



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

PETITION NO. 24 OF 2016

BETWEEN

JEREMIAH MEEME KINYUA.....1ST PETITIONER

DAVID MUTHAMA MULULU.....2ND PETITIONER

AND

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

THE INSPECTOR GENERAL OF POLICE

SERVICE.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

CPL. HUMPHREY KAIMENYI.....INTERESTED PARTY

RULING

Introduction

1. The Petitioners are both legal practitioners. They ply their trade within Nairobi and its environs. They filed the Petition on 26th Jan 2016 and subsequently amended it on 15th February 2016. They claimed that their rights as guaranteed under Article 50(2) and 50(4) of the Constitution had been violated. The Petitioners also alleged that the 1st Respondent had acted contrary to the Constitutional mandate as outlined under Article 157.
2. Alongside the amended Petition, the Petitioners also sought conservatory orders to restrain the Respondents from prosecuting the Petitioners in Chief Magistrate's Criminal Case No. 108 of 2016 pending the hearing and determination of the Petition herein.
3. Both the Petition as well as the application for conservatory orders was opposed by the Respondents as well as the Interested Party.

Factual background

4. The facts leading to the Petition are largely not in dispute.
5. The facts may be gathered from the amended Petition as well as the affidavits in support of the Petition sworn separately by both Petitioners. There is also the Further Supporting Affidavit sworn by the 2nd Petitioner. Some factual controversy is however raised by the Replying Affidavit of the Interested Party.
6. I may briefly state the facts as follows.
7. In August 2015 the Petitioners were involved in a land transaction. Their involvement appeared limited to acting as counsel for one Mr. Anthony Njunge Muiruri. At hand was the sale of a parcel of land known as Title No. Donyo Sabuk/ Komarock Block 1/52092 to one Francis Mungai Muturi. The 1st Petitioner introduced the said Anthony Njunge Muiruri to the Petitioners law firm of Kago, Muthama & Company Advocates. The 1st Petitioner is however not a partner in the said law firm. The said Anthony Njunge Muiruri however used the name or alias Zachary Njeru Karembu, the registered owner of title no. Donyo Sabuk/ Komarock/ Block 1/52092. A sale agreement was prepared by the Petitioners' law firm. It was executed by both the pseudo proprietor and the purchaser Francis Mungai Muturi. An amount of kshs. 1,000,000/= was paid as deposit on or about 14th August 2015. The balance of kshs. 4,250,000/= which included legal fees was paid some four days later. The vendor was also then paid the sum of kshs. 4,000,000/= by the Petitioners law firm. The initial deposit of kshs. 1,000,000/= had been paid directly to the vendor who was the Petitioners' client.
8. The entire transaction apparently took a record four days from the drafting and execution of the sale agreement, through the payment of the deposit, the application for the land control Board's consent, the issuance of the consent to transfer, the preparation of the transaction completion documents, exchange of the completion documents and the release of the balance of the purchase price to the vendor.
9. Shortly, thereafter the purchaser realized that the entire transaction was a fraud. The said vendor Zachary Njeru Karembu was not the distinguished looking gentleman the purchaser had thought he was. He was instead one Anthony Njunge Muiruri. He was apparently an imposter according to the purchaser who promptly lodged a complaint with the 2nd and 3rd Respondents.
10. The Interested Party investigated the complaint. A verdict was returned that the Petitioners alongside the imposter Anthony Njunge Muiruri were all culpable. Criminal charges were preferred against the three. The imposter was charged in criminal case No. 48 of 2016 initially with the Petitioners listed as witnesses. That was on 14th January 2016. Later, the Petitioners were also charged in criminal case no. 108 of 2016.
11. The Petitioners inclusion as accused persons prompted the instant Petition.

The Petitioners' case

12. The Petitioners' case is straight forward.
13. The Petitioners fault the Respondents for not having adequately investigated the case prior to preferring the criminal charges. The Petitioners fault the Interested Party for having demanded a bribe from the Petitioners which the Petitioners claim to have partly paid through an intricate arrangement involving a cash bail payment of Kshs. 160,000/= not refunded by the Respondents. The Petitioners insist that they have evidence incriminating the Interested Party and has since lodged a complaint with the Independent Policing Oversight Authority established under the Independent Policing Oversight Authority Act (Cap 88) Laws of Kenya.
14. The Petitioners also contend that the 1st Respondent has acted unconstitutionally by prosecuting the Petitioners without ; firstly, hearing the Petitioners and, secondly, when there is no evidence to make the Petitioners culpable. The Petitioners then allege that their rights under Article 27, 35, 47 and 50(2)(a) & (j) have been violated.

The Respondents' case

15. The Respondents' case which can be gathered from the Replying Affidavit of Corporal Misoga Tatala is also relatively straight forward.
16. The Respondents contend that the Petitioners were involved in a massive case of forgery duly

- confirmed by a Forensic Document Examiner. The Respondents contend that the 1st Petitioner was in cahoots with the fraudster and that the fraudster clearly implicated the 1st Petitioner. The Respondents state that the decision to prefer charges against the Petitioners was arrived at after a careful and due consideration of all the evidence gathered in the course of investigations.
17. For completeness, the Respondents state that the process of investigating and ultimately preferring criminal charges against the Petitioners was undertaken with the full observance of the law and there was consequently nothing unconstitutional.

The Interested Party's case

18. The Interested Party swore and filed a Replying Affidavit on 19th February 2016.
19. The Interested Party states that allegations of bribery and extortion are all a fabrication of the Petitioners' mind. That nothing of the sort existed or happened. The Interested Party adds that the fabrication is only intended to confuse the court.
20. Additionally, the Interested Party contends that the investigations as conducted clearly implicated the Petitioners in criminal activity.

Arguments in court

21. Mr. S.N. Thuku advocated the Petitioners' case while the Respondents' as well as the Interested Party's case was urged by Ms. Kihara Njoki. Both parties filed written submissions which were duly highlighted before me.

Petitioners' submissions

22. The Petitioners' counsel urged the court to seriously take note of the fact that the Petitioners are law professionals who were simply executing their professional duty of representing a client in the best interest. Counsel added that the Petitioners had exercised due diligence and had no way of knowing that the said Mr. Anthony Njunge Muiruri was an imposter and not the true owner of the property which was the subject of the sale. Additionally counsel also submitted that a search at the Lands Registry had revealed that the title documents availed were genuine.
23. The Petitioners reiterated the fact that their prosecution was being driven by an ulterior motive which was basically to extort money from them.
24. Relying on the case of **Republic vs. Director of Public Prosecution & 2 Others Ex p Nyaboga Mariaria [2014]eKLR** for the proposition that the Director of Public Prosecutions' prosecutorial powers are not absolute and must be exercised within the confines of the Constitution, counsel submitted that the instant case warranted the court's intervention.

The Respondents' submissions

25. Ms. Kihara's submissions were centered on the point that the Petitioners had not established a prima facie case worthy of the conservatory orders sought.
26. Firstly, Ms. Kihara submitted that the Petitioners had not pleaded their case with the requisite precision contrary to the principle laid down in **Anarita Karimi Njeru -v- Republic [1976-80] KLR 1272**. Ms. Kihara added that merely identifying and listing Articles of the Constitution was not enough.
27. Secondly, it was contended by counsel for the Respondents that the decision to charge the Petitioners with various criminal offences "was informed by the sufficiency of the evidence on record" and not otherwise. Ms. Kihara pointed out that notwithstanding the allegations by the Petitioner that the Interested Party had solicited bribes from the Petitioners the same even if true was not prejudicial as the case would be determined ultimately on the basis of evidence.
28. Finally, Ms. Kihara urged that the court should be reluctant to interfere with the Constitutional powers of the 1st Respondent and allow a constitutional process to proceed without any interference.

Discussion and Determination

Issue

29. The sole issue for determination is whether the Petitioners have met the necessary threshold for the grant of a conservatory order. The Respondents have also raised a corollary preliminary issue as to the formal competence of the amended Petition. I will determine the latter issue first.

Analysis

30. There is no doubt that there is a universally accepted principle that where a party alleges that his Constitutional rights and freedoms have been or are threatened with violation, the party must plead not only the manner of violation with reasonable precision but also precisely identify the relevant Articles of the Constitution allegedly impinged. The party must particularize the violations in a precise manner: see the cases of **Anarita Karimi Njeru vs. Republic [1976 -80] KLR 1272** and **Attorney General vs. W.K. Baitambala [1993] TLR 46** as well as **Prof. Lawrence Tribe** in his treatise **American Constitutional Law 2nd Edition** at page 67.
31. The precision need not be absolute however. Where the court is able to painlessly identify a petitioner's complaint and case, the threshold ought to be deemed as having been met.
32. In the instant case, it is my view that, the specificity test has been met. The Petitioners have identified both Articles 47 and 50(2) as the Articles of the Constitution which have been offended or under threat of being offended. Much effort has been placed by the Petitioners to show how the rights under these two Articles of the Constitution have been impinged in so far as the Petitioners are concerned. As to whether or not the violations have been proven, that is not done through pleadings.
33. Additionally, the Petitioners have also alleged that the 1st Respondent has violated Article 157 of the Constitution. The Petitioners contend that the 1st Respondent has abused its Constitutional mandate. This is in relation to the decision to prosecute the Petitioners. It is clear where the Petitioners' case is headed to in these respects. The responses advanced by both the Respondents as well as the Interested Party reveals that all the parties are clear on the issues raised in the amended Petition. I would not agree with the Respondents' submissions that the Amended Petition does not meet the requisite competence. It indeed does.
34. The core issue is whether the Petitioners are entitled to the conservatory orders sought.
35. I must first point out that at this stage of the proceedings the court is not expected and neither should it make any definitive findings of either fact or law.
36. Where faced with an application for conservatory orders, the guiding principles to be taken into consideration by the court are now relatively clear. I may shortly state the main principles as
- i. the applicant has to demonstrate a prima facie case with a likelihood of success and further that the applicant would suffer prejudice as a result of the violation;
 - ii. the court must consider whether allowing the application for conservatory orders would assist in enhancing constitutional values and objects;
 - iii. the court is also to consider the public interest in the matrix of the facts;
 - iv. the court is also to consider whether the substratum of the Petition would be rendered nugatory if the conservatory orders are not granted; and
 - v. where necessary the court may invoke the doctrine of proportionality, even where the other requirements are not met.

I must point out that these principles have been laid out in various cases within and outside our jurisdiction and as the various cases will reveal; the principles are not catalogued. Satisfaction of one or two principles in addition to the first principle as to the prima facie case would suffice: see the case of **Kenya Small Scale Farmers Forum vs. Cabinet Secretary Ministry of Education Science and Technology & 5 Others HCCP No. 399 of 2015 [2015]eKLR**.

37. The starting point should be and is that the 1st Respondent has a constitutional compulsion to prosecute those accused of criminal conduct or activity. Article 157(10) of the Constitution proceeds to state that in the exercise of his powers to commence criminal proceedings, the 1st

- Respondent does not require the consent of any person or authority and must also perform his functions without any direction or control of any person or authority. The independence of the 1st Respondent's office cannot be gainsaid and the court must also always refrain from interfering with such independence: see **Kenya Commercial Bank Ltd & 2 Others vs. Commission of Police and another [2013]eKLR**.
38. The Constitution however also commands the 1st Respondent to exercise his powers with regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process: see Article 157(11) of the Constitution. In the exercise of its constitutional mandate, the 1st Respondent must pay respect to the Constitution. In particular, the Bill of Rights must be upheld and promoted by the 1st Respondent as commanded by Article 3 of the Constitution.
39. Likewise the 2nd and 3rd Respondents, even though they are enjoined by both the Constitution under Article 245(4) and the National Police Service Act (Cap 84) to investigate, detect and prevent crime (Sections 24(e) and 51(j)), must be subservient to the Constitution.
40. The court of course as the main custodian of the Constitution and in particular the Bill of Rights will however not hesitate to interfere where there is transgression on the part of the 1st Respondent is so far as the Constitution is concerned: see **Githunguri vs. Republic [1986] 1 KLR 1** and **Meixner & Another vs. Attorney General [2005] 2 KLR 189**. Where also the criminal prosecution is an abuse of the process of the court will interfere and stop it: see **Vincent Kibiego vs. Attorney General, Misc. Application No. 839 of 1999** and also **Total Kenya Ltd & 9 Others vs. Director of Public Prosecutions & 3 Others [2013] eKLR**. The instances when the court will interfere and intervene by way of a prohibitory order stopping any prosecution or intended prosecution are however numerous and may not be successfully codified: see **State of Maharastra & Others vs. Arun Gulab Gawali & Others Supreme Court of India Criminal Appeal 590 of 2007 (27th August 2010)**. Each case must be viewed and considered on the basis of its own unique facts and circumstances.
41. In the instant case, the Petitioners majorly contended that the decision to prosecute them is ill-informed as it was made maliciously following the Interested Party's failed attempt to solicit bribes from the Petitioners. Secondly, the Petitioners also stated that there is no basis for their prosecution as they only acted as counsel and no evidence links them to the offences with which they are charged. The Respondents contend otherwise and the Interested Party adds that the alleged solicitation of bribes is a figment of the Petitioners' imagination.
42. It is not for the court at this stage to ascertain whether or not the allegations of extortion or sleaze are true. Even if they were to be proven as true, my preliminary view at this stage is that, as the 1st Respondent exercises the function of its office without any direction or control: Article 157(10), the decision to prosecute the Petitioners could possibly not have been made by the Interested Party. Such that if there was no evidence against the Petitioners the Interested Party could not be in a position to influence the decision whether or not to prosecute the Petitioners. Indeed, it has not been suggested that the Interested Party or any of the other Respondents influenced the decision made by the 1st Respondent to prosecute the Petitioners.
43. Secondly, I am not convinced that the fact of solicitation of bribe occasioned the Petitioners any prejudice. The Petitioners appear to have been participants in the intended business of sleaze. The amounts did not however add up. Even if the Interested Party behaved in an unethical manner and has misconducted himself, I have taken note of the fact that the Petitioners have now moved the Independent Policing Oversight Authority for action to be taken against the Interested Party. I am currently not satisfied that the same process should be fetched to an independent constitutional process aimed at ensuring that criminals are brought to book.
44. It brings me to the second point, that there is a dearth of evidence to warrant the Petitioners' prosecution.
45. Two rather contradictory principles guide the court on this point.
46. Firstly is the tenet that the analysis of evidence to ascertain the sufficiency or probative value therefore should be done by the trial court and not a court hearing a challenge to the prosecution: see **William Ruto & Another vs. Attorney General HCC. No. 1192 of 2004** and **Republic vs. Commissioner of Police Ex P Michael Monari & Another [2012]eKLR**. On the other is the tenet that a prosecution commenced without any foundational basis ought to be stopped by the

court: see **Kuria & Others vs. Attorney General [2002] 2 KLR 69** and **Republic vs. Attorney General Exp Kipngeno Arap Ngeny HC Misc Application No. 406 of 2001**.

47. Evidently, to ascertain if there is a "foundational basis" for the Director of Public Prosecutions to be allowed to continue with the process the court must review the evidence. The temptation to ascertain its veracity or its sufficiency does exist. Yet the court faced with a petition challenging the prosecution must refrain from taking over the role of the trial court. It appears to me that a balance must always be made. The court needs to satisfy itself that the Director of Public Prosecutions properly exercised his discretion to prosecute and that can only be so if there is a glimpse of evidence which can lead to prosecution. The court however need not be satisfied that the evidence is weighty enough to lead to a conviction.
48. In the instant case, it may not be correct to state that there is any evidence linking the 2nd Petitioner to the alleged criminal conduct or activities for which the Petitioners alongside a third party now face prosecution. The 2nd Petitioner has been linked to the criminal activity by reason only of having acted as counsel in the botched conveyancing transaction and for having received the purchase price or part thereof and paid to the named fraudster. There is no other material to point towards the 2nd Petitioner's culpability.
49. On the other hand the 1st Petitioner has been directly linked to the alleged criminal activities and conduct. A statement made by the named fraudster directly incriminates the 1st Petitioner. The veracity of the statement shall and can only be tested by the trial court.

Conclusion

50. It is safe to state that, the 1st Petitioner has not established a prima facie case that the 1st Respondent is acting in complete abuse of his powers to prosecute. On the other hand it is also safe to state that the 2nd Petitioner has established on a prima facie basis that there is no foundational basis for the criminal charge preferred against him. The Respondents of course may prove otherwise at the hearing of the Petition but at the moment and on the basis of the evidence before me I am convinced that the 2nd Petitioner, not the 1st, has demonstrated a prima facie case with a likelihood of success when it is submitted that there is no foundational basis to assist in linking him to the criminal activity or conduct.
51. It is indeed a professional hazard working as a legal practitioner but where it is demonstrated that there has been a semblance of due diligence exercised as was in this case, I believe it would be stretching it too far to conclude that the lawyer was also part of a criminal conspiracy with his client. The evidence needs to be strikingly clear to link the lawyer and his client.
52. It would not be in the public interest to allow the prosecution of the 2nd Petitioner to continue in the circumstances of this case unless and until the Petition is fully heard and the evidence adequately interrogated.
53. With regard to the 1st Petitioner, I have weighed his role in the entire matrix of facts in this matter. I have also considered the facts as laid out by the Respondents. I am not satisfied that the 1st Petitioner has made out a prima facie case with a likelihood of success. He may be prejudiced but I am satisfied that the public interest that persons accused of criminal conduct or activity are made to face the criminal justice system outweighs the 1st Petitioner's individual interest in the circumstances of this case. In the totality of the facts of this case and as there has been shown that there is a foundational basis for the prosecution of the 1st Petitioner, I find no reason to prohibit the 1st Petitioner's prosecution.

Disposition

54. In the end, I find that the application is so far as it concerns the 1st Petitioner has no merit. With regard to the 2nd Petitioner, I find that he is entitled to the orders sought. The application only succeeds in so far as the 2nd Petitioner is concerned.

Orders

55.I make in final disposition the following orders:

- a. There shall issue against the Respondents, their agents assigns or any person claiming through them an order restraining them from prosecuting or continuing to prosecute criminal charges against the 2nd Petitioner DAVID MUTHAMA MULULU in Milimani Law Courts Chief Magistrate's Criminal Case No. 108 of 2016 pending the hearing and determination of this Petition.
- b. The amended application dated 12 February 2016 in so far as the 1st Petitioner is concerned is dismissed.
- c. Each party will however bear its own costs of the application.

56.Orders accordingly.

Dated, signed and delivered at Nairobi this 31st day May, 2016

J.L.ONGUTO

JUDGE