



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

IN THE JUDICIAL REVIEW DIVISION HIGH COURT JUDICIAL REVIEW APPLICATION NO. 1 OF 2016

IN THE MATTER OF APPLICATION BY THOMAS KIPRUTO MARITIM FOR AN ORDER OF ROHIBITION

-BETWEEN-

REPUBLIC.....APPLICANT

-VERSUS-

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF THE NATIONAL POLICE.....2ND RESPONDENT

THE PRINCIPAL MAGISTRATE –SOTIK.....3RD RESPONDENT

RULING

The amended Notice of Motion application dated 2nd day of December 2016 seeks the following orders:-

1. That an order of prohibition do issue prohibiting the Respondents from prosecuting the ex-parte applicant in Sotik Principal Magistrate court Criminal case no. 520 of 2014.

2. Costs

The grounds are that the 1st and 2nd Respondents intend to exert pressure on the applicant so as to drop the suit pending in Kericho Court.

Secondly, that the intended prosecution of the applicant is an abuse of the court process.

In the amended statement amended on 2/12/2016 the applicant contends that he is the registered proprietor of LR No. 7288/644 with a certificate of title deed on which land, Samwel Cheluget trespassed.

2. As a result of that trespass, the applicant filed a suit No. 48 of 2011 at Kericho High Court seeking orders of injunction and eviction.

3. The Respondent on that suit Mr. Cheluget filed an application seeking on 27th June 2016 for dismissal of the suit.

4. This application for dismissal of the suit was determined on 24/9/2014 in which the court rejected it.

5. In the month of August 2014 a complaint was made to the police to the effect that the applicant had forged title No. LR No. 7288/644.

6. On 13/8/2014 the applicant was arrested and charged at Sotik PMs Court in Criminal Case No. 52 of 2014 with the offence of forgery Contrary To Section 349 of the Penal Code, with a second count of uttering a false statement Contrary to Section 353 of the Penal code.

7. The applicant's contention is that the prosecution against him is an attempt by the 1st and 2nd Respondents to exert pressure on him so as to drop the case against Samuel Cheluget.

The case for the 1st and 2nd Respondent

8. The first and second Respondents filed a Notice of Preliminary Objection together with a replying affidavit dated 26/9/2016.

9. The grounds for the objection is that the application is fatally defective bad in law and ought to be dismissed.

10. It is contended that the applicant entered into plot No. 7288/644 and damaged the fence and developments therein which had been put by one Samuel Cheluget prompting him to report the matter at Sotik Police Station.

11. After due inquiry and investigations it came to be realized that the plot in dispute belonged to one Erick Kipyegon who is a son to Samuel Cheluget who had put up the developments on behalf of his son.

12. Upon being summoned to the police station the applicant presented an allotment letter and title. These were taken for verification at the offices of Registrar of Lands and they were found to be fake.

13. The title was taken to a document examiner who found that the signatures were not genuine.

14. Upon finalization of investigations the file was forwarded to the DPP seeking directions in line with the provisions of articles 157 of the constitution, who found sufficient reasons to charge the applicant with the offence of forgery and uttering false documents contrary to Section 349 and 353 of the Penal Code respectively.

15. It is the contention of the 1st and 2nd Respondents that the decision to charge the applicant was based on evidence and that the 1st Respondent does not have any interest in the Civil Suit pending in Kericho and hence there is no intention to exert pressure on the applicant to drop it.

16. Further that the case before the magistrates court is part heard and the application is in bad taste as it is aimed at blocking the 1st and 2nd Respondents from discharging their duties.

Case for the interested party

17. In his replying affidavit dated the 21st day of September 2016 and the preliminary objection, it is contended that the Judicial review proceedings are fatally defective and bad in law.

18. The interested party is the complainant in Sotik PMCC No. 520 of 2014 and defendant in civil suit No. 48 of 2011 filed in Kericho High Court.

19. The interested party had lodged a complaint at Sotik Police Station prior to the institution of the civil suit.

20. It is contended that applicant was charged with the offence of forgery and altering false documents after investigations carried out by the 1st and 2nd Respondent.

21. The interested party further contends that he has testified in the criminal case at Sotik and no pressure has been exerted on the applicant to withdraw the civil suit.

22.The applicant case is that his prosecution in the criminal case violates his right to a fair trial as provided under article 25(c) of the constitution.

23.It is contended that the claims of fraud and forgery by the interested party can be ventilated in the civil suit and relies in the JR Misc application No. 444 of 2013 – Percy Arthur Oyugi Opiyo where it was held, “the mere fact that criminal proceedings have been commenced does not bar the court from halting them as long as the same have not been determined. In my view, it is only where the decision in question is complete that the court cannot stay the same. However, where what is sought is a continuous process, the same may be stayed at any stage of the proceedings.....Accordingly this court still has jurisdiction to stay the prosecution of the criminal proceedings”.

24.On the issue of concurrent litigation reliance is placed on Civil Appeal No 56 of 2012 commissioner of police & others –vs- Kenya Commercial Bank & others where it was held, “while the law (S.193A of the CPC) allows for concurrent litigation of both civil and criminal proceedings arising from the same issues”.

The power must be exercised responsibly in accordance with the laws of the land and in good faith. It is not in public interest in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court.”

25.The 1st and 2nd Respondents contention and submissions are that the decision to charge the applicant was made in the year 2014. The applicant filed the judicial review almost two years later and in breach of the provisions of order 53 of Civil Procedure Rule which requires judicial review proceedings to be brought not later than six months.

26.That Section 193A of the criminal procedures code allows for concurrent criminal and civil litigation and that issue of forgery and uttering false documents cannot be canvassed in a civil suit.

27.Reliance is placed on the decision in the case of Kenya Commercial Bank Ltd & others –vs- Commissioner of Police NRB Petition No 218(of 2013) eKLR where it was held, “the office of the Director of public prosecution and inspector General of police are independent and the court could not ordinarily interfere on their work”.

28.Counsel for the Respondents also relies on the authority in the case of R –vs- Commissioner of Police & another exparte Michael Monari & Another (2012) eKLR where it was held:- “The police have a duty to investigate on any complaint once one 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. The predominant reasons for the institution of criminal case cannot therefore be said to have been vindication of the criminal process. 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.

29.Counsel for the interested party submit that the applicant never served them with any processes except the submissions it is further submitted that there was no verification of facts in the Judicial review application by way of annexing the charge sheet and statement of witnesses or proceedings in the Sotik PMCCR Case No. 520 of 2014 or the proceedings or pleadings in Kericho HCC No. 48 of 2011 which was in breach of the provisions of order 53 of the civil procedure rules.

30.Reliance is placed in the case of PASTOLI –VS- KALALE DISTRICT COUNCIL & OTHERS where it was held:- In an application for Judicial review the affidavits filed in court by and

For the respective parties to the application constitute the records with regard to the decision or act complained of and the subject of review. In order to succeed in an application one has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety”.

31. Counsel also relies in the case of **R-vs-Chief Magistrate and DPP ex parte Mildred Nabunya NRB HCCC Misc Application 115 of 2013** where it was held:- the court might not usurp the constitutional mandate of the director of public prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon the office.

32. Lord Diplock in the case of council for **Civil Service Unions –vs- Minister for Civil Service (1985) AC 374 at 401D**, stated:- Judicial review as I think developed to a stage today when one can conveniently classify under three heads the ground upon which administrative action is subject to control of judicial review: the first ground I will call illegality, the second irrationality and the third procedural impropriety. By illegality I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. By irrationality it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.... I have described the third head as procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

The powers of the Director of Public Prosecution are provided under article 157 (10) of the Constitution.

33. Thus: 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 function, shall not be under the director or control of any person or authority.”

This gives the DPP much latitude in the exercise of his prosecutorial powers. However article 157(11) provides:- In exercising the powers conferred by this article, the Director of Public Prosecution shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.”

34. In the case of **R. V- AG & 4 others expert Kenneth Kariuki Githii (2014) eKLR** it was held:- “It is upon the ex parte applicant to satisfy the court that the discretion given to the Director of Prosecution to investigate and prosecute ought to be interfered with. It is not enough to simply inform the court that there is both criminal and civil proceedings going on. The High court ought not to interfere with the investigation or prosecutorial powers conferred upon the police or the director of public prosecution unless reasons are given for doing so.”

Article 157(11) of the constitution aptly captures the reasons why the decision to prosecute by the DPP can be impugned by the courts. That is, if it is shown that the DPP did not act in the public interest, that he acted against the administration of justice and thirdly, that his actions did not reflect the need to avoid abuse of legal process.

35. Section 193 A of the criminal procedure code allows concurrent criminal and civil litigation.

36. The allegation by the applicant are that the institution of the criminal proceedings are meant to exert pressure on him so as to withdraw the civil suit in Kericho High Court. It has not been shown what interest the Respondents have in the civil suit.

37. The charges of forgery and altering false documents cannot properly be canvassed in a civil suit as they squarely lie in the domain of criminal processes.

38. It has not been shown that the DPP in commencing the criminal proceedings did not have regard to public interest, that he did not have regard to the interests of the administration of justice and that he did not consider the need to prevent abuse of the legal process.

39. I find no good reasons to grant orders prohibiting the Respondents from prosecuting the ex parte applicant in Sotik Principal Magistrate court criminal case no 520 of 2014.

This case is already part heard. The applicant has his right to a fair trial under article 150 of the

constitution.

The application is dismissed with costs.

Judgement delivered dated and signed this 30th day of October 2017 in the presence of learned counsel Mr. Barasa for Respondents absent Mrs Kirui holding brief learned counsel for the applicant Odhiambo learned counsel for the interested party absent, court assistant Mr.

M. MUYA

JUDGE

30/10/17

Mrs. Kirui- We pray to be furnished with copies of the ruling.

M. MUYA

JUDGE

30/10/17

Same to be furnished.

M. MUYA

JUDGE

30/10/17