



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL PETITION NO. 77 OF 2014
DAVID OMWENGA MAOBE.....PETITIONER
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

1. This application dated 15th September, 2014 is brought under articles 23(1) and 165(7) of the Constitution of Kenya. It is supported by the affidavit of the same date with several documents attached. The applicant David Omwenga Maobe seeks the following orders:

1. *That the proceedings in the subordinate court at Kilgoris, being CMCR. Case No. 1194 of 2014- i.e. Republic vs. himself be quashed and the said subordinate court be prohibited from further proceedings with the same.*
2. *That the complainant be personally made liable to pay for the costs of this application for bringing the judicial process into ridicule and contempt.*

2. The same is based on several grounds:

1. *That the proceedings at the Kiloris CM. Criminal case No. 1194 of 2014 are an abuse of the processes of court in that they are intended to circumvent and defeat the findings of the High Court and the court of Appeal.*
2. *That the proceedings will result in embarrassing the High court and the court of Appeal.*
3. *That there can never be perjury in a matter where the High court found the petitioner veracious and which veracity was confirmed by the court of Appeal.*
4. *That the proceedings are intended to deny the petitioner his right to ownership of a property which has been determined by the High Court and court of appeal.*
5. *That there is an offence committed by the petitioner.*

3. **The Genesis of this matter: First, in the High Court at Kisii.**

The applicant was a plaintiff in Civil suit No. 149 of 2005 whereof he sued one John Teleyio Ole Sawoyo to recover land known as Transmara/Osinoni/49, about 16.5acres. The applicant was a primary school teacher in 1992 in the area, when ethnic clashes flared in the area, the applicant fearing for his life, moved from the land which had developed and had tilled and planted maize crops. He moved to the Town of Kilgoris for safety as he was at Kisii by ethnicity and the land was amongst the Maasais' of Kilgoris. As he moved away he sold the maize to the defendant. In 2005 the applicant realized that the defendant had changed records at lands to remove the plaintiff's name and insert his, the defendant. During this whole period land adjudication and demarcation was in progress. Hence plaintiff brought this case to recover his piece of land from the defendant.

The matter was heard by Musinga J (as he then was) After hearing both parties, the plaintiff and the defendant, the judge gave judgment for the respondent(plaintiff) in the following terms:

*“Having established that there existed a constructive trust between the plaintiff and the defendant as far as the suit land was concerned the defendant should transfer back to the plaintiff the entire suit land which I hereby order. Another entry will therefore be made in the register to record this transfer as ordered herein above. If the defendant fails(so) to do within the next thirty days from the date hereof, the Deputy Registrar of this court is authorized to sign and seal the necessary documents. The defendant shall bear the costs of this suit”. **The judgment was delivered on 22nd July, 2009.***

4. Second, in the Court of Appeal

From that decision the defendant appealed to the court of Appeal on some twelve grounds which, in the main, raise three issues:-

1. *The validity of the transactions between the appellant(defendant) and the respondent(plaintiff).*
 2. *The validity of the respondent’s claim in the light of limitation of actions act and in the absence of particulars of trust.*
 3. *The scope of the doctrine of the doctrine of trust and whether the respondent proved the same to the required standard.*
5. The court of appeal having gone through the proceedings of the High Court and the judgment thereof with tooth comb meticulousness concluded as follows:-

*“We think we have said enough to show that this appeal cannot succeed. We find no merit in any of the grounds cited by the appellant. We are satisfied, on our assessment of the evidence and the applicable law, that the learned judge of the High Court acted on correct principles in reaching his decision. The upshot is that the appeal fails and we order that it be and is hereby dismissed with costs to the respondent. It is so ordered”. **This court of Appeal judgment was delivered on 22nd day of November, 2013.***

6. However, on 25th August, 2014 the respondent was charged with perjury contrary to section 108(1)(a) as read with section 110 of the Penal Code. The particulars thereof stated as follows:

On the 18th day of may, 2009 at Kisii High court in Kisii District within Kisii County in a judicial proceedings, civil suit No. 149 of 2005 in the High Court of Kenya in which one David Omwenga Maobe was the appellant and John Teleyio Ole Sawoyo the respondent, while on a sworn oath before Justice Musinga, knowingly gave false testimony touching on a matter which was material to a suit pending in that proceeding, namely, denial of having sold a piece of land marked 49/Osinoni adjudication section to John Teleyio Ole Sawoyo.

7. It is this perjury proceeding that the applicant David Omwenga Maobe, brings a petition to this court to inter alia, quash the subordinate court’s proceedings and the said subordinate court be prohibited from further proceedings of perjury. The grounds and the reasons the applicant is relying on are given on his application and his supporting affidavit thereof.
8. On the other hand the prosecution contends if the petitioner committed perjury for which he is charged, the proceedings must proceed to conclusion at Kilgoris Magistrate’s court which court under section 4 of the magistrate’s courts Act, Cap. 10, vests this power in the Resident Magistrate’s court jurisdiction and power in proceedings of a criminal nature as are for the time being conferred on it by the Criminal procedure Code.
9. By virtue of section 4 and the 1st Schedule of the Criminal Procedure Code, any subordinate court of the first class has jurisdiction and powers in proceedings of perjury.
10. The prosecutor- respondent- poses this critical question:

“Can the petitioner be charged with perjury even though the two courts, High Court and the Court of Appeal agreed with him and gave judgment in his favour?”

11. The respondent submits in the affirmative. A person can and will be charged with perjury even after obtaining judgment in his favour through perjury. This is because judges, (and indeed magistrates) often base their verdicts, sentences or other important decisions on sworn testimony and signed documents. Statements given under oath are presumed to be truthful or at least made in good faith. This is why the legal effect of an oath is to subject the person to penalties for perjury if testimony is false.
12. For the sake of clarity, I want to digress a little, to delve into the meaning of (the offence) perjury. Halbury’s Laws of England Vol. 11(P.938) Fourth edition defines perjury as follows:-

“Any person lawfully sworn as a witness or as an interpreter in a judicial proceedings who wilfully makes a statement, material in that proceedings, which he knows to be false or does not believe to be true is guilty of perjury, and is liable on conviction on indictment”.

Is David Omwenga Maobe liable?

No. Evidence will, in the proceedings at Kilgoris court, either nail him or free him. And this not an event, it is a process.

“Should this process be countermanded by the High Court under article 165(7) of the Constitution and its supervisory powers conferred thereto simply because two superior courts, found for the applicant, superior court under article 165, High court and appellate superior court, under article 164, of the Kenyan constitution?”

13. This is what the court is going to rule on in this application.
14. Before this happens, the court must respond to an earlier point raised by the respondent.

“Can a person be charged for perjury even though two decision have given him judgment?”

The judgment of **R. V. Archar [2002] All ER 1) 314**. Jeffery Archar sued for libel, a tabloid newspaper, for reporting that he paid and had sexual intercourse with a prostitute. He won and was awarded \$500,000 in damages. Later on, it turned out that it was true he had indeed paid for sex with a prostitute and fabricated evidence to win the libel. This alibi convinced the judge. It later turned out this alibi was a fabricated alibi. He was later tried in a criminal court and found guilty of perjury and sentenced to four years’ imprisonment. This conviction was upheld by the **English Court of Appeal in R vs. Acher (2003) 1 Cr. Appeal R(5) 86**.

15. The petitioner brings this petition under article 23(1) and 165(7) what do these constitutional provision says:

Article 23(1) says:

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

And Article 165(7) says:-

“For the purposes of clause (6) the High Court may recall for the record of any proceedings before any subordinate court or person, body or authority referred to in clause 6, and may make or order or give any direction it considers appropriate to ensure the fair administration of justice.

16. **What right or fundamental freedom in the Bill of Rights of the petitioner herein has been**

- denied, violated or infringed or threatened to warrant this petition?** None has been mentioned. Another issue, does the perjury case deny violate, infringe and threaten the rights of the petitioner? The trial of perjury is but within the law, it takes no right or fundamental freedom guaranteed by the Constitution from the petitioner.
17. The Constitution article 165(7) the High Court, undoubtedly has supervisory powers over the subordinate courts but only if there is an irregularity in the proceeding to be countermanded. The trial of perjury here is not irregular, hence the need for order of prohibition to issue does not, in my view, lie.
18. **What triggered the perjury charges?** The land sale agreement and the letter written by the petitioner which the trial court- the High Court presided over by Musinga, J (as he then was)- dismissed as forgeries on the strength of the petitioner's sworn testimony, when forwarded to two institutional entities: National Registration Bureau in Nairobi and also to Document Examiners at CID Headquarters, were found that the signatures were made by the same person. The thumb print on the agreement which the petitioner denied, in court, having executed is found to be his thumb print.
19. The upshot of this evidence therefore is that the petitioner lied under oath to aid him in getting judgment in the suit at the High Court in 2009.
20. If the perjury proceedings were to proceed to conclusion and the accused- the petitioner- were convicted but quashed by the order of this court, who is the aggrieved person vis-à-vis the Land Parcel No. Transmara/Osinoni/49. At the centre of this perjury is the proprietary interest in the above parcel of land. Perjury subverts and perverts public justice system and is abhorred. The perpetrator of perjury must be stopped if the public justice system were to retain credibility.
21. **Conclusion**

The Petitioner has not demonstrated that his rights and fundamental freedoms will be denied, violated, infringed or threatened by the perjury proceedings now going on at Kilgoris against him. On the other hand, the respondent has ably submitted that perjury proceedings does not in any way, act as an impediment to the constitutional rights and freedoms of the petitioner.

22. Accordingly therefore the petition dated 15th September, 2014 be and is hereby dismissed with costs.
23. Orders accordingly.

Dated and delivered at KISII this 6th day of January, 2015.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Masese for the petitioner.

State(absent) for the respondent.

Edwin Mongare Court Clerk.