



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 297 OF 2012

REPUBLIC.....APPLICANT

VERSUS

CHIEF MAGISTRATES COURT, MILIMANI LAW COURTS.....1ST RESPONDENT

COMMISSIONER OF POLICE.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION DEPARTMENT.....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

EX-PARTE

ANTHONY KARANJA KANG'IRI

JOTHAM MWARIRI NJAMI

JUDGEMENT

The ex-parte applicants (Anthony Karanja Kang'iri and Jotham Mwariri Njami) through the Notice of Motion dated 27th July, 2012 pray for an order of certiorari to remove into this Court and quash all proceedings and orders made in **Nairobi Chief Magistrate's Court (Milimani Law Courts) Criminal Case No. 1022 of 2012 Republic versus Jotham Mwariri Njami and Karanja Kang'iri**. The applicants also pray for the costs of the proceedings.

The application is supported by the chamber summons application for leave, the verifying affidavit of Anthony Karanja Kang'iri and the statutory statement. The application is further supported by the supplementary affidavit sworn by the same Anthony Karanja Kang'iri on 16th November, 2012.

The application is opposed by way of the replying affidavit of Corporal Samwel Kamau sworn on 19th October, 2012. Samwel Njuguna Kithaka who is the complainant in the criminal proceedings was served but did not file any reply.

The 1st Applicant is an advocate of the High Court of Kenya. The 2nd Applicant is a businessman.

According to the statutory statement, the applicants were arrested on 18th July, 2012 and on 19th July, 2012 they were charged before the Chief Magistrate's Court at Milimani (the 1st Respondent) with the offence of conspiracy to defraud. The charges preferred against them were in respect to an immoveable property known as L.R. No 4953/479 within Thika Municipality. At the time of their arrest the property was registered in the name of the 2nd Applicant.

According to the applicants, the property in question had been sold to the 2nd Applicant by a company known as Gatuthu Njuguna Estate Limited in September, 2011. It is the applicants' case that the 1st Applicant has been charged for drawing the sale agreement whereas the 2nd Applicant is charged because he is a purchaser.

The applicants are aggrieved by the decision to charge them and are of the opinion that the charges that have been preferred against them are malicious, false, in total contravention of their constitutional rights and are an abuse of the power and authority of the police for several reasons.

The applicants claim that the vendor of the property namely Gatuthu Njuguna Estate Limited is not the complainant and has never complained. Instead the complainant is one Samwel Njuguna Gitaka who was the executor of the will of the deceased Gatuthu Njuguna. The said Samwel Njuguna Gitaka had already transferred the property to Gatuthu Njuguna Estate Limited prior to the sale of the same to the 2nd Applicant.

The applicants assert that the purported complainant has no right over the property of the deceased and he cannot be defrauded as alleged in the charge sheet. The applicants argue that the 1st Applicant was only involved in the sale of the suit property by virtue of his profession as an advocate and he has never been a party to the transaction and neither has he benefited from the proceeds thereof. He thus cannot be accused of conspiracy. They submit that the 2nd Applicant is an innocent purchaser for value without notice of defect in title.

The applicants aver that the parties who sold the property to the 2nd Applicant have not been charged in the criminal case. They contend that the transfer of the property to the 2nd Applicant was done by the Registrar of Titles on receipt of all necessary documents required for registration. The applicants contend that Samwel Njuguna Gitaka swore an affidavit on 27th February, 2012 in Nairobi High Court Succession Cause No. 172 of 1988 indicating that the title was indeed registered in the name of Gatuthu Njuguna Estate Limited at the time it was sold to the 2nd Applicant.

The applicants stated that some police officers at Muthaiga Police Station were overheard saying that they actually had no case against the applicants but instructions had come from their superiors that the applicants must be locked up and charged in court. According to the applicants this demonstrates that this case is an abuse of the court process. They aver that the fact that the property in question is in Thika and they have been charged in Nairobi only goes to demonstrate the malice behind their prosecution. To them, this shows that the complainant has police officers in Nairobi who work for him.

The 1st Applicant states that he was the complainant's advocate in **SUCCESSION CAUSE NO. 172 OF 1988 IN THE MATTER OF THE ESTATE OF NJUGUNA GATUTHU** and they disagreed after he (1st Applicant) declined the complainant's machinations to fleece the estate of the deceased and he is therefore using the criminal process to get back at him. Further the applicants aver that Hannah Gatuthu and Monica Gatuthu who are the two elderly widows of the late Gatuthu Njuguna and the directors of the company which sold the suit property to the 2nd Applicant have been threatened by the complainant that they would die in jail unless they co-operate with him. Finally, the applicants submit that the criminal justice system is being used to deny them the opportunity of legally earning a living.

The Chief Magistrate's Court at Milimani, the Commissioner of Police, the Director of Criminal Investigations Department and the Director of Public Prosecutions are the 1st to 4th respondents

respectively. The respondents' case is summarized in paragraph 2 of the replying affidavit of Corporal Samwel Kamau in which he avers:

“2. THAT I have read the petitioners’ petition and their verifying affidavit dated 20th July, 2012 plus all the annexures attached thereto and understood the same and wish to respond as follows:

(a) That on 29th May, 2012, I received a complaint from SAMWEL NJUGUNA GITAKA; the executor of the estate of GEOFFREY GATUTHU NJUGUNA, that JOTHAM MWARIRI NJAMI had transferred one of the properties of the deceased namely land parcel I.R 13765 (L.R. 4953/478) to GATUTHU NJUGUNA ESTATE LIMITED on 5th July 2010 and later to himself on 8th March 2012 without the knowledge of SAMWEL NJUGUNA GITAKA; the executor.

(b) The complainant stated that this situation was revealed to him upon conducting a search on the 8th March, 2012.

(c) I commenced investigations into the matter and established that the original will was filed in court in succession case number 172 of 1988.

(d) The complainant gave me a duplicate of the deceased’s will dated 19th January, 1988 which confirmed that he, SAMWEL NJUGUNA GITAKA was indeed the sole executor of the estate of GEOFFREY GATUTHU NJUGUNA.

(e) That my efforts to summon the accused persons bore no fruit; they did not turn up.

(f) From my investigations, I established that there was an agreement made on 28th of September, 2011 between GATUTHU NJUGUNA ESTATE LIMITED and JOTHAM MWARIRI NJAMI regarding the sale of the property under dispute herein whereby the agreed price for the property was Kenya Shillings Thirty Two Million Two Hundred and Fifty Thousand (Kshs.32,250,000.00).

(g) Further investigations revealed that GATUTHU NJUGUNA ESTATE LIMITED was not a registered company in the first place and hence could not legally be in a position to transact any business.

(h) That I also noted that some of the witnesses, namely; SAMWEL NJUGUNA GATHUTHU and JOSEPH KARANJA GATUTHU had failed to sign the said agreement despite their names appearing on it.

(i) Further, the I.D Card No. of PETER NJUGUNA GATUTHU was wrongly quoted.

(j) That I have also received a report from the Government Document Examiner showing that the signature of JAMES NJUGUNA GATUTHU was forged.

(k) Moreover, the complainant was not involved in the said transactions and yet he is the sole administrator of the deceased’s estate.

(l) That upon this evidence, I decided to charge JOTHAM MWARIRI NJAMI and ANTHONY KARANJA KANG’IRI jointly with others not before court in criminal case number 1022 of 2012 which is pending at Milimani Law Courts.

(m) That I have reason to believe that the petitioners were involved in forging the document and consequently obtaining registration by false pretense. I believe the evidence is sufficient to support a prosecution.

(n) That I have seen the sale agreement annexed to the petition stating that they bought the plot legally and the advocate was in the course of his normal business which contradicts the evidence I have on record. I believe here that the veracity of the evidence can only be tested in a trial.”

In reply to the respondents’ case the applicants argue that if the investigating officer had conducted any investigations he would have found that Gatuthu Njuguna Estate Ltd was registered on 25th March, 1988 vide Certificate of Incorporation No. C36888. They submit that there is evidence showing that the complainant is the one who executed an instrument of Vesting Assent on 18th September, 2009 transferring the property to Gatuthu Njuguna Estates Ltd and he was therefore *functus officio*. Further, the applicants state that the document that conveyed the property in question to Gatuthu Njuguna Estate Limited was drawn and presented to the land registry by an advocate called Charles M. Ngugi and the said advocate ought to have been arrested and charged if any crime had been committed.

Judicial review remedies are available where a public body has acted illegally, irrationally or in breach of the rules of natural justice. In order for an applicant to succeed there is need to establish that the decision being challenged contravenes the law, is in defiance of logic and acceptable moral standards or offends the principles of natural justice. The 2nd and 3rd respondents are empowered to investigate offences whereas the 4th Respondent is mandated to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed. These powers must be exercised within the boundaries of the Constitution and the law. As was observed by Odunga, J in **Nairobi H.C. JR Case No. 170 of 2012, REPUBLIC v CHIEF MAGISTRATE’S COURT NAIROBI LAW COURTS & EIGHT OTHERS Ex-parte SIMON NGOMONGE & ANOTHER:**

“The process of the court ought to be invoked in good faith with a view to vindicating the wrongs done to a person and not for the purposes of some collateral advantage which the law does not recognize as genuine. Therefore, whereas in judicial review proceedings the court will not venture into the merits of the criminal charge, in the circumstances of this case, it is clear that the institution of the criminal proceedings is meant to further some other motives other than the vindication of the rights of the complainant.”

The applicants before this Court have demonstrated at length how the prosecution’s case is lifeless. They are asking this Court to find that the prosecution’s case has no chance of resulting in a conviction. That is not the duty of this Court. It is for the trial magistrate to hear and weigh the evidence presented by both sides before arriving at a decision.

The Court of Appeal in **MEIXNER & ANOTHER v ATTORNEY GENERAL [2005] 2KLR 189** clearly established the boundaries of a judicial review court in a criminal trial when it observed that:

“As the learned judge correctly stated, judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through *certiorari* on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.

Having regard to the law, we agree with the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision. The other grounds which the appellants claim were ignored ultimately raise the question whether the evidence gathered by the prosecution is sufficient to support the charge.

The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during

trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

This Court would be overstepping its mandate were it to weigh the allegations of the applicants against that of the investigating officer and agree with one version over the other. The investigating officer has given a detailed account as to why he believes that the applicants committed some crimes. The applicants have, on their part, strongly submitted that no crime has been committed. It is now the duty of the magistrate to hear the evidence of each side and arrive at a decision. The applicants’ attempt to convert this Court into a criminal trial court cannot be allowed to succeed. Judicial review is about the decision making process and not the merits of the decision. The 2nd to 4th respondents should be given the leeway to exercise their constitutional mandates. The fact that the applicants were arrested by the police in Nairobi and not Thika may raise eyebrows but that alone is not sufficient to read any malice or abuse of power by the respondents.

This application fails and the same is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 31st day of March, 2014

W. KORIR,

JUDGE OF THE HIGH COURT