



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 194 OF 2015

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST APPLICANT
DIRECTORATE OF CRIMINAL INVESTIGATIONS.....2ND APPLICANT

VERSUS

CHIEF MAGISTRATE’S COURT, KIAMBU.....1ST RESPONDENT
RESIDENT MAGISTRATE’S COURT, NAIROBI.....2ND RESPONDENT
JOHN MUGO NJERU.....3RD RESPONDENT
MARY WANJIRU BERNARD.....4TH RESPONDENT
DAIMLER ENTERPRISES LIMITED.....5TH RESPONDENT
DOUBLE CLEAN LIMITED.....6TH RESPONDENT
RUORA INVESTMENTS LIMITED.....7TH RESPONDENT
MARSTONS ENTERPRISES LIMITED.....8TH RESPONDENT
NGINYO ROADWAYS LIMITED.....9TH RESPONDENT
JAMBO HOLDNGS LIMITED.....10TH RESPONDENT
CHIEF LANDS REGISTRAR.....11TH RESPONDENT

RULING

The application was filed vide a Notice of Motion dated 30th July, 2015 seeking the following orders:-

1. **That** pending the hearing and determination of this revision application, this Honourable Court be pleased to call for and examine the record of the Kiambu Chief Magistrate’s Court in Kiambu

Chief Magistrate's Court Miscellaneous Criminal Application Number 91 of 2015;

2. **That** pending the hearing and determination of this Revision application, this Honourable Court be pleased to call for and examine the record of the Nairobi Chief Magistrate's Court Miscellaneous Criminal Application Number 723 of 2015;

3. **That** pending the hearing and determination of this Revision application, the orders made on 30th June, 2015 and 23rd July 2015 by the Honourable Mrs. P.M. Mugure, RM, and all subsequent orders pursuant thereto in Nairobi Miscellaneous Application No. 723 of 2015 summoning Chief Inspector Bernard Kwarat for alleged contempt of court orders issued on 30th June 2015 pursuant to an application by the suspects, John Mugo Njeru and Mary Wanjiru Bernard, be stayed and/or set aside in their entirety;

4. **That** pending the hearing and determination of this Revision application, the orders made on 21st July 2015 by the Honourable Mrs. P. M. Mugure, RM, and all subsequent orders pursuant to the application dated 20th July 2015 filed in Nairobi Criminal Case No. 1203 of 2015, by the accused/suspects, John Mugo Njeru and Mary Wanjiru Bernard, be stayed and or set aside and the accused/suspects, John Mugo Njeru and Mary Wanjiru Bernard, do proceed to take plea and attend court as required in the said Nairobi Criminal Case No. 1203 of 2015;

5. **That** pending the hearing and determination of this Revision application, this Honourable Court be pleased to place a restriction on all transactions over TITLE Nos. NAIROBI/BLOCK 92/225, 226, 227, 228, 229 and 230;

6. **That** pending the hearing and determination of Nairobi Criminal Case No. 1203 of 2015 against the 3rd and 4th Respondents/ suspects/accuseds, JOHN MUGO NJERU, MARY WANJIRU BERNARD, this Honourable court be pleased to place a restriction of all transactions and dealings over TITLE Nos. NAIROBI/BLOCK 92/225, 226,227,228, 229 and 230;

7. **That** the decision of the 1st Respondent, the Kiambu Chief Magistrate's Court in Kiambu Chief Magistrate's Court Miscellaneous Criminal Application Number 91 of 2015, made on 12th May 2015, removing the restrictions over the aforementioned suspected fraudulent parcels of land, being TITLE Nos. NAIROBI/BLOCK 92/225, 226,227,228, 229 and 230, be reviewed, reversed and or set aside;

8. **That** the ruling and order made on 30th June, 2015 by the 2nd Respondent, Resident Magistrate's Court Nairobi, in Misc. Criminal Application No. 723 of 2015 Nairobi and all subsequent orders issued pursuant thereto; by the Honourable Mrs. P.M. Mugure, RM, be reviewed and or set aside;

9. **That** this Honourable Court be pleased to review, vary and or set aside the decision made on 21st July, 2015 and all subsequent orders made by the 2nd Respondent, Honourable P.M Mugure, RM, pursuant to an application dated 20th July, 2015 in Nairobi Criminal Case N0. 1203 of 2015; by the Applicants/ accuseds/suspects, John Mugo Njeru and Mary Wanjiru Bernard, and that the said Applicants/accuseds/suspects, John Mugo Njeru and Mary Wanjiru Bernard, do proceed to take plea and attend court as required in the said Criminal Case No. 1203 of 2015;

10. **That** the Honourable P.M Mugure, RM, be excused from handling any proceedings in connection to the complaint lodged by Jambo Holdings Limited against the suspects/accused/Applicants, John Mugo Njeru and Mary Wanjiru Bernard, including Nairobi Chief Magistrate's Court Case No. 1203 of 2015 Nairobi; Republic vs John Mugo Njeru and Mary Wanjiru Bernard; and

11. The costs of this application be provided for.

Which application is based on the following Grounds:-

- i. **That** on 23rd July, 2015 the learned Resident Magistrate, P.M. Mugure, RM, issued orders summoning Chief Inspector Bernard Kwarat, the Investigating Officer, to appear before her tomorrow (30th July 2015) on allegations of contempt of court yet he had not committed any contempt of court.
- ii. **That** effectively, the summons issued against Chief Inspector Bernard Kwarat the Investigating Officer are meant to intimidate him and deter him from carrying out his duties as required of him by the 2nd Applicant and further as directed by the 1st Applicant.
- iii. **That** there has been registered a criminal case against the 3rd and 4th Respondents, the accuseds/suspects, John Mugo Njeru and Mary Wanjiru Bernard, in Nairobi Criminal Case No. 1203 of 2015;
- iv. **That** even before they could take plea, the said accuseds/suspects applied for stay of the plea and for summons against Chief Inspector Bernard Kwarat, the Investigating Officer, both in Misc. Criminal application No. 723 of 2015 and in the same Nairobi Criminal Case No. 1203 of 2015 thereby avoiding and obstructing the criminal justice process;
- v. **That** in addition, the same learned Resident Magistrate has issued order preventing the Applicants from executing respective statutory and constitutional mandates;
- vi. **That** previously, on 12th May, 2015, another magistrate's court, the Kiambu Chief Magistrate's Court reversed restrictions placed earlier on 18th March, 2015 over suspected fraudulent TITLE Nos. NAIROBI/BLOCK 92/225, 226,227,228, 229 and 230;
- vii. **That** the restrictions placed over the aforementioned parcels of land were placed upon the application of the 2nd Applicant;
- viii. **That** the Kiambu Chief Magistrate's Court lifted the aforementioned restrictions on 12th May, 2015;
- ix. **That** the learned Kiambu Chief Magistrate and learned Nairobi Resident Magistrate P.M Mugure, erred in their respective decisions by failing to appreciate and find that the 2nd Applicant was exercising its mandate under Article 244 and Sections 24 and 35 f the National Police Service Act;
- x. **That** the removal of the aforesaid restrictions only served to facilitate further fraud and falsification of title by the 3rd and 4th Respondents, who are suspected of forgery of the aforementioned titles, with possible commission of more offences;
- xi. **That** the continued fluid situation is inimical to existence of law and order and goes against justice and fairness;
- xii. **That** the interests of the complainant, the 10th Respondent, as a victim of the suspected crime, have been severely prejudiced;
- xiii. **That** it is in the larger interests of the public that the restrictions lifted on 12th May, 2015 be restored and remain in force during the investigations and possible prosecution of the suspects;
- xiv. **That** the learned Resident Magistrate, Honourable P.M. Muruge, RM, illegally and unprocedurally lifted the warrants of arrest and charging of the 3rd and 4th Respondents, in Nairobi Misc. Criminal Application No. 723 of 2015 and further denied an application by the Applicants to

cause the issuance of summons against the 3rd and 4th Respondents/accused/ suspects;

xv. **That** further and against procedure, without jurisdiction and or fairness, the Learned P.M. Mugure, RM, issued a stay of plea of the 3rd and 4th Respondents yet the 1st Applicant has a constitutional right and obligation to prefer charges against any persons reasonably shown and suspected of committing a criminal offence;

xvi. **That** strangely and unprocedurally, the Honourable Mrs. P.M Mugure, Resident Magistrate has repeatedly and coincidentally handled all applications and proceedings filed by the suspects herein, John Mugo Njeru and Mary Wanjiru Bernard, and has thereby made strange decisions which have essentially shielded the said suspects from the criminal justice process despite existence of sufficient evidence;

xvii. **That** in so shielding the suspects, the Learned Magistrate has exhibited unabashed bias and desire to prevent the 1st Applicant from exercising its constitutional and statutory duty of bringing justice to the suspected criminal offenders;

xviii. **That** by preventing and otherwise unlawfully interfering with the due process, the Learned Magistrate has prevented the course of justice being pursued and thereby served to encourage lawlessness;

xix. **That** the lifting of the restrictions was not properly founded and only served to undermine public interest by encouraging the suspects to flash suspected forged titles to unsuspecting members of the public;

xx. **That** the ruling and orders issued by the Hon. P.M Mugure, RM made on 30th June, 2015 also served to prevent the Applicants from exercising their constitutional and statutory duties respectively;

xxi. **That** the summons issued on 23rd July, 2015 by the same learned Magistrate, P.M Mugure, RM, Ex Parte, requiring the Investigating Officer to show cause why he should not be punished for contempt of court is intended to intimidate the public officer and to deter him from pursuing the case against the suspects ad further to undermine the course of justice;

xxii. **That** unless the stay orders sought herein are granted, the Investigating Officer shall be unfairly accused of contempt of court and he shall be intimidated from undertaking his duties.

xxiii. **That** unless the orders of stay and or suspension of the summons against the Investigating Officer is issued and further, unless the orders sought therein are granted, the 3rd and 4th Respondents, shall succeed in subverting the course of the criminal justice process;

xxiv. **That** it is in the wider interests of justice and rule of law for the application filed herein to be granted as prayed.

Under Section 362 of Criminal Procedure Code, this court is required to examine the record of the criminal proceedings in a subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

The application herein is couched in such a manner that the Applicants are requesting for a revision of a multiple of orders made in various files. The orders arise from Nairobi Chief Magistrate's Court Misc. Criminal Application No. 723 of 2015, Nairobi Chief Magistrate's Court Criminal Case No. 1203 of 2015 and Kiambu Chief Magistrate's Court Misc. Criminal Application No. 91 of 2015.

In Misc. Criminal Application No. 723 of 2015, the court is asked to revise the orders made on 30th June,

and 23rd July, 2015 by Hon. P.M Mugure, RM, and all subsequent orders pursuant in that application. Further, the court is requested to revise orders for 21st July, 2015 by the said Hon. P.M Mugure, RM, pursuant to an application dated 20th July, 2015 by the accused persons ordering them to proceed to take plea and attend court as required in Nairobi Criminal Case No. 1203 of 2015. The orders made in Kiambu Misc. Criminal Application No. 91 of 2015 on 12th May, 2015, removed restrictions over parcels of land Nos. NAIROBI/BLOCK 92/225, 226, 227, 228, 229 and 230. It is urged that the court reinstates the order of restrictions. In respect of Misc. Criminal Application No. 723 of 2015, this court is requested to order that the accused persons namely; John Mugo Njeru and Mary Wanjiru Bernard who are the 3rd and 4th Respondents be ordered to take their pleas.

The brief background to the matter herein is that the various miscellaneous criminal applications aforementioned were filed prior to the filing of the criminal charges against the 3rd and 4th Respondents in the criminal case No. 1203 of 2015. At the Kiambu Law Court's application No. 91 of 2015, the Applicant sought restriction orders against the aforementioned titles of land. The orders have since been vacated prompting the Applicant to request for their reinstatement. In Misc. Application No. 723 of 2015, a warrant of arrest was issued against the 3rd and 4th Respondents. On the 30th June, 2015, an application was made to lift the warrant of arrest which is subject of prayer No. 3 in this application. The court hearing the application lifted the warrant of arrest against the Respondents therein John Mugo Njeru and Mary Wanjiru Bernard who are the 3rd and 4th Respondents herein. Subsequently, the investigating Officer one, Chief Inspector Bernard Kwarat summoned them for purposes of taking plea before the Chief Magistrate's court in Criminal Case No. 1203 of 2015. They deemed the action of Chief Inspector Bernard Kwarat as contemptuous of the learned magistrate's order of 30th June, 2015 lifting the warrant of arrest against them.

Back to Criminal Case 1203 of 2015, several charges were filed against the 3rd and 4th Respondents ranging from forgery, conspiracy to defraud, making a document without authority and obtaining registration by false pretences. The charge sheet is signed by the court on 17th July, 2015. On this date, the two Respondents did not appear to take plea. The court issued summons to them through their advocates to attend court to take plea on 22nd July, 2015. On 20th July, 2015 their advocate filed an application in court seeking the suspension of the summons requiring them to appear in court on 22nd July, to take plea. This application again landed in the hands of P.M. Mugure, Resident Magistrate, who was also in conduct of Misc. Application No. 723 of 2015. Being alive to the fact that she had lifted the warrant of arrest against them in that application, she suspended the summons requiring the two to appear in court and further deferred the plea from 22nd July, 2015 to a date until the determination of the application before her *inter-parte*. In the instant application again, the Applicant is seeking the setting aside of the orders issued on 22nd July, 2015 suspending the taking of plea by the 3rd and 4th Respondents. The application before Hon. P.M. Mugure was set for *inter-partes* hearing on 8th August, 2015. The same did not proceed as scheduled upon noting that the Respondents therein had moved to the High Court in the instant application.

The case for the 3rd to 9th Respondents is that there was an illegality and indeed it was improper to summon the 3rd and 4th Respondents to take plea since the court had suspended their taking of the plea in the Criminal case No. 1203 of 2015. Moreover, the charges filed against them related to Title Deeds in LR Numbers Nairobi/Block 92/225,226,227,228,229 and 230 which currently are subject of Nairobi Environment and Land Court Case No. 219 Of 2015. Further, when the orders placing the restrictions as issued in Kiambu Misc. Criminal Application No. 91 of 2015 were vacated, the Applicant ought to have appealed against them as opposed to coming before this court in the instant application. Finally, it was the 3rd to 9th Respondents' case that the Applicant was abusing the court process by filling numerous miscellaneous applications as opposed to filing an appeal when the orders were disallowed.

It is important to note that the 5th to 9th Respondents are limited liability companies whose directors are the 3rd and 4th Respondents. The 10th Respondent is the complainant in the Criminal case. The 11th Respondent who is the Chief Lands Registrar is a witness in the criminal case and had issued the

restrictions on the aforementioned titles of land.

On the part of the Applicants, their case is that the mere existence in the High Court of a civil matter, of itself, does not bar the institution of criminal prosecution. It was highly irregular on the part of the learned magistrate P.M Mugure to suspend the taking of plea when indeed, the plea court had issued summons for the appearance of the 3rd and 4th Respondents for that purpose. Furthermore, the criminal trial was not pending before the Environment and Land Court but before the magistrate's court. It was then misleading of the counsel for the 3rd to 9th Respondents to allude that there were three pending cases. In any case, the learned magistrate summoned the Investigating Officer to appear before her for contempt proceedings before he was heard. That of itself, according to the 10th Respondent, was irregular.

It is the view of this court that the existence of a civil suit does not, of itself, constitute a bar to commencement of criminal proceedings. It is trite from the submissions of all the respective parties that the criminal charges filed against the 3rd and 4th Respondents relate to the land case before the Environment and Land Court. Specifically, the subject matter therein is the aforementioned titles of land. Whether or not the Plaintiff in that case succeeds is a matter of determination by the Judge hearing that case. In the same spirit, the proof of guilt or otherwise of the accused persons (3rd and 4th Respondents) in the criminal case is also a matter of the strength of the prosecution's evidence. The Director of the Public Prosecutions under Article 157 (6) is vested with powers to institute and undertake criminal proceedings of any person before any court in respect of any offences alleged to have been committed. His perusal of their investigations file led him to conclude that the 3rd and 4th Respondents had a case to answer. It is not for this court at this juncture to determine the veracity of the evidence likely to be adduced before the criminal court. It is also not the onus of this court to determine whether or not, because the 5th to 9th Respondents may have raised a complaint with the police as well, then the 10th Respondent should not be deemed as the complainant in the criminal case. What the case for the 3rd and 4th Respondent would be is for them to prove their innocence or otherwise dislodge the prosecution's case. The gist to the institution of the criminal proceedings is whether or not the prosecution would discharge its burden in proving its case to the required standard. I do not see any merit in the learned magistrate P.M Mugure's orders to the extent that the investigating Officer erred in summoning the accused persons in the criminal case to appear in court for purposes of taking the plea. Indeed, her orders that the Respondents be not summoned to take the plea issued on 30th June, 2015 on the mere existence of the High Court Civil Land Case was based on a misapprehension of the law and facts that the existence of the land case did not bar the Applicants from filing the criminal charges. This court must therefore correct this error as failure to do so would occasion injustice not only to the complainant therein but to the entire criminal justice system.

However, regarding the issues of restrictions, this court is not in a position to reinstate the caveats on the respective land parcels as it would be overstepping its mandate into the realm of the pending civil case. The Applicants are at liberty if they deem it fit to apply to be enjoined in the civil case for purposes of any orders they wish be issued.

On the issue of forum shopping, I have not been convinced that the Applicants, in filing the various miscellaneous applications were shopping for a particular judicial officer who would give favourable orders to them. Any party is at liberty (but not to the extent of abusing the court process) to seek any redress before a court of competent jurisdiction. A scrutiny of the various criminal applications shows that they were all meant to clear the way in ensuring that justice is met. They were not filed with the intention of subduing justice. In that regard, the 3rd and 4th Respondents have not demonstrated before this court that Hon. P.M. Mugure should be barred from handling any matter touching on the subject matters herein.

The contention by the 10th Respondent that the Investigating officer, one Bernard Kwarat was summoned by the magistrate before he was heard lacks procedural basis. It is only by summoning him and invoking his explanation as to why he may have disobeyed court orders that the court would have made a determination of whether or not he was in contempt of any court orders. That submission then lacks

merit.

On consideration of the entire application and the respective submissions made before me, I make the following orders:-

1. I hereby set aside the orders made on 30th June, 2015 and 23rd July, 2015 by Hon. P.M. Mugure, RM, and all subsequent orders pursuant thereto in Nairobi Misc. Application No. 723 of 2015 summoning Chief Inspector Bernard Kwarat for alleged contempt of court issued on 30th June, 2015 pursuant to an application by John Mugo Njeru and Mary Wanjiru Bernard that the court lifts a warrant of arrest against them.
2. I hereby set aside orders made on 21st July, 2015 by Hon. P.M Mugure, RM and all subsequent orders pursuant to the application dated 20th July, 2015 in Nairobi Chief Magistrate's Court Criminal Case No. 1203 of 2015 suspending the taking of plea by John Mugo Njeru and Mary Wanjiru Bernard.
3. I order that the said John Mugo Njeru and Mary Wanjiru Bernard who are the 3rd and 4th Respondents herein do appear before the Chief Magistrate, Milimani Law Courts on 2nd March, 2016 in Criminal Case NO. 1203 of 2015 for purposes of taking plea.
4. The respective lower court files be remitted back to their court stations; more urgently file in criminal case no. 1203 of 2015 to enable the 3rd and 4th Respondents to take plea as ordered above.
5. Each party shall bear its own cost of this application.

DATED and DELIVERED this 25th day of February, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. M/s. Akunja holding brief for the Applicants**
- 2. Mbai holding brief for Ondabu for the 3rd and 4th Respondents**
- 3. M/s. Kilui holding brief for Nyang'a for the 5th to 9th Respondents**
- 4. M/s. Kaganzi holding brief for Mwangi for the 10th Respondent**