



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL PETITION NO. 33 OF 2011

IN THE MATTER OF: ALLEGED CONTRAVENTION OF
THE CONSTITUTION AND FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLE 22 OF THE CONSTITUTION OF
KENYA

BETWEEN

JAMAL SHARIFF SWALEH.....PETITIONER

VERSUS

1. THE DIRECTOR OF PUBLIC PROSECUTION
2. DISTRICT CRIMINAL INVESTIGATION OFFICER, URBAN
POLICE STATION, MOMBASA
3. JINGO TOURS AND SAFARIS LIMITED
4. ABDULGADER SHARRIF SWALEH
5. OMAR SHARRIF SWALEH.....
....RESPONDENTS

RULING

Before court is the originating Notice of Motion dated 14th June, 2011 by which the applicant seeks *inter alia* the following orders:

“b. THAT pending the hearing and

determination of the present application and the petition, there be a conservatory order to bar and/or restrain the respondents, their officers, servants and/or agents from arresting and or causing to be arrested the petitioner one JAMAL SHARIFF SWALEH and/or from charging, prosecuting and causing to be prosecuted the said JAMAL SHARIFF SWALEH or from taking any further action or causing further investigation on issues pertaining to plot No. 1292/I/MN/Nyali.

3. **THAT the Honourable court do give any such order for the protection and further preservation of the applicant's fundamental rights under the Constitution in addition to prayer 6 above as it may deem just and convenient to grant."**

MR. MOGAKA advocate argued the matter on behalf of the applicant whilst **MR. EGUNZA** acted for the 3rd, 4th and 5th respondents. **MR. JAMII** learned state counsel appeared for the Director Public Prosecution representing the 1st and 2nd respondents. In his submissions Mr. Mogaka gave a clear narration of the dispute whose genesis is actually a land dispute which involves several High Court cases being:

HCCC 484/2011

HCCC 41/2011

HCCC 218/2011

JR 77/2011

The petitioner claims to be the registered owner of plot No. LR 1292/MN. However, the respondents challenge the petitioner's title on the grounds that it was fraudulently acquired. This has resulted in the several suits mentioned above. The bone of contention here is the criminal process instituted by the Director Public Prosecution against the applicant vide criminal case No. 3118 of 2012. This was done during the pendency of orders issued by Hon. Justice (as he then was) J. B. Ojwang on 14th June, 2011 on the following terms:

"Pending the hearing and determination of the instant application, a conservatory order shall issue inhibiting the respondents, their officers, servants and/or agents from arresting and/or causing to be arrested, the applicant and/or from charging, prosecuting and/or causing to be prosecuted the said applicant one JAMAL SHARIFF SWALEH and from taking any further action in respect of plot No. 1292/I/MN."

The effect of this order was clearly to bar any arrest and/or prosecution of the applicant in respect of this matter. However, acting without notice of this order the Director Public Prosecution went ahead to charge the applicant over the issues in dispute on the civil cases. It was submitted by **MR. EGUNZA** for the respondent that it is quite lawful for criminal process to run contemporaneously with the civil process. Even where there exists a dispute over ownership of land if the Director Public Prosecution having carried out investigations finds that certain crimes have been revealed then it is proper and indeed desirable that criminal process be commenced in order to bring any perpetrators to book.

Whilst it is certainly not the intention of this court to bar the Director Public Prosecution from exercising his constitutional mandate to investigate and take action on any crime committed, it is also a fact that courts do not make orders in vain. All court orders once made are binding and must be obeyed unless subsequently varied or set aside. There is no evidence that the orders made on 14th June, 2011 were ever so varied or set aside. Therefore the action taken by the Director Public Prosecution to charge the applicant (though taken in ignorance of the orders made in the civil case) contravened a lawful court order.

As a general rule the Director Public Prosecution has an absolute discretion in deciding whether or not to institute criminal proceedings and the courts will not ordinarily interfere with this discretion. This absolute discretion is enshrined in Article 157 of the Constitution of Kenya 2010 which provides:

"The Director Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."

It is only where there has been shown to be an abuse of court process or a breach of the constitution that the courts will act to interfere with the discretion of the Director Public Prosecutions. In the case of **KENYA COMMERCIAL BANK LIMITED & 2 OTHERS – VS. COMMISSIONER OF POLICE AND ANOTHER, NAIROBI PETITION NO. 218 of 2011** (unreported) Hon. Majanja J. held that:

“The office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the constitution.” [my emphasis].

As submitted by Mr. Egunza the fact that a civil case has been instituted is not a bar to a parallel criminal process. Section 193A of the Criminal Procedure Code provides:

“193A Notwithstanding the provisions of any other written law the fact that any matter in issue in any criminal proceedings is 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 proceeding.”

Is there a contempt of court orders committed by the Director Public Prosecution

Mr. Mogaka for the applicant argues that the institution of the criminal process during the existence of the conservatory orders issued by Hon. Justice Ojwang amounts to a contempt by the Director Public Prosecutions. In **MILTON CRIMINAL LAW AND PROCEDURE VOL. 2 page 164** contempt is defined as follows:

“Contempt of court consists in unlawfully and intentionally violating the dignity repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it.” [my emphasis]

Thus contempt is indeed a serious offence which amounts to an attack on the dignity of the court. The standard of proof in matters of contempt was settled in the case of **MUTITIKA –VS- BAHARINI FARM 1982-881 KAR 863** where it was held that

“A person who knowing of an injunction or an order of stay willfully does something, or causes others to do something to break the injunction or interfere with the stay is liable to be committed for contempt of court as such person has by his conduct obstructed justice.” [my emphasis]

In order for a person to be cited for contempt it must be shown that they were **made aware** of the court order in question. **HALSBURY’S LAWS OF ENGLAND (4th Edition) Vol. 9 at page 37** states:

“As a general rule, no order of court requiring a person to do or abstain from doing an act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.”

Similarly the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 at Rule 23(3) provides that:

“the orders issued in sub rule (1) [conservatory and interim orders] shall be personally served on the respondent or the advocate on record or with leave of the court, by substituted service within such time as may be limited by the court.”

This is an extension of the rule that no person will be condemned unheard. In order to find someone

guilty of deliberately violating a court order it must be shown that said court order was brought to their attention.

MR. JAMII learned state counsel submitted that the conservatory orders were **never** served on the Director Public Prosecutions nor brought to their attention. Indeed **MR. MOGAKA** concedes that no blame attaches to the Director Public Prosecution. He argues that there has been malafides on the part of the 3rd, 4th and 5th respondents in filing multiple suits and in filing complaints with the Director Public Prosecutions. In the circumstances it has been proved that the Director Public Prosecutions acted in ignorance of the conservatory orders thus cannot be held to have been in contempt of the same. Further it is clear that the Director Public Prosecutions having investigated the case found there was sufficient evidence to support a charge and proceeded to institute charges. The fact that the Director Public Prosecutions acted with no knowledge of the civil cases is further evidence that his actions were above board and bona fide. I find no evidence of malafides on the part of the Director Public Prosecutions. There is no evidence that the Director Public Prosecutions is acting upon the instructions of or at the behest of the 3rd, 4th and 5th respondents. Thus I find no reason to bar the continuance of the criminal charges contemporaneously with the civil case. I therefore decline to confirm the conservatory orders issued barring such prosecution and set aside the same orders issued on 14th June, 2011. I further direct that the proceedings in Criminal Case No. 3118/2012 do continue to its logical conclusion. It is so ordered.

Dated and delivered in Mombasa this 14th day of February, 2014.

M. ODERO

JUDGE