REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

JUDICIAL REVEIW MISC. 314 OF 2005

EUNICE AKUMU OKOTH ….....PLAINTIFF

VERSUS

PETER OCHHIAMBO CHIRO …..... DEFENDANT

THE HONOURABLE ATTORNEY GENERAL ….....DEFENDANT

RULING

1. What is before me for ruling is the original summons dated 2**1st October, 2005** in which the applicants sought the following orders:-

1) Whether or not the entry of the Nolle Prosequi by the Attorney General dated 20.7.2015 at the conclusion of the trial of the applicants in Kisumu Chief Magistrate`s court, criminal case No. 666 of 2003, constituted a violation of the applicants` constitutional right to a fair trial.

ii) Whether or not, the subsequent arrest of the applicants and commencement by the Attorney General of fresh charges of the same Criminal charges in KSIUMU CMCC CASE NO. 666 OF 2003 against the applicants vide KISUMU CMCR CASE NO.542 OF 2005 constitute a violation of the constitutional right of the applicants to a fair trial?

Iii) Whether or not the continued maintenance of the said criminal case against the applicants vide KISUMU CMCR CASE NO. 542 OF 2005 constitute a violation of the applicants right to a fair trial in view of the judgment of the Chief Magistrate vide KISUMU CMCC NO. 165 OF 2000 between Eunice Akumu Okoth and Peter Odhiambo Chiro and the Attorney General, which remains unchallenged on appeal or otherwise, and the pendency of KISUMU CMCC NO. 827 OF 2003 between the 1st applicant and Florence Achieng Ogayo, all which relates to the same subject matter in all the cases over the same issue?

iv) Whether of not, the pending criminal trials against the applicants vide KISUMU CMCR Case No. 542 of 2005 ought to be terminated?

v) Whether or not the trial of the applicants on count 2 in KISUMU CMCR Case NO. 666 of 2003 ought to be terminated?

vi) Whether or not, the Attorney General ought to be condemned to pay the costs of these proceedings

2. The application which is supported by the affidavit of **Jude Ragot,** Advocate, sworn on **21st October, 2005** is premised on grounds that:-

a) The first applicant purchased from one Peter Odhiambo Chiro alias Wilson Chiro Sati the parcel of land known as KISUMU/NYALENDA A 625 for valuable consideration and a title deed issued in her favour upon transfer.

b) The said title deed issued in favour of the 1st Applicant was cancelled by the land registrar on allegation that the 1st Applicant had fraudulently acquired it from a person who was dead at the time of transfer.

c) By the judgment of the court in KISUMU CMCC NO. 165 of 2000 between the 1st Applicant and the said Peter Odhiambo Chiro alias Wilson Chiro Sati and the Attorney General, the 21st applicant was declared to have been an innocent purchaser of the said land for value without notice and her rights over the said land were declared to be indefeasible.

d) That Judgment was entered on 19th December, 2000 and is still in force and has neither been challenged on appeal nor otherwise set aside.

e) In the year 2003 the widow of Peter Odhiambo Chiro alias Wilson Chiro Sati sought to bury the body of Peter Odhiambo Chiro alias Wilson Chiro Sati on that parcel of land and the 1st plaintiff sought and obtained a temporary injunction pending the outcome of the suit vide KISUMU CMCC No. 827 of 2003 and that suit is still pending in court.

f) The latter civil suit provoked the criminal trial vide KISUMU CM CR NO. 666 of 2003 against the applicants on charges of obtaining registration by False Pretences in respect of that parcel of land and intermeddling with the estate of a deceased person in which the second applicant was charged for his involvement as a witness to sale transaction.

Briefly the background of this matter is that the two Applicants were accused persons in a Criminal Case **CMCR 666 of 2003** where they were charged with obtaining registration by **False Pretences Contrary to Section 320 of Penal Code.** On 2nd February, 2005 the charge was amended to include a second count to, wit, intermeddling with the people of a deceased person Contrary to **Section 45 (1**) as read with **Section 45(2) (a**) of the Law of Succession Act. However, on **2nd March, 2005** the Prosecution sought to withdraw the charges but were not allowed to do so. The case therefore proceeded and on 12th April, 2005 the defence closed its case and the Trial Magistrate scheduled judgment for 20th May, 2005. Come that day it was not ready and she deferred it to **17th June, 2005** and then to **25th July, 2005** at 2p.m. However, before she could deliver the Judgment, the Prosecution served her with a **Nolle Prosecui** in respect of the first count. She allowed the prosecution to terminate the proceedings. However, soon thereafter the applicants were arrested and charged with the same offences in **CMCR 542 of 2005**. This according to their affidavit is subjecting them to another full trial which is an abuse of the court Process and breaches the Provisions of **Section 138 of the Criminal Procedure Code.**

Being a reference under the now repealed Constitution the matter was on 16th January, 2006 ordered be placed before the Chief Justice and it was not until 21st June, 2012 that the advocate for the applicants applied that the matter be returned to this court for disposal. The matter was mentioned severally but eventually on 20th March, 2014 directions were given that the same be canvassed through Written Submissions. By 27th May, 2014 only those of the Advocate for the applicants had been received and it was only on November, 2014 that those of the Respondents were received. The Court reserved its judgment to 29th April, 2015 but the same was not ready and it was deferred to 23rdApril, 2015. The delay is regretted.

In summary Counsel for the Applicant`s submitted that the fresh charges against the applicants are appossive and against public policy because the decision to have the applicants charged on those two counts cannot be a proper exercise of the Attorney General`s discretion to institute Criminal Charges, in an instance like this where even after a full trial there would be no reasonable likelihood that any

conviction can legitimately arise. He submitted that it was not in dispute that the 1st applicant purchased **Kisumu/ Nyalenda 'A'/625** from one Peter Odhiambo Churo alias Wilson Chiro Sati for valuable consideration a fact that was confirmed by a court of law upon hearing Kisumu **CMCC 165 of 2000** wherein she had sued the said Peter Odhiambo Chiro and the Attorney General following the cancellation of her resultant title by the Land Registrar and that the judgment in that case was not appealed; That indeed the family of the said Peter Odhiambo Chiro alias Wilso Chro Sati was evicted from the land following reinstatement of the title to her. She even successfully sought and obtained orders to restrain his family from burying his remains on the land. While conceding that under section 26(8) of the then constitution the Attorney General was not subject to the direction or control of any person or authority he submitted that it was well established that the said power and discretion was not absolute and that where it was demonstrated that the power had been exercised judiciously, arbitrarily and in a manner that was oppressive, the High Court could interfere. On this he cited, Nairobi HCC Misc Application NO. 406 of 2001 Republic V. The Attorney General and the Chief Magistrates Court Nairobi and **Stanley Munga Githunguri V. R (1986) KLR 1.** He urged this court to be guided by the principles in those two cases. He further submitted that the charges against the applicants were actuated by malice and intention to defeat the first applicant`s right to enjoy the fruits of her judgment in the civil case and so that she could be intimidated to abandon the land. He described that as an extraneous purpose and further submitted that the charges were even more oppressive given that the previous trial had taken almost two years to conclude. That the decision to charge them afresh constitutes a gross violation of their fundamental rights and freedoms under sections of 72 (I) (e) and 77(1) of the then constitution. He contended that this is essentially a civil dispute which ought not to have been turned into a Criminal one and that it is not in the public interest to criminalise what is essentially a civil controversy. He urged this court to answer the questions posed in the originating summons in the affirmative and to halt the criminal case pending before the subordinate court. He also prayed that the costs of this reference be awarded to the applicants.

On behalf of the Director of Public Prosecutions it was submitted that the one line of thought running through this application is whether the institution of cases against the applicants constitute an abuse of the due process of the court and/or whether the applicants rights and freedoms as enshrined in the constitution were violated. It was then submitted that a Nolle Prosequi does not operate as an acquittal and an accused could be afterwards re-indicated citing the decision of **Odugna J. in Sisina & 8 others V. Attorney General (2013) eKLR** Counsel submitted that the decision to enter the Nolle Prosequi was in good faith and took into account all possible considerations. Citing **Otieno Clifford V.R [2006] eKLR Counsel** further argued that fraudulent acquisition of land being prevalent in this area there was need to prosecute such matters as they involve great public interest. He contended that the issue of double jeopardy does not arise and urge this court to disallow the constitutional reference by answering the questions posed in the negative and to allow Kisumu CMCR 542 of 2005 to proceed to its logical conclusion.

The facts in this matter are not disputed and they are that the Attorney General rearrested the two applicants and charged them afresh (with the same offences) in **CMCR 542 OF 2005** after entering a Nolle Prosequi only minutes before a judgment was delivered in **CMCR 666 OF 2005.** The old constitution did not have the current day provision that the Director of Public Prosecutions requires the permission of the court to terminate the proceedings and the discretion to enter a Nolle Prosequi in the lower court has unfettered (see article 157 (8) of the constitution). It could only be challenged in the High Court under Section 123 (8) of the Constitution. The parameter for so doing are as set out by my brother **Odunga-J** in **Sisima & others V. Attorney General;-**

"…..... (1) where there is an abuse of discretion; (2) where the decision- maker for an improper purpose; (3) where the decision is in breach of the duty to act fairly; (4) where the decision maker has failed to exercise statutory discretion reasonably; (5) where the decision maker acts in a manner to frustrate the purpose of the Act donating the power;(6) where the decision maker fetters the discretion given;(7) where the decision maker fails to exercise discretion, (8) where the decision maker is irrational and unreasonable". In the instant case much as the Respondent has not given any explanation for the exercise of the discretion to enter a Nolle Prosequi it is my finding that it has not been demonstrated that any of the aforementioned parameters exist so that this court is not in a position to conclude that the exercise of power was irrational, capricious or unreasonable. It has been submitted that the matter concerned fraud

touching In land matters and those offences were very prevalent in this area and as such the matter was one of public interest. It behoved the Attorney General therefore to consider the interest of all the parties including the victim and perhaps that explains why when the Prosecution first sought to withdraw the case the reason given was to put its house in order. The Respondent was within his right to enter the nolle Prosequi as he did. He was also entitled to charge the applicants afresh as upon the entry of the nolle prosequi they were only entitled to a discharge and nothing prevented them from being charged afresh. I am not persuaded that any of their fundamental rights and freedoms were breached. Their case is distinguishable from the **Githunguri** case because there the Attorney General had made an undertaking not to charge the applicant only to renege four years later. The court of Appeal came to the conclusion that " **the delay was so inordinate as to make the non-action for four years inexcusable**". Here the applicants were charged almost immediately after the entry of the Nolle Prosequi and there was no delay at all. In the Kipngeno Arap Ngeny case the delay was nine years and the court found that too long a delay and stated : **"We cannot think anything else but that the Criminal Prosecution against the Applicant was motivated by an alterior motive. It is not a fair prosecution....."** That certainly cannot be said to be the case here. I am unable to answer any of the questions posed in the affirmative. In the end I find no merit in this application and dismiss it.

Each party shall bear their own costs.

E.N. MAINA

JUDGE

Signed, dated and delivered in open court this …..... day of April 2015

H.K. CHEMITEI

JUDGE

<u>In the presence of:-</u>

….....Advocate for the Applicants

….....Advocate for the Respondent

Court Clerk- Moses Okumu

ENM/aar