



Shah v Inspector General of Police & 3 others (Environment & Land Petition 1 of 2021) [2022] KEELC 14751 (KLR) (10 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14751 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND PETITION 1 OF 2021

MC OUNDO, J

NOVEMBER 10, 2022

**IN THE MATTER OF AN APPLICATION BY JYOTI GIRISH SHAH
INVOKING THE SUPERVISORY JURISDICTION OF THE HIGH COURT
PURSUANT TO ARTICLE 165 (6) & (7) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
22, 23, 40, 157, 165 AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 7, 10, 15, 16, TO 18, 20 AND
26 OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

AND

**IN THE MATTER OF ABUSE OF POWER AND THE LEGAL PROCESS BY
THE ATTORNEY GENERAL, THE DIRECTOR OF PUBLIC PROSECUTIONS,
THE INSPECTOR GENERAL NATIONAL POLICE SERVICE, FOR**

**UNCONSTITUTIONALLY AND UNLAWFULLY ARRESTING
AND CHARGING JYOTI GIRISH SHAH OVER A CIVIL AND
LAND DISPUTE IN KERICHO CRIMINAL CASE NO. 272 OF 2020**

BETWEEN

JYOTI GIRISH SHAH PETITIONER

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

ATTORNEY GENERAL COUNTY 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT



JUDGMENT

1. Vide a Notice of Motion under a Certificate of Urgency dated the 22nd January 2021, and brought pursuant to the provisions of Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law, the Applicant herein had sought that there be interim orders of stay of any further proceedings in Kericho Criminal Case No. 272 of 2020 pending the hearing and determination of the main suit. The Applicant had sought for costs of the Application. The Application had been supported by the grounds therein as well as by the supporting affidavit of the Applicant Jyoti Girish Shah sworn on 22nd January 2021. There having been no opposition to the same, it was allowed without costs as per the orders of the court of 16th November 2021.
2. There was issued the stay order of the proceedings in Kericho Criminal Case No. 272 of 2020 pending the hearing and determination of the main suit wherein Parties were directed to dispose of the Petition by way of Written Submissions.
3. Subsequently the 3rd Respondent filed their Grounds of Opposition dated 7th February 2022 opposing the said Application, which Application was time barred and had been overtaken by events.
4. As I write this judgment there has been neither response to the Petition by the Respondents nor compliance of the orders issued on the 16th November 2021. In essence thereof, the Petition is uncontroverted and unchallenged both in terms of facts and the law. I shall therefore proceed to evaluate the same ex-parte pursuant to the provisions of Rule 16(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.
5. The Petitioner's Petition dated the 22nd January 2021, was to the effect that in the year 2007, one Girish K. Shah (deceased) the then Chairman of CADS Motors Limited had made a proposal to the Board of Directors of the company to purchase an undeveloped land parcel No. Kericho Municipality Block 5/152 which was adjusted to their business premises. A resolution was passed and the company bought the said parcel of land. Due process of the sale was followed and the company obtained a title deed thereafter wherein they continued to pay the land rates for the same.
6. That sometime in the 2014 and 2015 their neighbor had encroached onto the suit land by about 1¹/₂ meters wherein he had erected a fence and had started construction. The Petitioner had then sought the services of a surveyor who had confirmed that the beacons on their land had been moved. That her persistence to get the beacon certificate had culminated into her being arraigned in court and charged with criminal offence being forgery of the document, the title to the land, Contrary to Section 359 (2) of the *Penal Code*. That the alleged offence had occurred in 2008 while she was charged in 2020 which was 12 years later.
7. That the ascertainment of ownership of No. Kericho Municipality Block 5/152 and LR No. 63/1204 was a civil dispute and not a criminal one. That further the two titles were separate and distinct and therefore it was absurd to allege and charge the Petitioner with the offence of forgery. That her constitutional right as provided for under Article 28, 29(a) and (b), 39 and 49 of the *Constitution* had therefore been violated.
8. That during her arrest and detention, she had been treated in an undignified manner contrary to the provisions of article 28 of the constitution. That further her rights under Article 157(4) of the



- Constitution had been violated when the Respondents failed to conduct thorough investigations into ownership of the property that formed the subject of the criminal suit.
9. That her rights to property under Article 40 of the Constitution had also been violated when she was charged over the property that she had title to.
 10. The Petitioner had thus sought for a declaration that both the charge and proceedings in criminal case No. 272 of 2020 were illegal and therefore a nullity. She sought for costs of the Petition.
 11. In her submissions, dated the 16th February 2022, the Petitioner framed their issues for determination as follows.
 - i. Whether the lease title belongs to the Petitioner.
 - ii. Whether the arrest and prosecution of the Petitioner in criminal case No. 272 of 2020 is an illegality, violates her constitutional right and should therefore be terminated.
 12. The Applicant submitted that the High Court had supervisory jurisdiction over the subordinate courts pursuant to the provisions of Article 165(6) of the Constitution. She submitted that her prosecution was oppressive and malicious as was held in the case of Stanley Munga Githunguri vs Republic [1985] KLR 91.
 13. On the first issue for determination, it was the Petitioner's submission that she was the proprietor of the suit land by virtue of the title deed issued. That pursuant to the provisions of section 26 of the Land Registration Act, the certificate of title was to be held as conclusive evidence of proprietorship.
 14. That the Article 40 (1) of the Constitution provided that subject to article 65 of the constitution, that every person had a right either individually or in association with others, to acquire and own property.
 15. That the dispute between the parties herein was a matter which was capable of being determined in a civil court being the Land and Environment Court and not through a criminal process. That the Petitioner's criminal prosecution was meant to serve personal interests of the complainant as there was no way the a dispute as to ownership of property could turn into a criminal case without the other party presenting to the relevant authority an alternative document, and in this case, the certificate of lease in the complainant's name so as to challenge what the Petition had. Reliance was placed on the decided case in Peter Macharia Ruchachu vs Director of Public Prosecutions & Another [2014] eKLR.
 16. That having established *prima facie* that this was a matter that was devoid of any criminality, that the criminal proceedings in Kericho criminal case No. 272 of 2020 should be halted.

Determination.

17. I have considered the contents of the Petitioner's Petition, her Affidavit in Support, as well as her unchallenged arguments and the authorities cited. The Petitioner brings this Petition challenging the constitutionality of the Respondents in charging her with criminal offence in the subordinate court in criminal case No. 272 of 2020 whereas the cause of action arose from a civil dispute.
18. The Petitioner's claim stems from an allegation that pursuant to CADS Motors Limited in which she was its Director, purchased land parcel No. Kericho Muicpality Block 5/152 in the year 2007, in the year between 2014 and 2015 their neighbor had encroached onto the suit land by about 1¹/₂ meters wherein he had erected a fence and had started construction. That the Petitioner had then sought the services of a surveyor who had confirmed that the beacons had been moved. That her persistence to get the beacon certificate had culminated into her being arraigned in court and charged with criminal



offence being forgery of the document, being title to the land, contrary to Section 359 (2) of the [Penal Code](#).

19. That her subsequent arrest, arraignment and charging over a civil and land dispute in Kericho criminal case No. 272 of 2020 was therefore unconstitutional.
20. The Petition referred to infringement of Articles 22, 23, 40, 157, 165 and 258 of the *Constitution*. Having summarized the matter before me as above, I find the issues arising herein for determination as being;
 - i. Whether the Petitioner’s rights under these Articles had been violated by the Respondents.
 - ii. Whether this court has jurisdiction to stay criminal proceedings in the lower court facing the Petitioner.
 - iii. What remedies if any are available to the Petitioner.
21. In *Harman Singh & Others vs Mistri* 1971 E.A 122, it was held that:

“The High Court has inherent jurisdiction to order a stay of a suit for sufficient reason where the ends of justice so require. It is a discretionary power vested in the Court”
22. I have revisited what the Petitioner seeks from this court as herein above stated and strictly speaking, I find that the prayers sought are prayers whose resolution requires a full trial hearing and the interpretation of a statute rather than through a Constitutional Petition because a constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. The particular question to be decided herein so as to put this matter into the ambit of a Petition was whether the state was liable for acts committed by its agents while on duty.
23. The provisions of Article 157(6) of the [Constitution](#) are clear to the effect that;

The Director of Public Prosecutions shall exercise State powers of prosecution and may—

 - (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - (c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
24. The general rule in these kinds of proceedings is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the [Constitution](#).
25. The duty and mandate of the police was appreciated in [Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another](#) [2012] eKLR where it was held:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case



cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

26. However, it must be emphasized that a constitutional Petition challenging prosecution does not deal with the merits of the case but only with the process. The Court in such proceedings is mainly concerned with the question of fairness to the Petitioner in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the Applicant. (see *Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & Another* [2019] eKLR)
27. In the present matter, it was not enough for the Petitioner to claim that the Respondents were charging her with criminal offence in the subordinate court in criminal case No. 272 of 2020 whereas the cause of action arose from a civil dispute. The Petitioner needed to show how the process of the subordinate court was being abused or misused. She further needed to demonstrate how her constitutional rights was under serious threat of being undermined by the criminal prosecution.
28. In absence of concrete grounds for supposing that the criminal prosecution was an abuse of process, a manipulation, or such other processes, or even supposing that the Applicant might not get a fair trial as protected in the *Constitution*, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts.
29. Constitutional rights protect individuals from governmental injury and regulate the discretion of the government to inflict injury. In the present instance I find that should the Petitioner have a good defence in the criminal trial, then she ought to raise the same in her defence before the criminal trial instead of invoking this Court’s jurisdiction with a view to having this Court determine such an issue.
30. On the second issue as to whether this court has jurisdiction to stay criminal proceedings in the lower court facing the Petitioner.
31. In the case of *Joram Mwenda Guantai vs. The Chief Magistrate*, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170, the Court of Appeal held:

“It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”
32. It is therefore clear that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring



such proceedings to a halt. However, it must be emphasized that a constitutional Petition challenging prosecution does not deal with the merits of the case but only with the process.

33. In the present instance and keeping in mind that the Court will only interfere with a criminal trial in the Subordinate Court if it is found that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious and does not accord with an individual's freedoms and rights under the Constitution, I find that in the instant case there has been no *prima facie* evidence established by the Petitioner that her prosecution is oppressive and vexatious and/or an abuse of the process of the Court. In this effect thereof I herein decline to stay the proceedings in Kericho Criminal Case No. 272 of 2020. This in line with the fact that where a crime is proved in a criminal case, the said crime must be dealt with expeditiously and decisively and this is not an option
34. I find that the Petition lacks merit and the same is herein dismissed with cost at a lower scale since the same was undefended.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 10TH DAY OF NOVEMBER 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

