



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL REF. NO. 165 OF 2011

**IN THE MATTER OF RULE 12 OF THE CONSTITUTIONA OF KENYA SUPERVISORY
JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF
THE INDIVIDUAL (PRACTICE AND PROCEDURE) RULES**

ROSEMARY WANJA NJAU.....1ST

PETITIONER

STEPHEN MBUGUA MWAGIRU.....2ND

PETITIONER

ROBERT GITHUI.....3RD

PETITIONER

-VERSUS-

THE HONOURABLE ATTORNEY GENERAL.....1ST

RESPONDENT

TATU CITY LIMITED.....2ND

RESPONDENT

KOFINAF COMPANY LTD.....3RD

RESPONDENT

DIERCTOR OF PUBLIC PROSCUTIONS.....4TH

RESPONDENT

RULING

The 1st and 2nd Petitioners are shareholders in Tatu City Limited and Kofinaf Company Limited. They have instituted proceedings at the Commercial Court, seeking to either wind-up the two companies or to compel the other shareholders to buy them out.

Their reasons for the actions taken were that they had been oppressed by the majority shareholders, who had gone ahead to exclude them from the management of the two companies.

Whilst the winding-up proceedings were still pending, the petitioners registered caveats against the properties owned by the 2 companies. In response, the companies instituted proceedings to have the caveats removed.

The 2 companies also sought and were granted orders to stay further proceedings in the winding-up proceedings.

It is the petitioner's case that the companies have converted the civil disputes into criminal offences against the petitioners.

Their reason for so saying is that whilst the companies still had outstanding applications for committal of the petitioners to jail for contempt of court, in the petitions for the winding-up of the 2 companies, the petitioners were arrested and charged with criminal offences.

Those alleged criminal offences were, to the minds of the petitioners, attributable directly to the civil disputes.

Consequently, the petitioners believe that the criminal processes were being utilized to compel them to settle the civil disputes. They therefore submitted that the criminal processes were an abuse of the court process, and also constituted a contravention of the petitioners' rights to have access to justice.

As regards the 3rd petitioner, he is an advocate of the High Court of Kenya. In relation to the matters in issue in the civil disputes, he represented the 1st and 2nd petitioners.

It is the petitioner's contention that the Attorney General and the Director of Public Prosecution Were harassing the 3rd petitioner simply because he was acting for a client who was unpopular.

The further complaints of the 1st and 2nd petitioners were that;

- (a) Their right to privacy was violated, when police officers forcefully entered into the 2nd petitioner's house;**
- (b) Their right to freedom and security of the person was violated, when the 2nd petitioner was violently dragged out from her house;**
- (c) They were not promptly informed about the reasons for their arrest;**
- (d) The offences which they had allegedly committed did not fall within the category of offences for which arrests could be made without warrants of arrest;**
- (e) The institution of criminal charges against them was done arbitrarily, capriciously and in contravention of the Constitution;**
- (f) The criminal charges were fabricated, false and malicious.**

For those reasons, the petitioners ask this court to quash the criminal charges against them. They also ask this court to issue permanent injunctions against CID officers, to stop them from harassing the petitioners.

The petitioners also ask for vindictory damages/general damages, as well as for exemplary damages.

Finally, the petitioners asked for costs of the petition.

The Attorney General and the Director of Public Prosecutions have filed an affidavit though Sergeant Patrick Maloba, who is a police officer attached to the Criminal Investigations Department (C.I.D).

They assert that they received a complaint about an alleged forgery of a document that was purported to have been signed by the Registrar of Companies. The police officers commenced investigations into the complaint.

It is asserted that the visit to the residence of the 2nd petitioner herein Was in furtherance of the said investigations. Therefore, the 1st and 4th respondents believe that they were giving effect to their statutory duty, to investigate criminal complaints.

The police deny having entered the 2nd petitioner's residence forcibly. If anything, they say that they allowed the 2nd petitioner time and opportunity to call his advocate, who was thereafter present during the investigations.

The police also assert that the petitioners were handled in a humane manner throughout the investigations.

The police insist that the only time when they forced open the door to the 2nd petitioner's house is when he had, for 8 hours, refused to allow the police to have access. At that stage, the police say that they already had sufficient evidence to link the 2nd petitioner to an attempt to leave the country.

The police insist, that the petitioners were promptly informed of the charges which were to be preferred against each of them.

Furthermore, the police have made it clear that at no time did they ask the petitioners to remove the caveats which they had placed against the properties of Tatu City Limited or Kofinaf Company Limited.

It is also the case of the 1st and 4th respondents that there is no requirement, in law, for warrants to issue before a suspect can be arrested for cognizable offences, such as those with which the petitioners were charged.

As far as the police were concerned, there was sufficient evidence that the petitioners had forged the letter dated 11th June 2010, purporting it to be from the Registrar of Companies. The police also say that they have evidence that the forged document was uttered, by the petitioners, to the Land Registrar.

Therefore, as far as the Attorney General and the Director of Public Prosecutions were concerned, the only reason why the petitioners were charged with criminal offences was because they are believed to have committed the said offences. The said belief is anchored, inter alia, on the report of a document examiner; say the Attorney General and the Director of Public Prosecutions.

On their part, the 2nd and 3rd respondents assert that they were entitled, in law, to ask the Registrar of Titles to remove the caveats, as they did.

As far as the 2 companies were concerned, they are keen to pursue the determination of the civil disputes through the due process of the law.

If anything, the companies perceive the filing of the petition herein s nothing more than an attempt to delay the trial of the criminal case. Their reason for so saying was that the petition was not filed until the eve of the scheduled hearing of the criminal case; and that was 4 months after the petitioners were charged.

It is manifestly clear to me that the facts alluded to by the parties are disputed. Therefore, I cannot determine the factual issues based on affidavit evidence. That is because there is no way that I can determine, simply by a perusal of the respective affidavit, that one or the other party was either telling the truth or telling untruths.

In effect, the court cannot, at this moment, determine whether or not the 1st and 2nd petitioners were treated unlawfully, at the time of arrest. Most probably, the truth will only come out after each of the

parties' witnesses have undergone cross-examination.

If, as the petitioners' assert, the manner of their arrest is found to have been unlawful, certain consequences would follow. For instance, the court may choose to disregard evidence obtained in an irregular manner.

More significantly, there is no complaint that has been lodged against the trial court. The presumption must therefore be that none of the parties has any concerns about the jurisdiction, competence or independence of the trial court. In fact, it would be strange if the independence or competence of the trial court were to be challenged when it was not yet clear who exactly is going to be the learned magistrate who will preside over the criminal proceedings.

By dint of **Section 193A of the Criminal Procedure Code**, the fact that there was an ongoing criminal case in which the matters in issue were also directly or substantially in issue in a pending civil case, shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

One or another party to a civil dispute may commit an offence of a criminal nature. If that were to happen, there would be no justification, in law, to stop the police from carrying out investigations into the alleged criminal offence. And if the investigations revealed that a criminal offence had been committed, the police would be required, by law, to prefer criminal charges against the person concerned.

If the existence of civil disputes were to act as a bar against the institution of criminal charges simply because the alleged offence arose from facts which were also directly or substantially in issue in the civil proceedings, suspects would need only to rush to the civil courts if they wanted to put on hold any potential criminal charges. It is such an action which would, in my considered view, be deemed as an abuse of court process.

On the other hand, a suspect should find comfort in the fact that unlike in civil proceedings where the standard of proof is on a balance of probabilities, in the criminal case, the prosecution would have to tender proof beyond any reasonable doubt.

I honestly fail to appreciate the petitioners' contention that the criminal charges against them constitute the execution of the threat issued by Nahashon Ngigi Nyaga, that 1st petitioner's attempt to demand her rights would lead to harm being visited upon her and her children;

“by the Russian mafia.”

The criminal charges are before a court of law, not some shadowy criminal gang.

If the courts were either “the Russian mafia” or a tool thereof, it would defy all logic that the petitioners should have chosen the same avenue to seek legal redress!

If the petitioners' demonstrated that the criminal charges constituted an abuse of process, this court would have had no hesitation in putting on hold the proceedings before the criminal court.

However, there is nothing before me to show that either the Attorney General or the Director of Public Prosecution has simply pandered to the wishes of the complainants in the criminal case.

The evidence before me suggests that the police carried out their own investigations, which appear to have revealed a forgery. As forgery and the uttering of a forged document are both criminal offences under Kenyan law, I find that it cannot constitute an abuse of the court process if the police thereafter preferred criminal charges against the person or persons they perceive to be culpable.

In other words, I find myself unable to accept the petitioners' contention that ;

“.....the fact that prima facie case exists is no bar to a stay if the process is being abused;” ,

whereas the petitioners have not demonstrated that the decision made by the Attorney General or the Director of Public Prosecution was only intended to bring pressure on the petitioners to settle the civil disputes between them and the 2 companies (Tatu City Limited and Kofinaf Company limited).

I do actually believe that if the criminal proceedings are stayed, the petitioners may be denied the opportunity of proving their assertions. On the other hand, if the proceedings were allowed to go ahead, the petitioners will be afforded an opportunity to cross-examine the respondents' witnesses, and thus demonstrate that the decision to prefer criminal charges was for reasons that were unacceptable, in the justice system.

The concurrent existence of the criminal proceedings and civil proceedings would not, of themselves, prevent the petitioners from prosecuting the civil cases.

If the petitioners were to put forward, before the trial court, the material which they believe provides a complete answer to the allegations made against them, they would possibly persuade the said court that they were innocent. I find no reason, even at their own request, to delay or to halt the proceedings which would afford them such an appropriate opportunity.

Therefore, although leave has been granted to the petitioners' to prosecute the petition, I decline to order that such leave should operate as an order for the stay of the criminal proceedings. I reject the petitioners' request for a conservatory order.

Dated, Signed and Delivered at Nairobi, this 24th day of October, 2011.

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FRED A. OCHIENG
JUDGE