



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 442 OF 2013

BETWEEN

**MUSYOKI KIMANTHI
PETITIONER**

AND

**INSPECTOR GENERAL OF POLICE 1ST
RESPONDENT**

**THE DIRECTOR, CRIMINAL INVESTIGATIONS DEPARTMENT 2ND
RESPONDENT**

THE DIRECTOR OF

PUBLIC

PROSECUTIONS 3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioner is an advocate of the High Court. He has filed the petition dated 5th September 2013 seeking, *inter alia*, to stop his prosecution in ***Nairobi Criminal Case No. 1298 of 2013*** on account of violation of his fundamental rights and freedoms.

Facts

2. At the heart of this case is a property known as ***L.R. No. 1870/V/63*** (“the suit property”) situated along Church Road, Westlands, Nairobi. It is the subject of a dispute regarding ownership in ***Nairobi HC ELC No. 812 of 2012*** between ***Mimosa Investments Limited*** and ***Tom Onyango*** (‘the ***ELC case***’). The petitioner represents Tom Onyango in the case.
3. While the suit was pending, the respondents instituted three criminal cases against Tom Onyango and his relatives; ***Criminal Cases Nos. 432, 587 and 901 of 2013*** for various offences relating to forgery and fraud relating to the title of the suit property. The petitioner was instructed to represent all the accused in the matters. On 28th August 2013 the petitioner was arrested and charged in ***Nairobi City Court case No. 1298 of 2013*** with ten counts of forgery relating to the suit property.

Petitioner's case

4. The petitioner's case is set out in his petition dated 5th September 2013 and his affidavits sworn on 4th September 2013 and 11th October 2013.
5. The petitioner avers that he was instructed by Tom Onyango to represent him in the *ELC case* and while the case was still pending, the respondent instituted *Criminal Cases Nos 432 of 2013, 587 of 2013 and 901 of 2013* against Tom Onyango and his relatives where they were charged with the offence of conspiracy to defraud and forgery in relation to the suit property. The petitioner depones that on 28th August 2013 after he had concluded the day's proceedings on *Criminal Cases No. 432 of 2013* and *901 of 2013* at the City Court, he was arrested and charged with conspiracy to defraud and forgery.
6. The petition alleges that the timing of arrest was suspect as it happened outside court and the charges preferred against him were a replica of those in *Criminal Case No. 901 of 2013* facing his clients. In the course of his arrest, his client's file containing documents in connection with *Criminal Case No. 901 of 2013* was confiscated. He further avers that he was neither informed of the reason of his arrest nor had he been summoned to answer any accusation levelled against him. He avers that although the charges levelled against him and Tom Onyango relate to forgery and conspiracy to defraud, no allegations of fraud were made in the *ELC case*.
7. The petitioner argues that his fundamental rights and freedoms under **Articles 25, 28, 31 47 and 50** of the Constitution were violated. He contends that at all material times he acted on behalf of his client in good faith and that when the *ELC case* was filed there were no allegations of fraud or forgery made against his client. He depones that the investigation into alleged forgery were triggered by the fact that he filed, on behalf of his client, a replying affidavit to which he annexed the documents received from his client to demonstrated the ownership of the suit property.
8. The petitioner became aware that the police had commenced an investigation into the authenticity of the title documents in his client's possession. Consequently and on his own motion, he secured an appointment with the Officer in Charge of the Forensic Document Examination Unit on 2nd April 2013. On the date of the appointment he carried with him his client's title document and the searches that he procured to confirm the authenticity of the title. Unfortunately, the meeting between him and the investigating officer was not useful as the Investigating Officer declined to examine the documents in his possession.
9. After the police concluded the investigation and made finding adverse to the petitioner's client, the plaintiff in the *ELC Case* now asserted that the title document held by Tom Onyango was a forgery by dint of the examination reports provided by the Police. In order to respond to the plaintiff's allegations, the petitioner decided to write to the Land Registrar to confirm the authenticity of the title in his client's possession. He wrote a letter dated 8th May 2013 which he gave a Mr Njeru to deliver to the Lands Office. The petitioner avers that Tom Onyango has introduced Mr Njeru to him. Mr Njeru, who swore an affidavit sworn on 11th October 2013, confirms that he personally delivered the letter to the Lands Office to an officer he personally knew. The said officer promised that he would call him back as soon as a response to the letter was forthcoming. Mr Njeru depones that he received the call from the said officer that the petitioner's letter had been acted upon and that he could collect it. Mr Njeru collected the said letter and handed it over to the petitioner. The alleged response from the Chief Land Registrar, is a letter dated 16th May 2013 which confirms that the suit property is in the name of one Ashok Kumar Sood, the person from whom Tom Onyango claims to derive his title. The accusation facing the petitioner is that he forged the acknowledgment stamp on the letter dated 8th May 2013 to the Land Registrar and that likewise the letter made in response was a forgery.
10. The petitioner contends that the purpose of the criminal charges is to intimidate him and prevent him from discharging his legal duties towards his clients. He accuses the police of abusing the

process and avers that the matter in issue is already subject of court proceedings that will determine the true owner of the property. Counsel for the petitioner relied on the case of **Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and Others Nairobi CA Civil Appeal No. 56 of 2012 [2013]eKLR** to fortify his arguments.

Respondents' Case

11. The respondents filed a replying affidavit sworn on 25th September 2013 by Corporal Arthur Onyango Owade. He deposes that he received a complaint from *Rachier and Amollo Advocates* representing Mimosa Investments Ltd. The letter states as follows;

15th January 2013

The Criminal Investigation Department (CID)

Land Frauds department,

Kiambu Road Opp. Forestry Department Headquarters,

P.O. Box 30036-00100,

NAIROBI

*Att:*****

Dear Sir,

INVESTIGATION OF TWO SIMILAR TITLE DEEDS PRODUCED IN CIVIL SUIT NO. 812 OF 2012 BETWEEN MIMOSA INVESTMENTS LIMITED AND TOM ONYANGO

We refer to the above matter where we act for Mimosa Investments Limited who filed a suit on the 8th November 2012 against one Tom Onyango for the recovery of all that parcel of land measuring approximately 0.2158 hectares known as LR No. 1870/V/63 (hereinafter referred to as the "suit property") whereto was attached a copy of the title document for the suit property in the name of our client.

Kindly note that we have since then received a Replying affidavit sworn in the name of Mr Tom Onyango where a title grant was attached to the said affidavit which bore similar details clearly shows that one of them was fraudulently acquired. Our client maintains that his documents are authentic and we therefore write to get assistance from your office to establish the authenticity or otherwise of the two documents and we implore you to take necessary action thereafter.

Attached hereto are copies of the two conflicting title documents.

We kindly but urgent request you to deal with the issue herein considering the result of your investigation will be conclusive proof of the pending court matter.

Yours faithfully,

RACHIER AND AMOLLO ADVOCATES

12. Cpl Onyango proceeded with investigation to ascertain the authenticity of the plaintiff's

documents and defendant's documents in the **ELC Case**. At the conclusion of the investigation he formed the opinion that the property belonged to the plaintiff in the **ELC Case**. As regards the letter dated 8th May 2013 written by the petitioner to the Chief Lands Registrar seeking confirmation as to who the proprietor of the property and the response from the Land Registrar contained in the letter dated 16th May 2013, Cpl Onyango states that investigation ascertained that the letter dated 16th May 2013 was a forgery and that the petitioner's letter dated 8th May 2013 was not received in the Lands Registry as alleged neither did the receiving stamp on it emanate from the said registry.

13. He denied that the petitioner's file was confiscated rather, an acknowledgment deed dated 30th November 2013 bearing the petitioner's signature was obtained with his consent and an inventory taken with the purpose of conducting forensic examination on the petitioner's signature. He avers that the result of the forensic examination was that the petitioner was the author of the forged letters.
14. The respondents aver that due to his findings that the petitioner was aware that the letters were forgeries and used them in a bid to defraud the legitimate proprietor of the suit property; he inferred that the petitioner was involved in conspiracy to defraud. The respondents further submit that based on the aforesaid the respondents acted within their mandate to investigate a legitimate complaint and prosecute the petitioner and the petition is without merit and ought to be dismissed.

Determination

15. I have considered the petition, depositions and the written submissions of the parties herein. The question at the heart of this matter is whether the respondents acted within its mandate when they ordered the prosecution of the petitioner and whether the criminal proceedings are an abuse of the court process. Both parties cited various authorities that emphasise the mandate of the Police Service to investigate complaints and that of the Office of the Director of Public Prosecutions to prosecute offences. The decisions cited emphasise the extent of the inherent jurisdiction of the High Court to intervene in their respective mandates. (See generally *Joram Mwendwa Guantai v The Chief Magistrate Nairobi*, Nairobi CA Civil Appeal No. 228 of 2003 [2007]eKLR, *Mohamed Gulam Fazal and Another v The Chief Magistrates Court Nairobi* Nairobi HC Misc No. 367 of 2005, *Investments and Mortgages Bank Ltd v Commissioner of Police and Others* Nairobi Petition No. 104 of 2012, *Republic v Attorney General ex-parte Ng'eny* CA No. 448 of 2003, *Stanley Munga Githunguri v Republic* [1985]KLR 91, *Meixner and Another v Attorney General* [2005] 1 KLR 189, *Thuita Mwangi and Other v Ethics and Anti-Corruption Commission and Others* [2013] eKLR.)
16. That mandate of the Office of the Director of Public Prosecution ("the DPP") is found in **Article 157** of the **Constitution** which provides, in part, as follows:
 - (4) *The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction...*
 - (6) *The Director of Public Prosecutions shall exercise State powers of prosecution and may-*
 - (a) *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;...*
 - (11) *In exercising the powers conferred by this Article, the Director of Public Prosecution shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process...*
17. In light of the mandate conferred upon the DPP in **Article 147** of the Constitution, the High Court

therefore ought not interfere with the above mandate unless cogent reasons are given thus; that the DPP has acted without due regard to public interest, against the interest of the administration of justice and has not taken account of the need to prevent and avoid abuse of court process. Although the DPP has the discretion to determine which complaint should lead to a criminal prosecution, the High Court may intervene where that discretion has been abused or where the effect of the proceedings results in the abuse of the court process.

18. Ultimately in considering these factors, each case must be determined on its own merits. In this case it is clear that the complaint was based on the proceedings of the **ELC Case**. The letter dated 15th January 2013 which I have quoted above is clear that the complainant intended to use the police to investigate the veracity of the title documents before the High Court in order to establish its case.
19. I am aware that the **section 193 A** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** permits parallel proceedings involving the same subject matter in the a civil and criminal court. I am mindful of what the Court of Appeal stated in **Commissioner of Police and Other v Kenya Commercial Bank and Others (Supra)** that, *“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”*
20. I find and hold the purpose of the lodging the complaint was to assist the plaintiff in the **ELC Case** make out its case that the defendant’s title to the suit property was a forgery. The very purpose of the civil proceedings was to establish the owner of the suit property and the police were drawn in to assist the plaintiff make out its case.
21. In **Stanley Munga Githunguri v Republic (Supra)**, the Court emphasised that the High Court has inherent power to stop a prosecution that amounts to an abuse of the court process, is oppressive and vexatious. The facts I have outlined are clear that the petitioner was at all material times the advocate for the plaintiff in the **ELC Case**, he acted in the best interests of the client in accordance with the dictates of the legal practice. The letter petitioner confirms that he wrote the letter which made the inquiry to the Land Registrar about the authenticity of the title. There is no evidence that he delivered it and no inference can be made that he forged the delivery stamp when a third party affirmatively states the he effected delivery and procured a response to it. In my view therefore, the criminal proceedings are in the circumstances of this case oppressive to the petitioner and must be stopped.

Disposition

22. The upshot of my findings above is that if the criminal case against the petitioner continues, it will amount to an abuse of the court process. These then are my orders;
 - a. **An order of certiorari be and is hereby issued removing into the High Court quashing the entire proceedings in Criminal Case No. 1298 of 2013, Republic v Musyoki Kimanathi.**
 - b. **The 2nd respondent is restrained from prosecuting the said Musyoki Kimanathi in respect of offence related to Nairobi HC ELC Case No. 812 of 2012 and the property known as LR No. 1870/V/63.**
 - c. **The respondents shall bear the costs of the petition.**

DATED and DELIVERED at NAIROBI this 14th day of April 2014.

D.S. MAJANJA

JUDGE

Mr Karori with him Mr Kibanga instructed by Munga Kibanga and Company Advocates for the petitioner.

Mr Ndege, instructed by the Directorate of Public Prosecutions, for the respondents.