



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

PETITION. NO. 49 OF 2016

BETWEEN

SHAMSER KENYA LIMITED.....PETITIONER

AND

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

DIRECTOR OF CRIMINAL INVESTIGATION.....2ND RESPONDENT

AND

FARYD ABDIRAZAK SHEIKH.....INTERESTED PARTY

RULING

1. At the centre of the dispute between the Petitioner and the Interested Party is the parcel of land known as Title No. Kilifi/Gimba/332. The Petitioner claims ownership. The Petitioner also claims that the Interested Party has interfered with such ownership by purporting to be the proprietor of the said parcel. In consequence, the Petitioner had sought the Respondents' assistance in the form of a complaint made pursuant to section 24(7) of the National Police Service Act (Cap 84). The Petitioner had expected the Respondent to investigate and prosecute the Interested Party. When they did not, the Petitioner moved the Chief Magistrate Court in Private Prosecution No. 8 of 2014.

2. The Petitioner sought to privately prosecute the Interested Party. The Respondents however opposed such private prosecution. The Magistrate, in a Ruling rendered on 4th June, 2015 agreed with the Respondents. The Magistrate held that the private prosecution had been prematurely commenced as the Respondents were still investigating the matter. Dissatisfied with the ruling the Petitioner lodged an appeal before this Court being Criminal Appeal No. 93 of 2015. The appeal was lodged on 18 June 2015. In the appeal the Petitioner faulted the learned Magistrate for failing to exercise her discretion properly. The learned Magistrate was also faulted for failing to take into account the length of time taken by the Respondent in investigating and or concluding the complaints by the Petitioner in re the Interested Party.

3. As the appeal was pending, the Petitioner lodged the instant Petition.

4. The Petition itself seeks orders to be made against the Respondent in the form of Positive commands. The Petition also seeks declaratory order. In short, the Petitioner seeks declaratory orders that its right to information, rights to property and right to fair administrative action under Articles 35, 40 and 47 of the

Constitution respectively have been violated.

5. The Petition also seeks orders for the Respondents to conclude the investigations within a specified period of time and to conduct and submit a forensic report on the titles held by the Interested Party. Effectively, the Petitioner questions the investigatorial powers and process of and by the Respondents.

6. Until the Interested Party was enjoined to these proceedings, the Court was not aware of the existence of Criminal Appeal No. 93 of 2015. The court was however aware that the Petitioners attempts to privately prosecute the Interested Party had stalled following a determination that the 1st Respondent (the DPP) was not derelict in the performance of his prosecutorial powers but rather that the investigations were still ongoing.

7. A cursory look at the record of appeal in Criminal Appeal No. 93 of 2015 would reveal that the Petitioner who is the Appellant therein, still challenges the factual finding that the Intended Private Prosecution was premature as the investigations were yet to be completed. In particular, the Criminal Appellate Court has been asked to find as a matter of fact that the Respondent have taken an unreasonable length of time to conclude investigation in the complaints lodged by the Petitioner. That is the effect of grounds 3 and 4 of the Petition of Appeal.

8. The Petitioner before this court also asks the Court to find as a matter of fact that the Respondent have taken an unreasonable length of time to investigate the complaint and that as a result there is abuse of discretion. That is the effect of supplementary affidavit filed by the Petitioner herein on 4th April, 2016.

9. The Interested Party now holds the view that concurrent prosecution of both the appeal and the Petition herein is basically an abuse of the process and that either should give way to the other. The Petitioner holds a contrary view. The Respondents are innominate parties and would rather the court decides which of the two process should be stayed.

10. My view is that criminal appeal proceedings, in one way or the other has invited the Court to make certain findings of facts which are certainly also in issue before this court. In particular, the fact whether the Respondents are derelict in the performance of their investigatorial duties and functions is both in issue before this Court as well as before the Criminal Appellate Court. This court will have to make a factual determination as to whether the Respondents have taken an unreasonable amount of time in wrapping up the investigations before making any specific directions or orders, if at all. Likewise, the criminal Appellate Court will also have to make a factual determination on whether the Respondent have maintained a more than usual and reasonable reticence in investigating and prosecuting the Interested Party.

11. While I appreciate that the criminal justice process including the Appellate process may run concurrently with the civil justice process including constitutional litigation, I hold the view that the two Courts involved whether of concurrent jurisdiction as in this case or not, should not both proceed with the cases separately or concurrently where there is a likelihood that they might decide an issue, especially of fact, in opposite directions. It matters little the reliefs sought. What matters is the substratum of the claim.

12. In the instance case, I hold the view that the criminal appellate Court which has jurisdiction to review the facts and make independent determination, may indeed decide in an opposite direction the question of fact as to whether the Respondents have been derelict in their duty to investigate the complaint. Such a scenario, may lead to an unnecessary embarrassing scenario , when this Court also makes a different finding of fact.

13. The Petition herein is closely related to the criminal appeal case. The same point, as to the exercise of the Director of Public Prosecutions and the conduct of the Director of Public Prosecutions , is largely at stake in both proceedings

14. It would consequently be more appropriate if one of the now concurrent proceedings is stayed. I view it that no prejudice is likely to come the Petitioners way if the current proceedings are stayed. I exercise

my discretion and accordingly stay these proceedings pending determination of the Criminal Appeal No. 93 of 2015 which was filed first in time.

15. The Instant Petition will be stayed pending hearing and determination of Criminal Appeal No 93 of 2015.

Dated, signed and delivered at Nairobi this 24th day of October, 2016.

J.L.ONGUTO

JUDGE