



REPUBLIC OF KENYA

IN HIGH COURT OF KENYA AT MERU

HCA 43 OF 2011

MISC CRIMINAL APPLICATION NO. 49 OF 2014

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (6) OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUAL – HIGH COURT PRACTICE AND PROCEDURE RULES – 2006)

AND

IN THE EXERCISING SUPERVISORY JURISDICTION OVER CRIMINAL PROCEEDINGS

IN THE MAGISTRATE COURT AT GITHONGO IN CRIMINAL CASE NO. 797 OF 2014

BETWEEN

STEPHEN GITONGA APPLICANT

VRS

D.C.I.O IMENTI CENTRAL 1ST RESPONDENT

D.P.P. 2ND RESPONDENT

J U D G E M E N T

This petition is dated 12/11/2014, brought pursuant to Article 165 (6) of the Constitution. The petitioner prays that:

- (a) The charges against the petitioner in Githongo Criminal Case No. 797/2014 be declared a nullity.**
- (b) The Criminal Case 797/2014 be permanently stayed.**
- (c) Costs be provided for.**

The grounds upon which the petition is referred are that the petitioner was arrested on 15/8/2014 for

offences of giving false information, making false statement and obtaining land by false pretenses in Succession Cause No. 255/2013. It is his contention that the criminal charges are an abuse of the criminal process and are meant to intimidate the petitioner and that the issue at hand can only be resolved through the civil process.

The petition is also premised on two affidavits sworn by the petitioner dated 12/11/2014 and a supplementary affidavit dated 6/1/2014 and grounds found in the body of the petition. His case is that he has been charged with the offence of giving false information to a person employed in the Public Service contrary to Section 129 of the Penal Code; making a false statement contrary to Section 363 of the Penal Code and obtaining land registration by false pretenses contrary to Section 320 of the Penal Code; that the charges have emanated from Meru Succession Cause No. 255/2013 which he filed over the brother's estate. He deposed that he is the sole beneficiary of the deceased brother's estate as the estate belonged to his late father who had given it to the deceased to hold in trust for him; that prior to filing the Succession Cause, the said land Abothuguchi/Makandu/690 had a loan which had been taken by the deceased with National Housing Corporation (NHC) which the petitioner paid and the title was discharged and it was then registered in his names, regularly and legally. He denied that the documents from NHC and the Auctioneers are forgeries; that he obtained the death certificate from the Registrar of Births and Deaths as a beneficiary of the deceased; that the Investigation Officer in the criminal matter should have advised the complainants to pursue the Succession Cause. It is his contention that the criminal charges are mounted in order to force him to surrender his land to other people. The petitioner's Counsel argued that the criminal charges against the applicant are an abuse of the court process as they relate to issues which are *res judicata* as the same have already been determined by a court of competent jurisdiction.

The petition was opposed via two affidavits sworn on 3rd December 2014 and a further affidavit dated 10/3/2014 sworn by Josephath Mbingu Kisingu (1st Respondent) where he deposed inter alia, that he was asked to carry out investigations to establish how the petitioner obtained the title deed in respect of the subject land Abothuguchi/Makandu/690 and he found that the petitioner used false (forged) documents to file Succession Cause No. 255 of 2013 in the High Court; that the petitioner was issued with a certificate of confirmation of grant which would not have been issued if the true facts had been known by the court; that after the petitioner obtained the confirmation of grant, he transferred the land in question to himself then subdivided it and transferred some portions to other people leaving the deceased's children with nowhere to settle; that the succession cause which is pending before court should not be a bar to any criminal proceedings in view of Section 193A of the Criminal Procedure Code and that the criminal case is based on allegations of fraud which fall in the criminal law realm.

It was also submitted for the 2nd respondent that the criminal charges have no correlation with the succession cause as the succession cause does not address itself to the truthfulness of the documents produced in the matter as it is a criminal offence to give false information; that since the police allege that the documents used by the petitioner are false, the issue of their legality can only be left to the trial court at Githongo to determine.

I have carefully considered this petition; the rival submissions by the parties and authorities relied upon.

It is now well settled practice that the courts will exercise caution in granting stay in criminal proceedings. This principle was recently restated by the Court of Appeal in the case of **MANILAL JAMNANDAS RAMJI GOHL V DIRECTOR OF PUBLIC PROSECUTIONS NAIROBI CRIMINAL APPEAL NO. 57 OF 2013** where the Court of Appeal rendered itself thus:

“We are mindful that an order staying criminal proceedings would be granted only in the most exceptional circumstances.”

See ***GODDY MWAKIO AND ANOTHER V REPUBLIC (2011) ECLR*** where the court stated as follows;

“an order for stay of proceedings particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances...”

The petitioner's assertion that this case is *res judicata* is not only false but misleading. The applicant is facing criminal charges whereupon he has been charged with three different offences. The same has no correlation whatsoever with Meru High Court Succession Cause No. 255 of 2013 where the petitioner had petitioned the court for letters of administration and confirmation of grant. That was purely a civil matter and the allegations that the petitioner is now facing in the criminal case are purely criminal in nature. It cannot be said that the allegations that the petitioner is now facing were directly and substantially in issue in the Succession Cause and were determined therein. Section 7 of the Civil Procedure Act CAP 21 of the Laws of Kenya provides as follows:

“no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has heard and decided by such court.”

The plea of *res judicata* is not available to the petitioner. In criminal law, if he has been tried of a similar offence and convicted or acquitted, then his defence would be that the proceedings would lead to double jeopardy. In Black's Law Dictionary, that defence is said to arise from the 5th Amendment of the provision of American Constitution which states:

“Nor shall any person be subjected for the same offence to be twice put in jeopardy of life or limb”.

In England, it is called the doctrine of ‘*autrefois*’ convict and acquit’ whose essential elements is the protection of the liberty of the individual and respect of due process in that there will be finality of proceedings.

This Court is alive to the fact that under Article 157 (4) and (6) of the Constitution, the 2nd respondent is constitutionally mandated to investigate and prosecute criminal offences and should be given room to carry out its role. Only in situations of clear abuse of power or due process should the court intervene and prevent the abuse. So far, the petitioner has not demonstrated that there has been any abuse.

The petitioner contends that he has not committed any offence. The sufficiency or otherwise of the evidence to be adduced in the criminal case is not for this court to determine. The trial court in Githongo should be allowed to receive and evaluate the prosecution evidence and make a determination. Only if the petitioner is aggrieved by the decision of Githongo Court would this court intervene. Otherwise, this court will be usurping the powers of the respondent and the trial court.

In the end result, I find the petition to be without merit and the same is dismissed in its entirety. The orders issued by this court on 24th November 2014 are hereby vacated forthwith and the petitioner should appear before Githongo court on 13/7/2015 for the mention of Criminal Case No. 797/2014/2013 so that the magistrate can give directions on the further hearing.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF JUNE, 2015

R.P.V. WENDOH

JUDGE

PRESENT

Mr. Mulochi for State

Mr. Mureithi for Petitioner

Faith, Court Assistant, Present