



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 599 OF 2013
EPHRAIM WAMBU MIANO.....APPLICANT
VERSUS
DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT
DR. GEORGE GITAU WAINAINA.....INTERESTED PARTY

JUDGMENT

Introduction

1. In his petition dated 23rd December 2013, the petitioner challenged his prosecution in **Kibera Criminal Case No 4627 of 2013**. When the parties appeared before the court on 23rd December 2013, Counsel for the respondent, the Director of Public Prosecutions (DPP) conceded to a temporary stay of the proceedings in the criminal case. Directions for service of the petition on the complainant in the criminal case and his joinder as an interested party were also given. The petition was heard before me on 5th November 2014.

The Petitioner's Case

2. The petitioner's case is set out in the petition and in his affidavit in support sworn on 23rd December 2013, his supplementary affidavit sworn on 6th March, 2014 and submissions dated 24th March 2014.
3. In his affidavit, Mr. Miano makes various depositions regarding the facts giving rise to the petition, as well as legal arguments based on the advice of his Advocate on record.
4. According to Mr. Miano, he was at all material times the registered proprietor of land title numbers Kajiado/Kaputiei-North/4302 and Kajiado/Kaputiei-North/4303. He had charged the properties to Kenya Commercial Bank to secure the repayment of various credit facilities granted to an entity known as Fameland Bar & Restaurant, which fell into arrears and the bank in exercise of its statutory power of sale, sought to realize the securities. He avers further that he was forced to file several civil suits to stop the bank from realizing the securities, which suits are still pending.
5. Mr. Miano alleges that at a meeting between himself, the interested party and a Mr. Maina and Mr. Ndegwa, he was informed that the trio had learned that the bank intended to sell his property by

way of private treaty and that as the said Mr Ndegwa happened to know that the petitioner was the registered owner of the properties, he had decided to look for him with a view to saving the properties from being sold at a throw away price. The interested party was interested in purchasing the properties and the bank had allegedly agreed to sell the two parcels to him on condition that he entered into an agreement with the registered owner. The petitioner alleges that the interested party and the said Mr. Ndegwa showed him copies of documents between himself and the bank to prove their allegations, and informed him that the bank was agreeable to discharging the titles if it was paid Kshs1,400,000/-.

6. According to the petitioner, he had, prior thereto, negotiated with the bank with a view to redeeming the securities and an oral agreement had been reached that he should make a payment of Kshs1,800,000/-; that he had paid Kshs 400,000/-, leaving a balance of Ksh1,400,000/-, a fact that was known only to him and the bank official as it was not documented. It is his deposition therefore that he was convinced by the mention of the figure of Kshs 1,400,000/- by the interested party; that he did not at the time have money to pay the bank as had been agreed and there was no time to start further negotiations with the bank; that he was overwhelmed by the developments as narrated by Mr Ndegwa and the interested party and he was therefore forced to accede to the request by the interested party to sell the properties to him with the understanding that the bank had in fact agreed to sell the properties by private treaty.
7. The petitioner avers that a sale agreement was drawn by a firm of Advocates acting for both he and the interested party, with the amount payable to the bank indicated in the sale agreement. Thereafter, the interested party drew two bankers' cheques for Kshs 1,400,000 in favour of the bank and the cheques were forwarded to the bank by the advocates with a request that the two titles held as securities be discharged and released.
8. It is the petitioner's averment that upon receipt of the payments, the bank refused to discharge the titles, stating that the amount forwarded was well below the realizable values of the securities of Ksh3,100,000/-. He has annexed a copy of a letter from the bank dated 26th November 2007 and valuation reports. He alleges that it is at this point that he realized that he had been duped by the interested party and the said Mr. Ndegwa. He claims, however, that he nonetheless and in good faith held meetings with officials of the bank with a view to resolving the issue and the bank agreed to release the title of Kajiado/Kaputiei-North/4303 which was handed over to the interested party and subsequently transferred to him and a title issued.
9. The petitioner alleges that the interested party thereafter demanded the release of the other title, Kajiado/Kaputiei-North/4302, which is still held by the bank; that the interested party then reported the matter to the Nairobi Provincial Police (PPO) offices in 2009 where the petitioner and his Advocate were summoned; and that after investigations by a Mr. Kiragu, it was concluded that no criminal offence was disclosed and the complainant was advised to seek a remedy in a civil suit.
10. The petitioner avers that the interested party then filed Machakos HCCC No. 113 of 2009 against him, the bank and his Advocate in which he sought an injunction to restrain the defendants from selling the property Kajiado/Kaputiei-North/4302. The application was dismissed with costs but on appeal, the Court of Appeal granted a temporary injunction pending the hearing and determination of the appeal. Both the appeal and the civil case in the High Court are still pending.
11. The petitioner further avers that in 2010, after the filing of the civil cases, the interested party made another complaint to the Nairobi Provincial Police Offices regarding the same issues; that the complaint was investigated by PC Ogutu; that the petitioner complained about the re-opening of the investigations in a letter dated 10th December 2010; and that he did not hear anything regarding the investigation though he had been called several times by persons claiming to be from the CID to whom he explained the situation.
12. The petitioner has also deponed that he sought to recover from the interested party, in Machakos High Court HCC Civil Case No. 83 of 2011, land parcel number Kajiado/Kaputiei-North/4303

which he claims the interested party obtained from him by fraud and misrepresentation. An injunction was granted in his favour on 22nd May 2012 restraining the interested party from disposing of the property. This suit is also pending before the court.

13. The petitioner claims that on or about 19th December 2013, he was approached at his work place in Kirinyaga by police officers who informed him that they had obtained a warrant for his arrest and were intending to charge him in Kibera Court with the offence of obtaining money by false pretences from the interested party. It is his contention, inter alia, that the re-opening of the investigations and the intention to charge him are part of a wider scheme by the complainant to harass and intimidate him and steal a march on him in the civil cases which are pending in court.
14. In his submissions on behalf of the petitioner, Learned Counsel, Mr. Wainaina, submitted that the petitioner was seeking orders to restrain the respondent from prosecuting or continuing to prosecute the petitioner in Criminal Case No, 4627 of 2013 at Kibera Law Courts. The petitioner had not, at the time of filing the petition, been charged, but a warrant for his arrest on charges of obtaining money by false pretences had been issued.
15. Mr. Wainaina submitted that there was an agreement for sale of the petitioner's parcels of land which had been reduced to writing. The parcels had been changed to Kenya Commercial Bank, and the agreement was that once the money was paid the titles would be released to the interested party.
16. Mr. Wainaina submitted that the purchase money was released to the bank but the bank refused to release the titles; that after the petitioner's intervention, one of the titles was released to the interested party who proceeded to transfer the title to himself, but that the bank refused to release the other title, stating that there was still more money due to it from the petitioner. It was at this stage in 2009, according to the petitioner, that the interested party made a complaint to the police.
17. Mr. Wainaina reiterated the petitioner's averment that the investigations into the matter were handled by a Mr. Kiragu who summoned the petitioner the interested party and the Advocate who had prepared the agreement; that Mr. Kiragu said that the issue was a purely civil case and advised the interested party to seek a civil remedy; that the interested party filed HCCC No 113 of 2009 in which the interested party unsuccessfully sought orders to restrain the sale of Kajiado/Kaputed North 4302 by the bank or the petitioner; that he appealed and obtained a temporary injunction pending appeal, and that both the appeal and the High Court suit are still pending; that the petitioner also filed a case against the interested party, HCCC No 53 of 2011 in respect of the property he had transferred to him restraining the interested party from selling or transferring it and obtained an injunction, and that this case is also pending in Machakos High Court.
18. Mr. Wainaina submitted that the issue of fraud, deceit and misrepresentation are pleaded by the parties in the two cases, while the criminal charges preferred against the petitioner relate to obtaining money by false pretences, which are the same issues that the High Court is dealing with. While conceding that criminal cases can proceed alongside civil claims, it was his submission that the dispute between the petitioner and the interested party is a purely civil dispute pending before a court of competent jurisdiction. It was his claim therefore that the interested party is using the respondent to exert pressure on the petitioner with a view to getting the petitioner to withdraw or compromise the suits or accede to the demands of the interested party to get the property which was not transferred to him, thus giving the interested party an advantage prejudicial to the petitioner, and the criminal case is therefore an abuse of the court process and a violation of Article 157(4) and (11) and the court has the jurisdiction to stop it.
19. Mr Wainaina submitted further that the petitioner's right to fair hearing has been violated by his being forced to answer to criminal charges when the issues are civil in nature. He relied on various authorities in support, among them the case of **Githunguri -vs- Republic (1986) KLR** to urge the court to stop the criminal proceedings against the petitioner, who asks the court to grant him the following orders:

1. *That this Honourable Court be pleased to grant the petitioner general damages for breach of his constitutional rights*
2. *That this Honourable Court be pleased to grant the petitioner costs of this petition*
3. *That this Honourable Court be pleased to make any such further orders as it deems just.*

The Case for the Respondent

20. The respondent filed an affidavit sworn by Inspector Abdullahi Shuria on 20th January 2014 and written submissions dated 31st March 2014, which Learned State Counsel, Mr. Onjoro, asked the court to rely on in rendering its decision on the matter.
21. In his affidavit, Inspector Shuria, an Inspector of the National Police Service attached to the Directorate of Criminal Investigation Department stationed at the County Criminal Investigation Headquarters, Nairobi County, depones that investigation into the matter commenced following a complaint by George Gitau Wainaina, the interested party, on 15th November 2007. The interested party had entered into a sale agreement for the sale of property number Kajiado/Kaputiei North 4302 and 4303 measuring about 22.26 hectares for Ksh 2.7 million and Ksh 2.3 million respectively.
22. He depones further that the investigations indicated that the petitioner informed the interested party that the two properties were charged to Kenya Commercial Bank and that the interested party should make a payment of Ksh1.4 million to the said bank for the two titles to be discharged; and that a sum of Kshs 2,500,000/- shall be paid to him. A copy of the banker's cheque in favour of the petitioner is annexed to Inspector Shuria's affidavit.
23. Inspector Shuria further depones that according to the distribution agreement between the petitioner and the interested party, Kshs 550,000/- was paid in cash to the petitioner, and a further similar amount was paid to one Joseph Ndegwa Kamau and three others. In addition, Kshs275,000/ was paid to one Macdonald Maina John, while Kshs 275,000/- was to be paid to A.M Macharia, the petitioner's Advocate. All the payments were made and duly acknowledged as evidenced by documents annexed to Inspector Shuria's affidavit. Both Joseph Ndegwa Kamau and Macdonald Maina John have made statements in respect of the matter and are witnesses in the criminal case against the petitioner.
24. Inspector Shuria avers further that the bank released the title to Kajiado/Kaputiei North 4303 to the interested party, that the petitioner signed a transfer of the two properties to the interested party and that Kajiado/Kaputiei North 4303 was subsequently transferred to the interested. It is his deposition that the petitioner voluntarily provided a copy of his national identity card and income tax personal identification card for the purpose of registering the transfer of the property; and that both the petitioner and the interested party made an application for consent to transfer the two properties to the Purka Land Control Board which application was signed by both parties.
25. According to the respondent, in the course of investigations, Kenya Commercial Bank confirmed that the petitioner had failed to disclose to the interested party all the material particulars regarding the titles they held; and that investigations also confirmed that the petitioner received from the interested party the amount of KSHS2,700,000/- in relation to Kajiado/Kaputiei North 4302. It is his deposition that the allegation by the petitioner that the complaint was concluded and no criminal offence was disclosed, and that the interested party was advised to seek a civil remedy in a civil suit is untrue.
26. Inspector Shuria depones that having ascertained that a criminal offence had been disclosed, he sought the advice of the respondent who directed that charges be preferred against the petitioner, and as a result, on 10th December 2013, Criminal Case No 4627 of 2013 was instituted against the petitioner under the directions of the respondent and a warrant of arrest was issued by the Chief Magistrate Kibera.

27. The respondent submits that the issues raised in this petition form the petitioner's defence to the criminal charges before the court in Kibera and should be canvassed before the trial court. It is its case that the police have a duty to investigate any complaint made before them, and would be failing in their duty if they did not do so.
28. It is the respondent's further submission that the fact that any matter in issue in any criminal proceedings is also directly or substantially an issue in any pending civil proceedings cannot be a ground for any stay, prohibition or delay of criminal proceedings; that the petition has been filed in bad faith and is an attempt to defeat the cause of justice, and should be dismissed with costs. They have relied on a number of cases in support of their submissions in the matter.

The Case for the Interested Party

29. Dr. Wainaina, the interested party who is the complainant in the criminal case against the petitioner, filed an affidavit in opposition which he swore on 21st January 2014 and submissions dated 12th May 2014 and 8th July 2014.
30. In the said affidavit, Dr. Wainaina avers that the petition is full of falsehoods and should be dismissed. He reiterates the averments contained in the affidavit of Inspector Shuria, inter alia, that title number Kajiado/Kaputiei North 4303 was transferred to him by the petitioner pursuant to an agreement for sale between them; that an application for consent to transfer which both he and the petitioner signed was made; that the photographs of the petitioner and the interested party as well as copies of their IDs and PIN certificates were attached together with a letter of consent by the land control board. He avers that he has since subdivided the parcel of land, but that a temporary injunction obtained by the petitioner in respect of the said parcel of land has delayed and denied him the full enjoyment of his right over the property.
31. The interested party denies that he and the said Mr. Ndegwa informed the petitioner of the desire by the bank to sell the properties, or that they had correspondence between the petitioner and the bank, asserting that the only documents that the said Mr. Ndegwa had were papers relating to an auction by Garam Auctioneers. He avers that he learnt of the amount of Ksh1,400,000/- payable to the bank at the time of signing the sale agreement.
32. Mr. Wainaina avers that no businessman, however ignorant, which the petitioner is far from being, would be told details about his bank account by a third party and not check or confirm the said information, or sue the bank for disclosing confidential information to a third party.
33. He denies duping the petitioner, averring, on the contrary, that it was he who was duped by the petitioner that the amount payable to the bank was Ksh1,400,000/-; that if the petitioner realized that he had been duped at the stage at which the bank refused to release the titles as he alleges, that was the stage for him to renege on the agreement instead of which he went on negotiating for the release of title number Kajiado/Kaputiei North 4303 by the bank and its transfer to the interested party.
34. The interested party further avers that the petitioner signed all the transfer documents in respect of the title but has the temerity to file a civil suit claiming the interested party obtained the property by fraud. He asserts that such conduct on the part of the petitioner is evidence of malice aforethought, a necessary condition in a criminal case, in which the petitioner received money and/ or had the petitioner pay off his loan with the bank with the motive of keeping both the land and the interested party's money without any intention of keeping his obligations under the sale agreement.
35. In his oral submissions, Dr. Wainaina termed the averments and submissions by the petitioner as completely untrue, being true only in respect of the names of the parties and the fact that the interested party had met his obligations in the agreement for sale between himself and the petitioner.

36. According to the interested party, the two parcels of land were on sale for Kshs 5 million, and he was informed by the petitioner and his Advocate that the petitioner owed Kshs1.4 million to the bank, and that he should issue banker's cheques totaling Kshs1.4 million to be given to the bank for the release of the titles. He denies that it was he and an agent who informed the petitioner that the bank was selling his property, or that the bank was not selling the property as alleged by the petitioner, drawing attention to a statutory notice by the bank to the petitioner in respect of two properties. He avers that he reported the matter to the police as the petitioner had not told him the truth about what was due to the bank. While conceding that they did go before a Mr. Kiragu who said the matter was civil in nature, he alleges that the said Mr. Kiragu appears to have been compromised.
37. Dr. Wainaina submitted that the petitioner has come to court to frustrate the course of justice where a charge has been preferred against him; that the petitioner entered into a sale agreement with him under which he paid the petitioner, his agents and advocates and gave him transfer documents; that the petitioner then went to court to claim that the title was obtained fraudulently; and that this confirms that the petitioner meant to obtain money by false pretences. He urged the court to find that the petition was an abuse of the court process and dismiss it with costs.

Determination

38. I have considered the respective pleadings and submissions of the parties set out above, and the averments in relation to the facts and circumstances giving rise to the present petition. From the pleadings and submissions, I take the view that the sole issue for determination is whether there is a violation of the petitioner's constitutional rights disclosed that would entitle him to the prayers he seeks.
39. The crux of his case is that the interested party is abusing the office of the DPP in the investigation and preferment of charges against him resulting in a violation of Article 157 of the Constitution. It is his submission that the intention behind the criminal case is to exert pressure on him with a view to getting him to withdraw or compromise the pending civil suits or accede to the demands of the interested party to get the property which was not transferred to him, thus giving the interested party an advantage prejudicial to the petitioner. He contends that the criminal case is therefore an abuse of the court process and a violation of Article 157(4) and (11) of the Constitution. Article 157(4), which deals with the powers of the Director of Public Prosecutions, is in the following terms:

(4) "The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector - General shall comply with any such direction."

40. At Article 157(10) and (11), the Constitution provides as follows:

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

41. The petitioner has also alleged violation of his rights under Article 50. He submits that his right to a hearing has been violated by his being forced to answer to criminal charges when the issues in dispute are civil in nature.

42. As a party alleging violation of his rights under the Constitution and seeking the intervention of the court, the petitioner has an obligation to demonstrate, with a reasonable degree of precision, the rights alleged to have been violated and the manner of violation - see **Anarita Karimi Njeru (1976-80) 1KLR 1272, Trusted Society of Human Rights Alliance –vs- the Attorney General & 5 Others, Petition No. 229 of 2012, and International Centre for Policy and Conflict -vs- Independent Electoral and Boundaries Commission Petition No. 398 of 2012.**

43. Do the facts before me demonstrate a violation or threatened violation of either the Constitution with respect to the powers of the Director of Public Prosecutions or the petitioner's rights under Article 50?

44. Let me address myself first to the alleged violation of the right to a hearing. Article 50 provides as follows:

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

45. At article 50(2), the Constitution makes specific provision with regard to the rights of an accused person by providing that an accused person is entitled to a fair trial, which includes among others, the right to be presumed innocent and to be informed of the charges facing him or her.

46. In the present case, the petitioner's complaint with regard to the right to a fair hearing is that he is charged with a criminal offence, while there are several cases of a civil nature pending before the court. I believe the provisions of section 193A of the Criminal Procedure Code adequately answer the petitioner. It states as follows:

“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”.

47. Article 157 of the Constitution gives the DPP the mandate to order investigations and to direct that a prosecution be carried out if there is sufficient evidence to justify such prosecution. In the present case, the respondent has deponed that investigations indicated that the offence of obtaining by false pretences had been committed, and that there was sufficient evidence to charge the petitioner with the offence. In the circumstances, this court cannot interfere with the decision to charge the petitioner, for, as the court observed in the case of **Peter George Antony D'costa -vs- Attorney General and Another, Nairobi Petition No. 83 of 2010:**

“The process of the Court must be used properly, honestly and in good faith, and must not be abused. This means that the Court will not allow its function as a Court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the Court process, there is a breach of the petitioners' fundamental rights as the petitioner will not receive a fair trial. It is the duty of Court to stop such abuse of the justice system.”

48. The 1st respondent is vested by the Constitution with the discretion to determine whether or not, on the evidence before it, to charge a party with a criminal offence. The court can only interfere where the discretion has been exercised unreasonably. On the facts before me, I am not satisfied that any abuse of its powers or unreasonableness has been made out. Without entering into an analysis of the veracity of the respective cases of the parties which is properly the function of the trial court, it is nonetheless difficult not to conclude that the respondents, from the evidence in their possession, had justification for preferring charges against the petitioner.

49. The facts on the basis of which the charges were brought are not much in dispute: the petitioner voluntarily entered into a sale transaction with the interested party, had him pay certain monies to the bank which he was indebted to; received certain monies himself, from the evidence, amounting to Kshs 2.7 million by banker's cheque and Kshs 550,000 in cash, as did certain other persons, including his Advocate, from the interested party. He also executed transfers in favour of the interested party, applied for consent to transfer, and furnished the personal documents such as his identity card, personal identification number (PIN) for tax purposes, and photographs. It then transpired that the bank could not release the titles to the two properties in question, but the petitioner negotiated to have it released, and it was transferred to the interested party.

50. The petitioner has deponed at length that he was duped by the interested party into selling his properties, and denies obtaining money from the interested party by false pretences. However, such averments are not for this court, for the court seized of the responsibility to analyse the evidence of both the prosecution and the defence is the trial court. As Warsame J, (as he then was) observed in the case of **Monari & Another -vs- Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011:**

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

51. In the circumstances, I find no merit in this petition. It is hereby dismissed with costs to the respondent and the interested party.

Dated Delivered and Signed at Nairobi this 16th day of January 2015

MUMBI NGUGI

JUDGE

Mr Wainaina instructed by the firm of Kinyua Mwaniki & Wainaina & Co. Advocates for the petitioner

Mr Mule instructed by the Director of Public Prosecution for the 1st, 2nd and 3rd respondent

Dr George Gitau Wainaina interested party in person