



IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

**IN THE MATTER OF: QUESTIONS ARISING BETWEEN G.N. alias G. K. AND D. R. K.
CONCERNING OWNERSHIP AND DIVISION OF CARS, PAWN SHOP
BUSINESS AND FAST FOOD BUSINESS ACQUIRED DURING MARRIAGE**

BETWEEN

G. N. M. alias G. K. APPLICANT

VERSUS

D. R. K. RESPONDENT

RULING

(1) The Applicant has under Order 51 rule 1 of the Civil Procedure Rules, Articles 27 (1), 48 and 259 (1) of the Constitution of Kenya and sections 1A, 1B and 3A of the Civil Procedure Act sought the following principal orders:

***“2. That this Honourable Court be pleased to issue an order directing that the Applicant G. K. be protected under the law from arrest and harassment by any police officers and CID officers from Nyali Police Station, Bamburi Police Station and now Central Police Station and any other Police Station in the country and any charges being preferred against her or any of her witnesses pending the hearing and full determination of application and the suit herein.*”**

***3. That this Honourable Court be pleased to order that the rest of the witnesses in respect of the Originating Summons be protected from harassment by any police officers and CID officers from Nyali Police Station, Bamburi Police station and now Central Police Station and any other Police Station, Migration department in the country pending the hearing and full determination of the application and suit herein.*”**

4. That this Honourable Court be pleased to grant leave to join DPP in this matter and to issue summons to the officers Commanding Police Stations named above and or the office of the Director of Public Prosecution to explain why no action is being taken against the Police, D. K. and private investigator J. A.”

(2) The Applicant's complaint was that since inception of the suit two private investigators – one known as J. A. and a lady – and police officers and CID officers from the stated Police Station had followed and harassed the Applicant and her key witnesses - H. K. and E. E., and the latter had been charged with being in possession of drugs and subsequently interrogated at the Central Police Station on the 17th April 2012 **“all in an effort to dismay him from testifying in court”** and **“giving evidence which is damaging to the adverse party.”** The Applicant therefore sought that **“the rest of the witnesses [be] awarded protection as they are now all apprehensive to give testimony in the pending Originating Summons**

suit.”

(3) The Applicant further complains that immediately after the separation with the Respondent, which led to the filing of the Originating Summons for division of matrimonial property, he took possession of her car, jewelry and personal belongings while accompanied by five men who introduced themselves as CID officers, and she reported the matter to Nyali Police Station but no action was taken by the police. The Applicant states that her advocate had also reported the continued harassment including threatened deportation of E. E. to the office of the Attorney General seeking protection of the witnesses by letter dated 18th April 2012.

(4) In response to the application the said J. A. private investigator filed a replying affidavit of 3rd May 2012 in which he confirmed his private investigations and to being a witness in the suit but denied all the allegations made against him.

(5) The Respondent responded to the application by his “**further affidavit**” of 3rd May 2012 accusing the Applicant of material non-disclosure of the fact that she had sought similar orders before the High Court Criminal Division by **Misc. Cr. Appl. No. 64 of 2012** dated 18th April 2012 which she abandoned midstream after it was adjourned to 19th April 2012 for the Applicant to furnish further information to the court and that E. E. had been arrested for an incident on 17th April 2012 when he attacked a newsman who had attempted to take his picture with the Applicant, and was on 19th April 2012 arraigned in court in **Cr. Case No. 1265 of 2012 Republic v. E. E.** but had declined to take plea on the ground that he wanted a Arabic interpreter as he did not understand English, and the plea was deferred to 20th April 2012. The Respondent further stated that the Applicant's own witnesses were threatening his witnesses and himself through abusive and threatening text messages such as the ones to his witness L. I. A. by the said E. E. on diverse dates and one to him by one J. allegedly a human rights activist instructed by the Applicant to intimidate him. He said he had reported the matter to the police and also that he had gone on several occasions to the police station to record statements on complaints made against him by the Applicant and her witness one H. K. He also confirmed that the investigator J. A. was his witness and he was still working on tracing one of the motor vehicles the subject of the suit. He denied using the police to intimidate the Applicant or her witnesses.

(6) For the DPP, the Assistant Deputy Public Prosecutor/Provincial State Counsel filed a Notice of Preliminary Objection dated 28th June 2012 which was argued alongside the Applicant's application dated 19th April 2012. The DPP raised, in my view, four main grounds, namely that: -

(a) The application cannot be granted against the police or any other person not a party to the main suit being O.S. No. 3 of 2012 (Family Division);

(b) The court cannot protect a person from criminal process merely because he is a witness in a case not related to the criminal case in which he is a party;

(c) The application seeks a blanket protection of witnesses, some of whom are unidentified in a matter where the police or the DPP are not involved;

(d) No particulars of harassment by police have been given or disclosed.

(7) The parties then made oral submissions and cited legal provisions and case law in elaboration of their respective contentions. I consider that three issues arise for determination in this application as follows: -

(a) Whether the orders sought may be made against the Police, Immigration Department and the DPP who are not parties to the main Originating Summons Suit;

(b) Whether the court can protect a witness from criminal process unrelated to the civil suit in which he is scheduled to testify; and

(c) Whether the Applicants are guilty of material non-disclosure disentitling them to the relief sought.

(8) Whether the orders sought may be made against persons not parties to the Originating Summons.

Order 1 Rule 10 (2) of the Civil Procedure Rules permits the joinder of parties who are necessary for the effectual determination of the real dispute between the parties in these terms: -

“10. (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that... the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

The Police, the Immigration Department and the DPP are in my view necessary parties in the application before the court which seeks various orders against them, and they may be joined as parties to the application even without being parties to the main Originating Summons between the Applicant and the Respondent.

Moreover, Article 159 of the Constitution which requires the court to render substantial justice without undue regard to technicalities of procedure warrants the consideration of the issues raised in the application of 19th April 2012 within the Originating Summons rather than through separate proceedings brought for that purpose against the named Respondents. Indeed under the constitutional rules for Enforcement of the Bill of Rights made under section 84 of the former Constitution, which continue to apply by virtue of Clause 19 of the Transitional and Consequential Provisions of the Constitution of Kenya 2010, empower the court to deal with issues of fundamental rights and freedoms as they arise in ordinary litigation before the court without the necessity of separate petition for that purpose. I further consider that the inherent power of the court under section 3A of the Civil Procedure Act **“to make such orders as may be necessary for the end of justice or to prevent abuse of the process of the court”** would authorise the making of any order against a person whether a party to a suit or not if the effectual execution of the decision of the court requires such a person to do or refrain from doing any act.

(9) Whether the court will protect witnesses in civil suit from criminal prosecution.

The case law of **Mohamed Gulam Hussein Fazal Karwali & Another v. The Chief Magistrate's Court, Nairobi & Another (2006) eKLR** cited by the Applicants in support of the application relates to a different situation where a civil dispute is made the subject of criminal proceedings against one of the parties. However in the course of the decision, the court discussed the principles under which the court may prevent such prosecution as established in a line of local cases following on the Australian decision in **William v. Spautz (1992) 66 NSW LR 585**. The principle of general application which appear to emerge from the cases is that the court will stop criminal process which is being used unfairly, vexatiously, oppressively and in bad faith for ulterior purposes so as to amount to an abuse of the court process. So that if a criminal prosecution is shown to be instituted unfairly, oppressively and for ulterior purposes, or in bad faith, it would be an abuse of the court process and liable to be prevented whether the accused is a party to a civil dispute, a witness in any court proceeding or otherwise: the criminal prosecution must be shown to be *mala fides*.

(10) Article 157 (10) of the Constitution of Kenya provides that **“the Director of Public Prosecution 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.”** Judicial control of the powers and functions of the DPP is, in my view, reserved by the constitutional provisions of Article, 22 and 165 which respectively empower the Court to enforce the Bill of Rights and to authoritatively interpret the Constitution as the constitutional court. The principle of harmonious interpretation of constitutional provisions dictates that the exercise of the prosecutorial powers by the DPP, which by virtue of Article 20 (1) of the Constitution is subject to the Bill of Rights that the High Court is enjoined to enforce, is subject to the Judicial Control of the High

Court as the constitutional court. Judicial review of the prosecutorial powers was also the subject of the famous holdings in **Stanley Munga Githunguri v. Attorney General No. 2 (1986) KLR 1** and **Crispus Karanja Njogu v. Attorney General NBI H.C. Criminal application No. 39 of 2000** which considered provisions of the former Constitution similar to Article 157 (10) of the Constitution of Kenya 2010.

Under Article 165 (3) (d) (ii) the High Court has **“jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of the question whether anything said to be done under the authority of this Constitution or of any Law is inconsistent with, or in contravention of, this Constitution.”**

Judicial review procedure would also, in my view, be available to compel the DPP to perform his duties as directed under Article 157 (11) of the Constitution which provides as follows: -

“(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.”

(11) I do not consider that the court should direct the DPP or the Police to take action against any person by way of criminal prosecution or otherwise. Criminal prosecution or other criminal process is the result, stop, or in the course of, investigations leading to accumulation of evidence sufficient to support conviction before a court of law. The court cannot be involved at the stage of investigations and determination of sufficiency of evidence to justify a prosecution; that is the province of the police and the prosecution which is a ministerial as opposed to the judicial role of the courts; and any directions by the court to the police, save in well known exceptions in cases of contempt of court and death inquests, would, in my view, amount to unconstitutional interference with the police investigation and prosecution powers and functions in breach of the doctrine of Separation of Powers. It may be that the Police and the DPP have upon investigations formed an opinion that no evidence has been obtained to sustain any criminal charges. Were that to be the answer given in response to summons issued by the court as prayed, what further action would the court take? I think that this is a situation where private individuals may, if so advised, launch private prosecution if they took a view on the facts of the case contrary to that of the Police and the DPP.

(12) Whether the Applicants are guilty of material non-disclosure.

I accept the principle of full and frank disclosure of material facts by ex parte Applicants as established in the leading decision of **R. v. Kensington General Commissioners for purposes of Income Tax (1917) 1 K.B. 486** and applied in **Tiwi Beach v. Stamm (1990) 2 KAR 189** cited by the Respondent. In applying the principle to the facts of the case, I find that the Applicants did not, on the ex parte appearance of the 19th April 2012, disclose the material facts that the witness E. E. had been arraigned in court for charges of malicious damage to property over the incident alleged to have occurred on the 17th April 2012 and that they had appeared before the High Court Criminal Division on the 18th April 2012 when the application No. 64 of 2012 was deferred to the 19th April 2012 for the Applicant to furnish further information to the court. The application of the 19th April 2012 only indicated that witness E. E. had been interrogated by the police for undisclosed charges. Had the court been made aware that the interrogation was with respect to the incident of 17th April 2012, it would not have granted the ex parte order but would rather have ordered service of the application for hearing interparties on a subsequent date. There is also no reasonable explanation as to why the Applicants abandoned the Application No. 64 of 2012 filed in the High Court Criminal Division only the previous day, the 18th April 2012, and deferred to the 19th April 2012 when the present application was filed. This is a clear case of abuse of the court process, even though counsel for the Applicants submitted that the application No. 64 of 2012 was subsequently withdrawn.

In accordance with precedent, the advantage obtained by the Applicant by the material non-disclosure will on this discovery be taken away by the discharge of the ex parte order of 19th April 2012.

Findings

(13) Affidavit evidence adduced by the Respondent indicate that the witness E. E. was charged in court for malicious damage to property respecting an incident that happened after the court appearance of 17th April 2012 when a newsman attempted to take a photograph of the said witness with the Applicant. This charge has nothing to do with the dispute between the Applicant G. N. M. and the Respondent in Originating Summons No. 3 of 2012 in which the E. E. is a witness. As regards the Criminal Case against E. E. for possession of drugs for which he was convicted on his own plea of guilty, the same is before the High Court Criminal Division on appeal and it cannot properly be the subject of these proceedings before the Family Division.

As regards the Applicant and the other two named witnesses in the Originating Summons generally, there are no particulars of harassment by Police Officers as alleged. All that has been shown is the interrogation of the witness E. E., which cannot be held to be harassment in view of the alleged damage to property charge against him. In the absence of proof of harassment by Police Officers as opposed to the private investigator who is carrying out his duties and complaint against whom the Police must investigate with a view to taking action pursuant to section 121 of the Penal Code, as necessary, I have no basis to restrain the police from investigating and preferring criminal charges against the Applicant in the Applicant's Originating Summons No. 3 of 2012 and her witnesses or to find that the criminal prosecution against witness E. E. is unfair, oppressive or an abuse of the court process. I agree with counsel for the Respondent and the Assistant Deputy Public Prosecutor (APP) that a restraint on investigation and prosecution cannot issue in a blanket manner for all the witnesses and for all times. It can be issued to restrain specific criminal process against specified persons whose prosecution is shown to be unfair, oppressive, *mala fides* and thus an abuse of the court process. For a general moratorium on prosecution, the Applicant must show that all the proposed criminal processes are calculated to oppress the persons involved, in bad faith and therefore abuse of the court process.

(14) Moreover, the Applicant's right of access to justice and equality of law is not infringed by the criminal prosecution of the witnesses for offences unrelated to the civil dispute with the Respondent. The witnesses would still be available to testify in the Originating Summons notwithstanding the criminal charges for the independent offences.

I consider however, that the deportation of the Applicant's witness E. E. before he testifies in the Originating Summons will in view of the costs of return impede the Applicant's access to justice by escalating the costs of the litigation. In attending to the costs of the litigation, Article 48 of the Constitution requires that any charges or fees required for access to justice shall be reasonable so as not to impede access to court. Accordingly, I would direct that the Applicant's witness E. E. shall not be deported for a period of 12 months (which I estimate the full hearing of the Originating Summons No. 3 of 2012 to take) or such other period as is shown to be necessary to avail him an opportunity to testify before the court in Originating Summons. I do not consider that a time-less injunction against the deportation is justifiable. I take note of the serious allegations of terrorism levelled against the witness for which prompt action may require to be taken but the letter by the Anti-Terrorism Police Unit of 12th April 2012 to the Immigration Office does not sufficiently account for the conclusion that **"it is highly suspected that he is engaging in drug trafficking/terrorism."** If this were so, the witness should be further investigated and charged before the court, not have his entry permit visa cancelled and declared prohibited immigrant and deported by **"administrative action"** as proposed in the said letter.

(15) Accordingly, for the reasons set out above, I make the following orders on the Applicant's application dated 19th April 2012: -

(a) The Director of the Immigration Department is directed to ensure Applicant's witness Emad Emil shall not be deported from the country before he testifies in the Applicant's Originating Summons No. 3 of 2012 or before 12 months from the date of this ruling, whichever is later, or until further orders of the court.

(b) The prayers sought in the Notice of Motion of 19th April 2012 are declined, and the interim order

made on 19th April 2012 thereon is discharged.

(c) The Applicant shall pay the costs of the application to the DPP and the Respondent.

Dated and delivered on the 23rd day of October 2012.

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mrs. Kipsang for the Petitioner

Miss Osino for the Respondents

Miss Linda Osundwa - Court Clerk