



Ahmed v Director of Public Prosecutions & 3 others (Constitutional Petition E028 of 2022) [2024] KEHC 13219 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 13219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E028 OF 2022
DO CHEPKWONY, J
SEPTEMBER 20, 2024**

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20,
21, 22, 40, 47 AND 157 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: THE OFFICE OF THE
DIRECTOR OF PUBLIC PROSECUTION ACT, 2013**

BETWEEN

RISHAD HAMID AHMED PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

HANSON DEVELOPERS LIMITED 2ND RESPONDENT

KULDIP SINGH 3RD RESPONDENT

SIGNATURE PROPERTIES LIMITED 4TH RESPONDENT

JUDGMENT

1. This Judgment determines the Petition dated 12th July 2022, filed by the Petitioner, Rishad Hamid Ahmed, seeking orders against the Director of Public Prosecutions (herein referred to as ‘1st Respondent’) and several private entities (‘herein referred to as ‘2nd’, 3rd, and 4th Respondents’) regarding the prosecution of the Petitioner in Ruiru Criminal Case No.609 of 2020 (Republic –vs- Rishad Ahmed Hamid). The Petition calls upon this court to examine the legality and propriety of the ongoing criminal proceedings in view of the Petitioner’s assertion that the matter in contention is of a purely



civil nature, thereby falling outside the mandate of the 1st Respondent. The Petitioner seeks the following specific orders: -

- a. A Declaration that the decision to prosecute the Petitioner via Ruiru Criminal Case No. 609 of 2020 (Republic v Rishad Ahmed Hamid) is unlawful and in violation of Articles 10 (1), (2), (28), 50(1), 157 (11) of *the Constitution* as read together with Section 6 of the ODPP Act.
 - b. That an Order of Certiorari quashing the charges and prosecution of the Petitioner in Ruiru Criminal Case No. 609 of 2020 (Republic v Rishad Ahmed Hamid).
 - c. That an Order of Prohibition permanently prohibiting the 1st Respondent from proceeding with the prosecution of the Petitioner in Ruiru Criminal Case No. 609 of 2020 (Republic v Rishad Ahmed Hamid).
 - d. That an Order do issue against the Respondents prohibiting them from interfering with the Petitioner's right over the suit property; and
 - e. Costs of this Petition.
2. The Petitioner avers that he advanced a loan of Kshs.1,000,000/= to the 3rd Respondent, Kuldeep Singh, the Director of Signature Properties Limited (4th Respondent), on condition that the 3rd Respondent deposits a security with the Petitioner's advocate. The 3rd Respondent subsequently deposited the original title for Land Parcel L.R Ruiru/Ruiru/7/86 (the suit property) with the Petitioner's advocate, thereby creating an informal charge over the property. The Petitioner maintains that this loan agreement executed on 27th July, 2018 bound the parties and that the 3rd Respondent's deposit of the title created equitable interests in his favor.
 3. The Petitioner alleges that despite the informal charge, the 4th Respondent advertised the suit property for sale. In response, the Petitioner also advertised the property for sale to recover the outstanding loan and eventually executed a sale agreement with the 2nd Respondent, Hanson Developers Limited, on 2nd May, 2018, and transferred the property to them. The Petitioner asserts that this transaction was a lawful exercise of his rights under the loan agreement.
 4. Subsequently, the Petitioner and the 2nd Respondent were summoned by the Directorate of Criminal Investigations to record statements with the Land Fraud Department. Initially, the 1st Respondent preferred charges of Forgery contrary to Sections 345 and 349 of the Penal Code, and Uttering a False Document contrary to Section 357(b) of the Penal Code against the Petitioner. However, these charges were later deferred upon the realization that the dispute revolved around ownership of the suit property. That the 1st Respondent then advised the parties to seek for a resolution through the Environment and Land Court.
 5. Based on those directions, the 2nd Respondent filed Thika ELC No. 53 of 2021 (Hanson Developers Limited –vs- Signature Properties Limited & 3 Others) in the Environment and Land Court, addressing the question of ownership and purchaser's interest. The Petitioner argues that, despite the pending civil suit, the 1st Respondent has proceeded with the criminal case against him, which he contends is a violation of the criminal justice system and an abuse of legal proceedings.
 6. In support of this line of argument, the Petitioner placed reliance on the cases of Republic –vs- Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002]eKLR, Shakhhalanga Khwa Jirongo –vs- Soy Developers Ltd & 9 Others [2021]eKLR, and Commissioner of Police –vs- The Director of Criminal Investigations Department & Another –vs- Kenya Commercial Bank Limited & 4 Others [2013]eKLR.



7. The Petitioner asserts that the actions of the 1st Respondent violate Articles 10 (on national values and principles of governance), 50 (on the right to a fair trial), and 157(11) of *the Constitution* of Kenya, 2010. He argues that his prosecution on a matter that is primarily civil in nature undermines the independence of the criminal justice system and amounts to selective and abusive prosecution.

Analysis and Determination

8. As at the time of writing this Judgment, the Respondents had not filed their responses and submissions to both the Notice of Motion and Petition, both dated 12th July, 2022 despite the direction of the court on 3rd June, 2024, and on numerous occasions whenever the matter was placed before court. However, on court's directions, the Petitioner filed his submissions. I have considered the Petition together with all documents adduced in its support thereof as well as the Petitioner's Submissions. The court finds that the only issues arising for determination are whether the 1st Respondent's decision to prosecute the Petitioner via Ruiru Criminal Case No.609 of 2020 is justified; and if so, whether the court can grant orders to quash the criminal proceedings and permanently prohibit the Respondents from said prosecutions.?
9. In addressing the said questions, this Court is guided by the provisions of Article 157 of *the Constitution*, which establishes the Director of Public Prosecutions (DPP) as an independent office vested with the discretion to institute and undertake criminal proceedings and Article 157(6) which provides that the DPP may: -
 - a. Institute and undertake criminal proceedings against any person before any court in respect of any offense alleged to have been committed.
 - b. Take over and continue any criminal proceedings commenced in any court.
 - c. Discontinue criminal proceedings, subject to certain conditions.
10. Article 157(11) of *the Constitution* on the other hand limits the DPP's prosecutorial powers, mandating that the DPP shall exercise discretion in a manner that respects the public interest, the administration of justice, and avoids abuse of the legal process. The Court of Appeal in the case of Ethics & Anti-Corruption Commission –vs- Republic & 5 Others [2015]eKLR underscored that the DPP's discretion is not absolute and is circumscribed by considerations that align with constitutional values.
11. It is also important to point out that Section 193A of the Criminal Procedure Code allows the concurrent running of civil and criminal proceedings based on the same facts. This was buttressed in various authorities including the court in the case of Kuria & 3 Others –vs- Attorney General [2002] 2 KLR 69 where it was held that the existence of a civil dispute does not preclude criminal proceedings unless there is demonstrable evidence that such proceedings are intended to manipulate or abuse the court's process. The Court further emphasized that both civil and criminal proceedings serve distinct purposes and may run parallel if there is no abuse of the process.
12. In the case of Republic –vs- Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] eKLR, further explained that when a party alleges abuse of court process, then it requires showing that the criminal process is being used for a purpose other than the administration of criminal justice. Thus, without any evidence of manipulation or undue influence on the prosecutorial process, the mere existence of civil litigation does not justify staying criminal proceedings.
13. In this case, the Petitioner has merely alleged that his prosecution is an abuse of court process in view of the pending case before Environment Land Court without adducing any evidence to show any manipulation or undue influence on part of the ODPP. As such, without any evidence showing undue



influence on the part of the ODPP, this Court reiterates that the existence of the case pending before the ELC Court cannot be a basis of quashing the criminal proceedings preferred against the Petitioner.

14. In addition, Article 50 of *the Constitution* guarantees every individual the right to a fair trial and this Court observes that the Petitioner has not demonstrated that the criminal proceedings will undermine his right to a fair hearing. On that wavelength, this Court fully associates itself with the case of *Jirongo –vs- Soy Developers Ltd & 9 Others* [2021]eKLR which reinforces that criminal proceedings should be quashed only where they infringe upon fair trial rights or if the prosecution is actuated by malice or bad faith.
15. The court further associates with the decision of Court in the case of *Commissioner of Police v Director of Criminal Investigations & Another v Kenya Commercial Bank Ltd & 4 Others* [2013] eKLR which held that there is an inherent public interest in the prosecution of criminal offenses. That the Court must balance the public's interest in effective criminal prosecution against the individual's right to fair treatment.
16. In this instance, there is insufficient evidence to suggest that the Petitioner has been treated unfairly after the criminal proceedings were preferred against him. For this reason, this Court is persuaded that the ODPP acted within its constitutional mandate under Article 157, and furthermore, there is no demonstrated abuse of process that would necessitate interference.
17. Having established that Section 193A of the Criminal Procedure Code permits the coexistence of civil and criminal cases based on similar facts, then there is no compelling reason to grant the orders sought by the Petitioner.
18. Consequently, this Court finds no merit on the Petition dated 12th July, 2022 and proceeds to dismiss it with no orders as to costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 20TH DAY OF SEPTEMBER, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Musyoka holding brief for De. Okubasu counsel for the Petitioner

M/S Ndeda counsel for 1st Respondent

Court Assistant - Martin

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