



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHT DIVISION

PETITION NO. 6 OF 2015

IN THE MATTER OF SECTION 22,23,165,28,40 OF THE CONSTITUTION OF KENYA 2010

ERIC CHEGE KARIUKI.....PETITIONER

-VS-

D.C.I.O KILIMANI.....1ST RESPONDENT

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

SAYARI KENYA COMPANY.....3RD RESPONDENT

JUDGMENT

Introduction

1. By his petition dated 14th January 2015, the petitioner challenges his prosecution in connection with certain monies which he alleges he holds pending the taxation of his bill of costs.
2. The petitioner first approached the Court by way of an application for conservatory orders dated 14th January 2015 which was supported by his affidavit of the same date. He was directed to serve his application and petition, and to take the plea in the criminal case against him as required. Counsel for the petitioner thereafter indicated to the Court that the parties were discussing the matter with a view to an amicable settlement, and that the petitioner had not yet been charged with any offence.
3. Thereafter, on 23rd January 2015, the Court granted temporary orders of stay of prosecution, which were subsequently extended till the hearing and determination of the petition, which was heard on 3rd November 2015.

The Pleadings

4. While the parties are in agreement with respect to certain of the facts giving rise to the petition, they present very different versions in respect to others. The petitioner sets out his version of events in his petition and affidavit in support both dated 14th January 2015.

5. The facts of the matter as set out in his affidavit and petition are that he was instructed by the 3rd respondent in August, 2014, to act for it in the purchase of two properties valued at Kshs37,000,000/- and Ksh4,200,000/- respectively, and that the vendors of the said properties also instructed him to act for them. He therefore prepared the requisite sale agreements which were executed by the parties.

6. The 3rd respondent thereafter paid deposits of the sum of Ks420,000/- and a further Kshs.1,000,000/- towards the transactions to the petitioner's firm, which sums were retained by his firm.

7. The petitioner states that when the 3rd respondent was unable to secure financing for the transaction, it requested him to negotiate for an extension of time to enable it secure the finances. The negotiations were held in his office and a date of 24th December agreed upon. He then prepared the completion documents for the transactions in which financing had been arranged and forwarded the documents to the counterpart advocates for registration and processing of payment.

8. According to the petitioner, on a date which he does not specify but in December, 2014, the 3rd respondent demanded that he registers one of the transfers without payment having been received. He declined to act on the said instructions and advised the 3rd respondent that such an act would constitute a fraud against the vendor. The 3rd respondent then demanded the refund of the money held by the petitioner, which the petitioner states he declined to refund, advising the 3rd respondent that this would not happen until the matter had been officially rescinded and the consent of the vendor obtained. He contends that the 3rd respondent thereafter began harassing and attempting to intimidate him by, among other things, asking various police officers to call and demand his payment.

9. The petitioner avers that on 22nd December 2014, at a meeting held in his office, one of the vendors indicated her wish to cancel the transaction and requested for her documents, which she received. On the same day, the advocates for the financier indicated that they had finalized the transfer and charge and were ready to effect payment, and he gave them the vendor's account for purposes of payment.

10. He states that the 3rd respondent thereafter demanded refund of its money, which the petitioner indicated would be made upon deduction of his reasonable fees, and the 3rd respondent then took its documents from the petitioner and left. The petitioner then filed his bill of costs on 30th December 2014 and forwarded it to the 3rd respondent. He contends that the 3rd respondent then asked the same police officers who had been harassing him to summon him to Kilimani Police Station. His attempts to resolve the matter have been unsuccessful, and the police officers have insisted on his prosecution, and he had paid a cash bail of Ksh.40,000/- He had also recorded a statement with the police, though he alleges that they refused to allow him to write his own statement or to write what he was saying, and that they kept hurling insults at him.

11. It is his contention that the intended prosecution is meant to intimidate him and force him to relinquish his right to payment for work done. He therefore asks the Court to allow his petition and grant the following prayers:

1. ***The intended prosecution of the petitioner be stayed.***
2. ***The cash bail of Ksh40,000 be refunded to the petitioner.***
3. ***The respondents be compelled to compensate the petitioner for undue harassment.***
4. ***The respondents be compelled to pay the costs of this petition.***

12. The 3rd respondent's version of events is set out in the affidavit in opposition to the petition sworn by Mr. Clement Murimi Muriuki, a director of the 3rd respondent, on 13th February 2015.

13. Mr. Muriuki confirms that the 3rd respondent did enter into an agreement for the purchase of two

properties. One was L.R No. 12914/20 being sold by one James Mwangi Kahiga for Kshs. 37,000,000/-. The second was L.R No. RUIRU KIU BLOCK 6/1386 being sold at the price of Kshs.4,200,000/- by one Anne Wanjiru Njau. The sale agreement for the two properties were drawn by the petitioner through his law firm.

14. Mr. Muriuki terms the averments by the petitioner with regard to his alleged harassment by police at the instigation of the 3rd respondent as lies fabricated with malice by the petitioner. He states that the petitioner could only draw a bill of costs for services rendered to his clients, and in respect of the transactions in this matter, the petitioner was acting solely as the advocate for the vendors. Mr. Muriuki refers the Court to paragraph 6 of the agreements for sale drawn by the petitioner.

15. It is Mr. Muriuki's deposition that the 3rd respondent had, however, agreed on a fee for drafting the sale agreement. The amount agreed upon was Kshs.85,000, which amount was duly paid on 11th November 2014 by cheque number 000017 drawn in favour of Chege, Kariuki and Associates.

16. According to the 3rd respondent, it was a term of the agreement for sale that any deposit paid by the purchaser would be refunded in the event that the sale transaction was rescinded by the vendor. The petitioner had received a sum of Kshs.1,420,000/- as stakeholder, but has arbitrarily withheld the said amount after the transaction fell through, allegedly as legal fees for the two transactions.

17. The 3rd respondent reiterates that the petitioner was acting for the vendors in the sale transactions, and his acts of withholding the money from the 3rd respondent amounted to acts which were both criminal and civil in nature. It concedes that it reported the matter to the nearest police station, and that the authorities, after carrying out investigations, deemed it fit to charge the petitioner under the provisions of the Penal Code.

18. The 1st and 2nd respondents filed an affidavit in opposition to the petition sworn by No. 38833 PC Josphat Muriuki on 4th May 2015.

19. According to PC Muriuki, the case against the petitioner is one of stealing by agent contrary to section 268(1) read with section 282(b) of the Penal Code. He sets out the facts more or less as set out in the affidavit of Mr. Clement Murimi Muriuki, including the payment of Kshs.420,000 and a further Kshs1,000,000 paid on 15th November 2014 into the petitioner's account No. 1158498276 KCB Hurligham Branch. He further avers that on 12th November 2014, Mr. Muriuki paid Kshs.85,000/-, the total amount paid to the petitioner amounting to Ksh.1,505,000/-.

20. PC Muriuki avers that the petitioner did not pay the seller of the plot even after she visited his office several times, and she thereafter demanded that her title deed to the property be returned to her.

21. According to PC Muriuki, the petitioner stated that he had spent the money paid to him by the 3rd respondent in another business, and that he gave the purchaser a log book for M/V registration No. KCA 066T an Alfa Romeo, as well as a title deed for Kajiado/Mtashara/7937 as security, but both securities did not belong to the petitioner.

22. PC Muriuki deposes that as a result, the 3rd respondent complained to the police at Kilimani Police Station, and all the parties were called to record statements; and that it was determined that the petitioner should be charged with the offence of stealing by agent contrary to section 268(1) read with section 282(b) of the Penal Code, and he was released on a cash bail of Kshs.40,000/- to appear before the Kibera Court on 14th January 2015, following which he filed this petition.

The Submissions

The Petitioner's Submissions

23. Two sets of submissions and authorities were filed on his behalf. The case was presented by his Learned Counsel, Mr. Khamati.

24. The petitioner submits that the respondents are seeking to prosecute him for matters he considers a civil dispute in respect of fees payable to him for work done by him for the 3rd respondent, in respect of which he has filed a bill of costs, and has held the said money for services rendered. He reiterates that he has attempted an amicable settlement, but that his attempt has fallen on deaf ears.

25. He also complains about the manner in which he has been handled, alleging that such manner is injurious to his dignity under Article 28 as he has been harassed and intimidated because of his insistence on being paid.

26. While conceding that the 1st and 2nd respondents have a right to prosecute him, he submits that Article 157(11) requires that there should be regard to the need to avoid abuse of process, and the manner in which he has been handled tends to abuse of process.

27. With regard to the provisions of paragraph 6 of the agreement for sale annexed to his affidavit sworn on 14th January 2015 as "ECK1" in which the space for the Advocate for the purchaser is blank, he maintains that he was acting for the vendor and purchaser, and that the blank space is a typographical omission or an aspect of negligence that does not change the basic fact that he was acting for both parties. He asks the Court to allow the petition and direct that the bill of costs be expedited so that the matter can be settled.

Submissions by the 1st and 2nd respondents

28. The case for the DPP was presented by learned Counsel, Mr. Ashimosi. His submissions were that as confirmed by the averments by PC Josphat Muriuki, investigations were carried out which revealed the facts as set out in the said affidavit. The petitioner had received the amount in question from the 3rd respondent, but when the transaction fell through, had not refunded the amount to the purchaser. Instead, he had used the amount for other business, and had tried to give the 3rd respondent other security for his money, a motor vehicle and a piece of land, none of which was in his name, leading to the decision to charge him with a criminal offence.

29. It was the DPP's submission that the case had gone beyond an advocate-client relationship, that the DPP has established that there was a prosecutable case; that the petitioner had not demonstrated a breach of any provision of the Constitution, and it was the DPP's prayer that the petition should be dismissed with costs.

Submissions for the 3rd Respondent

30. Mr. Odhiambo for the 3rd respondent observed that the primary issue before the Court relates to two sale agreements made by the petitioner for two properties valued at Kshs4.2m and 37m. He observed that the two sale agreements were drawn by the petitioner, who knew what he was putting in the agreement, and he knew, as was evident from paragraph 6 of the said agreement, the party he was taking instructions from.

31. The 3rd respondent submitted that the sum of Kshs.1,420,000 was deposited with the petitioner to hold as stakeholder, not as legal fees, and that the transaction in question collapsed.

32. The 3rd respondent reiterated the averment by Mr. Muriuki that the petitioner was not acting for it. Mr. Odhiambo pointed to email correspondence annexed to the petitioner's affidavit as "ECK 2", being correspondence between the petitioner and Gathoga Wairigi & Company Advocates in which the petitioner gives instructions on where the money for the 37m. property was to be deposited. It was his submission that this was evidence of the fact that the petitioner was not acting for the purchaser as there

was another Advocate. It was his submission that the petitioner could not hold the money as instructions fees and as a lien for money due as instructions fees.

33. The 3rd respondent urged the Court to dismiss the petition, noting that the petitioner had not demonstrated a violation of his constitutional rights.

Determination

34. From the pleadings and submissions of the parties set out above, it appears to me that there is only one issue for determination in this matter: whether the facts as presented by the petitioner demonstrate a violation of his rights under Articles 28 and 40 of the Constitution, the only Articles guaranteeing rights that he alleges was violated with respect to him in the investigations of the matter in dispute, the others, notably 22, 23 and 165, relating to the powers and jurisdiction of the Court.

35. The parties have made various averments and submissions with respect to the transactions between the 3rd respondent and the vendors of the property in question, including the question whether the petitioner was acting for both parties or not. While it is not the business of this Court to enter into an inquiry into this issue, I will make one observation: having considered the sale agreements annexed to the affidavit of the petitioner, and having considered the email correspondence also attached to his affidavit, it appears to me that the petitioner was not acting for the 3rd respondent. This conclusion is further bolstered by the fact that the petitioner did not at any point challenge the averment that he had been paid a sum of Kshs85,000 for the purpose of drawing the sale agreement.

36. It is also not disputed that the petitioner was paid a sum of Kshs. 1,420,000, which amount he has retained. He alleges that he was entitled to retain this amount as a lien for his legal fees. However, taken with the allegation that he was not acting for the purchaser, and that he had attempted to give the 3rd respondent some security for the amount, it cannot be argued that the 1st and 2nd respondent had no basis for taking up the 3rd respondent's complaint, and seeking to charge the petitioner with the offence of theft by agent.

37. Is there anything before me that demonstrates a violation of Article 28, or an abuse of the powers of the DPP under Article 157(11)? Article 28 provides that ***“Every person has inherent dignity and the right to have that dignity respected and protected.”*** According to the petitioner, his right to dignity was violated in the manner he was treated at the police station, in that he was not allowed to record his own statement, that the police did not write what he stated, and that they hurled insults at him. There is, however, nothing before me to support these assertions.

38. Article 40 contains the constitutional guarantee to property, and provides that the state shall not arbitrarily deprive one of property. In this case, the petitioner has retained monies belonging to the 3rd respondent in circumstances that have led to the DPP, in exercise of his powers under Article 157 of the Constitution, to conclude that a criminal offence has been committed. No evidence has been placed before me that supports the allegation that there has been an unlawful deprivation of property. With respect to the amount of Kshs.40,000 that the petitioner states that he paid to the police, it appears to me that the said amount was required and properly paid in accordance with Article 49 on the rights of an arrested person. I cannot therefore see any basis for alleging violation of the right to property.

39. Has there been a violation of Article 157(11) in the intention to prefer charges against the petitioner? Article 157(11) provides that ***“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”*** While the petitioner alleges an abuse of process, he has failed to demonstrate how the preferment of charges amounts to an abuse of process.

40. What he is asking the Court to do is to examine the facts and evidence that the DPP has relied on in deciding to charge him with an offence. The Court has been invited on numerous occasions in the past to enter into the arena of the trial court in matters similar to this, and it has, except in very limited and clear

cases, declined to do so. The petitioner and the respondents have set out in their respective submissions such instances, including the case of **George Joshua Okungu & Another vs Chief Magistrate's Court (2014)eKLR**.

41. Warsame J set out succinctly the duty of the Court when confronted with a matter such as this in which a party asks it to interfere with the exercise of the constitutional prosecution powers. He stated as follows in the case of **Michael Monari & Another vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011**:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

42. In **George Joshua Okungu & Another vs Chief Magistrate's Court (supra)**, Odunga J set out the conditions under which the High Court can interfere with prosecution powers. He observed, first, as follows:

"[50.] The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the Petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the Petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings."

43. The Court went on to cite with approval the decision of the Court in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** in which the High Court had observed that:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform... A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives..."

44. Having carefully considered the matter before me, I am unable to find anything that would justify interference with the powers of the DPP, or justify an examination of the evidence that the petitioner intends to place before the trial court. He has the opportunity to place the material that he has sought to place before this Court as his defence in the lower court.

45. In the circumstances, I find no merit in the petition, and it is hereby dismissed with costs.

Dated, Delivered and Signed at Nairobi this 28th day of January 2016

MUMBI NGUGI

JUDGE

Mr. Khamati instructed by the firm of Anthony H. Khamati & Co. Advocates for the petitioner.

Mr. Odhiambo instructed by the firm of Makhanu, Ohiambo & Co. Advocates for the 3rd respondent.

Mr. Ashimosi instructed by the office of the Director of Public Prosecution for the 2nd respondent.