IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 70 OF 2012

ELDAN COMPANY LTD)

LAWRENCE MACHARIA KARANJA)

KAHIGA WAITINDI)

ST. COLUMBUS SCHOOL LTD)…….....…...APPLICANTS

VERSUS

DIRECTOR OF PUBLIC PROSECUTION)

DIRECTOR OF C.I.D..).....….RESPONDENTS

ST. COLUMBUS HIGH SCHOOL LTD)….INTERESTED PARTY

RULING

The ex-parte applicants (subjects) Eldan Company Ltd, Lawrence Macharia Karanja and Kahiga Waitindi, hereinafter referred to as the 1st to 3rd applicants, have brought this Judicial Review application against the Director of Public Prosecutions and Director of CID (1st and 2nd respondents) seeking an order of prohibition to restrain the respondents from arresting, charging, threatening to arrest or threatening to charge, harassing and intimidating the applicants for their participation in the land sale and transfer of the parcel of land known as Nakuru Municipality Block 15/792 and the subsequent subdivision of the land into Nakuru Municipality Block 15/976 to 985. The 3rd Interested Party (IP) is Columbus The notice of motion is supported by grounds contained in the statement of facts and verifying affidavit of Lawrence Macharia Karanja, dated 21/11/2012 and filed together with the chamber summons which sought leave of the court to commence these judicial review proceedings. A further affidavit was sworn by the same deponent and was filed in court on 25/9/2013. The respondents have challenged the lattere affidavit for having been irregularly filed. I will consider that issue later in this judgment.

The application was opposed. Chief Inspector James Ochieng Oludhe of CID Land Fraud Investigations Unit swore a replying affidavit dated 10/9/2013. Rita Walia, a shareholder in the Interested Party also swore an affidavit dated 4/4/03 opposing the motion.

A brief background of this matter is that the 2nd and 3rd applicants are directors of the 1st applicant. The two are also advocates in the firm of Mirugi Kariuki & Co. Advocates.

The deponent averred that in 2007, he acted for Francis Gachanja Mwangi a vendor, James Mwangi and Henry Methu in a sale transaction over LR No. Nakuru Municipality Block 15/792, the suit land, at the centre of controversy. The land was transferred and later subdivided into 10 plots and sold to new owners as Plots 15/976 to 985. Among the new purchasers is the 1st applicant, Eldan Company Ltd. In 2010, the IP filed a suit NKU HCC 334/2010 against the buyers of the new plots who inlcude:-

i. **James Kamau Mwangi**
ii. **Francis Gachanja Mwangi**
iii. **Henry Methu**
iv. **Peter Wangai Mararo**
v. **Jenniffer Wanjiru Wangai**
vi. **Mary Wanjiru Karuga**
vii. **Eston Mburu Karuga**
viii. **Susan Wambui Karuga**
ix. **David Mwangi Mwaniki**
x. **Eldan Company Limited**
xi. **Commissioner of Lands**

The IP also sought an order of injunction to restrain the defendants from interfering or entering the suit land but an officer from Ministry of Lands swore an affidavit confirming the status of the suit land (LMKV) and the court declined to grant the prayer. In 2012, the IP filed a criminal complaint and Chief Inspector Oludhe started calling the applicants as a result of which the applicants recorded statements at CID Headquarters on 2/7/2012. Francis Gachanja and Kenneth Kariuki Githii were then charged before CMC Kibera on 15/11/2012. Later, the Investigation Officer started demanding that the applicants produce the purchasers of the parcels of land and alleging the 1st applicant irregularly purchased the land. The applicants contend that the investigation officer's actions amount to abuse of the criminal process, is selective prosecution; that the criminal prosecution is meant to bolster a civil action; that there has been selective choice of forum and disregard of court orders.

Mr. Githui, counsel for the applicants submitted that when leave was granted to the applicants to commence these judicial review proceedings, the said leave was ordered to operate as a stay from harassment of the applicants and the criminal charges, but the respondent went ahead to arrest the applicants and took them to Kibera Court for plea. However, the court declined to take plea on being shown the court orders. Counsel also urged that the IP having failed to obtain an injunction in the civil case, filed the criminal complaint which was meant to coerce the applicants into settling the civil claim, which amounts to abuse of the criminal process as well as using the prosecution to bolster the civil action. In that regard, counsel relied on the case of **Rep v CMC Mombasa ex parte Ganijee (2002)2 KLR 703** where J Waki held that it is not the purpose of criminal investigation and charge or prosecution to help individuals in advancement of their civil cases. In **Macharia & Another v Attorney General & Another (2001)KLR 448,** the court held that a prosecution can be declared improper if it is meant to bring pressure to bear upon the applicant to settle a civil dispute. Mr. Githui also urged that there has been selective prosecution because despite the fact that there were 10 purchasers, only the three applicants have been picked upon and further, that despite the fact that the firm of Ikua Mwangi Advocates participated in the sale transaction, they have not been charged.

It is the applicants other ground that there is also selective choice of forum in that despite the fact that the 2nd and 3rd applicants reside and are advocates in Nakuru, the IP and the suit land are in Nakuru, charges were filed in Kibera Court and due to the manner of arrest and transfer to Nairobi, there is no doubt that the police intend to achieve goals not contemplated under Criminal Law. That is why they preferred this application.

In opposing the application, Mr. Marete, counsel for the respondent relied on the affidavit of CIP Oludhe sworn on 10/9/13 in which he recalled that the IP reported to the DPP (1st respondent) a case of fraud in respect of land parcel Nakuru Municipality 15/792. Investigations established that St. Columbus High School owns Nakuru Municipality 15/276 and Plot 15/792, which was adjoining land was allocated to the IPs school after an application by Directors of the IP; that they were granted a temporary occupation

licence (J003). They were allotted the land and they paid for it. The land was surveyed and a lease document prepared in 2007 but upon going to collect the lease, the documents could not be traced. Later Francis Gachanja emerged with a letter of allotment and was later issued with a lease. On investigation, it was found that the lease issued to the said Gachanja was found to be a forgery, the signature by Commissioner of Lands was found to be a forgery, the signature of the advocate who allegedly witnessed the sale transaction was found to be a forgery, and the letter forwarding lease was found to be a forgery too. The investigations disclosed fraud. He deponed that the sale agreements dated 13/9/07 when the land was subdivided was also fraudulent. He conducted a search at company registry and found that 1st applicant was not registered at the time of purchase of the plots. He found the transfer to have been done by Mirugi Kariuki Advocates where the 2nd and 3rd applicants work as advocates and one of the purchasers is a brother to the 3rd applicant. The Investigation Officer also took into account an affidavit sworn by Silas Mburugu Kingora in JR 29/09, which had been filed by Francis Gachanja and Kenneth Githii in which he deponed that the letter of allotment to Gachanja was a forgery and all the subsequent documents.

Rita Walia swore an affidavit opposing the application. She deposed that leave to file this application was granted on 21/11/2012 and the applicants were allowed 14 days within with to file and serve the substantive notice of motion but they did not file it until 6/12/2012 which was outside the time allowed and they never sought the leave of court to do so. Further, that the notice of motion was not served within 14 days as ordered by the court, but was served on 24/1/2013 and without any explanation, and therefore the application is incompetent; that She complained to police about the fraud that had been perpetrated over the suit land and after investigations, the police decided to charge the applicants in Kibera court where other suspects had already been charged.

In addition to the above Mr. Waiganjo, counsel for the IP submitted that it is the investigation officer who decided to charge the applicants after investigations and whether or not there will be a conviction or acquittal, is not for this court to decide; that all that needs to be demonstrated is that there are sufficient grounds to charge the applicants. Mr. Waiganjo also submitted that the applicants have sworn in their further affidavit that they were arrested after the court granted a stay order and therefore the order of prohibition is not available to the applicants. Counsel added that the applicants have not demonstrated that the order was served in good time as no affidavit of service was exhibited.

On whether there had been selective application of the law, Mr. Waiganjo submitted that two other persons had already been charged in Chief Magistrate's Court Kibera 6042/2012, **R v Francis Gachanja and Kenneth Githii**.

On whether the criminal proceedings are meant to bring pressure on the applicants, counsel urged that none had been disclosed and that **Section 193A** of the **Criminal Procedure Code** allows both the civil and criminal jurisdictions to be invoked where necessary.

On allegations that the 2 and 3rd applicants are being victimised for their professional work, counsel argued that as officers of the court, they should have known their limits, because they were party to the transaction but went ahead to purchase the land which was under investigation and one of the buyers turned out to be a brother to the 3rd applicant. On the authorities filed, counsel urged that they support the dismissal of the case.

Having considered the pleadings and submissions by all the counsel, I think I will start by considering the two objections raised by Mr. Waiganjo counsel for the IP.

The first objection is whether the application is incompetent for having been filed outside the time allowed by the court. When the applicants appeared before the court on 21/11/2012 seeking leave of the court to commence judicial proceedings, the court granted leave, and ordered that the substantive notice of motion be filed and served within 14 days. The notice of motion was filed on 6/12/2012. Computation of time is governed by **Section 57** of **Interpretation Act Cap 2, Laws of Kenya**. Computation excludes the day the order was made but includes the last day. In this case, the 14 days started running from

22/11/2012 and ended on 5/12/2012. The application should have been filed and served by 5/12/2012. It was filed on 6/12/2013, outside the time allowed without the leave of the court. In **Re ex parte James Kimotho and 5 Others,** J Kimaru struck out a JR application for having been filed outside the time allowed amongst other breaches of due process. This is a JR application. The court had specified the time for filing the application and granted an order of stay of the criminal process and the orders had to be strictly obeyed. The applicant can not flagrantly disobey a court's order and try to hide under the provisions of the **Constitution** under **Article 159** of the **Constitution**. Infact Mr. Waiganjo submitted that the application was not served till 24/1/2013, which was not disputed by the applicants. That was a further breach of the court's order. I find the application dated 6/12/2012 to be incompetent and is for striking out.

The first applicant filed a supplementary supporting affidavit dated 25/9/2013. I have perused the court record and nowhere was the court's leave sought to file the said affidavit. On the hearing date, Mr. Githui did not seek leave before proceeding to rely on it. **Order 53 Rule 4(2)** requires that any further affidavits be used or admitted into the proceedings with the leave of the court. **Order 53 rule 4(2)** of the **Civil Procedure Act** reads:-

> **"4. (2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits."**

The further affidavit is supposed to confine itself to responding to issues raised in the replying affidavit which is not the case with the instant supplementary affidavit. Introducing an affidavit without leave of the court is prejudicial to the other parties. This court finds that the supplementary affidavit filed in court on 25/9/2013 is incompetent and is hereby struck off the record.

The above findings notwithstanding, I will consider whether the application had any merit in any event.

Whether the criminal process is being abused:

What is the purpose of criminal proceedings? Their purpose was espoused in **William v Spautz (1992) 66 MWS LR 585** where the court said:-

> **"The purpose of criminal proceedings generally speaking, is to hear and determine finally whether the accused engaged in conduct which amounts to an offence and, on that account, is deserving of punishment."**

The applicants are threatened with possible criminal charges in the lower court and have alleged that the respondents are abusing the criminal justice process. The court defined abuse of criminal process in **Rep. v Commissioner of Police** and **Another ex parte Michael Monari 2012 KLR (a):-**

> **"proceedings taken in bad faith or circumstances yielding an inference that they were upto no good. Criminal law is not to be used oppressively to punish acts which in truth might be technically a breach of Criminal law but which contains no real vice and which can only be best handled under a process other than the criminal process namely any of the different systems of civil remedies (see Floriculture Internatioanl Ltd HCC 144/1997)."**

In the case of **Hunter v Chief Constable** of the **West Midlands Police (1982) AC 529 at pg 526,** Lord Diplock had this to say of abuse of court process:-

> **"Inherent power which any court of justice must possess to prevent misuse of its procedure in a way which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise**

bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this house were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this statutory power."

From the above decisions it is clear that the term ***'abuse of court process'*** does not carry any fixed meaning but it will depend on the special circumstances of each case. If the process is so unfair and is being used to perpetrate an injustice or for improper motives, then the court will intervene.

Article 157(4) of the **Constitution** confers powers on the Director of Public Prosecution to direct the Inspector General of the National Police Service to investigate any allegation of criminal conduct. Under **Article 157(6)(a),** the DPP has power to initiate and undertake criminal proceedings against any person before any court. Under **Article 157(10)** the DPP does not require the consent of anybody or authority to initiate criminal proceedings or in the exercise of its jurisdiction nor is it under the direction or control of any person or authority. In exercising its powers, it is mandated under sub Article (11) to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process. So that where the DPP (its officers) acts contrary to the above stated principles, the court has the duty to intervene to ensure that the DPP acts in accordance with the Constitutional principles.

In the instant case, the IP lodged a complaint with the Director of CID in respect of the disputed land, Nakuru/Municipality 15/792. Chief Inspector James Oludhe, the investigation officer, was mandated to investigate. He has set out in his affidavit what he has unearthed from his investigations. He set out the history of the suit land. He found that the IP had applied for allotment of the land way back in 1984, it was allotted to them; the allotment was accepted by IP, the land was surveyed, a lease document prepared and sent to District Registrar Nakuru but it went missing from there. Later, it was found that one Francis Gichanja had the letter of allotment for the same plot; he was later issued with lease documents but that the documents that resulted in issuance of lease to the said Gachanja were forgeries. The documents of allotment by one Phoebe Amiani, signature of Sammy Mwaita the then Commissioner of Lands, signature of Land Registrar, Githii on the lease, signature of Elijah Ogaro Advocate who allegedly handled the transaction and the letter forwarding lease by Margaret Kanake were all found to be forgeries. The Investigation Officer subjected the documents to forensic examination. The Investigation Officer has further deponed that the disposal of the land by Francis Gachanja was fraudulent. The transaction was facilitated by Mirugi Kariuki Advocate, for whom the 2nd and 3rd applicants work as advocates and they did not only transact but later purchased some of the plots after the land was subdivided; that before sale to the 1st applicant, the land had been sold to one Henry Methu Waitindi a brother to the 3rd applicant. Having considered the depositions of the Investigation Officer. It is my view, that he has found probable cause upon which he could prefer charges and commence criminal proceedings against the appplicants. There is no evidence that he intended to abuse the court process or that he intended to settle any personal vendetta with the applicants.

The applicants also contend that there has been selective prosecution in that there were 7 purchasers of the subdivided land but only the two have been picked upon. However, Francis Gachanja and Kenneth Kariuki Githii have already been charged in Kibera court in CR. 6042/2012. It is also deponed that apart from the 2nd and 3rd applicants being the advocates who dealt with the sale transaction which is suspected to be fraudulent, they went ahead to purchase the same suit land through the 1st applicant. In judicial review, this court has no mandate to consider the sufficiency or otherwise of the prosecution evidence. All that the court is expected to investigate is whether the respondents have preferred the criminal investigations and charges in good faith or are they driven by malice and personal vendetta. None of these were alluded to.

The applicants also allege that the criminal process is meant to bolster the civil case which the IP had filed against the applicants. In **Macharia & Another v AG (2001) KLR 448**, the court held that the court can declare a prosecution to be improper if:-

"(a) It is for purposes other than upholding the criminal law;

It is meant to bring pressure to bear upon the applicants to settle a civil dispute."

Section 193A of the **Criminal Procedure Code** allows for concurrent criminal and civil proceedings over the same issues. The fact that a civil case has been filed is not a bar to the institution of criminal charges based on the same facts. **Section 193A** reads as follows:-

> **"Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings in 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."**

It is the duty of the applicants to demonstrate that the preference of the criminal charges is meant to pressure them into settling the civil case. This was clearly stated in **Kuria & 3 Others v AG (2002) KLR** where the court stated:-

> **"It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is need to show the process of court is being abused or misused. There is a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds for supposing that a criminal prosecution is an 'abuse of the process', is a 'manipulation', 'amounts to selective prosecution' or such other processes or of even supposing the applicant might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts."**

It may be true that both the civil case and the criminal case are based on same facts but in the instant case, the applicants have not even attempted to show that the respondent has tried to get them to settle the civil case or are applying any pressure against them to settle the civil case.

As to the allegation that there has been selective prosecution of the applicants, the court has been told that two people have already been charged i.e. Francis Gachanja and Kenneth Githii. As observed earlier, the onus is on the 1st respondent to determine whom to charge or not based on the investigations and evidence. The depositions of Investigation Officers have not linked the other purchasers or Ikua, Mwangi Advocates to any conspiracy or fraud. In any event, in the end it is for the trial court to determine the merits or demerits of the case once the DPP lays the evidence before it. This court is only concerned with whether due process or conduct of the DPP in preferring the charges is in accordance with his mandate and observance of the constitutional principles under **Article 157(ii)** of the **Constitution.** This court cannot take over the discretion of the DPP to decide whom to charge or not to charge.

The applicants also allege that there is selective choice of the court, that instead of charging the applicants in Nakuru Court, where there are competent magistrates, the charges were filed in Kibera Court in Nairobi. As observed earlier, two other people face related charges in CRC 6042/2012, which were filed in Kibera Court in 2012. This court cannot tell why the prosecution decided to prefer the charges in that court instead of Nakuru. It is obvious they were not preferred in Kibera because of the applicants because they were not yet parties to the proceedings i.e. 2012. If there is any malice, it cannot be targeting the applicants. In any case, the Kibera Court is adjudicated upon by a qualified, competent and impartial magistrate and if the applicants are opposed to the forum, they should raise that objection once they are before that court.

The applicants complained that the respondent disobeyed a court order in that despite the fact that the court when granting leave to commence judicial review proceedings, granted an order of stay, but the respondents went ahead to arrest the applicants and arraigned them in Kibera Court and the plea was only deferred when the court order was served. If there was disobedience of the court order, the applicants

should have commenced contempt proceedings because that issue cannot be considered within this judicial review application. There is specific procedure for prosecuting a contempt of court application.

Would an order of prohibition be granted? The purpose of an order of prohibition is to prevent the making of a contemplated decision. If the decision is already made, the application becomes inapplicable (see CA 266/1998, **Kenya National Examination Council v Rep** ex parte, **Godfrey Githinji**) where the Court of Appeal in considering the nature and scope of prohibition said:-

> **"What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it, but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings."**

The applicants pray for an order:-

> **"that by way of judicial review, this court issues an order of prohibition to restrain the respondents from arresting, charging, threatening to arrest, threatening to charge, harassing and intimidating the subjects…."**

It cannot be contemplated that prohibition would operate to stop a court or quasi judicial body from pursuing an act which has already taken place. In this case, the charges have been filed in Kiberea Court. The decision to prosecute the applicants has already been taken by the DPP and all that was left was the taking of plea and to begin to hear the case.

Having taken into account the pleadings before the court, the issues raised by counsel, the authorities relied upon, in my view, the applicants will appear before a qualified, competent and impartial court of law which is the proper entity to evaluate and determine the weight or lack of it, of the evidence to be tendered against the applicants. Apart from the application being incompetent, it also lacks merit and it is hereby dismissed.

DATED and DELIVERED this 28th day of February, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Njeri holding brief for Mr. Githui for the applicants

N/A for the respondents

Kennedy – Court Clerek