



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 229 OF 2014

ESTHER NYAMUIRU MUCHIRIPETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION1ST RESPONDENT

JAMES IGAMBA2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner has filed the present petition alleging violation of her constitutional rights pursuant to her arrest and arraignment in court in Kiambu Criminal Case No. 889 of 2014. In the petition dated 13th May 2014 supported by the petitioner's affidavit of the same date and submissions dated 14th July 2014, the petitioner seeks, among others, a declaration that the criminal proceedings against her are in contravention of her fundamental rights under Article 50(1) of the Constitution.
2. The facts that give rise to this petition relate to a transaction for sale of two parcels of land, L.R No 2271815 and 6 which allegedly belonged to the petitioner's late husband, by the petitioner to the 2nd respondent. The petitioner claims that she and the 2nd respondent entered into an agreement for the sale of the land for Ksh13 million; that the 2nd respondent paid Kshs 1 million as a deposit but defaulted on the payment of the rest on the due dates, though the petitioner concedes receipt of Kshs 13 million.
3. She states that the 2nd respondent then started complaining that the petitioner had sold to him land which he could not constrict on, while alleging that the 2nd respondent did not indicate to her the purpose for purchasing the land and such purpose was not put in the sale agreement. She avers that she later got information through her advocate that the two plots she had sold to the 2nd respondent belonged to Nairobi Water and Sewage Company, but that her request to be furnished with the titles to the said company limited were not forthcoming.
4. The petitioner alleges that she has not been accorded a chance to provide her side of the story in the mater leading to the criminal proceedings. The basis of her claim is that she was charged in court without having recorded a statement with the investigating officer, and that she was not told why the charges of obtaining by false pretences were levelled against her. She also alleges that

the criminal case is a violation of her right to a fair trial and protection from double jeopardy.

5. The petitioner claims that the dispute between her and the 2nd respondent is purely civil in nature and cannot give rise to a criminal charge in any way. She contends that the 2nd respondent is using the 1st respondent to coerce her to agree to an out of court settlement on his terms; that he had instituted ELC No 100 of 2014 in which he was seeking refund of sums of money paid to the petitioner, and it is her contention that the suit filed against her by the respondent is the right suit and procedure for the settlement of the dispute between the petitioner and the respondent.
6. She contends that the criminal case is intended to force her to arrive at a settlement with the respondent. She relies on correspondence between the 2nd respondent and the then Nairobi City Council and Nairobi Water and Sewerage Company seeking a relocation of the pipes on the subject land and the response by the Council that the land is not suitable for construction.
7. It is her submission that her rights shall be contravened if the criminal prosecution proceeds and she prays that the case be terminated as being in contravention of her constitutional rights.
8. With regard to the provisions of section 193A of the Criminal Procedure Code, it is her submission that the charge of obtaining by false pretences cannot be supported by the evidence and the facts contained in the matter before the Kiambu Court. To the respondent's submission that the petitioner had made a statement, Mr. Opere submitted that the statement exhibited by the respondent was not signed, nor had a statement that she had refused to sign. He contended that the petitioner had demonstrated violation of her right to a hearing under Article 25 in that she was not given ample time to respond to the allegation before the charges were preferred against her. She therefore asks the court to grant the following orders:
 - a. ***A declaration that the criminal proceedings no 889 of 2014 is contravention of the fundamental rights of the petitioner relating to fair trial as per section 50(1) of the Kenya constitution***
 - b. ***A declaration that the failure by the 1st respondent to conduct proper investigation in this matter is a violation of the petitioners rights to fair administration of justice envisaged under section 47(1) of the Kenya Constitution.***
 - c. ***That the institution of the criminal proceedings in Kiambu are a violation of the petitioner's rights envisaged under section 25(a) and section 25(c) of freedom for inhuman or degrading treatment or punishment.***
 - d. ***The failure existence of parallel cases against the petitioner amounts to double jeopardy and the court has powers to intervene under its supervisory jurisdiction.***
 - e. ***That the institution of the criminal proceedings in Kiambu is a violation of the petitioners rights to human dignity envisaged under section 28 of the constitution.***
 - f. ***That the arrest and subsequent incarceration of the petitioner on 19/3/2014 and 20/3/2014 are an attach on the petitioners rights to freedom and security as envisaged under section 29(a) of the constitution.***
 - g. ***That it is the interest of justice that the orders herein be granted.***
 - h. ***Costs of the petition***
 - i. ***Any other/further orders this Honourable Court may deem to grant***

The 1st Respondent's Case

9. Ms. Spira for the 1st respondent relied on the affidavit in reply sworn by PC Christopher Gatuir Force No 71093 on 3rd June 2014, grounds of opposition dated 21st May 2014 and submissions dated 23rd July 2014 in opposing the petition.
10. In the said affidavit, **PC. Gatuir**, who is attached to the Directorate of Criminal Investigation in Kiambu, states that he was assigned the investigation of the 2nd respondent's complaint. He recorded statements from both the petitioner and the 2nd respondent when he started investigating the matter on or about the 10th day of October, 2013. He states that his investigations revealed that the petitioner fraudulently and without a color of right subdivided that parcel of land known as LR 7022/8 into two parcels namely LR/22718/5 and LR 22718/6 and entered into a sale agreement with the 2nd respondent, without the consent of the City Council, for the price of Kshs. 14, 000, 000/.
11. PC Gatuir avers that the parcels of land belonged to the petitioner's late husband one Francis Muchiri who pursuant to an agreement made between himself and the defunct Nairobi City Commission was compensated for the use of the land as a wayleave by the Commission. Despite knowing of the existence of the agreement between her late husband and the defunct Nairobi City Commission, the petitioner went ahead and entered into the sale agreement dated 27th August 2012 with the 2nd respondent.
12. PC Gatuir further avers that at the time of entering into the sale agreement, the petitioner had not obtained letters of administration of her late husband's estate, and she was not the sole administrator of the estate in the Succession Cause No. 1397/2012 as one James Robert Muchiri was her co- administrator and ought to have been party to the said sale agreement; and that the application for letters of administration did not include LR 22718/6 which is one of the parcels listed in the sale agreement dated 21st August 2012.
13. PC Gatuir avers that further investigations revealed that there are two huge pipes and a concrete washout pipe laid across the two parcels of land by the defunct Nairobi City Commission deterring any form of development on the said parcel of land and that the petitioner failed to disclose these details to the 2nd Respondent at the time of signing the agreement.
14. He states that upon inquiry from the Nairobi Water and Sewerage Company, it was established that the petitioner was to seek consent of the Council before making any commitments and was required to further inform the Council before any sale. He further avers that upon review of the evidence on record the 1st respondent recommended that the petitioner be charged with offences that are known to law.
15. To the contention that the petitioner was not given a chance to record her statement, Ms. Spira referred the court to the annexure 'CG1' in the replying affidavit of PC Gatuir which is a statement recorded by the petitioner.
16. She denied the claim that the petitioner would be subjected to double jeopardy, submitting that the principle can be raised as a defence in the trial court, but does not arise as the petitioner has never been arrested, charged or convicted on the same facts as are presently before the court in Kiambu.
17. Ms. Spira submitted further that the office of the DPP is an independent office and is not subject to the control of any office or authority, and that therefore the allegation that it was being used to force the petitioner to enter into an out of court settlement had no basis.
18. It was the 1st respondent's submission that it received the investigation file, analysed the evidence and determined that it was sufficient for the petitioner to be charged with the offence. It was also Ms. Spira's submission that section 193A was clear that the pendency of a civil claim was no bar to criminal prosecution. She submitted that the petitioner has failed to prove the violation of her rights or her claim that the criminal charges were instituted to harass her. It was her contention

that the changes were instituted to enforce the criminal law, relying for this submission on the case of **Thuita Mwangi & Others vs Ethics and Anti corruption Commission and 3 Others**, and she prayed that the petition be dismissed with costs.

The 2nd Respondent's Case

19. Mr. Chahenza, Counsel for the 2nd respondent, adopted the submissions made on behalf of the 1st respondent. He also relied on the affidavit of the 2nd respondent sworn on 26th June 2014 and submissions dated 15th August 2014.
20. In the said affidavit, the 2nd respondent avers that on or about the 27th day of August, 2012, the petitioner offered to sell to him, and he agreed to buy, L.R No. 22718/5 and L.R No. 22718/6 situate within Kiambu County at a sum of Kshs. 14,000,000.00. An agreement for sale was entered into, the terms of which were that he would pay the amount in instalments. He paid a total of Kshs 13,000,000 towards the purchase.
21. The 2nd respondent avers further that at the time the sale agreement was entered into, the petitioner passed herself off as the sole Administrator of the estate of the late **Francis Kimani Muchiri (deceased)**.
22. It is also his deposition that prior to the completion date but after he had paid the said Kshs 13,000,000.00 to the petitioner, he found out that the petitioner did not have a clean title to the property; that at the time of execution of the agreement of sale she was not the administrator of the deceased's estate and was therefore intermeddling in the estate of a deceased person; that the registered owner of the properties, Francis Kimani (deceased) had in the year 1990 or thereabouts, under the Wayleaves Act {Cap 292 of the Laws of Kenya} (repealed) granted the then Nairobi City Commission rights of easement and way leave on the properties, for which he was compensated by the Government.
23. He avers further that the Government through the Nairobi City Commission thereafter laid drains or pipeline into, through, or under the said properties, which occupy a surface area of approximately 0.512 of an acre and measure approximately 18 metres by 110 metres. The government also imposed the condition that no permanent structure ought to be constructed on the properties, and he was therefore not able to use the properties for the purpose of construction, which is what he had intended.
24. He avers that the petitioner knew that the suit properties could not be used for any permanent developments, and that she obtained the sum of Kshs. 13,000,000.00 from him with intent to defraud as she knew or must have known, as the spouse of the deceased, that the properties were of little commercial value and had laid fallow since 1990. Mr. Chahenza submitted therefore on behalf of the 2nd respondent that there was probable cause to charge the petitioner as she had offered to sell the land in dispute to the 2nd respondent without disclosing that the land had been encumbered by the Nairobi City Council.
25. It was also his case that no evidence had been adduced to prove that the 2nd respondent was using the DPP to harass the petitioner; that all the 2nd respondent did was make a complaint after which law enforcement took over the matter, investigated and charged the petitioner; that the offence is known in law; and the court before which she is charged has jurisdiction to determine whether the matter is criminal or civil within the jurisdiction of the court. The 2nd respondent therefore asked the court not to interfere with the criminal case and to dismiss the petition with costs.

Determination

26. The issue that this petition raises is fairly simple. The court must consider whether there has been

a violation of the petitioner's rights under Articles 25(a), 25 (c), 28, 29 (a), 47 (1) and 50(1) and 502)(o) of the Constitution in her being charged with a criminal offence in Kiambu Criminal Case No. 889 of 2014.

27. In determining this issue, I will start with my observations in **High Court Petition No 482 of 2013 (Consolidated with Petition No 483 of 2013) Weldon Kechie Langat & Another –vs- The Director General of Police & Another:**

“...the fact that criminal charges are preferred against a person is not a violation of constitutional rights. The criminal justice system is underpinned by the Constitution, with safeguards placed in the Constitution and statute to ensure protection of the rights of accused persons. Further, the discretion on when and whether to bring criminal proceedings against a party is vested in the Director of Public Prosecutions, who under Article 157(10), must be independent and not subject to the direction or control of any party.”

28. Articles 157(10) and (11) provide as follows with regard to the exercise of power by the 1st respondent:

“The Director of 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.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions 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.”

29. The petitioner has alleged that the 1st respondent is being used by the 2nd respondent to coerce her into settling a civil dispute on terms favourable to the 2nd respondent, and that there is therefore an abuse of the powers of the 1st respondent.

30. The court will only be entitled to interfere with the exercise of powers by the Director of Public Prosecutions if it is clearly demonstrated that he has acted without due regard to the public interest, has acted against the interests of the administration of justice, or has not taken account of the need to prevent and avoid abuse of the process of the Court. In considering a similar allegation of abuse of the powers of the Director of Public Prosecutions, the Court (Majanja J), in the case of **Peter George Anthony D'Costa vs AG & Anor, Petition No. 83 of 2010**, observed as follows:

“The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is a breach of the petitioners' fundamental rights as the petitioner will not receive a fair trial. It is the duty of court to stop such abuse of the justice system.”

31. Similarly, in **Thuita Mwangi Ors –vs- The Ethics & Anti-Corruption Commission & 3 ORS Consolidated Petitions No. 153 & 369 of 2013**, the court stated as follows:

“The Court may only intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of court process.”

32. I am also guided by the words of the court in the case of **Michael Monari & Another vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011**, in which the court (Warsame, J. as he then was) stated as follows:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

33. In this case, the crux of the petitioner's grievance is that she was not asked to record a statement prior to being charged, and that the substance of the charges against her are civil in nature and the 2nd respondent has already filed a civil claim. This second limb of her complaint is easily disposed of. Section 193A of the **Criminal Procedure Code** is clear:

"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"

34. So long as the Director of Public Prosecutions has sufficient evidence to justify the bringing of criminal proceedings against a person, the court will not interfere with his discretion. It is for the trial court to determine whether or not such evidence is sufficient to sustain a conviction. The fact that the same set of facts may give rise to a civil claim is no bar to the prosecution.

35. Further, the prosecution of the petitioner while there is a civil claim pending does not, as she alleges, violate the prohibition against double jeopardy contained in Article 50(2)(o), that every accused person has the right ***"not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted."***

36. The wording of this provision is clear, that one must have been tried and convicted or acquitted of the offence arising from the acts or omissions in question for the double jeopardy prohibition to apply. The existence or otherwise of a civil suit is not applicable, and this Article is therefore of no avail to the petitioner.

37. Has there been a violation of Article 47(1) in respect of the petitioner? It is not clear from the material before me how violation of this right is said to have arisen. Perhaps it is connected to the allegation that the petitioner was not asked to record a statement before she was charged in court. However, I note from the affidavit of PC Gatuiri that there is a statement taken from the petitioner, and when confronted with this statement, her response through her Counsel was that she did not sign it. I am, however, unable to find any violation of Article 47 in this regard.

38. The allegations of violation of Articles 25, 28 and 29 are also, in my view, without foundation. Article 25 sets out the rights in the Bill of Rights that cannot be limited under the limitations permitted under Article 24. With regard to Articles 28 and 29, the petitioner has not demonstrated how the rights guaranteed by these Articles, to dignity and security of the person respectively, have been violated by her being charged in a process that is legal and underpinned by the Constitution.

39. There is therefore no merit in the present petition. It seems to me to be an attempt to avoid a

reckoning with the criminal justice system, and therefore amounts to an abuse of the court process.

40. It is therefore dismissed with costs to the respondents.

Dated Delivered and Signed at Nairobi this 18th day of December 2014

MUMBI NGUGI

JUDGE

Mr Opere instructed by the firm of Njeru Gichovi & Co. Advocates for the Petitioner

Ms Spira instructed by the Office of Director of Public Prosecution for the 1st Respondent

Mr Chahenza instructed by the firm of Soita & Associates advocates for the 2nd respondent