REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO 356 OF 2000

SAMUEL KAMAU MACHARIA

JOSEPH GILBERT KIBE……..…….APPLICANTS

VERSUS

ATTORNEY GENERAL & ANOTHER.....DEFENDANTS

RULING

On 17th March 2000 Samuel Kamau Macharia (first applicant) and Joseph Gilbert Kibe (second applicant) were charged in the Senior Principal Magistrates Court Kibera in Criminal Case No 2560 of 2000 with 5 counts *viz*:

(i) Obtaining money by false pretences. Particulars are that on diverse dates between 21st August 1997 and 26th August 1997 in Nairobi jointly with others with intent to defraud obtained 550,000,000/- from Kenya Reinsurance Corporation by falsely pretending that a piece of land LR 12236 was free from encumbrances.

(ii) Making a document without authority c/s 357(a) of the Penal Code. The particulars are that on the 4th day of July1997 in Nairobi within Nairobi area jointly with others not before Court with intent to defraud and without lawful authority or excuse made on account of the High Court of Kenya a false document namely a raising order for LR Number 216/8 Karura.

(iii) Forgery c/s 349 of the Penal Code. The particulars are that on the 4th day of July 1997 in Nairobi jointly with others not before court forged a *certiorari* raising order purporting it to be a genuine raising order issued by the High Court of Kenya in respect of LR Number 216/8 Karura.

(iv) Uttering a false document c/s 353 of the Penal Code. The particulars are that on the 22nd day of July 1997 at Ardhi House in Nairobi knowingly and fraudulently uttered a false document namely a raising order for land reference number 216/8 Karura.

(v) Obtaining registration by false pretences c/s 320 of the Penal Code. The particulars are that on the 10th day of July 1997 in Nairobi, jointly with others not before Court willfully procured for themselves the registration of LR Number 12236 by falsely pretending that land reference No 216/8 Karura which was amalgamated with 12261 to create land reference number 12236 had no encumbrances. The applicants pleaded not guilty to all the charges and the hearing was fixed for 17th day of April 2000. On 6th April 2000 the applicants filed the instant application which is by way of an originating motion. The same is brought under the provisions of sections 65(2), 72, 73, 74, 77, 82 and 84 of the Constitution,

section 3 of the Judicature Act, s 3A of the Civil Procedure Act and order 50 rule 1 of the Civil Procedure Rules. The declaration being sought by the applicants in the motion are that the institution, prosecution and maintenance of the Senior Principal Magistrates Court at Kibera Criminal Case No 2560 of 2000 against the applicants upon the purported complaint of Ngengi Muigai the second respondent

(a) Was and is for a purpose other than that of upholding the criminal law.

(b) Was to bring pressure to bear upon the applicants to settle the civil disputes in HCCC No 14232 of 1991;

HCCC No 6542 of 1991 and Court of Appeal Civil Appeal No 42 of 2000.

(c) Is an abuse of the criminal process of the Court.

(d) Is oppressive illegitimate vexatious harassment of the applicants and offensive and contrary to the public policy.

(e) Is a contravention of the applicants rights under s 77 of the Constitution to the prosecution of the law generally and to have their civil rights and obligations determined by a civil court rather than a criminal court.

(f) Is a contravention of the applicants right under s 73 of the Constitution not be held to servitude.

(g) Is a contravention of the applicants right under s 74of the Constitution not to be subjected to inhuman and degrading treatment

(h) Is arbitrary and a contravention of the applicants right under section 82 of the constitution to equal treatment.

(i) Is a contempt of Court and a contravention of the applicants rights under s 77 and s 84 of the Constitution in that it is aimed at compelling the applicants to settle their civil claims in pending suits in accordance with the dictates of the first and second respondents and preventing the Courts from jointly adjudicating upon the said pending suits.

The applicants further seek an order that the said criminal proceedings in Kibera Law Courts be stayed permanently and in the alternative an order of prohibition to issue prohibiting the Senior Principal Magistrate Kibera from hearing or proceeding with the said Criminal Case No 2560 of 2000 against the applicants.

The grounds for the application are set out on the body of the application. Both applicants filed affidavits in support of the application and for their part, the respondents too filed replying affidavits.

The history of the matter as given by the applicants is that LR No 12236- Karura reasons about 100 acres was to be purchased from Mrs Mama Ngina Kenyatta by the applicants, the second respondent, one Solomon Karanja through a company known as Scenaries Ltd. The 4 parties were to contribute equally to the purchase of the said piece of land whose purchase price was Kshs 21million. The second respondent and Solomon Karanja failed to pay their contribution of the purchase price and they got out of the deal. According to the applicants LR No 12236 was a consolidation of 2 parcels – LR 12261 measuring 5 acres and LR No 216/ 8 measuring 95 acres. The vendor and the purchasers acted under a misapprehension that the whole piece of land being sold to Sceneries Ltd was LR 216/8 and all the conveyancing was carried out on that basis. In 1989 the second respondent registered a caveat against LR 216/8 claiming to be a co-owner thereof.

The 2nd respondent filed HCCC No 6542 of 1991 in which he claims to be shareholder of Sceneries Ltd and obtained an injunction restraining the applicants from transferring LR 216/8. Sceneries Ltd also filed HCCC No 4232 of 1991 asking for the removal of the caveat registered against the title to LR 216/8. The

2 suits were later consolidated and by a consent order recorded before Hon Justice Mbito on 16th July 1996 the consolidated suits were referred to arbitration, the parties nominated Mr Justice Edward Togbor and Mr Chege Kirundi advocate as joint arbitrators. Arbitration proceedings commenced on 21st August, 1996.

In July 1997 Sceneries Ltd sold to Kenya Reinsurance Company LR 12236 for Kshs 550 million. The parcel is now duly registered in the name of Kenya Reinsurance Co Ltd. On the advice of his counsel, Mr Nagpal the second respondent complained to the police in late 1997 about the sale which he termed fraudulent. The 2 applicants admit receiving that amount of money as directors and shareholders of Sceneries Ltd. It was not until 17th March 2000 that the applicants were arrested and charged with the offences they now face in the lower court.

Dr Kamau Kuria for the applicants submitted that the first respondent is trying to assist the second respondent by putting illegitimate pressure on the applicants to settle what are civil claims. Counsel contended that the applicants were charged in Court when the investigations were not completed. He referred to the letter dated 9th February 2000 written by the Director of Public Prosecution (DPP) to the Provincial Criminal Investigations Officer Nairobi (PCIO)) in which the DPP indicated the recommended charges be holding charges and that further investigations in the case be carried out. Counsel accused the Attorney General in not exercising his discretion in a quasi judicial way and the Attorney General acted arbitrarily. This offends the provisions of s 82 of the Constitution, added counsel. He further argued that the issue whether good titled passed to Kenya Reinsurance Corporation is for a civil court.

Dr Kuria stressed that to continue the proceedings at Kibera Law Courts is to hold the applicants' in servitude which is contrary to s 72 of the Kenya Constitution. That criminal process is being used to sort out the mess in the lands office and in lawyer's offices.

Mr Bwonwonga Assistant Deputy Public Prosecutor in reply submitted that it is not for this Court to rule on the sufficiency of the evidence and referred us to the ruling of the Constitutional Court in Misc Appl No 322/ 99 which was consolidated with Misc Appl No 810 of 1999. According to counsel the allegations by the applicants that they are being oppressed by the prosecution is not supported by evidence. Mr Bwonwonga contended that the trial magistrate should have been made a party to the proceedings, as she is the one who admitted the charges against the applicants. He also querried why the Kenya Reinsurance Corporation was not made an interested party as the outcome of this matter will affect its interests. Mr Bwonwonga stated that as those are proceedings pending in the lower court the applicants have no automatic right to come to this Court as this would be contrary to the provisions of s 84(3) of the Constitution. According to him an application can only be filed in this Court under s 84(1) of the Constitution where there are no proceedings pending in a lower court in respect of the same matter being complained of in the application brought to the High Court. Lastly he submitted that s 65 of the Constitution deals with judicial review and does not cover cases such as the instant one.

Mr Gathengi for the second respondent asked us not to give much weight to the fact that it is only the names of the second respondent which appear on the charge sheet as the complainant. He argued that a crime was committed by the applicants while the arbitration proceedings were going on. His further submission was that as at 17th March, 2000 the applicants could not show that the lower court was subject to the provisions of s 65 (2) of the Constitution.

The first issue we wish to deal with is the mode in which the application has been brought. It is field as an originating summons. There is no prescribed form for filing a constitutional application. The procedure is governed by s 84(6) of the Constitution, which states:

(b) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court).

Since the promulgation of our Constitution no Chief Justice has made rules to regulate the practice and

procedure relating to the filing of applications under s 84 of the Constitution. The practice that has developed over the years is for such an application to be filed as an originating motion. We therefore find the form of the instant application to be in line with previous applications of this nature.

Counsel for the first respondent urged us to dismiss the application as being defective for the omission to join the trial magistrate and the Kenya Reinsurance Corporation as interested parties in this application.The applicants are not seeking any orders against the Kenya Reinsurance Corporation. In any suit filed in Court it is the Attorney General who represents any arm of the Government or any public servant where the matter arises out of the public servants' course of duty. So that even if the magistrate in Kibera was joined as a nominal respondent it is only the Attorney General that can appear in Court to represent him. Mr Bwononga contended that as the matters complained of are still pending in the lower court the application is incompetent as the application could only be brought pursuant to the provisions of s 84(3) of the Constitution and not s 84(1) of the Constitution. The effect of that is that the applicants should have first raised the issue at the trial court before coming to the High Court. S 84(3) of the Constitution stipulates: (3) If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of s 70 to 83 (inclusive) the person presiding in that Court may, and shall if any party to the proceedings so requests refer the question to the High Court unless in his opinion the raising of the question is merely frivolous and vexatious.

In their ruling in Misc Cr Appl No 322 of 1999 consolidated with Misc 810 of 1999 *Kamlesh Pattni and Goldenberg International vs Republic* Githinji J, Osiemo, J and Onyango Otieno, J, while observing that there is no unanimity of opinion as to the construction of the 2 subsections – s 84(1) and s 84(3) – concluded that that s 84(3) is however in scope and does not guarantee automatic access to the High Court as access is subject to an order of the presiding magistrate. S 84(1) is wide in scope. We are in entire agreement with that ruling of the learned judges. We feel it neglects the proper interpretation of the law.

In this matter we are not dealing with the sufficiency of the evidence that the prosecution intends to adduce at the trial in the lower court, and even if we were called upon to do so, we think it is not our duty to delve into that in this application and it would be an improper exercise of our powers if we did so.

The other important issue for consideration is whether the Attorney General acted independently and judiciously in his decision to arraign the applicants in Court, and whether in so doing, he acted oppressively against the applicants. Counsel for the applicants submitted that the Attorney General's discretion to arraign a person in Court should be exercised in a quasi – judicial way. We entirely agree. And in the light of that we wish to shift our focus on the role the second respondent played in the events leading to the arrest and arraignment of the applicants. As pointed out in the earlier portion of this ruling the second respondent complained against the applicants to the police in late 1997.

The second respondent recorded this statement with the police on 20th November 1997. For sometime thereafter the 2nd respondent appears to have put aside his complaint to the police and concentrated on attempts to enforce his claims in the consolidated suits. Upon his application to the arbitrators an order was issued on 8th December, 1997 directed to Scenaries Ltd to deposit with the arbitrators and the lawyers for the parties, a sum of Kshs 150 million, being one fourth of the proceeds of sale of LR 216/ 8 Karura, to Kenya Reinsurance Corporation. The 2nd respondent filed another application in Court dated 30th April 1998 in which he sought judgment to be entered against the applicants as per the arbitrators award dated 17th March 1998. On 9th July 1998 Hon Justice O'Kubasu granted the orders as prayed in the application and ordered that in default of the applicant's depositing the Kshs 150 million as per the order of the arbitral tribunal made on 18th December 1997 execution would issue forthwith and taxation was dispensed with. The applicants sought to set aside the order of 9th July 1998 but the same was dismissed on 31st July 1998. On 6th August 1998 the second respondent filed another application in Court in the consolidated suits. On 11th August 1998 Justice Oguk ordered as follows:

(1) That the element of a raising order on a caveat against LR 216/8 Karura be and is hereby ordered to be investigated by the PCIO Nairobi.

(2) That a report thereof be filed within 60 days. We were not addressed as to whether the orders given by Oguk, J were sought as a result of the 2nd respondent losing in police investigations; the slow pace the investigations were taking or the inability to execute the decree resulting from the judgment in his favour.

Dr Kamau Kuria informed us that an order by Visram, J to have the decree in favour of the 2nd respondent executed was stayed by the Court of Appeal. That was not denied by the respondents. On 14.3.2000 the applicants filed an appeal in the Court of Appeal challenging the judgment of the High Court in the consolidated suits. Three days after the appeal was filed the applicants were arrested and arraigned in Court.

From our analysis of the events between late 1997 to March 2000 we are of the view that the 2nd respondent was driven more by his quest for the Kshs 150 million than a genuine intention to have the applicants face criminal trial. It is apparent that it was only when his endeavors to get the money proved futile that he resorted to criminal proceedings. We are convinced that the 2nd respondent wishes to employ criminal process to force the applicants settle the civil dispute. He fits in the description of galloping litigant as per the analysis by Kuloba, J in Misc Appl No 839 & 1088/99 *Vincent Kibiego Saina vs The Attorney General*. He is the only complainant inclinated in the charge sheet filed in Cr Case 2560 of 2000. This is confirmed by the depositions in the affidavit sworn by Senior Sergeant Anthony Matibo in his affidavit sworn on 23rd May 2000 and filed in Court on the same day. Paragraph 7 of Mr Matibo's affidavit states:

7. That on 20th November, 1997 in the afternoon Mr Ngengi Muigai recorded a statement as the complainant on the reported allegations.

In her letter dated 9th February, 2000 to the PCIO Nairobi the DPP refers to the 2nd respondent as the complainant in the heading of her letter but recommended that Kenya Reinsurance Corporation in the first charge. There is no indication that a representative of Kenya Reisurance Corporation recorded a statement to support the allegations in count one of the charge sheet and while saying so we are alive to the fact that the Corporation could record a statement with the police even after the applicants had been taken to Court.

In the circumstances of this case we are unable to find that the 1st respondent acted in a quasi - judicial manner. It was being prodded by the 2nd respondent to an extent that it did not act independently. The lapses in the chain of police investigations were not explained, and this would naturally raise suspicion as to *bona fides* of the investigations. In our view the conduct of the 2nd respondent amounts to abuse of the due process of the law. We were unable to discern any legal or factual basis for the applicants' contention that their rights under sections 73, 74 and 82 of the Constitution have been contravened. We are also unable to agree with the applicants that their prosecution in the lower court amounts to contempt of Court.

However we are satisfied, and we declare that the institution, prosecution and maintenance of the Kibera Senior Principal Magistrates Criminal Case No 2560 of 2000 against the applicants upon the complaint of Ngengi Muigai was and is for a purpose other than upholding the criminal law; that the said prosecution is meant to bring pressure to bear upon the applicants to settle the 2 civil disputes; that the prosecution of the applicants is an abuse of the criminal process of the Court; that the prosecution of the applicants amounts to harassment and is contrary to public policy and that the prosecution of the applicants is a contravention of their rights under s 77 of the Constitution.

An order of prohibition will issue directed to the Senior Principal Magistrate Kibera prohibiting the Court from proceeding with the said Criminal Case No 2560 of 2000 against the applicants.

Dated and delivered at Nairobi this 12th day of June, 2001

J.W. MWERA

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JUDGE

J.K. MITTEY

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JUDGE

K.H. RAWAL

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JUDGE