate the Applicant. The Applicant claims that the intended Interested Party one **FRANCIS WANJAU** who is a witness in **CMCC No. 1912 of 2013 (Mombasa)** and or officers under him have been constantly summoning, harassing and without reasonable cause detaining the applicant at the Changamwe Police Station.

5. The Applicant alleges that the intended Interested Party by himself and/or officers under him have also raided the Applicant's home in search of the Applicant thereby causing unnecessary embarrassment and fear to the Applicant's family and that on 15th July 2017 five officers went to the Applicant's home and arrested the Applicant.

6. The Applicant further alleges that intended Interested Party has also incessantly summoned the Applicant to produce documents and exhibits which are subject to court proceedings as evidence and that an officer named **CHARLES** has been calling the Applicant through a mobile phone number **0721753032** requesting the Applicant to produce exhibits that have already been produced in court in **CMCC No. 1912 of 2013**.

7. The Applicant's case is that the actions of the intended Interested Party are as a result of the behest and instigation of the 1st Respondent in the 1st Respondent's quest to frustrate justice and settle personal scores with the Applicant.

Response

8. The application is opposed by the 1st Respondent through a replying affidavit sworn by **MORRIS MALOBA** on 27th March 2017 and by the 2nd Respondent through a replying affidavit sworn by **RHODA NGALA** on 24th April 2017. The 3rd Respondent did not respond to the application and neither did the intended Interested Party.

9. The 1st Respondent alleges that his late father **THOMAS OKIYA** was illiterate and thus signed all his documents by way of thumb print. The 1st Respondent further disputed the agreement between his late father and the Applicant herein which was signed in 1999 and doubted the thumb print that was appearing on the agreement. The 1st Respondent alleges that he visited Changamwe Police Station and requested the verification of the thumb print impression on the National Social Security Fund Benefit form (a copy of the National Social Security Fund Benefit form is annexed to the 1st Respondent's replying affidavit and marked as "MM 1") belonging to his late father and the thumb print impression on the agreement (a copy of the agreement is annexed to the 1st Respondent's replying affidavit and marked as "MM 2(a)") aforementioned.

10. The 1st Respondent's case is that the police proved that a forgery had been committed and therefore restraining the intended Interested Party would amount to obstructing justice. The 1st Respondent further alleges that this application is not supported by any documents to prove the innocence of the applicant.

11. The 1st Respondent states that the applicant has tried to defeat justice by bringing application after application and enjoining parties within and without and that criminal proceedings are appropriate against the applicant so as to make the applicant account for his actions.

12. On her part, the 2nd Respondent states that she purchased a house without land on Plot No. 676 situated at Jomvu from the applicants herein at a consideration of Kshs. 940,000/= and that she paid Kshs. 900,000/= upon signing the agreement. The 2nd Respondent further alleges that she embarked on renovations of the house which cost Kshs 112,000/= to improve the face value of the suit premises.

13. The 2nd Respondent further alleges that she was served with a letter informing all tenants that there was a new administrator to the said property. The 2nd Respondent alleges that she realized that she had been duped and she filed **CMCC No. 1912 of 2013** to recover her money.

14. The 2nd Respondent alleges that **CMCC No. 1912 of 2013** has been going on and that the 2nd Respondent has tendered her testimony together with that of her witnesses and it was now the Defendant's turn to tender their evidence.

15. The 2nd Respondent's case is that the applicants have filed the current proceedings to defeat her attempts of recovering her money and prayed that that **CMCC No. 1912 of 2013** be heard to its logical conclusion.

Hearing

16. The application came up for hearing on 29th May 2017. **Mr. Opolu** appeared for the applicant while the 1st and 2nd Respondents were present in person.

17. Mr. Opolu submitted that when **CMCC No. 1912 of 2013** was proceeding, the 1st Respondent filed an application before the magistrate on 9th June 2016 and the magistrate gave orders which included certifying the application as urgent and summons were to be issued for the DCIO Changamwe to attend court and testify on 10th July 2016. Counsel submitted that the Chief Magistrate was giving these Orders while the matter was pending before Hon. Yator and that the Chief Magistrate did not have jurisdiction over the Hon. Yator's court.

18. Mr. Opolu submitted that the Applicants came to this court and obtained stay of proceedings in the Chief Magistrate's Court. Counsel submitted that the 1st Respondent then went to the intended Interested Party who has since been harassing the Applicant herein purporting to be carrying out investigations on some exhibits and threatened to arrest the Applicants herein who are husband and wife.

19. Mr. Opolu submitted that the DCIO Changamwe should be stopped from interfering with the Applicant until the main application is heard and determined on its merits.

20. On his part the 1st Respondent submitted that the matter herein concerns the purchase of house in 2013 which belonged to the 1st Respondent's late father. The 1st Respondent submitted that there was a sale agreement which he did not comprehend and therefore he went to the DCIO Changamwe to get clarification on the alleged sale agreement which purportedly had a thumb print of the 1st Respondent's late father as the seller.

21. The 1st Respondent submitted that when the matter was investigated the document was found to be a forgery.

22. The 2nd Respondent submitted that the matter herein concerns the 1st Respondent and not her. The 2nd Respondent further submitted that she was not aware of the issues surrounding the alleged agreement and requested for the case before the lower court to continue.

Determination

23. Having considered the above submissions, the issues for determination before this Court are **whether**

the Applicants should be granted leave to join the intended Interested Party herein the OCPD Changamwe and whether an order should be issued by this Court restraining the intended Interested Party from further summoning, investigating or detaining the Applicant or in any way dealing with the proceeding in this matter and in CMCC No. 1912 of 2013.

Whether the Applicants should be granted leave to join the intended Interested Party herein the OCPD Changamwe.

24. The Applicant herein has premised this application on the actions of the intended Interested Party. The Applicant has claimed that the intended Interested Party has harassed, threatened and intimidated the Applicant as a means of purportedly forcing the Applicant to concede or abandon his claim against the 1st Respondent. The Applicant has further claimed that intended Interested Party has summoned and without reasonable cause detained the Applicant purportedly investigating civil proceedings before the lower court. The 1st Respondent herein has not denied the purported actions of the intended Interested Party but has alleged that these actions are as a result of a forgery that was purportedly discovered on documents presented as exhibits in **CMCC No. 1912 of 2013.**

25. It is therefore evident that the intended Interested Party is somehow involved in this matter and is therefore a relevant party to this matter hence this Court will allow the Applicant to join the DCIO as an Interested Party in this matter.

Whether an order should be issued by this Court restraining the intended Interested Party from further summoning, investigating or detaining the Applicant or in any way dealing with the proceeding in this matter and in CMCC No. 1912 of 2013.

26. Article 165 (6) and (7) provides:

“(6)The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For purposes of clause (6), the High Court may call for record of any proceedings before any subordinate court or person, body or authority referred in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

This court has supervisory jurisdiction over subordinate courts, however, this does not mean that this court should unreasonably interfere with matters before subordinate courts.

27. The 1st Respondent herein alleged that he went to the Interested Party to seek clarification on the similarity between the thumb print impression that appeared on the agreement dated 12th March 1999 (a copy of this agreement is annexed to the 1st Respondent’s replying affidavit sworn on 27th March 2017 and marked as “MM 2(A)”) and the thumb print impression on the National Social Security Fund Benefit Form belonging to his father (a copy of the National Social Security Fund Benefit Form is annexed to the 1st Respondent’s replying affidavit sworn on 27th March 2017 and marked as “MM 1”) after he disputed the agreement between his deceased father and the Applicant signed in 1999. The 1st Respondent alleged that upon examination it was revealed that the two thumb impressions were not identical and that the finger print impression on exhibit marked “I” (the agreement) was not made by the 1st Respondent’s father, **THOMAS OKIYA.** The 1st Respondent alleged that the forgery had been carried out by the Applicant herein and it was on this basis that the Interested Party begun investigations on the Applicant.

28. The 1st Respondent annexed to his replying affidavit sworn on 27th March 2017, a copy of a C.6 form marked as “MM 2 (b)” which is an Exhibit Memo Form that indicates the complaint by the 1st Respondent against the Applicant, Nicholas Amunga Onyango, and on the reverse side the finding that

the two thumb prints aforementioned above were not identical. The Applicant herein did not contest the said findings nor did he challenge the accusation by the Interested Party that he had committed forgery.

29. The Applicant herein was a party to the agreement dated 12th March 1999 in which the 1st Respondent's late father, Thomas Okiya purported to allow the Applicant to build a house on his plot No. 676 on condition that the Applicant pays the deceased Kshs. 1,000/= every month. The agreement contains the signature of the Applicant and a finger print impression of the 1st Respondent's deceased father. It is therefore reasonable for the 1st Respondent to suspect that the Applicant may have been responsible for the forgery as the Applicant was the one acquiring interest in the agreement. It was therefore in order for the 1st Respondent to seek Police intervention to establish the correctness of that document. However, the DCIO Changamwe had already been ordered by the matter in the Chief Magistrate's Court to be a witness in CMCC No. 1912 of 2013. Being a prospective witness he cannot at the same time be the one to conduct any investigations on the matter.

30. More importantly, however by virtue of orders issued here on 20th September, 2016 the proceedings in CMCC No. 1912 of 2013 were stayed pending the hearing and determination of the Notice of Motion dated and filed herein on 13th September, 2016.

31. For these two reasons aforesaid the Interested Party, who is now also a prospective witness, cannot purport to at the same time carry out any investigations related to the CMCC No. 1912 of 2013.

32. The upshot is that the Notice of Motion application dated 13th March, 2017 is allowed as prayed.

Costs shall be in the cause.

Dated, Signed and Delivered in Mombasa this 27th day of July, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Jami for DPP

Respondents in person

Mr. Kaunda Court Assistant