



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NUMBER 550 OF 2012

DR. PETER G WILFRED NJIRI. PLAINTIFF

VERSUS

DANIEL NDUNGU T/A D NDUNGU & COMPANY. DEFENDANT

R U L I N G

The application before the court is the Notice of Motion dated 6th November, 2012. It seeks mainly, the instant stay of criminal proceedings in Kibera Criminal Case Number 5181 of 2011 and Advocates Disciplinary Tribunal Disciplinary Cause Number 50 of 2012, both against the Defendant in this case, Daniel Ndungu.

The ground upon which this application is based is effectively that the determination by this court of this civil case shall or is likely to negatively affect him and render a fair trial to him difficult or impossible.

The applicant argued that the Plaintiff herein is also the complainant in the other abovementioned cases while the Defendant herein is also the accused in the said two cases aforesaid. The Applicant accordingly argues that an earlier determination of this civil suit, will necessarily later influence the finding in the cited cases both of which are of a criminal nature and affect the right of personal freedom of the applicant/Defendant herein. He further argued that the particulars of fraud arising from the Ksh.10,000,000/- paid by the Plaintiff to the Defendant are in essence, the substratum of the criminal charges in the Kibera Criminal case and in the disciplinary case in the tribunal. The Applicant finally argued that in case of a conviction against him in the two cases the likely appeal by him will be to this court which should accordingly stand clear of the matter by not effectively tying its hands at this moment.

The Respondent's response was to the effect that this court is capable of independently and fairly handling this civil case without tying its hands. That the legislature foresaw applications such as this, forthcoming and that to forestall such cases, it proceeded to amend section 193 of the Criminal Procedure Code by providing Section 193A thereof. The Respondent/Plaintiff accordingly urged this court to dismiss this application and allow the Plaintiff to recover the sum of Ksh.10,000,000/- paid to the applicant by the Plaintiff as a stakeholder in a sale transaction.

I have perused the content of the Plaintiff/Respondent's claim in the plaint. I have also carefully considered the representations from both sides. I observe that in this case the Plaintiff/Respondent sought to recover from the Defendant/Applicant a sum of Ksh.10,000,000/- had and received by the Defendant as

a stakeholder in the process of an intended purchase of pieces of land – L.R. No. Kajiado/Kisaju/1292 and L.R. No. Kajiado/Kisaju/1293, in the year 2011. That is after he had filed complaints with the police in respect of the said amount of Ksh.10,000,000/- having been obtained by and held away in a fraudulent manner. If facts and evidence so confirm in a criminal trial, the Applicant might be found guilty of the criminal charges and be punished as provided by the law.

In this case before me, on the other hand, the Plaintiff is seeking recovery of the funds obtained from him in a land sale transaction which failed. On the face of things, the Plaintiff is entitled to recover the money. Whether or not he succeeds in doing so will depend on evidence before the court as applied within the law as it is.

The Applicant/Defendant opines that a finding in a civil claim that the Applicant/Defendant ought to refund to the Respondent/Plaintiffs money received lawfully or otherwise by the Applicant as a stakeholder in a failed land sale transaction, will prejudice the results in criminal cases arising from the same transaction. This court does not however share that view with him. First and foremost, the standard of proof in a civil case is much lower – the same being on the balance of probabilities. Such a finding will not be adequate to influence the trial court in a criminal case where the standard of proof is beyond a reasonable doubt. So the applicant should have no cause to fear.

Secondly, the law, as provided in Section 193A of the Criminal Procedure Act, is quite clear. It provides thus: -

“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 proceedings.”

I understand the above provision to mean that no civil proceedings, such as those in this case, shall stand on the way of a criminal proceeding or trial such as those now going on at Kibera Chief Magistrate’s Court in Criminal Case Number 5181 of 2011. That is so whether the Civil and Criminal Proceeding in question arise from the same document or are based on the same issues and are therefore concurrent. Not even the imposition of penalty or fine in a criminal trial will necessarily relieve a person, such as the applicant herein, from liability to answer a civil claim, as provided by Section 62 of the Interpretation and General Provisions Act, Cap 2.

In this application the applicant has not deponed that he is not getting a fair trial in the process of the trial of the criminal charges in the Kibera Court Criminal Case Number 5181 of 2011. While in my view, this is not the right court before which the Applicant should test the legality or constitutionality of Section 173A of the Criminal Procedure Code in the face of Article 50(1) of the Constitution, I would on my part hold that each of the three tribunals – the High Court handling this case, the Chief Magistrate’s Court handling Criminal case No. 5181 of 2011 and the Advocates Disciplinary Committee handling Cause Number 50 of 2012, are properly and lawfully and competently handling the related matters before them. In my further view, the applicant’s invocation of Article 50 aforesaid is done in vain and with the sheer intention to block or delay lawful proceedings before the tribunals.

I accordingly find this application misguided and without merit and hereby dismiss it with costs. Orders accordingly.

Dated and delivered at Nairobi this 24th day of September, 2014.

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JUDGE