



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

PETITION NO. 89 OF 2015

BETWEEN

CAROLINE WAIRIMU WANJIHIA.....PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR, DIRECTORATE OF CRIMINAL

INVESTIGATIONS.....2ND RESPONDENT

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

AND

CECIL MUNGAI.....1ST INTERESTED PARTY

HEMANT KUMAR KANTILAL KARIA.....2ND INTERESTED PARTY

MINAXI HEMANT KARIA.....3RD INTERESTED PARTY

RULING

Introduction

1. The Petitioner, Caroline Wairimu Wanjihia, is an advocate of the High Court of Kenya practicing as such in the name and style of C.W Wanjihia & Co. Advocates. She has practiced as such for over thirty years .She has brought these proceedings substantively against the 1st Respondent, the Inspector General of Police, the 2nd respondent, Director, Criminal Investigation Department, and the 3rd Director of Public Prosecutions (“the DPP”). The respondents constitute the offices constitutional charged with the responsibility of driving the criminal justice system in so far as investigations and prosecutions are concerned.

2. The Petitioner challenges her impending investigations and perhaps prosecution. In this regard , she seeks from the court orders quashing the Notice of Intended Prosecution as well as a Notice Compelling her attendance at a police station. The Petitioner also seeks in the main, orders to restrain the respondents

from prosecuting the petitioner in respect of the offence of theft related to property known as L.R No 5884/13.

3. Alongside the Petition, the Petitioner also filed a Notice of Motion and sought interim conservatory orders pending the determination of the Petition. Both the Motion and the Petition were contested by the Respondents as well as the Interested Party. The Motion is the subject of the instant ruling.

Background facts

4. In August 2013 the Petitioner was attorned by both the 1st Interested Party as well as the 2nd and 3rd Interested Parties to act in a real property transaction. The subject of sale was all that property known as LR No 5884/13 (“the subject property”) registered in favour of Eric Mbugua Mungai and Dennis Kariuki Mungai (“the proprietors”). The 1st Interested Party was selling the subject property pursuant to a Power of Attorney donated to him by the proprietors. The sale was to the 2nd and 3rd Interested Parties. A Sale Agreement was prepared by the Petitioner. It was executed by the Interested Parties as vendor and the purchasers. Ultimately a transfer was registered in favour of the 2nd and 3rd Interested Parties in November 2013 and vacant possession of the subject property delivered up to the 2nd and 3rd Interested Parties. The full purchase price was however never remitted to the 1st Interested Party, leading to a dispute.

5. The Petitioner says that there was an issue involving the Deed Plan. There was also an issue with the architectural drawings. There was then also an issue as to the condition of the subject property. The Petitioner states that these issues led to the Petitioner to continue holding on to a portion of the purchase price. The amount withheld, according to the 2nd and 3rd Interested Parties was Kshs 13,200,000/=. It was withheld by the Petitioner. Frustrated, the 1st Interested Party regained, albeit without a court order, possession of the subject property from the 2nd and 3rd Interested Parties. The dispute between the Interested Parties escalated and ultimately ended up in court, where the Petitioner, alongside the 2nd and 3rd Interested Parties, was sued by the proprietors. The suit is ELC No 791 of 2015 at Nairobi. It is still pending before the Environment and Land Court at Nairobi.

6. In the meantime as well the 1st Interested Party had also made a complaint to the 1st and 2nd Respondents on 28th November 2014. The 1st Interested Party accused the Petitioner of fraud. The 1st Interested Party insisted that he had sold the property for Kshs 59 Million and not Kshs. 45 Million as had been claimed by the Petitioner and the other two Interested Parties.. The 1st Interested Party claimed that the Petitioner had fraudulently tampered with the sale agreement that he had signed. The 1st and 2nd Respondents investigated and thought that there was a conspiracy to defraud. Accordingly, the 1st and 2nd Respondents recommended to the 3rd Respondent that the Petitioner be prosecuted and the 3rd Respondent obliged. The Petitioner then came to court.

The Parties’ cases

The Petitioner’s case

7. The Petitioner’s case is that there is a dispute between the parties to the original sale transaction which dispute is already before the court for determination. The Petitioner states that the dispute led to the Petitioner withholding the balance of the purchase price. The Petitioner states that the 1st Interested Party only lodged a complaint with the police with a view to advancing a civil cause in the sense that the 1st and 2nd Respondents are being used by the 1st Interested Party to retrieve the balance of the purchase price from the Petitioner. The Petitioner stated that this is an abuse of the process as well as of the 3rd Respondent’s powers.

The Respondents’ case

8. The Respondent's case is contained in the Replying Affidavit of Cpl Joseph Kiragu sworn and filed in court on 5 July 2015.

9. The Respondents contend that they are merely executing their respective constitutional and statutory mandates. The Respondents contend that once a complaint was made they were under an obligation to investigate the same and the investigations had revealed that the Petitioner was criminally culpable. The Respondents contend that there is sufficient documentary and forensic evidence to prosecute the Petitioner.

10. Together with the 2nd and 3rd Interested Parties the Respondents opposed the application. The Interested Parties additionally contend that the dispute in court was no reason at all for the Petitioner to continue withholding the funds.

Arguments in court

The petitioner's submissions

11. The Petitioner filed written submissions on 26 October 2015.

12. Mr. Stephen Gitonga who appeared for the Petitioner submitted that the court has powers to prohibit or stop any prosecution where there was evidence of abuse of the process by either the Police service or the Director of Public Prosecutions. For this proposition counsel relied on the case of **Githunguri vs. Republic [1986]1 KLR**. Counsel also submitted that the process was being abused as the 1st Interested Party who was the complainant was simply using the criminal justice system to advance a civil cause. Counsel submitted that the criminal justice system was being invoked and used to force the Petitioner to effect payment of the monies she was holding and to complete a conveyancing transaction. Counsel referred the court to the cases of **Musyoki Kimanathi vs. The Director, Criminal Investigations Department & Another HCCP No 442 of 2013**

Respondents' submissions

13. The Respondents' case was urged by Mr F.S. Ashimoshi.

14. Referring to the Respondents' written submissions filed on 26 October 2015, Mr Ashimoshi submitted that the Respondents' powers to investigate and prosecute ought not to be interfered with. Counsel submitted that the 3rd Respondent was satisfied that the evidence was sufficient to lead to the Petitioner's prosecution and saw no need to await the determination in the civil case. Counsel additionally submitted that the 3rd Respondent had not been influenced in any way by extraneous circumstances. Mr. Ashimoshi finally submitted that the Petitioner had not shown or established that any of her rights had been violated. Mr. Ashimoshi referred the court to the two cases of **Kenya Commercial Bank limited vs. Commissioner of Police & Another [2013]eKLR** and **George Joshua Okungu & Another vs. Chief Magistrates Court [2014]eKLR**.

The Interested Parties' submissions

15. The Interested Parties' case was urged by Mr Mwangi.

16. Mr Mwangi supported the 3rd Respondent's case that the Petitioner ought to be prosecuted. Mr Mwangi denied that the 2nd and 3rd Interested Parties had in any way colluded or conspired with the Petitioner whilst adding that the 2nd and 3rd Interested Parties had paid the full purchase price to the Petitioner.

Discussion and Determination

17. The motion before me seeks conservatory orders in the interim. I need not consequently make any

definitive findings of fact or of law as that is a function of the court at the trial and final determination of the Petition.

18. For a conservatory order to be issued, the Petitioner needs to demonstrate a prima facie case with a likelihood of success. The Petitioner also need establish the prejudice she will likely suffer if no order is granted in the interim and that the petition may well be rendered nugatory if no order is granted. The nature of conservatory orders also dictate that constitutional values and objects be enhanced through the grant or denial of a conservatory order. Finally, there is the aspect of public interest and public policy. The court must also seek to ascertain whether it would favour the public's interest in granting or denying the conservatory orders sought.

19. For a summary exposition of the above principles, see the cases of **Jeniffer Shamalla –v- Law Society of Kenya & 12 Others HCCP No. 85 of 2016 [2016]eKLR** and **Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education Science and Technology & 5 Others HCCP No 399 of 2015[2015] eKLR**

20. The sole question for determination is whether, with the above principles in mind, the Petitioner has made out a case for the issuance of a conservatory order.

21. It is not contested that the Respondents are the constitutionally mandated offices for purposes of driving the criminal justice system forth. The Respondents are enjoined to ensure that law and order is maintained. The Respondents on their own initiative may investigate criminal activities. They may also do so when prompted by any member of the public: see Article 157(4) of the Constitution as well as Article 245(4) of the Constitution. See also the Office of the Director of Public Prosecutions Act No 2 of 2013 and the National Police Service Act (Cap 84) Laws of Kenya generally. The Respondents must however act within the confines of the Constitution : see Article 157 (11) and 244 of the Constitution.

22. Where constitutionalism is not observed and the process of the criminal justice system is shown to be abused by the national police service or by the Director of Public Prosecutions , the court will intervene and prohibit or stay the process whether the prosecution has been commenced or not: see for example **Kuria & Others vs. Attorney General & Others [2002]2 KLR 69**, **William S.K Ruto vs. Attorney General [2010]eKLR** and **Macharia & Another vs. Attorney General & Another [2001] KLR 448** . The instances where the court may intervene are infinite and there cannot be said to exist any rigid classification or formula: **Godfrey Mutahi Ngunyi vs. Director of Public Prosecutions & 4 Others [2015]eKLR**.

23. There is however need to show deference to constitutionally mandated offices to execute their mandates and thus the court will only intervene in exceptional circumstances where it is shown that the process has been subjected to abuse: see **Manilal Jamnadas Ramji Gohil vs. Director of Public Prosecutions C.A.Crim App No 57 of 2013** and also **Paul Nganga Nyaga & 2 Others vs. Attorney General & 3 Others [2013]eKLR**.

24. It is for the Petitioner to establish such exceptional circumstances that would warrant the court's intervention: see **Koinange vs. Attorney General & Others [2007] 2 EA 256**.

25. In the instant case the Petitioner alleges that the criminal justice system is being abused as the Interested Parties are using the system to achieve another purpose altogether. The Petitioner states the purpose to be one of completing a conveyancing transaction when there is still pending certain issues to the transaction. According to the Petitioner the criminal justice system is being used to force the Petitioner to compromise the pending suit and complete a conveyancing transaction contrary to the provisions of a binding sale agreement.

26. There is no doubt that criminal investigations or prosecution should never be used to assist individuals in advancing or frustrating their civil disputes or claims. That is not the purpose of the criminal justice system: see **Republic vs. Chief Magistrate's Court at Mombasa Ex p Ganijee & Another [2002] 2 KLR 703**. Where that happens the prosecution must be stalled.

27. The circumstances of the instant case point to the undisputed fact that the Petitioner acted for the Interested Parties in a transaction which was effectively completed save for the payment of the balance of the purchase price to the 1st Interested Party. The purchase price, according to the Petitioner as well as the 2nd and 3rd Interested Parties, had been fully paid to the Petitioner. Even though the proprietors who were not a party to the sale agreement by virtue of the fact that they had donated the power to transact to the 1st Interested Party now dispute the fact that the purchase price was Kshs 45 million. The vendor also disputes this fact. It is however not in dispute that the transfer had indeed been effected and possession delivered up to the 2nd and 3rd Interested Parties, only to be regained.

28. The civil dispute before the Environment and Land Court revolves around the fact that the purchase price was apparently understated. The 1st Interested Party also lodged the same complaint by accusing the Petitioner of tampering with the sale agreement to vary the purchase price without the 1st Interested Party's knowledge. I see no reason why investigations could not go into such allegations which also touch on the integrity of the Petitioner and possible fraudulent actions. The 1st and 2nd Respondents were enjoined under section 24 of the National Police Service Act (Cap 84) to take appropriate action and investigate the complaint. The Respondents say they did and further that forensic evidence seems to disclose that the Petitioner was culpable. The 3rd Respondent then adds that there was sufficient evidence to prosecute the Petitioner.

29. It is not for this court to determine the sufficiency or otherwise of evidence that may lead to the prosecution of a person. That is a discretion left with the 3rd Respondent. The court may only interfere where there is no foundational basis: see **Meixner & Another vs. Attorney General [2005] 2 KLR 189 and also R vs. Attorney General Ex p Kipngeno Arap Ngyen HCC Appl No 406 of 2001**.

30. On the evidence before me, I am not satisfied that the petitioner has shown a prima facie case with any likelihood of success. Rather I am convinced that Respondents have shown that they have executed their constitutional and statutory mandates within the confines of the Constitution. The law is clear that nothing stops the criminal justice system and the civil adjudication of disputes from running concurrently: see Section 193A of the Criminal Procedure Code (Cap 75). I see no need why the two cannot also run concurrently in the instant case.

31. Indeed, public interest would dictate that officers of this court like counsel are always brought to account through investigatory mediums like the one currently being undertaken by the 1st and 2nd Respondents. Public policy and interest would also dictate that investigations into any alleged criminal activities are investigated to a logical end. I take note of the fact that the Petitioner's own clients have submitted themselves to the process and thus have effectively waived any legal professional privilege that the Petitioner could have sought to protect during any investigations

32. I further take note of the fact that the complaint leading to the investigations by the Respondents was lodged in November 2014 while the civil case was lodged in court some nine months later. The civil case was indeed filed long after the instant petition had been filed. In the absence of any evidence to the contrary, one would not be led to an inference that the Respondents and the Interested Parties are using the criminal justice system to bludgeon the Petitioner into a compromise.

33. For now, I am satisfied that the circumstances herein do not warrant any interference in my view with the ongoing investigations by the Respondents or any decision that the 3rd Respondent would wish to make. The Petitioner has not made out a prima facie case to warrant my intervention. On a prima facie basis the Petitioner has failed to demonstrate that the actions of the Respondents violate the Constitution.

Conclusion and disposal

34. It is apparent that the application by the Petitioner for conservatory orders is wanting in merit. That aside, my reading and assembly of all the facts in this matter would lead me to state that this is a matter capable of an amicable resolution by the parties concerned. The Interested Parties appear to be willing to

do so but the Petitioner, in my view, appears to want to stall any such process by insisting on withholding a portion of the purchase price. The parties should explore an alternative process of resolving the dispute with the goodwill of the Respondents.

35. For now however and for the above reasons, I find no merit in the application dated 11 March 2015, and it is hereby dismissed with costs to the respondents and the interested party.

Dated, Delivered and Signed at Nairobi this 19th day of December 2016.

J.L.ONGUTO

JUDGE

Mr. Stephen Gitonga instructed by the firm of Gitonga Mureithi & Co. Advocates for the petitioner.

Mr. F. Ashimosi instructed by the office of Director of Public Prosecutions for the respondents.

Mr. Mwangi. N instructed by the firm of Macharia-Mwangi & Njeru Advocates for the 2nd & 3rd Interested Parties.