



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 296 of 2012

STEPHEN KIPKENDA KIPLANGAT PETITIONER

AND

THE CHIEF MAGISTRATE'S COURT 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

HON ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction and background

1. The issue in this matter is whether the Court should stop the prosecution of the petitioner on account of the fact that the Director of Public Prosecutions (“the DPP”), in exercising his discretion to prosecute the petitioner has abused his power in a manner that violated the petitioner’s fundamental rights and freedoms.

2. Stephen Kipkenda Kiplagat, the petitioner, is an advocate of the High Court and he is facing criminal charges in *Nairobi Chief Magistrate Court Criminal Case No. 1171 of 2010*. He is charged together with David Some and Esther Fura Some, upon the complaint of Wilson Kipkoti, on the following charges;

COUNT I

STEALING BY AGENT CONTRARY TO SECTION 283(C) OF THE PENAL CODE

Stephen Kipkenda Kiplagat on the 17th day of September 2010 at Equity Bank Limited, Four Way Tours Branch in Nairobi within Nairobi Area, being an advocate for UFANISI CAPITAL AND CREDIT LIMITED stole Kshs.31,350,000/00 which had been received by you for and on account of the said UFANISI CAPITAL AND CREDIT LIMITED.

COUNT II

OBTAINING MONEY BY FALSE PRETENCE CONTRARY TO SECTION 313 OF THE PENAL CODE.

David Some Barno and Esther Fura Some on the 17th day of September 2010 at Equity Bank Ltd Four Way Towers Branch in Nairobi within Nairobi Area, jointly with intent to defraud obtained

Kshs.31,350,000/= from UFANISI CAPITAL AND CREDIT LIMITED by falsely pretending that it was genuine payment for stamp duty, legal fees and miscellaneous expenses incurred by you from the sale transaction of LR 209/2582 University Way Nairobi.

ALTERNATIVE CHARGE TO COUNT 1 AND II

CONSPIRACY TO DEFRAUD CONTRARY TO SECTION 317 OF THE PENAL CODE

Stephen Kipkenda Kiplangat, David Some Barno and Esther Fura Some on the 17th day of September 2010 at Equity Bank Ltd Four Way Towers Branch in Nairobi within Nairobi Area, jointly conspired to defraud Ufanisi Capital and Credit Ltd of Kshs.31,350,000/= by falsely pretending that the transfer of the said Kshs.31,350,000/= to DESAHE ACCOUNT at the said Equity Bank Ltd was a genuine payment.

Petitioner's case

3. The petitioner's case is set out in the petition dated 16th July 2012 and his supporting affidavit sworn on the same date. The basic facts giving rise to the petition are not in dispute and are as follows.

4. The petitioner was instructed by Ufanisi Capital and Credit Limited ("Ufanisi") to act for it in the sale of a property known as LR No. 209/2582 situated in Nairobi ("the suit property") to Superiorfones Communications Limited ("Superiorfones"). At the time material to the transaction, the petitioner was a partner in the firm of **Kipkenda, Lilan and Koech Advocates** ("the firm").

5. Pursuant to instructions issued by Ufanisi, the petitioner drew a sale agreement dated 27th January 2010 and simultaneously with that agreement, the petitioner avers that the firm was instructed to draft a Commission Agreement between Ufanisi and the commission agent Dasahe Limited ("Dasahe"). The agreements were dated 21st January 2010 and 23rd March 2010 and were all signed, sealed and executed by all the parties concerned. According to the Commission Agreement, the petitioner was bound to pay a commission upon receipt of the sale proceeds to Dasahe upon completion of the sale transaction. Indeed, the petitioner in compliance with the instructions paid Dasahe the sum of Kshs.61,350,000/00 which was duly acknowledged.

6. Unfortunately the transaction became the subject of various disputes in court. In brief, the suit property was originally owned by Piedmont Investment Limited ("Piedmont") and which it charged to Standard Assurance Company Limited ("Standard Assurance"). At some point, Standard Assurance purported to dispose of it in exercise of its power of sale causing Piedmont to move to Court, in **Milimani HCCC No. 806 of 2003, Piedmont Investment Ltd v Standard Assurance Kenya Limited (under Statutory Management), Ufanisi Capital and Credit Limited and Superiorfones Communications Ltd**, for injunctive relief. On 1st July 2008, Justice Kimaru ordered that that status quo be maintained. Standard Assurance, being aggrieved by the orders, appealed to the Court of Appeal and applied for the stay of the orders of Justice Kimaru. While the application for stay was pending, Standard Assurance was placed under Statutory Management by the Insurance Regulatory Authority.

7. The effect of the placing Standard Assurance under statutory management was to incapacitate the directors and empower the Statutory Manager to take control of the management and assets of the company. Despite this and without the knowledge of the Statutory Manager, counsel appointed by the former directors of Standard Assurance purported to prosecute the application for stay. The Court of Appeal granted an interim order of stay in favour of Standard Assurance.

8. Thereafter Standard Assurance purportedly sold the suit property to Ufanisi. Ufanisi then transferred the suit property to Superiorfones. On 11th March 2010, Piedmont moved the Court in **Milimani HCCC No. 806 of 2003**, to reverse the various orders and entries on the property register transferring the property to Superiorfones. After hearing the parties, Justice Kimaru made the following order on 25th March 2010, "[That] the purported transfer of L R No. 209/2582 to Ufanisi Capital and Credit Limited and subsequently to Superiorfones Communications Ltd are hereby

cancelled ...The ownership of the suit property shall revert back to [Standard Assurance Company Limited].”

9. Aggrieved by the orders of Justice Kimaru, Superiorfones lodged an appeal in the Court of Appeal and applied for orders of stay in **Civil Application No. NAI 79 of 2010 (Superiorfones Communication v Piedmont investments, Standard Assurance Kenya Limited and Ufanisi Capital and Credit Limited)**. After hearing the matter, the Court, by a ruling delivered on 24th September 2012, declined to grant an order of stay and dismissed the application on 24th September 2010. The Court of Appeal observed that in view of the facts, **“the intended appeal may not be arguable.”**

10. After the Court of Appeal dismissed the application for stay, the petitioner and the directors of Dasahe, the 2nd and 3rd accused in the criminal case, were arraigned in court and charged on 27th September 2012. But for orders of stay issued by this Court, the case would have proceeded for hearing on 17th and 18th July 2012.

11. The petitioner’s complaint is that the charges are founded on a sale transaction which has been declared illegal and fraudulent and therefore the decision to charge him is a blatant abuse of power and contrary to **Articles 27, 47, and 157(11)** of the Constitution. The petitioner also contends that the complainant in the criminal trial having been adjudged by the High Court and Court of Appeal to have been a party or architect of the fraudulent and illegal transaction cannot be a complainant in a criminal trial founded on the same facts, therefore the DPP’s decision to prefer charges is an abuse of power under **Article 157(11)**.

12. The petitioner avers that the alleged offence he was charged with was subject of lawful agreement and if there is a dispute the matter is ordinarily within the realm of civil jurisdiction of the court and more particularly it is the subject of **Nairobi HCCC No. 529 of 2010 (OS), Ufanisi Capital and Credit Limited v Stephen Kipkenda Kiplagat, Paul Lilan and Philemon Koech t/a Kipkenda Lilan & Koech Advocates** which is still pending. He avers that the decision to prosecute him is intended to assist the complainant to vex, harass, scandalise and or coerce the petitioner in breach of his fundamental rights.

13. The petitioner avers that the decision to charge him to the exclusion of the partners of the firm is discriminative and selective and contrary to **Article 27**. The petitioner also avers that the trial is yet to commence almost two years since he was first arraigned in court and such delay is an infringement of his right to have a fair trial within a reasonable time guaranteed by **Article 50**.

14. The petitioner seeks the following reliefs;

(a) *That a declaration that the decision by the 2nd respondent to prefer criminal charges against the petitioner in CRIMINAL CASE NO. 1771 OF 2010 (R V STEPHEN KIPKENDA KIPLAGAT & OTHERS) was unconstitutional and a violation of the Petitioner’s Constitutional Rights.*

(b) *That an order of certiorari by way of Judicial Review be issued to bring forthwith to this Honourable Court and quash the 2nd Respondent’s decision to charge the Petitioner in CRIMINAL CASE NO. 1771 OF 2010 R V STEPHEN KIPKENDA AND OTHERS.*

(c) *That an order be issued directed to the 1st respondent to terminate and or dismiss forthwith CRIMINAL CASE NO. 1771 OF 2010 R V STEPHEN KIPKENDA AND OTHERS and acquit the petitioner of the criminal charges preferred against him.*

(d) *Such other orders as this Honourable Court deems fit to give and grant given the peculiar circumstances of this matter.*

15. The petitioner’s case is supported by the 2nd and 3rd interested parties; David Some Barno and Esther Fura Some, the co-accused in the criminal case. They rely on the replying affidavit of David Some

Barno sworn on 1st October 2012. The two interested parties are the directors of Dasahe which entered into a commission agreement with Ufanisi.

16. The interested parties confirm that on 21st September 2010, the petitioner's firm paid Dasahe Kshs. 35,000,000/00 being the agreed Commission. Dasahe on its part facilitated the sale of the suit premises by securing a loan from Equity Bank which amount was used to pay stamp duty. In addition, Dasahe paid legal fees on behalf of Ufanisi which was unable to do so and it entered into an agreement with Ufanisi to raise 10 million on account of the fees. The interested parties support the petitioner's case to the extent that they assert that the agreements were entered into voluntarily and according to them the prosecution is for an ulterior purpose.

17. Mr Njuguna, counsel for the petitioner, outlined the petitioner's case and highlighted the written submissions dated 22nd October 2012.

2nd Respondents' case

18. The respondent opposed the petition on the basis of grounds of objection dated 23rd October 2012. These grounds were emphasised by Mr Mule, counsel for the 2nd respondent. Mr Mule submitted that the petition is frivolous, vexatious, incompetent, bad in law, misconceived and an abuse of the court process and should be dismissed with costs.

19. According to the DPP, all the issues raised by the petitioner in the petition were really the basis of his defence in the criminal case pending before the subordinate court. Mr Mule submitted that the High Court has no capacity to adjudicate upon the defences in the criminal case in the manner proposed in the petition.

20. Counsel maintained that the Constitution and the laws of Kenya provide for fair trial which include the right to challenge evidence adduced or proposed to be adduced by the prosecution. The petitioner will be entitled to by cross-examine of witnesses and have the opportunity to call his own witnesses and where there is a conviction to appeal or apply for revision to the Superior Court. Counsel submitted that the petitioner has not demonstrated that he is unlikely to be accorded fair trial.

21. As regards the transaction that is the basis of the prosecution, the DPP's position is that the sale agreement was nullified on account of fraud and other irregularities and it is the petitioner who was specifically responsible for the preparation of the sale agreement and in the circumstances there is a reasonable basis upon which the petitioner could be prosecuted and that it is on this basis that the DPP exercised his discretion.

22. The DPP contend that in the exercise of his duties under **Article 157** he does not act under the control of direction of anyone and therefore to grant the orders sought by the petitioner would be tantamount to interfering with his discretion. Furthermore, the Court would be taking it upon itself to decide the guilt or innocence of the petitioner which is a matter reserved for the trial court. It is on this basis that counsel urged the Court to dismiss the case.

3rd Respondent's Case

23. Mr Moimbo, counsel representing the Attorney General submitted that the Court should take into account the cases that have been determined by the Court in relation to the matter in determining whether the DPP has acted in accordance with the provisions of **Article 157**. Counsel submitted that the power granted to the DPP under **Article 157(6)** is limited by **Article 157(11)** and the Court should inquire into the exercise of that power.

Interested Party's case

24. On 20th September 2012, I granted leave to Ufanisi to join these proceedings as the 1st

interested party and ordered that the Affidavit of Wilson Kipkoti sworn on 30th July 2012 be deemed to be in opposition to the petition. The interested party moved the court on the ground that, the interim order has been obtained on the basis of material non disclosure and concealment of material facts as follows.

25. The first ground is that the issues in the petition were raised in Criminal Case by way of a request for interpretation by the petitioner. The application was heard and dismissed by the Chief Magistrate in a ruling delivered on 3rd May 2012.

26. Secondly, there is still pending in the High Court, **Nairobi HC Misc. Appl. No. 543 of 2010, Republic v The Commissioner of Police ex-parte Stephen Kiplagat and David Barno**. The petitioner did not disclose the existence of the application which raises the same issues raised in the petition. The Notice of Motion in that case seeks the following prayer, “*That this Honourable Court be pleased to issue an order of prohibition directed to the Police Commissioner prohibiting him and any other police officers working under him from harassing, intimidating, threatening with arrest, detaining in police cells, preferring criminal charges and or prosecuting the Applicants in respect of a complaint lodged by the directors(s) of Ufanisi Capital and Credit Limited.*”

27. The interested party also avers that the petition failed to disclose the pendency of a “*Notice of Intention to Raise a Constitutional Issue*” in **HCCC No. 529 of 2010 (OS)** in response to an application in the said case, seeking to commit the petitioner to civil jail for failure to comply with the order made therein on 8th April 2011, despite the significance of the same to the issues raised in the petition and the order of stay made on 17th July 2012.

28. Ufanisi reads *mala fides* in its exclusion in this matter. It submits that failure to join the company was intended to enable the petitioner pursue the same issue in three separate proceedings namely, **Criminal Case No 1771 of 2010, Miscellaneous Civil Application No. 543 of 2010** and **HCCC No. 529 of 2010(OS)** and therefore bind it without its participation.

29. Ufanisi contends that the petitioner has not established a case for delay of the criminal case as the facts disclose that the failure to prosecute of the criminal case was occasioned by the petitioner himself.

30. The interested party’s case was outlined in the written submission filed in court on 24th October 2012 and the list of authorities filed in court on 18th October 2012.

Determination and Analysis

31. The issue in this case is whether the Court should interfere in the discretion of the DPP to prosecute the petitioner on the basis of the facts asserted. The Office of the DPP is established under **Article 157** as an independent office. Under **Article 157 (6)** the DPP shall exercise State powers of prosecution and may institute and undertake criminal proceeding against any person before any court in respect of any offence alleged to have been committed. **Article 157(10)** and **(11)** guarantee the independence of the Office and provide as follows;

157 (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.

(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.

32. The powers of the DPP are not absolute as **Article 157(11)** itself sets out the limits. In the case of **Hon. Chirau Ali Mwakwere and Others v Robert Maberu and Others Nairobi Petition No. 6 of 2012 (Unreported)**, I observed that, “*The Director of Public Prosecutions is constitutionally mandated*

under **Article 157** to order investigations on any information or allegation of criminal conduct and institute criminal proceedings against any person before any court. The office of the Director of Public Prosecutions is an independent office and this court would not ordinarily interfere in the running of that office and the exercise of its discretion provided it is within the Constitution and the law. The office of Director of Public Prosecutions is 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.”

33. Like any independent institution under the Constitution, the Office of the DPP is subject to inquiry by the High Court when the Court is called upon to question the legality of its action. (See generally **Federation of Women Lawyers of Kenya (FIDA – K) and Others v Attorney General and Others Nairobi Petition No. 102 of 2011 (Unreported)**, **Trusted Society of Human Right Alliance v Attorney General Nairobi Petition No. 299 of 2012 (Unreported)** and **Jeanne W. Gacheche and 6 Others v Judges and Magistrate’s Vetting Board and Others Nairobi Judicial Review No. 295 of 2011, 433, 434 and 438 of 2012 (Unreported)**). Furthermore, the power to prosecute, must be based or grounded on the Bill of Rights which under **Article 20(1)** applies to all law and binds all state organs and all persons.

34. The issue of judicial control of prosecutorial discretion has been the subject of various decisions of our superior courts cited by all the parties. Some of these case include; **William S. K. Ruto and Another v Attorney General and Another Nairobi HCCC No. 1192 of 2004 (Unreported) [2010] eKLR**, **Jacob Juma v The Director of Public Prosecutions and Other Nairobi HC JR Petition No. 652 of 2009 (Unreported)**, **Bryan Yongo v Attorney General Nairobi HCCC No. 61 and 196 of 2006 (Unreported)**, **Elory Kranveld v Attorney General Nairobi Petition No. 153 of 2012 (Unreported)**, **Republic v Amos Karatu Nairobi HC Criminal Case No. 12 of 1996 (Unreported)** and **Ndarua v Republic [2002] 1 EA 205**.

35. For the purposes, this case I would distil these principles as follows. First, it must be remembered that the Constitution confers discretion to prosecute on the DPP and not the Court and the court’s jurisdiction is to ensure compliance with Constitution. Second, the High Court in exercising its jurisdiction is not a trial court to test and weigh the evidence and to conduct a mini-trial to see whether there is sufficient evidence or to determine whether the petitioner would be acquitted in any event. This task is better left to the trial court. Thirdly, the petitioner bears the burden of proving the breach of its fundamental rights or that the decision to prosecute constitutes an abuse of the legal process.

36. It is against this background that I shall consider the issues raised by the petitioner. The first issue is that of discrimination contrary to **Article 27**. The petitioner’s case is that he was a partner in the firm which was instructed and acted on behalf of Ufanisi. In the replying affidavit sworn on 25th November 2010 in **HCCC No. 529 of 2010 (OS)**, the petitioner swore that, “I am personally familiar with the transaction in issue as I exclusively dealt with it for and on behalf of the plaintiff company I am therefore, competent and duly authorised to depone this replying affidavit on behalf of the Respondent firm.”

37. On the petitioner’s own admission, he dealt with the matter exclusively and in my view it was not unreasonable for the DPP to prefer charges against him. I do not see any basis for accusing the DPP of discrimination. In the case of **James Ondicho Gesame v Attorney General Nairobi Petition No. 376 of 2011 (Unreported)[2012] eKLR**, the Court (Mumbi Ngugi J)in response to the argument the prosecution was discriminatory stated “[69] With respect, I do not find anything discriminatory in the preferment of criminal charges against the petitioner. The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mugirango Constituency be prosecuted for alleged misappropriation of funds unless there was evidence against them.” (See also **Charles Okello Mwanda v Attorney General Nairobi Petition No. 95 of 2011 (Unreported) [2012]eKLR**.)

38. The second ground of attack is that the prosecution has taken an inordinately long time as almost two years have elapsed since the petitioner was indicted. This issue was disposed of by the Chief

Magistrate when she considered the petitioner's application for reference to the High Court. In her ruling, the learned Magistrate stated as follows, ***"I have perused the Court record and noted that it is true that the matter has come up severally and if the hearing did not take off for a reason was given. Indeed a plea was taken on 25.10.2010 and the first hearing was scheduled for 6.12.2010. On that day the trial magistrate was indisposed. At one time the accused did not attend and a warrant of arrest was issued. When the matter came for hearing again the police did not have their file as it had been recalled by the DPP for directions. That scuttled the but when eventually the matter was fixed for hearing this application was made. I do agree with counsel that there is no time limited for such application but the same ought to be made at the earliest opportunity. If the accused is complaining of delay he himself has not come with clean hands because he has waited too long to bring this application."***

39. Apart from the bare allegation made by the petitioner to support this point, the petitioner has not placed any evidence that the criminal case has taken inordinately long so as to negate a fair trial guaranteed by **Article 50(2)(e)**. I am inclined to agree with the learned Magistrate as she had the entire record of proceedings before her and therefore this ground lacks merit and is dismissed. (See also **Julius Kamau Mbugua v Republic CA Nairobi Crim. App. No. 50 of 2008 (Unreported) [2010] eKLR**)

40. The third and substantial ground for consideration is that the matters complained of are subject of civil proceedings and as such the criminal proceedings should be stayed. I reiterate that there is no general principle that where there are civil proceedings, criminal proceedings ought not to be pursued or vice versa and each case is to dealt with on its own merits. **Section 193A** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** provides that;

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, prohibition or delay of the criminal proceedings.

41. As I stated, the High Court is wary of conducting a trial or inquest of the facts that would amount to taking over the jurisdiction of the subordinate court. There is no allegation that the petitioner will not receive a fair trial guaranteed under **Article 50**. When this issue was raised before, the trial magistrate stated, ***"the two civil matters in the courts referred as the reason why these criminal proceedings cannot hold. It is the case however that the same are not a bar to a criminal charge and vice versa. No substantial question of law arises from that to warrant a constitutional reference. Moreover these are matters that the accused could raise in his defence if indeed the two civil proceedings absolved him from liability. I would say the same regarding the 5th and 6th and 7th issues. Those are issues of evidence and if the accused wishes he can raise them in his defence no substantial question of law is raised by any of the questions that would warrant me to make a reference and dismiss the application by the 1st accused."***

42. I agree with the learned magistrate and likewise, I do not think a case has been made by the petitioner.

43. The other reason I have declined to go into the facts raised is that there is in existence another matter, **Nairobi HC Misc. 543 of 2010**, where the petitioner and his co-accused sought orders of prohibition. Although the application was made prior to arrest and arraignment, the facts on which it is based and as deponed by the verifying affidavit sworn by the petitioner are similar to those alleged in this matter and if the Court in that case were convinced of the petitioner's case, it would prohibit the matter against the petitioner and the other accused from proceeding to trial.

Disposition

44. On the basis of the matter raised in the subordinate court and which have been the subject of a decision and the pending application, I conclude that this petition is an abuse of the court process and it lacks merit. It is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 14th day of December 2012

D.S. MAJANJA
JUDGE

Mr Njuguna instructed by Kang'ethe and Company Advocates for the petitioner.

Mr Mule, State Counsel, instructed by the Director of Public Prosecutions.

Mr Moimbo, Litigation Counsel, instructed by the State Law Office for the 3rd respondent.

Mr Toiywa instructed by Havi and Company Advocates for the 1st interested party.

Mr Marigi instructed by Oyugi and Company Advocates for the 2nd and 3rd interested party.