



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 10 OF 2014

ASHOK KUMAR RAMBHAJI PATEL.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS & 3 OTHERS.....RESPONDENTS

J U D G M E N T

1). The petitioner's petition dated 19-6-2014 prays for the following reliefs:

1). A declaration that the petitioner's constitutional rights to equal protection and equal benefits of the law, non discrimination, fair hearing and not to be subjected to cruel treatment and torture (mental or otherwise) and to protection against inhuman and degrading treatment have been grossly infringed and violated by the 1st, 2nd and 3rd respondents.

a) That this application/petition be certified as urgent and be heard ex-parte in the first instance with respect to prayer 2 of this application.

b) That the honourable court be pleased to order the stay of any further proceedings against the petitioner in Kisumu Chief Magistrate's Criminal case No. 257 of 2014, Republic -VS- AshokKumar Rambhai Patel pending the hearing and determination of this application inter parties.

c) That the honourable court be pleased to order the stay of any further proceedings against the petitioner in Kisumu Chief Magistrate's Criminal case No. 257 of 2014, Republic -VS- AshokKumar Rambhai Patel pending the hearing and determination of the petition filed herein.

d) That a date for inter partes hearing be given.

e) That the costs of the application and petition be provided for.

2). The issue for consideration in this matter is whether this court should intervene to prohibit the respondents from proceedings with the prosecution of the petitioner vide Kisumu Chief Magistrate Criminal Case No. 257 of 2014.

Facts

3). The simple facts of the case are that the petitioner and his late brother Jayantibhai Rambhai Patel operated a business going by the name Foamat Supermarket Limited which they later disposed off in the year 2006. After such disposal, the two brothers decided to register the company property on which Foamat Supermarket was situate into their names. They both relocated, where the petitioner moved to Australia and his late brother moved to London wherein he passed on.

4). After the demise of his brother, that is when all trouble began. The petitioner traveled to Kenya and in the company of his late brothers' sons accessed the safe at Bank of Baroda wherein all the title documents to their various properties were kept including certificate of lease to Kisumu Municipality Block 7/387 the subject matter herein Kisumu Municipality Block 10/498 and Kisumu Municipality Block 10/499. The petitioner later obtained a copy of his late brother's death certificate and transferred the land into his name claiming that theirs was joint tenancy and the property automatically devolved upon his brother's demise.

5). Subsequently, upon discovery of the new registration, the deceased sons lodged a complaint with the CID alleging that the petitioner had fraudulently transferred property belonging to him and their father into his own name without their involvement. It was also their allegation that the petitioner obtained their father's death certificate by deceiving their mother. At the same time, the petitioner also filed complaints against his deceased brother's sons stating that they had fraudulently transferred Kisumu Municipality Block 10/498 and 10/499 into their names while the property were jointly owned by him and his late brother.

6). The CID carried out their investigations and on 27th June 2013, they wrote a letter to the office of the DPP reiterating the outcome of their investigations and requesting to be advised on how to proceed with the matter. It is surprising that the office of the DPP took a whole year to respond to the letter and on 13th May 2014, the Senior Director of Public Prosecution wrote back advising the CID County Commander to prefer charges against the petitioner. In that letter he stated thus:

“I do hereby concur that there is prima facie evidence established against Ashok Kumar Rambhai Patel on the offence of obtaining registration by false pretence contrary to section 320 of the Penal Code. Have him traced, arrested and charged for the said offence”.

7). The petitioner was subsequently arrested and arraigned in court on 27th May 2014 charged with three counts all relating to the transfer of the subject matter. As all this was happening, the two sons of the deceased had filed a civil suit KSM HCCC NO. 14 of 2012 at the Lands and Environment court on 27th June 2012 with respect to Kisumu Municipality Block 7/387 and the same was ongoing as criminal charges were preferred against him. Being aggrieved by the criminal proceedings preferred against him, the petitioner filed this petition seeking several prayers as outlined in the petition.

Petitioner's Case

8). The petitioner's case is premised on Articles 10, 27 and 50 of the Constitution. It is his case that his constitutional rights guaranteed under the above mentioned Articles of the Constitution are likely to be violated by selectively preferring charges against him whilst the land registrars who effected the transfer go scot free. It is also his case that he was discriminately charged while his nephews were not, yet he had also made a complaint involving them to the CID officers concerning parcels 10/498 and 10/499.

9). Further to that, it was his view that his nephews intended to use the criminal case to obtain information which they would use in the civil matter at the land and Environment court. It is his view that being charged years after the investigations had been finalised and two years after filing the civil suit was an abuse of the legal process, inhuman and cruel. He therefore prayed for his petition to be allowed.

The 1st, 2nd and 3rd Respondents' Case

10). The 1st, 2nd and 3rd respondents vide a replying affidavit sworn by D.N. Ogoti, the Senior Assistant Director of Public Prosecution. The 4th respondent did not file any reply. In his affidavit, Mr.

Ogoti stated that the 1st and 3rd respondents are state officers occupying constitutional offices under Article 157 (1) and 245 (1) and they are mandated to exercise state powers of prosecution which powers they have exercised in accordance with the constitution. He further stated that the petitioner had failed to demonstrate how his rights as alleged have been violated.

The 5th Respondent's Case

11). The 5th respondent in his affidavit sworn on 23rd July 2014 stated that the petitioner effected the transfer of the subject parcel land through fraud and as such criminal proceedings are in order. He stated that transfer was effected after his father's death. It is his case that they only accessed the safe in which the original title documents were kept in January by which time the transfer had already been effected. He argued that the petitioner could have obtained the transfer fraudulently as even he himself did not the original certificate of lease.

12). Further that he took the other certificates of lease and used them to obtain cautions without the knowledge of the 5th respondent and his brother. The 5th respondent alleges that it is only the criminal trial that the petitioner can explain how and when he got the lease to the subject parcel of land. That it took the two years for the petitioner to be charged as the 5th respondent was away and there was no one to follow up on the proceedings.

Counsel Submissions

13). All parties filed written submissions through their advocates. Mr. Menezes, counsel for the petitioner filed detailed submissions in which he stated that the actions of the 1st – 3rd respondents charging the petitioner two years after investigations had been concluded amounted to inhuman, degrading, cruel treatment and are in contravention of Articles 10,19,20,21, 28 and 50 of the constitution. He further submitted that the said actions demonstrate ulterior motives behind the process of charging him which is to obtain information for use in the civil case and to exert pressure on the petitioner to compromise the civil case. He stated that the charges were not brought in good faith. Counsel cited several authorities in support of his argument which I humbly take note of one such as the case of **The Commissioner of Police & The Director of Criminal Investigations Department -VS- Kenya Commercial Bank & 5 Others, Nairobi CA No. 56 of 2012**, where the Court of Appeal state thus:

“While the law (section 193 A of the CPC) allows concurrent litigation in civil and criminal proceeding arising from the same issue, and while it is prerogative of the police to investigate crime, we reiterate that such power must be exercised responsibly, in accordance with the law 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 criminal proceedings? It is not in the public interest and the interest of the administration of justice to use the criminal process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in settlement of what is purely a civil dispute being litigated in court”.

14). Counsel also submitted that the prosecution was selective, arbitrary and discriminatory. His basis was that although the petitioner reported to the CID that the 5th respondent and his brother threatened to kill and has also interfered with some parcels of land, no action was taken against them. He relied on **George Joshua Okungu & Another -VS- The Magistrate's Court Anti-Corruption Court at Nairobi & Another Nairobi HC Petition No. 227 & 230 of 2009**.

15). The 1st to 3rd respondents filed joint submissions. Learned State counsel argued that the petition does not pass the test of allegation of a breach of constitutional right. It was his argument that all the petitioner did was to raise several pertinent issues but which did not demonstrate how his rights under the constitution had been violated. He had failed to set out the acts or omissions constituting violations. Counsels relied on the case of **Amerita Karimi Njeru -VS- Republic [1979] 1 KLR 154**.

16). Counsel further submitted that it was the petitioner's intention to block due process of the law by

hiding behind civil proceedings. Further that the respondents were following the letter of the law under section 3 (1) of the Criminal Procedure Code which stated that all offences under the penal code shall be enquired into, tried and otherwise dealt with according to the code. As the respondents had the duty to enquire and upon discovery that a crime had been committed to try the same regardless of whether a civil suit on the same issue had been filed.

17). Counsel implored not to be moved to issue orders shielding suspects that involve themselves in criminal acts. Mr. Olel learned counsel appearing for the 5th respondent stated that the petitioner's allegations were baseless as the police investigations in the matter commenced before the filing of the civil case. It cannot therefore be argued that the charges were preferred in order to in any way interfere with the proceedings before the High Court.

18). On the issue of Kisumu Municipality Blocks 10/498 and 10/499, counsel submitted that the police investigated the matter and found no culpability on the part of the 5th respondent and his brother. The two parcels were transferred in 2007 by the deceased and so the complaint if any should have been against his deceased brother. It was counsel's submission that complaint by the petitioner was aimed at diverting attention from himself and the transfer of Kisumu Municipality Block 7/387. Further, it was submitted that the petitioner has not demonstrated how his rights have been violated having in mind the prerogative of the police under section 193 A of the Criminal Procedure Code.

Analysis and Determination

19). It must be noted at the outset that the intention of this court must not be to test the legality or otherwise of the charge or determine the guilt or innocence of the petitioner. Although the parties have raised several issues for consideration, the single constitutional issue raised based on the material before court is the question as to whether the respondents' action of conducting investigations and preferring charges against the petitioner are within the law and whether such criminal charges are infringing on the rights of the petitioner or an abuse of due process. It is this issue that the court must limit itself to.

20). There is no dispute that the 1st, 2nd and 3rd respondents have mandate to investigate crimes where there is reasonable basis to believe that offence has been committed. In performance of their duties, they are independent institutions. The office of the Director of Public Prosecutions established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. However, its action must be within the law and in accordance with the Constitution.

21). The court in **Kenya Commercial Bank Ltd & 2 Others -VS- Commissioner of Police & Another, Nairobi Petition No. 218 of 2011 (unreported)** stated as follows:

“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”.

22). In our present case, the petitioner raises several issues which he intends will show that the respondents have acted in violation of the Constitution and in total disregard of the fundamental rights and freedoms enshrined in the Bill of Rights.

From the facts, it is easy to decipher that the investigations began before the civil suit was filed. The CID carried out their investigations and in June 2013 via a letter dated 27th June 2013 forwarded a report of their investigations to the office of the DPP for advice on how to proceed. It is not explained why the office of the DPP took so long to reply but in 13th May 2014, the Senior Assistant Director of Public Prosecution wrote back advising the CID county commander to charge the petitioner with the offence of obtaining registration by false pretence.

23). It is worth noting at this point that the civil proceedings in the High Court are still ongoing. Counsel for the petitioner relied on several precedents in support of his argument that the criminal case is intended to pry and is not filed in good faith. I must however distinguish the precedents from the present petition. A reading of the precedents reveal that criminal investigations were either instigated after the civil matters were concluded or after substantive orders were issued. That in effect was upsetting already decided issues by a court of competent jurisdiction. However, in our present case, investigations began before filing of the civil suit. The charges were not preferred as a reaction to any substantive order of the superior court. The criminal case only flowed into the civil case. In the Kenya Commercial bank Ltd & 2 Others -VS- Commissioner of Police & Another (Dupra), Justice Majanja observed:

“Although this matter is not one where criminal proceedings have been commenced, it is one where criminal proceedings hangs over the heads of the petitioners. It is recognised even in light of section 193 A of the Criminal Procedure Code, the High Court may stop proceedings where such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of fundamental rights and freedoms. This power though must be exercised sparingly as it is in public interest in that crime is detected and those suspected of criminal conduct are brought to face the consequences the law prescribes”.

24). It would therefore appear that it is not a guarantee that criminal proceedings must be halted in the face of civil proceedings. As was stated in Investments & Mortgages Bank Limited -VS- Commissioner of Police & The Director of Criminal Investigations Department, Nairobi HC PET No. 104 of 2012. The principle alluded to must be applied in the light of the circumstances of each individual case.

25). In the circumstances of this case, I conclude that the discontinuing the criminal proceedings would be tantamount to interfering with the powers and duties of the 1st to 3rd respondent. The investigations were not a reaction to any court order having began before the civil suit. The prosecution carried out their investigations independently and came to the conclusion that the petitioner had committed an offence. The fact that they took too long to prefer the charges is attributable to the fact that the office of the DPP took too long to advise them on how to proceed. In any event the issues raised by the petitioner including several pieces of evidence contained in his affidavit shall be adduced in the criminal proceedings.

26). Consequently and in light of the above observations the petition is hereby dismissed.

Dated, signed and delivered at Kisumu this 9th day of December, 2014.

**H.K.
JUDGE**

CHEMITEI