



REPUBLIC OF KENYA

High Court at Malindi

Constitutional Petition 22 of 2011

IN THE MATTER OF: THE CONSTITUTION OF KENYA

A N D

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 22, 23, 49 AND 50(2) (C)

A N D

IN THE MATTER OF: CHIEF MAGISTRATE'S COURT (MALINDI) CRIMINAL CASE NUMBER 345 OF 2011, REPUBLIC -VS- DAVID MWANGI MUIRURI

A N D

IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOM OF INDIVIDUAL (SUPERVISORY JURISDICTION) PRACTICE AND PROCEDURE RULES, 2006 AND PART 5 RULE 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA

A N D

IN THE MATTER OF: UNIVERSAL DECLARATION OF HUMAN RIGHTS 1968

IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE CAP 75 AND THE PENAL CODE CHAPTER 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE PRINCIPLE OF FAIRNESS

BETWEEN

DAVID MWANGI MUIRURIAPPLICANT

AND

CHIEF MAGISTRATE'S COURT, MALINDI1ST RESPONDENT

THE HON. ATTORNEY GENERAL..... 2ND RESPONDENT

JUDGMENT

INTRODUCTION

1. The history of this petition was set out in my previous ruling in this matter which was delivered on 11th September, 2012. The said ruling was in respect of the petitioner's application that the judge seized of the matter disqualifies herself. The court declined the application and directed that the chamber summons dated 7th December, 2011 be heard on 11th October, 2012. Briefly the facts of this case are that a complaint was lodged with the police in respect of an immovable property, Malindi 622, which had been transferred from its original owners Mirko Blaetterman and two others, to a company associated with the petitioner. He claimed to have acquired ownership through a court decree issued in CMCC 18A/2004. Following investigations the petitioner was charged in Criminal Case No. 345 of 2011. This petition arises from the said trial.

THE PETITIONER'S CASE

2. The key prayers in the chamber summons filed on 7th December, 2011 are No. 3, 4 and 5 which are reproduced below:

“3. That this honorable court to issue an order of injunction entirely restraining any person/persons from interfering with issues pertaining to the Subject matter CMCC 18A of 2004 at Malindi already dealt with by the High Court in HCC 72 of 2007 at Malindi as per rulings annexed DMM 9” and DMM 10”. Do give such directions as to the hearing of the chamber summons application herein owing to the unique circumstances of the case and until the filed petition is fully heard and determined.

4. That this honorable court be inclined to issue an order restraining the 2nd respondent, its agents, assigns and particularly the Kenya Police at Malindi or any to her person acting for or on behalf from arresting the petitioner David Mwangi Muiruri, and/or prosecuting criminal case no. 345 of 2011, Republic -versus- David Mwangi Muiruri, or any other criminal case emanating from matter relevant to the issues complained of in the petition filed herein pending the hearing and determination of this application and thereafter the petition or further orders of this honorable court.

5. That the criminal case no. 345 of 2011 at the Chief magistrate's court at Malindi be quashed and declared a nullity and an infringement of the applicant's constitutional rights.” (sic)

3. The application contains 10 lengthy grounds and is supported by a 40 paragraph affidavit sworn by the petitioner David Mwangi Muiruri. The petition itself is equally lengthy. It contains five prayers as follows:

1) A declaration that the accused has been subjected to an unfair trial and his constitutional rights have been infringed.

2) A declaration that the proceedings in Chief Magistrate's Court Case No. 345 of 2011 Republic -vs- David Mwangi Muiruri are unfair, irregular and unlawful and an infringement of the petitioner fundamental rights and the same be quashed and/or be nullified.

3) An order directed to the director of prosecution or anyone acting on his behalf barring him from subjecting the petitioner to any further or future prosecution on charges related to the matters raised in the petition herein.

4) The 2nd respondent or anyone acting on behalf of the state and especially the Kenya Police at Malindi Police station be restrained and prohibited from arresting and/or harassing the petitioner forthwith in any matters related to the matters raised in the petition herein.

5) Damages.

4. It is self-evident that the petition prayers are closely related with the chamber summons prayers. The petitioner is in Malindi Criminal case no. 345 of 2011 charged with Forgery of a judicial document contrary to section 351 of the Penal Code. The particulars are that:

“On 29th March 2004 at Malindi Law Courts within Kilifi County, jointly with others not before court the court (he) forged a court decree and judgment in civil suit no. 18A of 2004 where (he) was declared the legal owner of plot no. 622 Malindi purporting it to be a genuine decree and judgment issued by the then Chief Magistrate which was in fact not true.”

Some of the witnesses listed on the charge sheet are Taher Shabir Ali, Alex Kitsao and Joyce Manyasi Matu. The accused denied the charges.

5. The parties' relied on their written submissions and affidavits filed. In summary the petitioners complaints are that:

a. the alleged complainant Tahir Ali (Shabir) lacks locus standi.

b. that the petitioner lawfully acquired the property but the police have intentionally brought a false charge without “tangible evidence” in order to harass him.

c. his rights to a fair trial under Article 50 of the Constitution have been violated or threatened by the prosecution failure to furnish him in advance, with the original file no. CMCC 18A/2004 to enable him prepare for the trial.

6. The petitioner's “skeleton submissions” reiterated the material in his affidavits, emphasizing his right to a fair trial. The submissions also dealt with another application filed on 29th December, 2011 seeking to transfer criminal case no. 345/11 to Mombasa, on grounds that the Chief Magistrate, Malindi will be required to testify therein, and secondly, that police officers George Ogolla and Ali Mohamed Bakari be debarred from handling the criminal case as they are biased against the petitioner.

7. The petitioner further submitted upon his main petition. He cited article 50 (2) (c) of the Constitution. And posed the question whether the “conduct in criminal case no. 345 of 2011 observe(s) the guaranteed fairness in trial and procedure.” He urges the court to find that the said trial constitutes an infringement of his constitutional rights and therefore his petition should be allowed.

THE RESPONDENT'S CASE

8. In response, the State filed a 38 paragraph replying affidavit sworn on 4th April 2012 by the investigating officer in criminal case no. 345/2011, Corporal George Ogolla. The affidavit narrates the investigative steps undertaken by Cpl. Ogolla upon receiving the complaint on 8th February, 2011 and culminating in the prosecution of the petitioner. The respondent's submissions also take cue from the material in the affidavit and stress that:

a. The prosecution case is that the proceedings in CMCC 18A of 2004 are a forgery hence no originals can be supplied to the petitioner as they never existed in the first place.

b. The petitioner has not demonstrated the alleged infringement of his rights.

c. Related civil proceedings in HCCC 72 of 2007 cannot be a bar to criminal prosecution in light of Section 193 of the Criminal Procedure Code.

9. Having carefully considered the material canvassed before me, it is apparent that both the petitioner and the respondent in their submissions also dealt with the main petition and not just the chamber summons filed on 7th December, 2011 which is itself commendable as it facilitates the expeditious disposal of the matter. Thus the chamber summons filed 7th December, 2011 which seeks interim orders pending the hearing of the petition is deemed as spent. Equally prayer 1, 2, 3 and 7 of the

Chamber Summons filed on 29th December, 2011 are spent the residual prayers being 4, 5 and 6.

THE LAW APPLIED TO THE FACTS

10. This petition is expressed to be brought under Articles 22, 23, 49 and 50(2) (C) of the Constitution. The first two articles provide for the enforcement of the Bill of rights while the latter two relate to the rights of arrested persons and the right to a fair hearing. Having scanned the petition material, I am unable to find any complaint related to article 49 in any way and none was urged.

11. The crux of petitioner's complaint as I understand it is that his right under article 50(2) (c) of the Constitution is threatened or has been violated in that he was not supplied with the original file of CMCC 18A of 2004 whose decree and judgment he is accused of forging. Secondly, that he cannot receive a fair trial as the investigating officers are biased while the Malindi Magistrate (Chief Magistrate) then trying the case will certainly be a witness with respect to the alleged file.

12. Article 50 (2) (c) of the Constitution is in the following terms:

“Every accused person has the right to a fair trial, which includes the right -

(c) to have adequate time and facilities to prepare a defence.”

It is trite law that whoever alleges a constitutional infringement has the onus to demonstrate the same. Although the case of **Anarita Karimi Njeru v Republic (1979)1 KLR 154** was decided under the 1963 Constitution I think its ratio still good law:-

“.....if a person is seeking redress from the High Court on a matter which invokes a reference to the Constitution, it is important, (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

This principle has been reiterated in the recent Court of Appeal decision in **Julius Kamau Mbugua vs R (2010) eKLR**.

13. With regard to article 50(2) (c), there is no dispute that the petitioner has not been supplied with the original proceedings in the file CMCC 18A of 2004 which is at the heart of the criminal case against him. The State asserts that it is the prosecution case that no such file exists (in original) and that the decree and judgment purported to have been issued in the said file are indeed forgeries, hence the present charges. The petitioner maintains his demand for the original file.

14. Looking at the charges facing the petitioner and the particulars, it is evident that it will be incumbent upon the prosecution during the trial to prove the non-existence of a genuine case file no CMCC 18A of 2004 and the related judgment and decree. This court cannot supplant the role of the trial court by trying to establish the veracity of the competing allegations. That is clearly the role of the trial court.

15. Therefore this court cannot conclude that the line adopted by the prosecution case (file does not exist) is a violation of the accused's right. From what I can glean, the prosecution was mounted for that very reason. In the circumstances I am unable to see how the petitioner's rights under article 50(2) (c) have been violated. It must be recalled that the petitioner's trial will certainly involve the calling of witnesses who will be cross examined on their evidence. Besides he is presumed innocent in the duration of the trial. I think it is absurd for the petitioner to continue insisting on being provided with documents, which are by the very nature of the charges facing him asserted to be non-existent.

16. Regarding his complaint that Shabir is not the appropriate complainant and that PC. Ogolla are biased and or that there is no tangible evidence, these are matters of evidence to be canvassed at the trial. This court cannot predetermine such matters when it has not heard the witnesses. The petitioner's

material in the petition is presented in a manner that suggests that this court is trying factual issues related to the criminal case. The constitutional court must decline the covert invitation to prematurely evaluate the evidence intended to be tendered at the criminal trial, or even to issue directions as to which police officers should handle the case and how it should be prosecuted. The circumstances of this case do not justify such interventions.

17. The prosecutorial mandate is vested in the Director of Public Prosecutions (DPP), by virtue of Article 157 of the Constitution. Sub article 157(10) states:

The Director of public prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his or her power or functions, shall not be under the directions or control of any person or authority.

He is however obligated under sub article 11 to have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. In appropriate cases however, the constitutional court can intervene to secure the rights of those prosecuted (See **Githunguri vs R (1986) KLR1.**)

18. For the purposes of this case, it cannot be gainsaid that the DPP should be concerned about alleged forgery of court records as it touches on the administration of justice and public interest. That is not to say that the rights of the petitioner do not matter. His individual rights however must be balanced against societal interest as no constitutional right is absolute.

19. In **Githunguri v R [1986] KLR 1** the court stated that the main consideration in determining whether a right has been violated or not is the question “*where the line should be drawn between the conflicting rights of the accused and societal interest*” (See **Julius Kamau Mbugua vs R [2010] eKLR- per Mc Lachlin J.** in the Canadian Case of **R vs Morin [1992] I SCR 771**). Finally, the Court of Appeal in Mbugua's case set out several applicable principles including the one which states:

“i. The right (in that case to trial within a reasonable time) is not an absolute right as the right of the accused must be balanced with the equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.”

20. The petitioner has alluded that the trial in the Lower Court is somehow a nullity but has not demonstrated in what manner. I would use the words of Emukule J. in **R v David Geoffrey Gitonga Cr. Case No. 79 of 2006 MERU (UNR):**

“...Firstly the principle of nullity presupposes that the process of the trial is void either because it is against public policy, law, order,...for a trial to be void in law it must be shown that the offence for which the accused is being tried is non-existent or that the court seized of the matter has no authority to do so.”

This reasoning was approved by the Court of Appeal in **Julius Kamau Mbugua v R.** The petitioner is charged with an offence known to the law before a competent court. There is nothing to suggest that the process is void. Besides as Mr. Kemo for the State correctly argued, under Section 193 of the Criminal procedure Code the existence of a civil case (as alleged by the petitioner) over the same subject matter is not a bar to the mounting of concurrent criminal proceedings.

21. Regarding the alleged likelihood of the trial magistrate also being called as a witness at the trial (with regard to correspondence allegedly emanating from her office) the previous trial magistrate L. W. Gitari (CM) has since left the station on transfer and is no longer seized of any matters in this jurisdiction. Her second successor is in office. Hence the ground advanced by the petitioner in support of the transfer of the case to Mombasa or to another court has been overtaken by events.

CONCLUSION

22. In view of the foregoing, I have found no merit in the petition and the chamber summons filed on 29th December, 2011. The prayers sought therein are not warranted and cannot be granted. Both the said chamber summons and petition are hereby dismissed in their entirety. As earlier indicated, the application filed on 7th December, 2011 is spent. I direct that the trial in criminal case no. 345/2011 do recommence with dispatch.

Delivered and signed at Malindi this **26th day of November, 2012** in the presence of the petitioner and Mr. Kemo for the State.

court clerk – Evans

C. W. Meoli

JUDGE