



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

PETITION NO.238 OF 2014

BETWEEN

ROBERT NGARUIYA CHUTHA.....1ST PETITIONER

BONIFACE NJUGUNA KIMANI.....2ND PETITIONER

AND

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

JOSEPH CHEGE NDUNG’U.....2ND RESPONDENT

THE CHIEF MAGISTRATE THIKA LAW COURTS.....3RD RESPONDENT

JUDGMENT

Background

1. The Petitioners, Robert Ngaruiya Chutha and Boniface Njuguna Kimani, are the accused persons in **Thika Chief Magistrate’s Court, Criminal Case No.5622 of 2013** where they are facing the charge of obtaining land registration by false pretence contrary to **Section 320** of the **Penal Code**.
2. It was alleged that on 12th January 2012 at Thika Lands Office in Thika West District within Kiambu County, they jointly and wilfully procured land registration of Parcel No.RUIRU WEST/BLOCK 1/673 by falsely pretending that the legitimate owner of the said land was Robert Ngaruyia Chutha, a fact they knew to be false. They took plea on 29th October 2013, denied the charge and the trial is yet to commence.
3. Earlier, Robert Ngaruiya Chutha, the 1st Petitioner had instituted **ELC. Suit No.239 of 2012** against Joseph Chege Ndung’u and on 16th November 2012, Nyamweya J issued orders restraining the said Ndung’u from either entering, trespassing on and/or constructing any structures on Land Parcel No.RUIRU WEST/BLOCK 1/673 and the said Chutha was also restrained from demolishing or in any other way interfering with any structures constructed on the said parcel of land by Ndung’u aforesaid.
4. The Petitioners now challenge the institution of the criminal proceedings after the orders of the High Court had been issued and seek the following prayers;

“(a) An order that the Criminal Case in Thika Criminal Case No.5622/2013 be stayed pending the full hearing of ELC. Suit 239/12 Robert Ngaruiya Chutha vs Joseph Chege Ndung’u filed earlier and a Ruling and High Court Order given on 16th November 2012.

(b) A declaration that the Charge Sheet and Criminal Proceedings in Thika Criminal Case No.5622/13 vs Robert Ngaruiya Chutha & Boniface Njuguna Kimani are unconstitutional, null and void and should be terminated forthwith.

(c) A declaration that a Subordinate Criminal Court has no jurisdiction to decide on the same fraudulent complaints over Title of Land which has been ruled upon and High Court Order issued by the High Court Land Court and also full hearing is pending between the same parties.

(d) An order that the charge sheet in Thika Criminal Case No.5622/13 vs Robert Ngaruiya Chutha & Boniface Njuguna Kimani be quashed and the criminal case terminated forthwith as it is an abuse of the Court process by the 1st Respondent and O.C.S. Ruiru Police Station and the Complainant 2nd Respondent Joseph Chege Ndung’u.

(e) A declaration that criminal charges before the 3rd Respondent amount to disregard and defiance of the Ruling and Order of the High Court Land Court of 16th November 2012 as to who has a genuine right to Title, possession and occupation of the Parcel of Land known as Ruiru West Block 1/673 given in ELC. Suit 239/12 Robert Ngaruiya Chutha vs Joseph Chege Ndung’u.

(f) Any further orders, writs, directions as this Honourable Court may consider appropriate.

(g) Cost of the suit, and interest.”

Petitioners’ Case

5. By their Petition dated 22nd May 2014, Supporting Affidavits of both Petitioners sworn on the same date, as well as in written submissions dated 30th September 2014, the Petitioners have complained that the concurrent proceedings in the Chief Magistrate’s Court and the High Court regarding the same dispute has created a situation where the administration of justice has been brought into disrepute. That in fact the criminal charges were preferred to defeat the orders of Nyamweya J and the said charges are therefore unlawful, unconstitutional and that the Magistrate’s Court has no jurisdiction to determine the same.
6. Relying on the decision in **Josephine Onyango & Anor vs DPP and 4 Others, Petition No.471 of 2013** Counsel for the Petitioners submitted that whereas **Section 193 A** of the **Criminal Procedure** allows simultaneous criminal and civil proceedings on the same subject matter, the High Court has unlimited jurisdiction to halt the criminal proceedings until the civil dispute is determined.
7. Further, that **Section 193 A** aforesaid does not oust the jurisdiction of the High Court under **Article 165** of the **Constitution** to ensure that the Director of Public Prosecutions does not abuse the Court process and the Magistrate’s Court acts within the law and the Constitution in matters before it.
8. That the orders elsewhere reproduced above are in the circumstances well deserved and should be granted as prayed.

1st Respondent’s case

9. The Director of Public Prosecutions (DPP) filed a Replying Affidavit and written Submissions in response to the Petition.
10. In the Replying Affidavit sworn on 5th August 2014 by PC Timon Melly, it was his case that the criminal case has partly been heard and so the Petitioners came to this Court belatedly and as an afterthought. In any event, that there is no basis for the contention that civil and criminal proceedings cannot be simultaneously conducted in view of **Section 193 A** of the **Criminal Procedure Code**.
11. Further, that the orders by Nyamweya J did not address the question as to how the title to the suit property was acquired including registration thereof and so the Magistrate's Court was entitled to reject any plea to suspend or stay the criminal proceedings on account of those orders. In addition, that the High Court cannot stop the police and DPP from lawfully undertaking investigations and preferring charges against criminal suspects.
12. Lastly, that the Petitioners have been unable to show what rights that they are entitled to have been violated and how so.
13. In his written submissions, Mr. Murang'a, learned Prosecution Counsel relied on the decisions in **Rosemary Njau & 2 Others vs A.G and 3 Others, Petition No.165/2011, Joseph Kimani Kagombe & Anor vs DPP and 3 Others [2014]eKLR** for the proposition that the High Court can only interfere with the mandates of the police and DPP if they act in bad faith or in abuse of the Court process.
14. On whether any fundamental rights have been breached as alleged, he relied on the decision in **Joel Kihanga & 2 Others vs A.G & 2 Others [2012] eKLR** to submit that it is upon a Petitioner to discharge the burden of proof that such rights have indeed been breached.

2nd Respondent's case

15. Joseph Chege Ndung'u filed a Replying Affidavit sworn on 4th June 2014 and stated that he was the originator of the complaint that led to the arrest of the Petitioners. His complaint was that ***"people whom [he] later came to learn had been hired by the Petitioners trespassed to [his] property known as Ruiru West/Block 1/673 purporting to fence the same."*** That the said property was his by direct purchase from Teresia Wambui Gitahi (deceased) and he is in occupation thereof.
16. Regarding **ELC. No.239 of 2012**, he was aware of the proceedings and the orders of Nyamweya J and had moved to seek a stay of those orders.
17. That the complaint aforesaid was made in early 2012 to the DCIO Ruiru and witness statements were taken before the filing of **ELC. No.239 of 2012** and that this Court ought to allow the criminal process take its natural course by dismissing the present Petition.

Determination

18. The 3rd Respondent filed no response to the Petition and from my rendition of the contested matters above, the following issues arise for determination;
 - i. Whether it is proper to allow simultaneous criminal and civil proceedings over the same dispute.
 - ii. Whether the orders sought can be granted.

Whether it is proper to allow Simultaneous Civil and Criminal Proceedings over the same dispute

19. Parties have disagreed on the import of **Section 193 A** of the **Criminal Procedure Code**. For avoidance of doubt, it provides as follows;

“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 proceedings.”

20. The above provision speaks for itself and I note that the Petitioners’ main complaint is that the criminal charges were preferred against them to defeat the civil proceedings. I note in the said regard that in the brief Plaintiff in **ELC. No.239 of 2012**, the prayers sought are the following;

“(a) A permanent Injunction be issued against the Defendant and/or family members, workers, servants, or agent restraining him/them from entering, trespassing, erecting structures and interfering with the Plaintiff’s possession, occupation and legal ownership of the parcel of land known as title No.Ruiru West Block 1/673.

(b) An Eviction Order be issued to remove the Defendant and his family members and illegal structures from the Plaintiff’s Parcel of Land known as title No.Ruiru West Block 1/673 after thirty (30) days from the date of Judgment.

(c) That the OCS Ruiru Police Station be ordered to supervise the enforcement of these orders granted herein.

(d) General damages for trespass to property be awarded.

(e) The cost of the suit and interest on (d) above be awarded to Plaintiff.”

21. Attached to the Supporting Affidavit of the 1st Petitioner is a Certificate of Lease in his name issued on 12th January 2012 and it is the same Certificate of Lease that forms the subject of **ELC. No239 of 2012**.

22. Reading **Section 193 A** in the above context, the fact that there are simultaneous proceedings cannot *per se* be a reason to stay, prohibit or delay the criminal proceedings.

23. This finding is subject to what I shall state below.

Whether the orders sought can be granted

24. From what I have stated above, it is obvious that Prayers (a), (b), (c) and (d) are unsupported by any law and cannot be granted.

25. Prayer (e) is unsupported by any evidence because it is contested whether the criminal complaint was made earlier than the civil suit instituted by the 1st Petitioner. It may well be that it was the 1st Petitioner who instituted the civil suit to slow down the criminal proceedings but none of the contentions by the 1st Petitioner and the 2nd Respondent carry any weight.

26. Prayer (f) is a generic one that seeks the intervention of this Court in no specific way.

27. It follows therefore that none of the Prayers above can be granted.

Conclusion

28. The Petition before me was crafted as a Petition for alleged violations of constitutional rights but in fact it ended up being a simple complaint that because certain orders benefiting both the 1st

Petitioner and the 2nd Respondent were granted by Nyamweya J, then the criminal proceedings that the Petitioners are facing ought to be quashed.

29. With respect, although Counsel for the Petitioners purported to invoke **Articles 2, 23, 47 and 50(1)** of the **Constitution**, their application to the above issue was irrelevant to the determination of the single complaint made.

30. It is my understanding in that context that where no constitutional issues are raised and specifically under the Bill of Rights, no remedies under **Article 23(3)** of the **Constitution** can be granted. That is why in **Mpumelelo Obed Mbatha vs University of Zululand, CCT 45/2013 [2013] ZACC 43, 2014 (2) BCLR 123 (CC); [2014] 4 BLLR 307 (CC)** the Constitutional Court of South Africa deprecated an Appellant's failure to raise credible constitutional issues for determination and stated thus;

“This Court did not, without more, proceed to find that there was a constitutional issue purely because the Applicant said there was one. What it did instead was to look at the substance of the issues that he was raising, seeing them for what they were, came to the conclusion that no constitutional issue had been raised.”

It went on to state;

“Otherwise, that would be the simplest stratagem by means of which the unscrupulous would have their issues ventilated in this Court under the guise that they raise constitutional issues.”

31. I will take the same approach in the present matter. The factual issues in contest as to who owns the suit property is not for this Court and it has not been shown that the police and the DPP exceeded their mandate in law. What constitutional issue then arises for determination? I submit none.

32. In any event, should the Petitioners prove before the trial Court that the Certificate of Lease was lawfully obtained, they will be free of the charges and merely need to prosecute the civil suit on its merit. I do not see why specifically it is the criminal case and not the civil suit that ought to be stayed in the circumstances.

Disposition

33. I see no merit in the Petition before me. The same is dismissed but let each party bear its own costs.

34. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

No appearance for Parties

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

19/2/2016