



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 181 OF 2016

In the matter of Articles 22 of the Constitution of Kenya 2010

and

In the matter of alleged contravention of Fundamental Rights and Freedoms under Articles 29, 31, 40, 47, 50 (4), 160 (1), (5) of the Constitution of Kenya

and

In the matter of Section 6 of the Judicature Act, Section 129 of the Evidence Act

Abdulkadir Athman Salim ElKindy.....Petitioner

vs

The Director of Public Prosecutions.....1st Respondent

The Ethics and Anti-Corruption Commission.....2nd Respondent

JUDGEMENT

Introduction

1. Rule 8 (1) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013,^[1] provides that "Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place." The cause of action complained of in this petition is alleged to have arisen at the Chief Magistrates Court at Kisumu. The High Court within whose jurisdiction the cause of action arose is the High Court of Kenya, Kisumu. It is not clear why this petition was filed in Nairobi, yet the cause of action arose in Kisumu. Further, the criminal proceedings the petitioner seeks to challenge are pending at the Chief Magistrates Court at Kisumu within the jurisdiction of the said High Court.

2. I also find it disturbing to note that this petition was filed on 5th May 2016, six years after the institution of the criminal trial, and barely two weeks after the Court of Appeal sitting at Kisumu allowed an appeal filed by the Respondents herein against the petitioners co-accused in the criminal case, effectively clearing the way for the criminal trial to proceed. A stay was obtained in this case, effectively

defeating the court of appeal decision, the effect of which was to again delay the prosecution of the criminal trial. I am convinced that had the existence of the court of appeal decision been brought to the attention of the learned judge, he would have been hesitant to grant the conservatory orders in this case. The effect is that, the criminal appeal number **429** of 2010, Kisumu, is still pending in court, seven years after it was instituted.

3. The petition raises a fundamental question, namely, whether or not the immunity granted to judicial officers by the law extends to shield them from criminal prosecution.

4. Judicial authority is derived from the people and vests in, and is to be exercised by the courts and tribunals established by or under the Constitution.^[2] In exercising judicial authority the Courts and Tribunals are, *inter alia*, to be guided by the principle that the purpose and principles of the Constitution shall be protected and promoted.

5. National values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.^[3] The national values and principles of governance include integrity.^[4]

6. The Constitution is the supreme law of the land and binds all persons and all State organs at both levels of government.^[5]

The petitioners case

7. The petitioner was a magistrate serving at the Kisumu Law Courts. He acted as a Deputy Registrar of the High Court of Kenya, Kisumu. He states that between 21st May 2007 and 30th January 2008, in the course of his duties, and acting in good faith, he signed summons to enter appearance and other court documents in Kisumu High Court Civil Case Number **225** of 1993, Negandra Sexana vs Miwani Sugar Mills Ltd.

8. The petitioner avers, (without providing details), that he was subsequently charged with a criminal case, together with **8** others in Kisumu Chief Magistrates Case Number **429** of 2010 with the offence of conspiracy to defraud contrary to section **317** of the Penal Code.^[6]

9. He claims that his rights under Articles **29, 31, 40, 47, 50 (4), 160 (5), 161** and **169** of the constitution are threatened with violation and that his rights to immunity under the law in the *bona fide* performance of his judicial duties protected under sections **6** of the Judicature Act^[7] and **169** of the Evidence Act^[8] are being violated.

10. The petitioner avers that the Respondent's decision to charge him with a criminal offence arising from the performance of his judicial duties is unconstitutional, unlawful and that the same is not in public interest nor is it in the interests of the administration of justice or the need to prevent and avoid abuse of the legal process.

First Respondent's Replying Affidavit

11. On record in opposition to the petition is the Replying affidavit of **Emily Kamau**, a Senior Assistant Director of Prosecutions and Head of Division of Anti-Corruption and Economic Crimes, who had the conduct of Kisumu Chief Magistrates case No. **12** of 2010 and Kisumu Court of Appeals No. **1 & 2** of 2013.

12. She avers that the Kenya Anti-Corruption Commission conducted investigations in to allegations of fraudulent transfer of **L.R. No. 7545/3** measuring approximately **9,394** acres valued at **Ksh. 2.32** Billion to a shell company known as Crossley Holdings Limited without consideration and that upon conclusion of the investigations the file together with the report pursuant to section **35 (1)** Anti-Corruption and Economic Crimes Act^[9] was submitted to the Attorney General for review and decision to charge. Upon

review and re-evaluation of the evidence, the Attorney General independently concluded that there was sufficient evidence to charge the suspects including the petitioner herein for various criminal offences both under the Penal Code^[10] and the Ant-Corruption and Economic Crimes Act.^[11]

13. She avers that the investigations revealed series of fraudulent, irregular and illegal acts of conspiracy committed at the High Court of Kenya at Kisumu presided over by the then Principal Magistrate/Deputy Registrar, namely, the petitioner herein, a judicial officer who conducted sham judicial process without jurisdiction in order to effectuate and complete the series of conspiracy that also involved land Board offices and land registry resulting in the fraudulent transfer of the property belonging to Miwani Sugar Mills (1989) Ltd., a company in which the government of Kenya owned 49% stake to a shell company known as Crowsley Golding Limited.

14. She further avers that the actions stated above were not *bona fide* actions by a judicial officer but were done devoid of any jurisdiction and in flagrant ignorance of previous courts orders by the Honourable **Justice G. Mugo** dismissing a similar application but notwithstanding such a dismissal, the applicant granted orders in furtherance of a criminal conspiracy and abuse of his office as the Deputy Registrar.

15. Further, she averred that the investigations revealed that the petitioner played a key role in furtherance of the fraud in that he extended validity of summons which had expired outside the requisite **24** months period provided by the Civil Procure Act^[12] and Rules without jurisdiction, and thereafter granted *ex parte* orders of judgement in default of defence in favour of a shell company against Miwani Sugar Mills (1989) Ltd (in receivership) without prove of service on the receivers and without jurisdiction, and also taxed the costs of the suit *ex parte* that was never done and finally gave *ex parte* orders directing the removal of restrictions and vesting and transferring the property of Miwani Sugar Mills (1989) Ltd valued at **Ksh. 2.32** Billion to a shell company.

16. She insisted that the law protects judicial officers only when exercising their functions judiciously or where they do not omit to do something within their jurisdiction, or judicial errors and not when they deliberately act without or in excess of jurisdiction to further criminal acts or if the judicial office is used to commit or aid commission of a criminal offence or abuse of judicial authority.

17. Consequently, the Hon. Attorney General recommend the prosecution upon being satisfied that there was sufficient evidence, and the petitioner and his co-accused were charged in Kisumu Chief Magistrates case number **429** of 2010. She also avers that upon being charged as aforesaid, the petitioner and his co-accused challenged the recommendation to charge them in High Court Misc. Application number **12** of 2010 (Abida Ali Aaroni J) which culminated in consolidated Civil Appeal numbers **1** and **2** of 2013, Kisumu which were heard and determined and the court of appeal upheld the decision to charge.

Second Respondents Replying Affidavit

18. **Elias Kipyego** in a Replying affidavit filed on 20th May 2016 terms this petition as an abuse of court process. He states that the petitioner has been aware of the above court cases which sought to challenge the criminal proceedings, but he never sought to be enjoined, and that the court of appeal allowed the prosecution to proceed and reiterated the involvement of the petitioner in the all the activities that led to the prosecution in question and insisted that the activities of the petitioner were not *bona fide* in the discharge of his duties but were deliberate misdeeds in furtherance of a conspiracy and abuse of his office as a Deputy Registrar.

Petitioners further Affidavit

19. In a further affidavit filed on 20th June 2016, the petitioner denied the contents of the Replying affidavits and insisted that the civil procedure granted him powers to grant the orders in question, and that he acted within his jurisdiction.

Petitioners Advocates submissions

20. The petitioners' counsel submitted that the civil procedure rules allows the petitioner to grant the orders in question, that as a judicial officer, the petitioner enjoyed immunity against criminal prosecution. [13] In support of this proposition, counsel cited *Sirroos vs Moore & Others*[14] and *Halsbury's Laws of England*[15] which states:-

"The object of the judicial privilege is not to protect malicious or corrupt Judges, but to protect the public from the danger to which the administration of justice would be exposed if the persons concerned therein were subject to inquiry as to malice or to litigation with those whom their decisions might offend. It is necessary that such persons should be permitted to administer the law not only independently and freely and without favour, but also without fear."

21. Counsel also cited *George Ngaya vs Judicial Service Commission & 3 Others*[16] in which the court ordered the name of a magistrate struck of a labour dispute on grounds that she sued for discharging her judicial and administrative duties and reiterated that the petitioner acted in good faith.

First Respondent's Advocates Submissions

22. Counsel submitted that the petitioner has failed to demonstrate that the decision to charge him was illegal, that courts ought not to usurp the mandate of the DPP, and that immunity of judicial officers only extends to acts or omissions genuinely done but not to cover crime and that the propriety of the charges was considered by the court of appeal.

Second Respondent's Advocates Submissions

23. Counsel submitted that the constitution does not envisage absolute immunity to judicial officers but the acts in question must be done in good faith and that the test is whether the challenged actions were innocent or ignorance of lack of jurisdiction and that the evidence points to conspiracy to defraud and that the independence should not be used to shield an allegation of corruption, misconduct, lack of integrity, incompetence or lack of transparency, accountability or inability to dispense justice.[17]

24. Further, the immunity afforded to a judicial officer is partial[18] and that criminal liability is personal and cannot be extended to an office and that the criminal acts complained of constitute offences known in law, hence, the prosecution in question does not violate article 160 of the constitution.

Analysis of the law, issues and authorities

25. The core issues that falls for determination are:- (a) whether judicial officers are precluded from investigations, arrest, detention or prosecution for criminal offences allegedly committed in the course of performing their judicial functions, and (b) if answer to (a) is in the affirmative, whether there are sufficient grounds to stop the criminal proceedings against the petitioner.

26. In *Bradley v. Fisher*,[19] Justice Field used the following language:- "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.

27. The above position is captured correctly in the provisions of Article 160 (5) of the constitution which provides that "A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function."

28. The test in article 160 (5) is that the judicial officer must have done the thing complained of or omitted to do it in good faith in the lawful performance of a judicial function. Lawful in this context means "*conforming to, permitted by, or recognized by law or rules.*"[20]

29. The adjective of the word lawful is (a) allowed or permitted by law; not contrary to law: a lawful enterprise. (b) recognized or sanctioned by law; legitimate, (c) appointed or recognized by law; legally

qualified, **(d)** acting or living according with the [law](#); law-abiding.[21] Allowable or permissible by being in conformity with laws, principles, regulations, statutes, etc., meant to govern or regulate a particular activity or conduct. It also means legal and legitimate.[22]

30. Section 6 of the Judicature Act provides that "no judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it."

31. The above section shields judicial officers from [civil proceedings](#) arising from the conduct of their judicial functions and not criminal proceedings. In *Cooley on Torts*,[23] the author says:-

“Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely and without favor and he may exercise it without fear; that the duties concern individuals but they concern more especially the welfare of the State and the peace and happiness of society; that if he shall fail in the faithful discharge of them, he shall be called to account as a criminal, but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer. The rule thus laid down applies to large classes of offices, embracing some, the powers attached to which are very extensive and others whose authority is exceedingly limited.”

32. A more relevant holding was rendered in *Griffith vs. Slinkard*,[24] where the court held that ‘Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which the said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done.’

33. Upon due consideration of numerous authorities from different jurisdictions, and upon careful consideration of the provision of section 6 of the Judicature Act,[25]and Article 160 (5) of the constitution, I am satisfied that a judicial officer cannot be held to be under any civil liability for actions done in the course of his judicial duties provided that the same are done in good faith. However, these provisions do not cover criminal liability.

34. However, this being so, the provisions of Article 160 of the Constitution compel me to conclude that the fundamental principle of judicial independence cannot simply be equated with a principle of immunity of judicial officers from **criminal prosecutions** for all acts and/or omissions in the exercise of their judicial functions, irrespective of the circumstances of the individual case.

35. It goes almost without saying that the criminal prosecution of judicial officers for such acts and/or omissions will – and must – remain an extraordinary and exceptional step. Any decision by the office of the DPP to prosecute a judicial officer must be taken with the utmost caution, due regard being had to the fundamental principle of judicial independence, but also to the related principle that judicial officers are subject to the Constitution and the law and thus cannot be completely immune from criminal prosecution, in appropriate cases, for their acts and/or omissions in the exercise of their judicial functions.[26]

36. Clearly, judges – like any other person – should be punished for any crimes they commit, be they general crimes, for example causing a car accident in a state of drunkenness, or specific crimes related to the judicial function, such as taking bribes for handing down favourable judgments or interfering with the administration of justice for which alone they swore to uphold. Judicial officers are bound by the

constitution and the laws of the land and must live and uphold the spirit of the law. Like Ceaser's wife, they must be beyond reproach. It would be a sad day for the administration of justice if those charged with the responsibility of interpreting the law and upholding the rule of law are to be perceived as the ones breaking the law. The public will certainly lose confidence in the entire system of the administration of justice and the consequences cannot be imagined.

37. The justification for immunity for judicial officers-where it exists-cannot be to protect the judicial officer from criminal prosecution, but only from false accusations that are levelled against a judicial officer in order to exert pressure on him or her. It is my view that a contrary interpretation will have the inescapable effect of conferring an extra-constitutional immunity on judicial officers.

38. Thus, where an impropriety has been committed of the nature of criminal conduct which may include violations of law, or breach of court rules or abuse of office or interfering with the flow of justice, then, such immunity cannot stand.

39. The next issue for determination is whether or not the petitioner demonstrated sufficient grounds to warrant this court to terminate the criminal prosecution. The basic principle is that it is for the prosecution, not the court, to decide whether a prosecution should be commenced and, if commenced, whether it should continue. In *Environment Agency v Stanford*,^[27] Lord Bingham LCJ said:-

"The jurisdiction to stay, as has been repeatedly explained, is one to be exercised with the greatest caution ... The question of whether or not to prosecute is for the prosecutor....."

40. The DPP is required to act independently in the discharge of his duties. Article 157 (10) of the Constitution of Kenya 2010 provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority. This position is also replicated under Section 6 of the Office of the Director of Public Prosecutions Act.^[28]

41. The above provisions require the DPP to not only act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. The decision to institute or not institute court proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. I find nothing in the petitioners case to suggest, even in the slightest manner that the DPP did not act independently in arriving at the decision to prosecute.

42. Section 24 of the *National Police Service Act*^[29] sets out functions of the Kenya Police Service. In my view, the petitioner has not demonstrated that the investigations and prosecution in question constitute an abuse of process or police powers, nor has the petitioner proved malice or bad faith.

43. The duty and mandate of the police was appreciated in *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another*^[30] where it was held that **the police have a duty to investigate any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.**

44. **I note that as the law then required, E.A.C.C forwarded the file to the A.G. who upon evaluating the evidence, made the decision to prosecute. Nothing has been stated to demonstrate that the A.G. did not act in conformity with the law.**

45. The courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution in the magistrates' courts) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of the petitioners fundamental rights.

46. Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case.[31] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. I am afraid, from the material before this court, there is nothing to show that the prosecution is unfair, wrong, baseless or an abuse of police powers or judicial process. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.[32]

47. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[33] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is none, then the court ought to allow the prosecution to continue.

48. In my view, the high court should prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process** because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[34] These categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.[35] The power to stay or stop a prosecution should only be exercised if exceptional circumstances exist which would result in prejudice to the accused which cannot be remedied in other ways.

49. A criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. There is nothing to suggest that there was no proper factual foundation in undertaking the prosecution in question.[36] The decision whether or not to prosecute is very important. It can be very upsetting for a person to be prosecuted even if later found not guilty. However, a decision not to prosecute can cause great stress and upset to a victim of crime. I find nothing in the material before me (even mere reasonable suspicion) to suggest that the A.G. or DPP acted in violation of article **157 (10)** of the Constitution and Section **6** of the Office of the Director of Public Prosecutions Act[37] cited above.

50. In all honesty, I find nothing in the material before me to show that the petitioners right to a fair trial has been hampered or threatened in the criminal trial in question nor is there is tangible evidence to demonstrate that the police acted maliciously or outside their powers or that the prosecution in question was commenced without proper or reasonable foundation.

51. It is my view that the petitioner has not demonstrated even in the slightest manner that his rights to a fair trial have been or will be infringed if the prosecution in Criminal case number **429** of 2010, Kisumu, proceeds nor has it been shown that the said trial is an abuse of court process or it will inherently violate his rights to a fair trial as enshrined in the constitution. I also find it disturbing that a 2010 criminal trial is still pending in court awaiting trial.

52. I find that this petition has no merits. Consequently, I dismiss this petition with costs to the Respondents and direct that Chief Magistrates Criminal case Number **429 OF 2010, Kisumu, Republic vs A. N. Gakoi Maina & 8 Others** proceeds for hearing and determination.

Orders accordingly

Signed, Delivered, Dated at Nairobi this 25th day of July 2017

John M. Mativo

Judge

- [1] Legal Notice No. 117 of 28th June 2013
- [2] Article 159 of the Constitution
- [3] Article 10(1) of the Constitution
- [4] Article 10 (2)(c) of the Constitution
- [5] Article 2 (1) of the Constitution
- [6] Cap 63, Laws of Kenya
- [7] Cap 8 Laws of Kenya
- [8] Cap 80 Laws of Kenya
- [9] No. 3 of 2003
- [10] Supra
- [11] Supra Note 9
- [12] Cap 21, Laws of Kenya
- [13] See Article 160 (5) and section 6 of the Judicature Act, Cap 8, Laws of Kenya and section 129 of the Evidence Act
- [14] {1974}ALL ER 776-797
- [15] 4th Edition Vol. 1 at 207
- [16] E.L.R.C No. 398 of 2014
- [17] Dennis Mogambi Mong'are vs A.G. & 3 Others, Nairobi Civil Appeal No. 123 of 2012 {2014}eKLR cited
- [18] George Ngaya vs Judicial Service Commission & 3 Others, Cause N. 398 of 2014 {2015}eKLR
- [19] 13 Wall. (80 U. S.) 335, 337, 347, 20 L. Ed. 646, 647
- [20] <https://www.google.com/search?q=meaning+of+lawful&ie=utf-8&oe=utf-8&client=firefox-b>
- [21] <http://www.dictionary.com/browse/lawful>
- [22] <http://www.businessdictionary.com/definition/lawful.html>
- [23] 3rd Ed. vol. 2, p. 795
- [24] 146 Ind. 117, 44 N. E. 1001, 1002,
- [25] Supra
- [26] Minister for Justice & Constitutional Development v Moleko (131/07) [2008] ZASCA 43 (31 March 2008)

[27] {1998} C.O.D. 373, DC

[28] Act No. 2 of 2013

[29] **No 11 A of 2011**

[30] **{2012} eKLR**

[31] *Hui Chi-Ming v R* [1992] 1 A.C. 34, PC

[32] *DPP v Meakin* [2006] EWHC 1067.

[33] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[34] See *Bennett v Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R v Methyr Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.

[35] *R v Birmingham and Others* [1992] Crim. L.R. 117

[36] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[37] Supra