



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 36 OF 2014

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
PROHIBITION AGAINST THE DCIO NAKURU COUNTY**

AND

IN THE MATTER OF CHARLES MUNENE MUIYURO ADVOCATE

REPUBLIC.....APPLICANT

VERSUS

**DIRECTOR OF CRIMINAL INVESTIGATIONS NAKURU COUNTY.....1ST
RESPONDENT**

**THE OFFICER COMMANDING NAKURU CENTRAL POLICE STATION.....2ND
RESPONDENT**

**CHARLES MUNENE
MUIYURO.....SUBJECT**

RULING

1. By the Notice of Motion dated 16th October 2014, the subject seeks an order of prohibition restraining the Respondents from arresting or in any way preferring criminal charges against the subject in any matter arising from the transaction for the sale of the land between Kamau Gachunu and Muungano Wa Wanavijiji Akiba Mashinani.
2. The application was supported by the Statement of Facts and affidavit verifying the facts both dated 7th October 2014.
3. The subject is an advocate of the High Court of Kenya practicing under the name Munene & Associates. On 23rd December 2010, he received clients who had been referred to him by one Mr. Simiyu. The clients instructed him to act for them in a transaction for the sale of land. The vendor, Kamau Gachunu was with his agent Josphat Kangara and the purchaser Muungano wa Wanavijiji was represented by its agent Mr. Muthama.
4. The subject obliged and prepared the Sale Agreement and presented the transfer forms to the Lands Office for registration in favour of the purchaser. Once the title was issued, the subject transmitted it to the purchaser and that marked the end of his instructions.

5. On diverse dates in the year 2011, he was summoned to the Crime Investigation Department office in Nakuru (hereinafter referred to as the CID office) and informed that the title that was issued by the Land Registry and released to the purchaser was fake. He also received a letter from the Nakuru County Lands Office dated 27th June instructing the purchaser to surrender the title within fourteen days or it would stand cancelled.
6. The subject presented himself to the CID office and recorded his statement. He was assured by the investigating officer that the investigations did not implicate him with any fraud and that he would be made a state witness.
7. Four years later, in October 2014, he was summoned by the DCIO and informed that he would be charged because the primary culprit who was the vendor could not be traced.
8. He alleges his intended prosecution is illegal because he is the only person who has been arrested in connection with this land transaction. He further alleges that the arrest has been made in bad faith. He contends that if the court does not intervene, his practice which is based on goodwill will suffer immensely because of the criminal charges which have not been instituted to achieve any legitimate goals.
9. The application was not opposed. It was heard *ex-parte*. It was submitted for the subject that his intended prosecution is prejudicial to him. Because of the verbal undertaking given to him that he would not be prosecuted and instead would be treated as a state witness. By preferring the charges four years after the illegal act was done, the State is acting in bad faith. It must not be allowed to abuse the court process in this manner. Reference was made to the decision in **Stanley Githunguri Munga V. Republic**, [1986] eKLR where the court found that a prosecution commenced four years after the Attorney General had given an undertaking to Parliament that the accused would not be prosecuted, to be an abuse of the court process.
10. He also submitted that there is no probable cause for instituting the charges against him. The offence being investigated is the making of title. All titles are made in the lands registry. That none of the staff of the registry have been charged with the offence is evidence of selective prosecution.
11. The fact that Section 193A of the Criminal Procedure Code allows criminal proceedings to be filed notwithstanding that there are civil proceedings pending in court on the same issue is not a reason to prosecute matters that belong to civil courts or to engage in selective prosecution.

ISSUE FOR DETERMINATION

12. The questions for determination are:

- i) whether the impending arrest and prosecution of the subject are an abuse of the court process.
 - ii) whether the orders sought are merited.
13. The 1st Respondent has the powers under Article 147 of the Constitution to commence, undertake or terminate any criminal proceedings. The exercise of powers of this powers must be fair and reasonable and must not be exercised arbitrarily or oppressively. (**Githunguri V. Republic**, [1986] eKLR).
 14. It is an abuse of the court process if the purpose of the criminal proceedings is to achieve an ulterior motive other than a genuine desire to punish on behalf of the public a crime committed. **Republic V. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another**, [2002] 2 KLR 703.
 15. The judicial review remedy of prohibition will only be issued on evidence of manipulation, abuse or misuse of the court process or that the right of the accused to fair trial will not be realised. The burden of proof lies on the person seeking the orders of court. However, the mere fact that there is a civil suit from the same set of facts does not invalidate the criminal proceedings. (See **Kuria & 3 Others V. Attorney-General** [2002] 2 KLR 69 at pages 80 and 81).
 16. The circumstances of this case disclose that the dispute arose from the transaction of sale of the land known as **KIAMBOGO/KIAMBOGO BLOCK 2/485**. It has emerged that the vendor unlawfully misrepresented to the purchaser that he was the registered owner or that he had the

- powers to transfer a proprietary interest to the purchaser. The subsequent title that was issued to the purchaser, it is alleged, was a forgery. These set of facts disclose both a civil case, as well as criminal offences of forgery and fraud.
17. The subject was a party to this transaction because he was the person who prepared the Sale Agreement and oversaw the registration of the title in the Lands Registry. He is the person who eventually handed the Title to the purchaser upon payment of the full purchase price. Whether or not he was culpable is a matter to be determined by a criminal court of law after the prosecution has presented its case. Judicial review does not go to the merits of a case but rather it only inquires into the decision making process.
 18. The subject has also questioned the motives of the prosecution because of the fact that no other person including the officers working at the Lands Registry who prepared the faulty title have been prosecuted. This is a question of weight of evidence against the various parties. Each party must bear their own burden for the role they played. The subject cannot ask to be exonerated solely because other persons who were also party to the transaction have not been prosecuted. It must be demonstrated that there must be an element of malice or ill will in only pursuing the subject. To my mind, this has not been done.
 19. Further, the subject has asked the court to uphold the undertaking issued to him by the 2nd Respondent that he would not be prosecuted. He has extensively relied on the case of **Githunguri V. Republic** (*supra*). In this case there was official communication from the Attorney-General that the accused would not be prosecuted for his crimes and that his file had been closed. This decision was made after a full inquiry into the case had been made and was honoured by the two Attorney-Generals who took office and it was also acted upon by the Bank. Accordingly, the court found that without fresh evidence to justify reopening the case, the intended prosecution which was going to be undertaken six years after the undertaking was given was an abuse of the court process.
 20. The above case can be distinguished from the present case because the decision not to prosecute was made officially by the Attorney-General who was at the time vested with the powers to make that decision. In the instant case, the undertaking was given by an investigating officer who had no final mandate to determine who would be prosecuted. Therefore in the absence of any official communication, the undertaking cannot be upheld because the person who made it was not seized of any authority.

DETERMINATION

21. For the above reasons I find that the subject has not demonstrated that the intended criminal proceedings are an abuse of the court process; or unreasonable and or *ultra vires*.
22. This application is hereby dismissed.
23. There shall be no orders as to costs.

Dated, Signed and Delivered at Nakuru this 22nd day of May, 2015.

A. MSHILA

JUDGE