



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.226 OF 2011**

**BETWEEN**

**HASIT SHAH.....1<sup>ST</sup> PETITIONER**  
**RARIM SAYED.....2<sup>ND</sup> PETITIONER**  
**TERRA FLEUR LIMITED.....3<sup>RD</sup> PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**THE DISTRICT CRIMINAL INVESTIGATIONS OFFICER,THIKA.....2<sup>ND</sup> RESPONDENT**

**AND**

**SWANI COFFEE ESTATE LIMITED.....INTERESTED PARTY**

**JUDGMENT**

1. On 12th May 2012, I delivered a Ruling in this matter in which I determined that pending the hearing and determination of the Amended Petition dated 12th September 2011. In doing so, I made it clear that this Court in the circumstances of this matter cannot determine whether the evidence collected by the Respondents against the Petitioners is credible to maintain criminal charges or not. I maintain that position and the reasons will be seen shortly.
2. In any event, the background to this matter is that according to the Petitioner, by a conveyance dated 16th May 2003, the Interested Party sold to the 3rd Petitioner 50 acres of land to be excised out of land parcel No.304/5 (originally No.304/3/1) situated at Thika.
3. The purchase price was agreed to be Kshs.27,375,000/- and after the transfer was made, the 2nd Petitioner charged the land in favour of Bank of India in order to secure a loan facility. When it defaulted in repayment of the loan, the Bank advertised the land for sale but by an injunction in HCCC No.202 of 2008 (Nbi) it was restrained from doing so. The injunction was obtained by the Interested Party which *inter-alia* alleged that the transfer to the 3rd Petitioner was irregular and unlawful because Land Control Board consent had not been obtained prior to the sale. It also lodged a complaint with the Police for the same reason and also that certain transfer documents relating to shares held by it as security for finalisation of the conveyance to the 3rd Petitioner were

unlawfully transferred back to the latter using forged documents.

4. The Petitioners argue that the Police, on receipt of the complaint, investigated the matter and found no criminal culpability on the part of the 3rd Petitioner or its Directors and advised the parties to resolve the dispute in a civil Court of law. In the meantime, the 3rd Petitioner had transferred the land parcel to M/s. Chania Riverbanks Estates Ltd and another criminal complaint regarding that transfer was made by the Interested Party principally alleging that Land Control Board consent was irregularly obtained or was not obtained at all prior to the transfer made to M/s. Chania Riverbank Estate Limited. Pursuant to the complaint, the 2nd Respondent acted and summoned the 1st and 2nd Petitioners to record statements and allegedly also threatened them with arrest and prosecution.
5. It is the Petitioners' case that the purported attempt at turning a purely civil dispute, if at all, to a criminal matter was unlawful and in any event, the issue of the authenticity or otherwise of the Land Control Board consent had been determined by both the High Court and Court of Appeal in civil proceedings in, and arising from HCCC No.202/2008 and that the Interested Party and Respondents could not properly relitigate the matter by opening criminal charges against them. That the said action was also unfair, oppressive and a violation of the Petitioners' constitutional rights and freedoms.
6. The final orders sought in the Amended Petition are the following:
  - “a) A Declaration that the intended arraignment, prosecution and filing of charges against the Petitioners by the police through the 2nd Respondent or otherwise is discriminatory, unlawful, unconstitutional and designed for a purpose other than vindication of justice;***
  - b) A prohibitory Order barring the 1st and 2nd Respondents or their agents from arresting, arraigning in Court, preferring any charges or detaining the Petitioners in relation to the conveyance of the parcel of land known as Land Reference Number 304/5 between the Interested party and the 3rd Petitioner and between the 3rd Petitioner and Chania Riverbank Estate Limited.***
  - c) An order for stay of any investigations and prosecution by the criminal investigations department of the police arising from the sale of land transaction between the 3rd Petitioner and the Interested Party and between the 3rd Petitioner and Chania Riverbank Estate Limited;***
  - d) A Declaration that the Petitioners' constitutional and fundamental rights have been contravened. Consequently a declaration that any proceedings that may be instituted against them are a nullity;***
  - e) A Declaration that the dispute between the Interested Party and the 3rd Petitioner in relation to the sale and transfer of share stock and the suit property known as Land Reference No.304/5 (original No.304/3/1) Thika and sale of the same property by the 3rd Petitioner to Chania Riverbank Estate Limited is a civil/commercial dispute which should be adjudicated upon at the Civil/Commercial Court without resulting to criminal proceedings.***
  - f) Cost of the Petition.”***
7. The 1st and 2nd Respondents in the Affidavit sworn on 22/8/2011 by one, David Kalaba and in Submissions by learned Principal State Counsel, have made the point that when the 2nd Respondent received the complaint contained in a letter dated 14/6/2011 that a purported Land Control board Consent relating to the transfer of L.R. No.304/5 had been obtained irregularly and was a forgery, he launched investigations and submitted the Consent to a document examiner who concluded that it was indeed a forgery. That on 15/7/2011, he summoned the 1st and 2nd Petitioners to explain themselves but they refused to do so.

8. That the aforesaid actions were all lawful and that no constitutional right or freedom that the Petitioners were entitled to, was threatened with violation and that the existence of any civil proceedings cannot be a bar to criminal proceedings being commenced if a criminal case has been established. That the Petition is therefore misconceived and is merely intended to obstruct investigations and is an abuse of Court process and should be dismissed.
9. The Interested party on its part has argued that the conveyance to the 3rd Petitioner of the suit property was *void ab initio* for failure on the latter's part to complete paying the purchase price and further that the signature on the share transfer document did not belong to Kamlesh Shah, a Director of the Interested Party. The complaint lodged against the Petitioners was therefore proper and the Police have a duty to investigate it and if need be, arrest and prosecute any person found to be criminally culpable.
10. Further, that no person should be granted immunity from prosecution if there is sufficient evidence to warrant such an action and that the Amended Petition is without merit and should be dismissed.
11. I have considered the matter and my opinion is as follows;

Firstly, there is no contest about the facts relating to the dispute and so the issue to quickly dispose of is whether the summons issued by the 2nd Respondent to the 1st and 2nd Petitioners were lawful.

In that regard, it must be noted that the 1st and 2nd Petitioners have neither been arrested nor prosecuted and in fact, so far as I can see, they have not even answered the Interested Party's complaint because they refused to appear before the 2nd Respondent to record their statements. The answer to the question posed above is also one that the Constitution has adequately answered because it provides as follows;

In **Article 245(4)**;

“(1) ...

(2) ...

(3) ...

(4) *The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—*

(a) *the investigation of any particular offence or offences;*

(b) *the enforcement of the law against any particular person or persons; or*

(c) *the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.”*

12. In that regard, the 2nd Respondent exercises powers delegated by the Inspector General as his office is not an office independent of that of the Inspector-General.

13. Further, **Article 157(10)** provides as follows;

“(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

***(10) 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. ”***

14. Read together, it means that no person can purport to direct either the Police or the 3rd Respondent in the conduct of their affairs and **Articles 10, 159 and 259** also obligate this Court to promote and respect the fundamental principles in the Constitution including that of separation of constitutional functions.

15. But the above notwithstanding, **Article 157(11)** provides as follows;

“(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

(10) ...

***(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”***

16. The above therefore means that where the 3rd Respondent acts in violation of the above principle, then this Court can step in under **Article 165(3)(d) (ii)** and inquire whether his actions are within the law or are a violation of the Constitution – see also **Githunguri vs Republic [1986] KLR 1** and **Mohammed Gulam and Anor vs Chief Magistrate's Court & Anor [2006] eKLR** where it was held that;

***“Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any Prosecution which is vexatious, oppressive, malafides, frivolous or taken up for other improper purpose such as undue harassment of a party or abuse of the process of court.”***

Further, that;

***“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before institution of criminal proceedings, there must be in existence material evidence on which the Prosecution can say with certainty that they have a probable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”***

The learned Judge proceeded to state that;

***“Prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest.”***

The learned judge then concluded thus;

***“The rationale for prohibiting such proceedings is that for a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the Court (of its inherent power to prevent abuse of its process). On the score of cost alone, the exercise of the power will protect the accused person from expenditure on a trial on indictment which he or she cannot recoup.”***

17. I am in agreement with the above holdings but so far as I can see, the Summons issued to the 1st and 2nd Petitioners were properly issued, a complaint having been filed and it does not necessarily follow that they will be arrested or even prosecuted. Investigations may even vindicate them and so I see no unlawful action on the part of the Respondents.

18. There is however the vexing issue whether the existence of civil proceedings on the same dispute is a bar to criminal investigations. Further, there is the corollary question whether I should delve in to the credibility of the evidence allegedly held by the 2nd Respondent including the document examiner's report. I have said above that I cannot properly address the veracity or otherwise of the evidence for reasons that this is not a criminal trial Court and on the former, **Section 193 A** of the **Criminal Procedure Code** provides as follows;

***“Notwithstanding the provisions of any other written law, the fact that any other 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.”***

19. The above is a relevant factor because it would seem that **HCCC No.202 of 2008** and an appeal from certain decisions made in it are still pending resolution in the Civil Division of the High Court. But notwithstanding as I have indicated elsewhere above, where the criminal investigation or prosecution is an abuse of Court process including using criminal proceedings to settle scores in a purely civil dispute, then this Court will certainly intervene – See also **KCB & Others vs Commissioner of Police & Others, Petition No.218 of 2011.**

20. I reiterate that; I have noted in that regard that the 2nd Respondent merely summoned the 1st and 2nd Petitioners to recorded statements on the basis of a complaint filed by the Interested Party. The complaint is separate and different from the initial one made when the suit land was sold to the 3rd Petitioner as it is based on a letter dated 14/6/2011 long after **HCCC No.202/2008** had been filed and on the basis of a report that was made available after the civil suit had been filed. In fact it relates to the sale transaction between the 2nd Petitioner and M/s Chania River banks Estate

Limited and I therefore find it very difficult in the circumstances to hold against the Respondents.

21. On the question whether any fundamental rights and freedoms were breached, in the Petition and Submissions this issue was casually addressed and I will not spend any time on it. I have also shown above that once the Respondents are shown to be executing a constitutional mandate, and there is no evidence that they have abused that mandate, then there cannot logically be any violation of any constitutional right available to the Petitioners.

22. In any event, I find that the Petition is premature, and the Petitioners have all the rights under **Article 49** and **50** of the **Constitution** should they be arrested and prosecuted. For the 1st and 2nd Respondents, the message from this Court is that although they may have succeeded, their actions thereafter will obviously be subject to the Constitution only and not either the interests of the Interested Party or any other party for that matter.

23. The Petition is therefore hereby dismissed but each party shall bear its own costs.

24. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2013**

**ISAAC LENAOLA**

**JUDGE**

***In the presence of:***

***Irene – Court clerk***

***Miss Mithamo holding brief for Mr. Kariuki for Petitioner***

***Miss Kithiki for Respondents***

**Order**

***Judgment duly read.***

**ISAAC LENAOLA**

**JUDGE**