



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW APPLICATION NO. 16 OF 2016

IN THE MATTER OF THE ARREST, HARASSMENT, DETENTION OF SIMON OKOTH IN FRAGRANTE VIOLATION OF VALID COURT ORDERS AND INSTITUTION OF CRIMINAL CHARGES IN TOTAL ABUSE OF PROSECUTORIAL POWERS UNDER ARTICLE 157 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF INTENDED AND ATTEMPTED ARREST OF MANAGEMENT STAFF AND SENIOR SECURITY PERSONNEL OF THE APPLICANT IN OUTRIGHT CONTEMPT, DISDAIN AND DISOBEDIENCE

MARKET MASTERS LIMITED1ST APPLICANT

SIMON OKOTH2ND APPLICANT

VERSUS

STEPHEN EKIRAPA, OCS GIGIRI1ST RESPONDENT

KENNEDY BOSIRE,

DEPUTY OCS GIGIRI2ND RESPONDENT

INSPECTOR KIBET,

POLICE OFFICER GIGIRI3RD RESPONDENT

RULING

1. The substantive application herein is a miscellaneous application filed under section 5 of the Judicature Act seeking, in the main, to punish for contempt three Police Officers for what is described as willful disrespect and obstruction of a Court Order in Milimani Civil Suit No. 6021 of 2013 (*German Point v Market Masters Limited*). The 1st Applicant is Market Masters Limited which was the Defendant in that suit and the beneficiary of a Court Order issued on 11th December, 2015. The 2nd Applicant is an officer of the 1st Applicant. The three Police Officers are deployed to Gigiri Police Station which serves the Village Market Mall the premises which were subject matter of Milimani Civil Suit No. 6021 of 2013.

2. It is important to briefly state the history of the case. In a suit between German Point and the 1st Applicant, the Milimani Chief Magistrates' Court issued an order on 11/12/2015 authorizing the 1st Applicant to re-enter its premises situated at Village Market. Those premises were previously occupied by German Point. It is fair to say that the process of re-entry has been anything but harmonious and peaceable. It appears that the 1st Applicant had to resort to the use of a court bailiff and auctioneer to forcibly gain entrance and remove the remaining moveable properties belonging to German Point. It would seem that in this process, German Point made complaints to the Gigiri Police Station which got involved in the dispute. Suffice it to say that the kerfuffle degenerated to a point where the Police Officers recommended the filing of criminal charges against the 2nd Applicant. The Police have indicated an intention to file charges against more officers of the 1st Applicant.

3. The 1st Applicant believe that the Police Officers involved are acting in collusion with German Point to frustrate the enforcement of the Court Order in the civil case and that they are using their Police authority cynically to oppress the 1st Applicant and its officers. They deem this to be not only *per se* unconstitutional but to be in outright contempt of the Court orders issued in Milimani Civil Suit No. 6021 of 2013.

4. Consequently, the Applicants have approached this Court as part of an enforcement proceeding in Milimani Civil Suit No. 6021: Primarily, they have applied for the three named Police Officers to personally be held to be in contempt of court.

5. When the matter was first brought before me under Certificate of Urgency, I certified it as urgent and asked the Applicants to serve the Respondents and the Office of the Director of Public Prosecutions (ODPP). I asked ODPP to be served because one of the reliefs sought in the Notice of Motion was for the staying of the criminal case facing the 2nd Applicant.

6. The parties appeared before me on 25/07/2016 for inter partes hearing. Mr. Maatwa appeared for the ODPP. He indicated that ODPP wished to be party to the proceedings as Interested. Mr. Mutua was also present and sought the leave of the Court to appear for German Point as an Interested Party.

7. Mr. K.M. Mwangi for the Applicants vehemently opposed the applications by the ODPP and German Point for the two parties to be enjoined as Interested Parties. His point was that the current suit does not prejudice or affect the ODPP in any way and that the order for stay of the criminal case was only a temporary one. He was of the view that the Applicants are bringing the contempt proceedings against the Police Officers as contemnors and the suit will require a determination by the Court whether implementation of a valid court order can amount to a criminal proceeding. To this extent, he argued, neither the ODPP nor German Point were necessary parties to the suit. He insisted that the three Police Officers were being sued in their personal capacity since disobeying court orders was not part of their official duties.

8. Mr. Maatwa argued that it is a basic constitution principle that parties should not be denied an opportunity to be heard where they have a stake in an issue. His view was that the application touches on the ODPP because it is the ODPP that made an independent decision to charge the 2nd Applicant with a criminal offence – an act which the Applicants now argue amounts to contempt of court. Similarly, Mr. Mutua argued that German Point was the complainant in the criminal case which is a subject in these proceedings. Most of the orders in the current application touch on Milimani CMCC No. 6021 of 2013 in which German Point is a party. His view was, therefore, that German Point should be allowed to participate in the matter in order to put matters straight.

9. The single issue for determination is whether the ODPP and German Point should be permitted to be enjoined as Interested Parties in this proceedings. In my view, the question can be answered by a straight-forward application of the principles that emerged from our jurisprudence on the issue.

10. The test for whether a person can be enjoined to a suit as an Interested Party to existing legal proceedings is to ask whether the person has “an identifiable stake or legal interest in the proceedings

before the court.” See, for example, *Judicial Service Commission v Speaker of the National Assembly & another [2013] eKLR*. That test was stated somewhat similarly by the Supreme Court in *Trusted Society of Human Rights v Mumo Matemu & 5 Others (Supreme Ct Pet No. 12 of 2013)* where the Court stated that an interested party is one who has a stake in the proceedings though he was not originally a party. He is one who will be affected by the decision of the court when it is made and feels that his or her interest will not be articulated unless he or she appears in the proceedings.

11. Utilizing this test, it appears clear to me that both the ODPP and German Point have identifiable and legitimate stakes and interests in these proceedings and ought to be permitted to participate. The ODPP is the only office with an independent authority to determine whether criminal charges should be brought against a party or not. Any claim that criminal prosecution has been utilized oppressively to serve interests other than those of the criminal justice system implicate the ODPP directly. ODPP, then, must be permitted to participate in any such proceedings.

12. Similarly, as Mr. Mutua argues, these proceedings emanate directly from Milimani CMCC No. 6021 of 2013 in which German Point was the Plaintiff. Indeed, the current proceedings are an enforcement proceedings of that case. The interpretation of the court orders coming out of that case directly affects German Point and its interests. This is clearly demonstrated by the fact that it is the complainant in the Criminal Case in which the 2nd Applicant is the Accused Person and which the Applicants want stayed.

13. In the end, therefore, a straightforward application of the principles enunciated in our jurisprudence lead to the conclusion that both the ODPP and German Point have legitimate and identifiable legal interests in these proceedings and they ought to be joined as Interested Parties. They are hereby so allowed. They shall be permitted to participate in the proceedings subject to the directions of the Court.

Dated and delivered at Kiambu this 5th day of August, 2016.

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JOEL NGUGI

JUDGE