



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 443 OF 2015
BETWEEN
JOSEPH NGANGA MWAURA..... PETITIONER
AND
DIRECTOR OF PUBLIC PROSECUTIONS.....1st RESPONDENT
ATTORNEY GENERAL.....2nd RESPONDENT
JUDGMENT

Introduction

1. The Petitioner filed the Petition herein claiming a violation of his rights under the Constitution. The Petitioner claimed that the Constitution had been violated by the 1st Respondent and the 2nd Respondent's officers. The Petitioner as a result sought a declaration that the institution of proceedings and his continued prosecution before the Senior Principal Magistrate's court at Limuru in Criminal Case No 281 of 2012 was an abuse of the process. The Petitioner also sought an order to prohibit the prosecution any further.

Background facts

2. The background facts appear in the Petition and the supporting affidavit and are basic. The Petitioner filed no less than three additional affidavits with a view to drumming home his factual perspective.

3. The Petitioner was on 19 April 2013 formally charged with five counts of obtaining money by false pretence. The investigations as well as the criminal proceedings had been prompted by one David Kirika Kariuki ("the complainant"). The criminal proceedings are still pending before the magistrate's court in Limuru, having been partly heard and severally adjourned.

4. The genesis of the matter may however be tracked back to 18 January 2011 when the Petitioner as the registered owner of all that parcel of land known as title number Gatamaiyu/ Kagwe/1646 entered into a sale agreement to sell to the complainant a portion of the property. Of the agreed purchase price of Kshs.470,000/=, the Petitioner was paid an amount of Kshs. 375,000/=.

5. The Petitioner however states that the contract of sale was frustrated when the Petitioner's wife lodged caveats against the title. The court finally ordered the Petitioner to transfer the subject property to the Petitioner's estranged wife.

The Petitioner's case

6. The Petitioner's case is that the Respondents' actions in investigating and preferring criminal charges against him are only intended to harass the Petitioner as this is a purely civil dispute and the entire criminal process is being used to achieve the purpose of forcing the Petitioner into submission. According to the Petitioner, the criminal proceedings were instituted with the dominant purpose of enforcing a civil obligation. In these respects, the Petitioner contended that the criminal justice process was being abused by the Respondents.

7. The Petitioner also contends that there has been delay in the trial of his case and this amounts to a violation of the Petitioner's right to fair trial. The Petitioner blamed the Respondents for the delay which he termed unreasonable and thus unconstitutional.

8. The Petitioner also states that the 1st, 2nd and 3rd Respondents are not applying the law equally as they have failed to investigate and prosecute the 4th Respondent.

The Respondents' case

9. The Respondents' case may be discerned from the Replying Affidavit of Ms Frida Ombogo filed on behalf of the 1st Respondent and also from the Grounds of Opposition dated 27 January 2016 filed on behalf of the 2nd Respondent.

10. The Respondents reiterate the fact that the 1st Respondent is tasked under both the Constitution and statute with prosecuting possible offenders.

11. The Respondents also contend that there was sufficient factual basis to initiate the Petitioner's prosecution and that the prosecution was not prompted by any ill-motive or malice but was ordinary and regular. The Respondents finally assert that there is no bar in proceeding with a criminal trial even where a civil case is already on-going.

12. It is also the Respondents' contention that the Petitioner has not shown that any of his fundamental freedoms or rights guaranteed by the Constitution have been infringed or violated.

Arguments by the Parties

13. Mr Chege Kamau, appearing for the Petitioner submitted that the dominant motive in the institution of the criminal proceedings against the Petitioner was to assist the complainant in enforcing the civil claim against the Petitioner. This, in Mr. Kamau's view, was unconstitutional as civil disputes could not be criminalized. In this regard, counsel referred the court to the cases of **Vincent Kibiego Saina vs. Attorney General HCCC No 839 of 1999** and also **Rosemary Wanja Mwangi vs. Attorney General & 3 Others [2013]eKLR**. Counsel also referred the court to the case of **Githunguri vs. R [1986] 1KLR** for the proposition that the 1st Respondent could not exercise his powers capriciously and where he did so or attempted to do so, the court had powers to intervene and stop the prosecution. In the instant case, counsel concluded, the 1st Respondent had abused his prosecutorial powers donated under Article 157 of the Constitution.

14. Further, Mr. Kamau submitted that the impugned criminal proceedings had been unduly and unreasonably delayed contrary to Article 50(2)(e) of the Constitution which is clear that every accused person has a right to have his trial begin and conclude without unreasonable delay. Counsel then submitted that in the instant case, the 1st Respondent had failed to expeditiously prosecute the Petitioner. The trial had been unduly delayed and the delay had been occasioned either by the court or by the 1st

Respondent. Mr. Kamau proceeded to urge the court to terminate the criminal proceedings as the delay had prejudiced the Petitioner. Accordingly, counsel concluded, the Petitioner's rights to a fair trial had been violated there was no likelihood that he would receive a fair trial at all.

Respondents' case

15. Mr Gitonga Muranga appeared for the Respondents.

16. Relying on his written submissions, Mr. Muranga started off his submissions by stating the obvious: the 1st Respondent has prosecutorial powers under Article 157 of the Constitution. The powers must be exercised without the control direction or influence of any person. Counsel then submitted that a review of the evidence by the 1st Respondent had led him to make the informed decision that the prosecution of the Petitioner was merited.

17. Counsel submitted that an order for prohibition was discretionary and only tenable where any decision by a public body was tainted with illegality, irrationality and procedural impropriety which were all missing in the instant case. Counsel stated that the 1st Respondent had acted in good faith and within the confines of the Constitution and the Office of the Director of Prosecutions Act and could not be faulted in any way. Counsel urged that the independent decision of the 1st Respondent should not be interfered with in the absence of any proof that the Constitution had been violated or that the 1st Respondent had acted in bad faith. Mr Muranga relied on the case of **Douglas Maina Mwangi vs. Kenya Revenue Authority & Another HCCP No 528 of 2013** for the proposition that the court needed to exercise restraint when dealing with the 1st Respondent.

18. On the allegations that the motive of the prosecution was to assist the complainant in his civil claim, Mr. Muranga submitted that the Criminal Procedure Code under section 193A allowed criminal proceedings to be commenced side by side with any civil claim.

19. With regard to the contention by the Petitioner that the trial had been unduly and unreasonably delayed, Mr. Muranga heaped blame on the Petitioner for consistently seeking adjournments to try and settle the dispute with the complainant. The adjournments were always allowed by court. Counsel also contended that the Petitioner had not shown any prejudice suffered as a result of any delay.

Discussion and Determinations

20. Having read through the various affidavits as well as the Petition and having listened to counsel, I am satisfied that there are only two core issues to be deliberated. First, should the criminal proceedings in Limuru Senior Resident Magistrates' Court No 281 of 2012 be halted by reason that the same was commenced by an ulterior motive, being to cause the compromise of the civil claim in favour of the complainant. Secondly, has there been an undue and unreasonable delay in the trial itself to compromise the petitioner's right to fair trial.

21. From the onset, I must state that I am satisfied that there was no material in the form of reasonably detailed pleadings before me to lead to me pursue a determination as to whether the Petitioner's rights to fair administrative action under Article were infringed. The contest was on the prosecution which was commenced in 2012. There was no decision made, save for the decision to prosecute the Petitioner and this has been separately challenged as an abuse of the 1st Respondent's powers under Article 157 of the Constitution.

22. The abuse allegedly fetched on the Respondents is that the criminal process is being used for a purpose quite collateral to that of the criminal justice system.

23. There is no dispute that the 1st Respondent is enjoined through the Constitution under Article 157 as promoted and supplemented by the Office of the Director of Public Prosecutions Act No.2 of 2013 to institute prosecutions. The 1st Respondent's office is an independent one and the court must be reluctant

to intervene unless the 1st Respondent acts beyond the prescribed constitutional limits by instituting criminal proceedings which amount to an abuse of the court process: see **Ndarua vs. Republic [2002] 1 EA 205** as well as the English case of **Connelly vs. DPP [1964] 2 All E R 401**.

24. It is not in doubt that criminal proceedings ought not to be invoked solely to settle personal scores or to advance personal interest like helping a complainant to settle a civil dispute. The central thesis, which is to assist in curbing crime, must be put in the fore. In **David Mathenge Ndirangu vs. Director of Public Prosecutions & 3 Others [2014]eKLR** at paras 37 & 39 in which the case of **R vs. Chief Magistrate's Court at Mombasa Ex P Ganijee & Another [supra]** was cited with approval, the court was clear that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”

25. A similar position had earlier been expressed in the case of **R vs. Director of Public Prosecutions & Others Ex P Qian Guo Juan & Anor [2013]eKLR** .

26. I have no quarrel with the principles and pronouncements discernible from the above case law. I however hasten to add that it does not however follow that criminal and civil proceedings cannot run concurrently. An investigation may be commenced by the Police service notwithstanding the existence of a civil claim. By the better reason as well, a civil claim may be commenced notwithstanding any on-going criminal proceedings or investigations. That, in my understanding, is what Section 193A of the Criminal Procedure Code (Cap 75) stands for when it provides that :

“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.”

27. The court ought to however balance both regimes well and ensure that the purpose of either is met.

28. In the instant case, the Petitioner has alleged that his prosecution in Limuru Criminal case No.281 of 2012 is an abuse of the process of the court and is being used to settle scores. The Petitioner claims that as the dominant motive on the part of the Respondents.

29. I have reviewed the facts and circumstances of this case. A complaint was lodged by the complainant with the police service in March 2012. It is not disputed that the police service investigated the matter and took statements from possible witnesses. The statements have been exhibited as annexures to the

Replying affidavit filed on behalf of the 1st Respondent. The Petitioner was then arraigned in court and duly charged with the offence of obtaining money by false pretences. No less than four witnesses in addition to the complainant recorded statements with the police service.

30. Then in December 2015, the complainant filed a civil suit claiming the moneys it had paid to the Petitioner as part of the purchase price. The case, being Civil suit Number 334 of 2015 was filed before the law courts at Limuru. The petitioner does not dispute these facts. Indeed, the Petitioner claims that he always wanted to transfer the property to the complainant but he was frustrated by his estranged wife who had lodged a caveat against the title.

31. I have read the witness statements as well as the petition. It is true the genesis of this matter is a collapsed sale agreement between the Petitioner and the complainant. The sale transaction collapsed as a result of pressure from the Petitioner's now estranged wife. On the face of the documents, it would appear that the Petitioner was always aware that the title was encumbered even as he entered into an agreement with the complainant. The Sale Agreement was executed in January 2011, yet the Petitioner's wife had much earlier in March 2010 registered a caution against the title.

32. Additionally, another caution had also been registered against the title in March 2009 by another party claiming a purchaser's interest. Evidently, the Petitioner was aware of these caveats and the fact that the Petitioner could not immediately complete the transaction unless the caveats were lifted. As fate would have it, the Petitioner was never able to complete. The Sale Agreement became null and void but the Petitioner was unable to refund the monies paid by the complainant.

33. The foundation was laid, in my view, when the Petitioner failed to refund the monies and also by the fact that the Petitioner always seemed to know that he could not complete the transaction.

34. I am unable to fault the 1st Respondent's judgment when he decided to let the Petitioner face prosecution.

35. It is additionally noted that the complainant only lodged the civil suit after the criminal process had commenced. The Petitioner was charged with the criminal offences in 2012, the civil claim was lodged by the complainant in 2015. I do not see how, in the circumstances, it may be argued that there were ulterior motives on the part of the Respondents in preferring charges against the Petitioner. There is indeed no indication that the criminal proceedings could have influenced the complainant in any way. I am not satisfied that the criminal proceedings were being used to put pressure on the Petitioner to settle the civil dispute with the complainant.

36. I next come to the question as to whether the Petitioner's trial has been unreasonably delayed contrary to the provisions of Article 50(e) of the Constitution.

37. There exists an almost self-standing constitutional requirement and right to a trial within a reasonable time. The trial is guaranteed to commence and conclude without unreasonable delay: see Article 50(2)(e) of the Constitution. The constitutional design is basically to ensure a person charged with a criminal offence, who is presumed innocent until proven guilty, does not remain too long in a state of uncertainty. It also insulates an accused person against excessive and unnecessary procedural delay. Consequently, if there is any unreasonable delay in the commencement or in the conclusion of a trial, then the trial may in appropriate circumstances be determined. It is thus critical for the court to decide what unreasonable delay is.

38. The threshold of unreasonable delay, in my view, must certainly be deemed to be high. Given the current skewed ratio of State agencies to incidents of prosecutable offences, minimal and explicable delay is acceptable.

39. Unreasonable delay must however be ascertained through various factors. Firstly, the period of delay itself ought to give concern. It must be excessive, inordinate and unacceptable to be ranked unreasonable. Besides, for each case, the court must also reflect on other factors. These include but are not limited to

complexity of the case, conduct of the accused and the manner the State (police, prosecutor and court) has handled the prosecution. The court with such factors in mind is then able to determine on the basis of the circumstances of the case whether there has been unreasonable delay.

40. The fact that delay is shown to be unreasonable may itself however not lead to determination or stay of the trial. If the accused has not been prejudiced beyond repair and fair trial is still possible then the court ought not to stay the trial. The question is whether the delay is incompatible with the accused person's rights to a fair trial or not. This is in line with the role of the criminal justice system which seeks to bring criminals to book. The public is always interested in whether or not a defendant is tried for offences committed, even as the rule of law demands that the defendant's individual rights are well respected. There has thus to be a clear balance between the public interest and the individual interest.

41. In the South African case of **Wild vs. Hoffert NO [1998] 3 SA 695** the Constitutional Court whilst considering an equivalent a right to a trial within reasonable time guarantee provision, observed thus

“[a] balance [has]...to be struck between competing societal and individual interests once a finding has been made that the delay was indeed unreasonable and the enquiry turns to remedies. A careful value judgment is required whenever a court considers the kind of relief that would be appropriate in a given case...More particularly a court need not resort to relief as drastic as a permanent stay of prosecution in order to remedy an infringement of the right to a speedy trial that does not entail trial prejudice.”

42. The court then continued, having determined that whether to stay criminal proceedings is not the most important question in speedy trial protection, as follows:

“On the contrary, the true effect and scope of the protection against unreasonable delay is much wider and more significant than-and should not be obscured by-the more dramatic and far-reaching remedy of a stay of prosecution. The crucial point...is that the Constitution demonstrably ranks the right to a speedy trial in the forefront of the requirements for a fair criminal trial. That means that the State is at all times and in all cases obligated to ensure that accused persons are not exposed to unreasonable delay in the prosecution of the cases against them. That in turn means that both State prosecutors and presiding officers must be mindful that they are constitutionally bound to prevent infringement of the right to a speedy trial. Where such infringement does occur, or where it appears imminent, there is a duty...to devise and implement an appropriate remedy or combination of remedies.”

43. The highlight is that a permanent stay of proceedings may in given circumstances be extreme a remedy to grant even where delay has been shown to be unreasonable. The court has to reflect on appropriate relief if the court has to vindicate the right to a fair and speedy trial. That assists in balancing the public interest and ensures that that enforcement of the Bill of rights is not in itself detrimental to a fair and balanced criminal justice system.

44. With the foregoing in mind, the delay in the instant case reveals that it has span three years. A period of three years is inordinate when one considers the nature of the criminal charges the Petitioner was faced with. It was not a complex case, in my view. The investigations took hardly one week to finalize. The prosecution witnesses were all lined up and one had even testified. Even though the Petitioner was charged in March 2012, the trial did not commence until over one year later in April 2013. Before then there were numerous adjournments occasioned by the Petitioner, the court and the prosecutor. Then post the first witness, there again followed a flurry of adjournments. Once again contributed to by the Petitioner, the court and the prosecution. The main reason advanced by the Petitioner and the prosecution was that the parties were endeavoring to amicably settle the matter. The adjournments to allow the parties to settle lasted months and traversed the period of delay between July 2012 and June 2015. There were of course intermittent adjournments occasioned by the State, when the Court was not ready to start the hearing or the concerned judicial officer was absent.

45. Given the manner in which the 1st Respondent has handled the trial, I am not convinced that he is

solely to blame for the delay. There was little alacrity in proceeding with the matter but so much was also prompted by the Petitioner who now complains of the delay. I appreciate that it is the State's sole responsibility to ensure a speedy trial but where the delay has been sufficiently explained that it was indeed substantially contributed to by the accused person then his conduct in such respects must be considered before a verdict is returned that the trial process is beyond redemption.

46. In the instant case, I am not ready to find that there has existed some institutional inertia on any arm of the State or that the trial has been delayed inexplicably and unreasonably. In the circumstances of this case, I am not convinced that the prosecution of the Petitioner if allowed to proceed will end up with the Petitioner not getting a fair trial.

Conclusion and disposal

47. The Petitioner has not established that the criminal justice system is being used for a purpose other than that intended for criminal law. The Petitioner has also, in my view and from the above foregoing analysis, not shown that there exist such exceptional circumstances to warrant a prohibition of the criminal proceedings. It is also clear from the circumstances of this case that the State is not entirely to blame for the rather glacial pace of the trial involving the Petitioner. The Petitioner has been a great contributor towards the delay.

48. The consequence is that I find no merit in the Petition and it ought to be dismissed.

49. I direct that the prosecution be allowed to run its full course unless the 1st Respondent decides to terminate the same.

50. The Petition is otherwise dismissed but with no order as to costs.

Dated, signed and delivered at Nairobi this 31st day of October, 2016.

J.L.ONGUTO

JUDGE