

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 86 OF 2015

IN THE MATTER OF VIOLATION OF THE RIGHT TO DIGNITY, FREEDOM AND SECURITY OF THE PERSON, FAIR ADMINISTRATIVE ACTION AND FAIR TRIAL IN THE MATTER OF ARTICLES 2, 19, 20, 22, 23, 27, 28, 29, 47, 50, 157, 165, 245 & 259 OF THE CONSTITUTION OF KENYA

GEORGE NGUGI.....PETITIONER

VS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE CHIEF MAGISTRATES COURT, KIBERA LAW COURTS.....3RD RESPONDENT

THE CHIEF MAGISTRATES COURT, MAKADARA LAW COURTS....4TH RESPONDENT

AND

BETH NYAMBURA MBURU.....1ST INTERESTED PARTY

MONICA WAITHERA MBURU.....2ND INTERESTED PARTY

MAGDALENE NYAKINYUA GATIMU.....3RD INTERESTED PARTY

JUDGMENT

Introduction

1. I find it disturbing that this Petition has been pending in Court since 9th March 2015 which to be is an unreasonably long time and unacceptable. The Petitioner seeks to stop three criminal cases mounted against him. It is not clear what the status of the criminal cases is three years after filing this Petition.
2. The genesis of the problem appears to be a disagreement among family members relating to the distribution of the estate of the late *Samoson Mburu Huho*-deceased.

Petitioners case

3. The crux of the Petitioners case can be summarized as follows:-

a. the first interested Party instigated the first and second Respondents to initiate criminal proceedings against him being criminal case number 2666 of 2012[1]alleging that the Petitioner forged the will of the late Samoson Mburu Huho-deceased.

b. that a one Betty Rashid, advocate who prepared the said will obtained a court[2] order barring the first and second Respondents from carrying out any investigations or filing any charges against her relating to the will. Hence, his continued prosecution on charges relating to the said offence is oppressive and intended to influence the outcome of succession cause numbers 2582 and 2649 of 2011.[3] He avers that the will is the subject of prove in the said succession proceedings.

c. He also avers that in a further attempt to harass and intimidate him, the second interested party caused the first and second Respondents to initiate Makadara Criminal Case Number 1193 of 2014 on alleged assault and Makadara Criminal Case Number 175 of 2015 on alleged offence of theft and assault.

d. He avers that the said proceedings are initiated to punish him with the ultimate intention of influencing the outcome of the succession proceedings, hence the actions by the first and second Respondents amount to abuse of court process, hence the orders sought in this Petition.

First and second Respondents Replying affidavit

4. On behalf of the first and second Respondent is the Replying Affidavit of Cpl Patrick Muraguri filed on 4th March 2016. He avers that the interested parties herein filed three complaints alleging assault, malicious damage to property and forgery. Investigations revealed that the Petitioner was culpable, hence he was charged with assault, theft and forgery, and that ,the DPP acted in conformity with the law[4] and that the matters raised by the Petitioner ought to be raised at the criminal trial.

Third and Fourth Respondents Replying affidavit an grounds of objection

5. In their grounds of opposition, the first and second Respondents state that:- the Petition does not disclose any constitutional violations by the third and fourth Respondents; that the Petition is bad in law; the mandate of the third & fourth Respondents does not include prosecutions; there are no grounds to terminate the prosecution; that the trial court is better placed to deal with the sufficiency and quality of evidence.

Interested parties Responses

6. On record are Replying affidavits by the second and third interested Parties in response to the Petitioners notice of motion. In so far as they are relevant to the Petition, they reiterate the genesis of the criminal cases, the succession dispute and insist that the Petitioner came to court with unclean hands.

Petitioners Advocates Submissions

7. The petitioners counsel submitted that simultaneous criminal and succession proceedings is improper use of constitutional powers; and that it is meant to force the petitioner to submit to the civil claim[5]and that the challenge to the will should be determined in the succession proceedings.[6] Counsel also submitted that the machinery of criminal justice system should not be used as a pawn in personal civil feuds[7]or to serve extraneous purposes.

First and second interested Party's Advocates Submissions

8. Counsel for the first and second interested parties submitted that the petition does not disclose violation of rights[8]nor has the Petitioner proved malice[8] and that the existence of the succession proceedings is not a bar to the criminal proceedings and that it is not the duty of the court to deduce the merits or demerits of the criminal case.[9]

Failure by the Hon. Attorney General to file submissions

9. On 14th November 2017, Counsel for the Hon. Attorney General asked for three days to file

submissions, but at the close of three days no submissions had been filed.

Analysis of the issues, submissions and the law

10. From the above facts, the following issues distil themselves for determination, namely, **(a)** whether the petitioner has demonstrated grounds to stop the prosecutions. **(b)** whether pendency of a civil suit is a bar to criminal prosecution.

Whether the prosecution and demonstrated grounds to stop the said prosecutions.

11. Article **157 (10)** of the Constitution requires the DPP to act independently in the discharge of his duties. This position is replicated in Section **6** of the Office of the Director of Public Prosecutions Act. [\[10\]](#) The DPP is not only required to 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. There should be no reasonable basis to believe that the prosecution was instigated by another person.

12. 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. Where the decision is surrounded by doubt or even mere reasonable suspicion that an interested party has a hand in the prosecution, such a decision cannot be allowed to stand.

13. The prosecutor should act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the accused, victims, and witnesses.

14. A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable. [\[11\]](#)

15. 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. Therefore, the DPP must carefully consider whether or not to prosecute.

16. Also, one key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest.

17. The criminal cases relate to forgery, assault and stealing. It is not for this Court to determine the veracity or to weigh the strength of the accused persons defence. That is a function for the trial court hearing the criminal trial. The allegations raised herein touch on the merits of the cases in the lower court. This court can only intervene if there cogent allegations of violation of Constitutional Rights or threat to violation of the Rights or in clear circumstances where it is evident that the accused will not be afforded a fair trial or the right to a Fair Trial has been infringed or threatened. None of these have not been established in this case

18. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receives careful consideration.

19. 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) 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.

20. 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.^[12] 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 or an abuse of court process or abuse of police powers or judicial process. In my view, the circumstances raised in this case, namely, assault, theft and forgery cannot be perceived as helping the interested parties in the litigation pending in court. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.^[13]

21. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.^[14] 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, then the court ought to stop the prosecution.

22. 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.^[15]

23. The above categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.^[16] 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. To me, this is not a deserving case where the prosecution ought to be halted for the interests of justice.

24. In fact, on the contrary, it is in public interest that prosecutions be mounted to uphold law and order and justice for the victims of crime.

25. A criminal prosecution or police investigations can also be stopped if it was commenced in the absence of proper factual foundation. This has not been alleged or proved in this case. From the material before me, there was proper factual foundation to warrant undertaking the prosecution in question.^[17]

26. The Constitution contains, in material respects, a fundamental commitment to human rights. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. ^[18] The prosecution of an accused person must be conducted with due regard to traditional considerations of candour, fairness, and justice. These have not been shown to be absent. Where a trial is conducted in a manner different from what is prescribed under the law, the trial is bad.^[19] In my view, the investigation and trial was commenced with factual basis.

27. Fundamentally, a fair and impartial trial or investigation has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial or an investigation is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism. And again decidedly, there has to be a fair investigation process and a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused.^[20] In fact, no prejudice has been alleged or proved in this case.

28. The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).^[21] The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the

fact that under article 25 (c) of our constitution, it is among the fundamental rights and freedoms that may not be limited.

29. The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized.^[22] The Petitioner has not proved that he will be prejudice if the trial proceeds.

30. A criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would in my vie open the door to an unfair trial. The Petitioner has not proved that the investigations were partisan.

31. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, Judicial review, mandamus or permanent stay of proceedings are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceeding ought to be quashed.

32. The saving of the High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice.

33. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction.^[23]

34. The High Court has inherent powers to quash, stay or prohibit criminal proceedings. These powers are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India^[24] revisited the law on the issue and held that '*these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.*' The court delineated the law in the following terms:-

"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings.....The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers"^[25]

35. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*.^[26] The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

i. Where it would be impossible to give the accused a fair trial; or;

ii. 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.

36. The above categories are not mutually exclusive and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse, and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances. **Chris Corns** in his Article entitled '*Judicial Termination of Defective Criminal Prosecutions: Stay Applications*' [27] argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories;-

i. When the continuation of the proceedings would constitute an 'abuse of process,'

ii. When any resultant trial would be 'unfair' to the accused, and

iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

37. The latter ground is not limited to abuse of the trial court procedures and processes but extends more generally to abuse of the administration of criminal justice process as a whole. Clearly, there can be significant overlap between these various grounds for the stay; an unfair trial, for example would tend to bring the administration of justice into disrepute. Conversely, in some circumstances the holding of a trial may not be technically unfair to the accused yet still undermine the integrity of the legal system because of some impropriety in the investigation or prosecution of the case. The justification for granting a stay extends beyond any abuse of process and includes circumstances where it would be 'unfair' to the accused for the proceedings to continue. [28]

38. Criminal proceedings commenced to advance other gains other than promotion of public good are vexatious and ought not to be allowed to stand. The word "vexatious" means "harassment by the process of law," "lacking justification" or with "intention to harass." It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.

39. It is my view that the petitioner has not demonstrated that his rights to a fair trial have been or will be infringed if the prosecution proceeds nor has he demonstrated that the prosecution will inherently violate the petitioner's rights to a fair trial as enshrined in the constitution.

Whether pendency of a civil suit is a bar to criminal prosecution.

40. Section 193A of the Criminal Procedure Code provides:-

"193A Notwithstanding the provisions of any other written law the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceeding."

41. Clearly, the mere pendency of the succession proceedings between the parties is not a bar to continuation of the criminal proceedings.

42. In view of my analysis of the facts and the law enumerated above, I find that the this Petition has no merits. Consequently, I dismiss the petition with no orders as to costs.

43. Orders accordingly

Signed, Delivered and Dated at Nairobi this 29th day of November, 2017

John M. Mativo

Judge

[1] R vs George Ngugi

[2] Orders are said to have been issued in Petition Number 257 of 2012, Betty Rashid vs Commissioner of Police and Another

[3] In the matter of the Estate of the late Samoson Mburu Huho-Deceased

[4] Article 157 of the Constitution and the Office of the

[5] Njuguna S. Ndungu vs Ethics and Anti-Corruption Commission & 3 Others {2014} eKLR cited

[6] Desderio Nkonge Kirigu vs R{2013} eKLR

[7] Kuria vs A.G. {2002} 2 KLR 69 and R vs Chief Magistrates Court a Mombasa ex parte Ganijee and Another{2002} 2 KLR 703

[8] Anarita Karimi Njeru vs R {1976-1980} 1KLR 1272

[9] Michael Monari & Another vs Commissioner of Police & 3 Others, Misc App No. 68 OF 2011

[10] Act No. 2 of 2013

[11] Republic vs Attorney General ex-parte Arap Ngeny

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

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

[14] 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.

[15] 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.

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

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

[18] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94

[19] Indian Case of *Pulukiri Kotayya vs Emperor* L.R. 74 Ind App 65

[20] The Supreme Court of India in *Rattiram v. State of M.P.*[20], a three-Judge Bench

[21] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI),

December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

[22] *Natasha Singh v. CBI*{2013} 5 SCC 741

[23] See *Kafnatakavs L. Muniswamy& Others SAIR 1977 SC 21489*

[24] See *Maharashtra vs Arun Gulab Gawali*

[25] See *State of West Bengal & Others vsSwapan Kumar Guha& Others, AIR, 1982, SC 949, Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others AIR 1998, SC 128 & G. ugarSuri&AnoVs State of U.P & Others, AIR 2000 Sc 754*

[26] {1993}All E.R 138, 151, House of Lords

[27] Chris Corns, *Judicial Termination of Defective Criminal Prosecutions: Stay Applications*, 76 *University of Tasmania Law Review*, Vol 16 No. 1, 1977

[28] *Ibid*