



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CONSTITUTION PETITION 2 OF 2016

EVANSON MWANGI KIHUMBA.....PETITIONER/APPLICANT

VERSUS

THE CHIEF MAGISTRATE EMBU

EMBU COUNTY CRIMINAL INVESTIGATION OFFICER

THE DIRECTOR OF PUBLIC PROSECUTIONS

THE ATTORNEY GENERAL

SILAS MURIITHI MBUI.....RESPONDENTS

RULING

1. In his petition to this court, the petitioner/applicant seeks the following declarations. First, a declaration that the decision to charge him and his subsequent trial vide Embu Chief Magistrate Court Criminal case No 498 of 2016 is unconstitutional, hence null and void. Second, a declaration that his continued trial in that case has violated his constitutional rights including the right to own property and the right to a fair administrative action. He has also asserted that his continued trial violates his right to a fair trial. Additionally, he seeks an order of prohibition to prohibit the Director of Public Prosecutions (hereinafter referred to as DPP) from prosecuting him in that criminal case, that is pending in the magisterial court at Embu. Furthermore, he seeks an order to the effect that the proceedings in that court should be quashed.

2. Finally, in the alternative to the foregoing, he seeks an order directing that the proceedings in that magisterial court be stayed pending the hearing and determination of his civil suit in Embu High Court Environment and Land Case No. 15 of 2016, Evanson Mwangi Kihumba v. Everlyn Wamuyu Ngumo & 4 others. He also seeks an order for the provision of costs in respect of this petition.

3. The petitioner has filed a statement of facts dated 18th July 2016 to which is annexed a verifying affidavit dated 18th July 2016. In his averments in the statement of facts, he has stated as follows. First, he has stated amongst other matters that the 5th defendant is a resident of Embu County and is the complainant in Embu Chief Magistrate's Criminal Case No. 498 of 2016, Republic v. Evanson Kihumba Mwangi. Second, he has stated that sometimes in 1968 he purchased land parcel No. Gaturi/Weru/377 from one Paul Njeru N. Kamara, who had in turn purchased the same land from one Nyaga Kobuthi. Third, he has also stated that before purchasing the land, he confirmed by way of verification of

documents that Paul Njeru N. Kamara was the owner of the said parcel of land and held its title deed.

4. Fourth, he has also stated that he obtained all the necessary consents and executed the necessary transfer and instruments and thereafter paid the agreed purchase price in the sum of Kshs 4,500/- and was then issued with a title deed on 18th December 1968. He has further stated that he took possession of the said parcel of land and used it to secure a loan in the sum of Kshs 12,000/- from Kenya Commercial Bank, which loan he fully paid and was discharged on 10th October 1981.

5. Furthermore, he has stated that on 21st October 1981 he charged the same land to secure a loan of Kshs 50,000/- obtained by his wife, Lucy Nyambura Kihumba. He went to the Lands Office in Embu and presented a discharge of charge for purposes of discharging the 1981 charge. While there, he learned that the land had been discharged, subdivided and title deeds issued to other different persons. He has further stated that upon further inquiries, he discovered that one Everlyn Wamuyu Ngumo had been registered as the proprietor of the said land purporting to have purchased the same from the petitioner. The said Everlyn Wamuyu Ngumo had subdivided the suit land into 10 plots and sold it to two persons.

6. Additionally, he has stated that he has never dealt with Everlyn Wamuyu Ngumo at all and all her acts in relation to the said sit land are fraudulent. He has further averred that he did not appear before the Land Control Board to obtain consent for the subdivision, sale and transfer of the land to Everlyn Wamuyu Ngumo. He has also averred that he was shocked by this turn of events and as a result he reported the matter to Itabua Police Station and his complaint was recorded as OB/NO.16/19/01/2016. Finally, he has averred that his counsel, Mumbi Njuguna sought to know the progress of the investigations concerning his complaint and he was informed that his complaint had been referred to the office of DPP for advice. Subsequently, Everlyn Wamuyu Ngumo and four others were charged with the offence of conspiracy to defraud amongst other offences and was surprised that he was not the complainant, instead one Silas Muriithi Mbui was the complainant in that case.

7. The petitioner then decided to file in the High Court at Embu Environment and Land Civil Suit No 15 of 2016 in which he sued Everlyn Wamuyu Ngumo, The Land Registrar Embu, The Attorney General, Daisy Njeru Ndwigwa and Charles M. Musau after realizing that the office of the DPP was not in a position to assist him. He has further averred that on 29th June 2016 counsel for all the parties in that civil suit recorded a consent which restrained the defendants from transferring, charging, developing, selling or howsoever dealing in any manner detrimental to the interests of the petitioner to wit land parcel No Gatari/Weru/377, pending the hearing and determination of that land suit.

8. The petitioner has also averred that he was shocked when he was arrested and charged in court with the offence of conspiracy to defraud contrary to section 317 of the Penal Code (Cap 63) Laws of Kenya, in which it was alleged that he conspired to **defraud one Mbui Kobuthi of land registration No Gatari/Weru/377, the sum of Kshs 12,000,000** by pretending that they had bought the said land from Paul Njeru N. Kamara, a fact that the petitioner knew to be false. The petitioner has further contended that the filing of criminal proceedings against him by the DPP after they had filed a civil suit in the Environment and Land Court contravenes his right to acquire and own property in any part of Kenya and therefore in breach of Article 40 of the 2010 Constitution of Kenya.

9. The petitioner further contends that the filing of the criminal proceedings by the DPP is an affront and a breach of the provisions of **Article 47 of the 2010 Constitution of Kenya** for the following reasons:

(a) The decision to charge him was taken with an ulterior motive or for a purpose calculated to prejudice his rights.

(b) The decision by the Director of Public Prosecutions to charge him was made in bad faith.

(c) There was an unreasonable delay of 40 years of 40 years since the alleged offence was committed.

(d) The decision to charge him is in the premises unreasonable and unfair.

(e) The decision to charge him violates the legitimate expectations of the petitioner because he is now faced with a possibility of two conflicting judicial pronouncements one emanating from the criminal proceedings one from the Chief Magistrate and another one from the Environment and Land Court.

10. Finally, he has averred that his being charged and the subsequent trial has infringed his right to a fair trial as guaranteed under **Article 50 of the Constitution** due to the unreasonable delay in bringing the charges.

11. The petitioner's counsel has filed written submissions.

12. The second respondent through No. 62946 Robert Kering has filed a replying affidavit on behalf of the 2nd and 3rd respondents. In that affidavit, he has deponed that he is the investigating officer. He has deponed that Silas Muriithi Mbui reported at the CID Kiritiri a complaint vide OB No 16/1/4/2015. After further investigations, it was found that land parcel No. Gaturi/Weru/377 was registered lastly in the names of Everlyn Wamuyu Ngumo, who then subdivided it and sold it to different persons. Upon further investigations, he found that the documents in the land's office at Embu which showed that Everlyn Wamuyu was sold land by the petitioner, a fact that has been denied in this suit. Further investigations showed that Paul Njeru N. Kamara never sold land reference No Gaturi/Weru/377 to the petitioner, which is contrary to the assertions of the petitioner.

13. Further police investigations showed that the supporting affidavit of the petitioner is a forgery in terms of the document examiner's report. The report of the Document Examiner shows that the document purportedly signed by Paul Njeru N. Kamara is a forgery. The said police officer has also deponed to the history of the petitioner taking loans from financial institutions.

14. The 5th respondent also filed a replying affidavit dated 8th August 2016. He has deponed amongst other matters that the petitioner cannot claim to own the suit land, when the person from whom he bought the land has denied owning the said parcel of land. He has further deponed that his late father never sold land reference No. Gaturi/Weru/377 to any person including Paul Njeru N. Kamara, who purportedly sold the land to the petitioner. And for that reason, he has urged the court to dismiss the petitioner's petition.

15. In the light of the affidavit evidence of the parties and the submissions of all counsel, I find that the issues for determination are as follows. First, whether the filing of the charges against the petitioner are time barred due to the delay of about 40 years. Second, whether the filing of the suit in the Environment and Land Court by the petitioner is a barrier to his prosecution. Third, whether the DPP has instituted this prosecution for ill motive purposes. I find that there is prima facie evidence of forgery in respect of the alleged sale of the said land to the petitioner. I also find that there has been a delay of 40 years in prosecuting the petitioner. I further find that the petitioner used the said land to obtain loans from Kenya Commercial Bank.

16. I find that there is *prima facie* evidence of forgery in respect of the alleged sale of the said land to the petitioner. I also find that there has been a delay of 40 years in prosecuting the petitioner. I further find that the petitioner used the said suit land to obtain loans from Kenya Commercial Bank.

17. Furthermore, I find that there is no limitation period which prevents the DPP from prosecuting the petitioner. In terms of **section 219 of the Criminal Procedure Code (Cap 75) Laws of Kenya**, the only offence that may not be brought after the expiry of 12 months is an offence whose maximum punishment does not exceed a term of imprisonment of 6 months or a fine of Kshs 1,000/- or both and such an offence should be one that is triable by a magisterial subordinate court. This is clear from the provisions of **section 219 of the Criminal Procedure Code** which in terms states as follows: ***“Except where a longer time is specially allowed by law, no offence the maximum punishment for which does not exceed imprisonment for six months, or a fine of one thousand shillings, or both, shall be triable by a subordinate court, unless the charge or complaint relating to is is laid within the twelve months from the time when the matter of the charge or complaint arose”.***

18. For those classes of offences whose limitation period is 6 months, the charges must be filed within 12 months from the time when the matter of the charge or complaint arose. The offence with which the petitioner is charged carries a maximum sentence of imprisonment of 3 years in terms of **section 317 of the Penal Code (Cap 63) Laws of Kenya**. It is therefore clear that the prosecution of the petitioner in respect of the offence of conspiracy to defraud is not time barred. In other words, the offence of conspiracy to defraud is not caught up with the period of limitation in terms of **section 219 of the Criminal Procedure Code**. I have considered the delay of about 40 years in prosecuting this offence and I find from the affidavit evidence that the circumstances warrant the prosecution of the petitioner, which is in the public interest

19. Furthermore, I find that where there are two concurrent proceedings, one of which is a civil suit and the other one is of a criminal nature. It is settled law that the prosecution of the criminal cases takes priority over civil proceedings, in situations where there are two concurrent proceedings as in the instant petition. In the circumstances, I find that the prosecution of the petitioner in the magisterial subordinate court at Embu will take priority over the civil proceedings that have been filed in the Environment and Land Court. The reason for this is that in a criminal trial, the liberty of the accused person is at stake and the prosecution must be started and concluded without unreasonable delay as provided for in **Article 50 (2) (e) of the 2010 Constitution of Kenya**.

20. From the totality of the evidence of the parties, I find that there is *prima facie* evidence to warrant the prosecution of the petitioner. In other words, the prosecution of the petitioner is based on the evidence and is not motivated by any ulterior motive on the part of the DPP.

21. In the light of the foregoing matters, I find that the declarations, sought by the petitioner lack merit and are hereby dismissed. I further find that the petitioner is not entitled to an order of prohibition against the DPP or his agents. Finally, I find that his right to acquire and own property in terms of **Article 40 (1) of the 2010 Constitution of Kenya** has also not been violated.

22. The upshot of the foregoing is that the petitioner's petition is hereby dismissed in its entirety with no orders as to costs.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **14th** day of **DECEMBER 2016**

In the presence of the petitioner and Ms Mbae holding brief for Ms Mwanza for the State.

Court clerk Njue

J.M. BWONWONGA

JUDGE

14.12.16