



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

PETITION NO. 1 OF 2020

1. KANINI KITILI MWENGI.....

2. BENSON MWANZIA KITILI.....

3. KITILI MWENDWA..... PETITIONERS

4. MWENGI KITILI.....

5. ALEX SALMIN KITILI.....

VERSUS

1. DIRECTOR OF PUBLIC PROSECUTIONS

2. NATIONAL POLICE SERVICE.....RESPONDENTS

3. THE MAGISTRATE'S COURT, KITUI

AND

1. PAUL MWAI.....INTERESTED PARTY

JUDGEMENT

1. The Petitioners' herein, **Kanini Kitili Mwengi, Benson Mwanzia Kitili, Kitili Mwendwa, Mwengi Kitili, and Alex Salmin Kitili** have been charged with the following counts namely: -

(i) **Conspiracy to defraud** contrary to **Section 317** of the

Penal Code.

(ii) **Obtaining money by false pretense** Contrary to **Section 313 of the Penal Code**. They have all been charged vide Kitui Chief Magistrate's Court **Criminal Case No. 1259 of 2018** and the particulars of the two respective counts facing the petitioners relate to the sale of the parcel of land known as **Kyangwithya/Tungutu/1124** (hereinafter to be referred to as the property in dispute for ease of reference).

2. The Petitioners have lodged this Petition to challenge the decision reached by the Office of Director of Public Prosecution (ODPP) to arraign them and are seeking the following reliefs: -

a) A declaration that the Respondents have violated Articles 2,3,10,19,20,21,27,29,40,47,50,157(11),162 and 165 of the Constitution.

b) A Judicial Review order of Prohibition to stop and prevent the 1st and 2nd Respondents from prosecuting the Petitioners and for the 3rd Respondent to stop further continuation of the proceedings in Kitui Chief Magistrates Criminal Case No. 1259 of 2018 and 1357 of 2018 as consolidated or otherwise.

c) A Judicial Review Order of Certiorari to bring to the High Court, the decision to charge and prosecute the Petitioners and or to quash the decision and the criminal proceedings in Kitui Chief Magistrate's Criminal Case Number 1259 of 2018 and 1357 of 2018 as consolidated or otherwise.

d) Compensation and damages.

e) Cost of this Petition.

3. Background

A brief summary of the background of this case, shows that the property in dispute is registered in the name of the late **Kitili Mwengi Mwai (deceased)** who died on **24th April 1995**. The property in dispute therefore was part of his estate. That fact is uncontested. It is also not contested that the grant in respect to the estate of the late Kitili Mwengi Mwai was confirmed on **13th August, 2018** vide a Certificate of Confirmation dated **28th August, 2018** issued through Kitui CM's court **Succession Cause No. 223 of 2013**. In the Certificate of Confirmation, the disputed parcel was distributed to **KANINI KITILI**, the 1st Petitioner herein.

4. The Interested Party in this Petition, **Paul Mulwa Lungui** alleged that he purchased the disputed parcel (**1124**) from the 1st Petitioner and her children on **29th January, 2014** at **Kshs. 2,100,000** vide a Written Agreement and took possession of the said parcel with the consent of Petitioners. The dispute appears to have escalated to environment and Land court vide **Environment and Land Case No. 175 of 2014** which entertained the dispute and found in favour of the 1st Petitioner for the reason that the contract entered between the Interested Party and the 1st Petitioner was not enforceable in law. The Interested Party also lost his quest to have Kshs. 2,100,000 refunded to him for want of proof and the 1st Petitioner was given eviction orders to remove him from the disputed parcel.

5. The Interested Party, upon being evicted decided to pursue justice by registering a complaint at Kitui Police Station. The 2nd Respondent herein, upon investigation forwarded the investigation file to Director of Public Prosecution who in turn preferred charges against the Petitioners herein. As observed above, the decision to charge them vide **Kitui CM's Court Criminal Case No. 1259 of 2018** is now the subject of this petition.

6. The Petitioners' Case

The Petitioners aver that the 1st Petitioner is the wife of the deceased and Legal Representative of the estate of **KITILI MWENGI MWAI**. They claim that the Interested Party's purchasers claim on the disputed parcel was determined in **Machakos Environment and Land Case No. 175 of 2014** in her favour and that upon determination of the said Civil Case, the Interested Party proceeded to Kitui Police Station where he lodged a complaint.

7. The 1st Petitioner further plead that when she took the eviction orders to the Police for assistance to evict the Interested Party, on **9th October, 2018** that the Police dilly dallied. She adds that on **11th October, 2018**, she and her children were arrested and charged in the said Criminal Case before Kitui CM's Court. She further states that on **17th October, 2019**, the Interested Party was eventually evicted

8. The Petitioners have faulted the Respondents herein for violating their Constitutional Rights which they have listed as follows: -

(i) **Article 27 of the Constitution**-The Petitioners claim that, the Respondents have not accorded them equal protection and benefit of the law.

(ii) **Article 29 of the Constitution** -They claim that, by arresting and prosecuting them without valid and lawful reason, their rights to freedom and security have been violated.

(iii) **Article 40 of the Constitution**. They claim that, the Criminal Justice System is being used to assist the Interested Party in a civil matter and that their rights to property are being infringed.

(iv) **Article 47 of the Constitution**. They also claim that their rights to a fair administrative action that is lawful, reasonable and procedurally fair have been violated.

(v) **Article 50 of the Constitution**. They claim that the Criminal proceedings against the Petitioners are being conducted in breach of Principles of Fair Hearing.

(vi) **Article 157(11) of the Constitution**. They claim that the decision by the 1st Respondent to prosecute them was not made in interest of administration of justice and that the said decision was exercised arbitrarily in an abuse of court process and abuse of discretion granted to the Office of the Director of Public Prosecution.

(vii) **Article 162 and 165 of the Constitution**. The Petitioners faults the 3rd Respondent for proceeding with the trial in violation of principle of **stare decisis** and the binding nature of the decisions from the higher courts.

(viii) They claim that the 1st and 2nd Respondent have not exercised their authority in a manner that is consistent with the purposes and objections of the Constitution or in a manner that promotes public confidence in their offices adding that the decision to charge them was not objective and impartial.

9. The Petitioners have exhibited documents in support of their petition and in the particular documents that lay basis of this petition and the judicial review orders sought to stop these prosecutions and quash the decision to charge them in the cited criminal case.

10. **The 1st and 2nd Respondents case.**

The 1st Respondent has opposed this petition through a replying affidavit by Mamba Vincent sworn on **16th June, 2020** and Written Submissions dated the same date. The Office of Director of Public Prosecution claims that the 1st Petitioner and the Interested Party entered into a written sale agreement over the disputed parcel drawn by one J.M. Mwalimu Advocate.

The 1st Respondent claim that, from the said agreement, the 1st Petitioner was paid in instalments of **Kshs. 1,000,000, Kshs. 500,000 and Kshs. 270,000**. It claims that in total the 1st Petitioner acknowledged receipt of **Kshs. 2,100,000**. It further claims that the sale was conducted by the parties in full knowledge that the property in question was part of an estate of a deceased person and that the Interested Party was given the title deed document to keep as security awaiting formal procedures in Probate and Administration proceedings.

11. The 1st respondent contend that the 1st Petitioner moved to the Environment and Land Court in order to annul or revoke the agreement and evict the Interested Party from the disputed parcel in bad faith and that the Interested Party felt cheated and conned and hence the complaint made to the police that resulted in the Criminal charges.

12. The 1st Respondent submits that the main purpose and objective of the Petitioners were designed to deceive the Interested Party to make payments with full knowledge that they will not honour their part of the bargain.

13. The 1st Respondent contend that the actions of the Petitioners were ill informed and contrary to the spirit of **Section 317 of the Penal Code**. It submits if the reliefs sought by the Petitioners are granted, a fair trial as envisaged under **Article 50(1)** of the Constitution will not be achieved.

14. The 1st Respondent insist that, that the Petitioners committed the offences for which they are charged and that it is ready to demonstrate to the trial court that;

- a) That the Petitioners obtained something that is capable of being stolen.
- b) That they obtained by false pretenses and
- c) That their intention was to defraud the Interested Party herein.

15. It submits, that the actions by the Petitioners discloses an offence under **Section 313 of the Penal Code** adding that the fact that the Environment and Land Court in Machakos adjudicated on the matter, does not prevent a Criminal Court from determining the matter and cites the provisions of **Section 193 of the Criminal Procedure Code** to buttress the contention.

16. It asserts that in preferring charges against the Petitioners, it acted properly in accordance with **Article 157(6) (10) and Article 249(2) of the Constitution**. It denies that it has abused its powers or exceeded its powers.

17. The 1st Respondent also submits that the question of whether to prosecute or not should better be left to it. It adds that the Petitioners have not demonstrated the decision to charge them was made in bad faith or outside the mandate of the 1st and 2nd Respondents. It is further submitted that the 2nd Respondent is empowered to investigate any complaint made to them and that they would be failing in their mandate if they did not detect crime and prevent the same. It urges this court to be reluctant in intervening with the Criminal trial adding that the Interested Party has appealed the decision of **Environment and Land Court Civil Case No. 157 of 2014** and that **Section 193 A of Criminal Procedure Code** provides that existence of a Civil Case over a subject matter is not a bar to Criminal Proceedings.

18. The 1st Respondent contests the Petitioner's assertion that by allowing the Criminal proceeding to proceed will be tantamount to Magistrates sitting on appeal of the High Court decision. It submits that the trial court has powers and jurisdiction conferred to it by law and urges this court to allow the trial to proceed to its conclusion.

19. **The Interested Party's Case.**

The Interested party on his part, has thrown his weight behind the 1st and 2nd Respondent in opposition of this Petition through grounds of opposition dated **9th November, 2020**. The Interested Party claims that the Petitioners had unsuccessfully sought to challenge their prosecution vide **Kitui High Court Miscellaneous Cause No. 68 of 2019**. The Interested Party has however not exhibited the decision or the reliefs sought to demonstrate that this matter is **res judicata**.

20. He further avers that the function of the police is to investigate crime while the Office of the Director of Public Prosecution is mandated to undertake prosecutions. He urges this court not to intervene as the Petitioners will have an opportunity to defend themselves at the trial.

21. This court has considered this petition and the response made. For the record, the Petitioners through Counsel chose not to make written submissions on time or at all and thereby left this court to simply rely on their pleadings filed. The Interested Party has on the other hand raised a critical point that this petition is **res Judicata** but for unknown reasons failed to demonstrate through an affidavit that a similar matter had earlier been filed and the court rendered itself. In the absence of evidence showing that this matter is **res judicata**, the plea

cannot be sustained.

22. Having said that, the petition placed before basically raises one issue for determination which is whether the Office of the Director of Public Prosecution has overstepped its mandate or abused its power by deciding to prosecute the petitioners in the face of a decision rendered by Environment and Land Court over the subject matter which is the parcel of land in dispute.

23. It is not disputed that the Direction of Public Prosecution has powers donated by **Article 157(b) of the Constitution** to undertake criminal proceedings against any person before any court where an offence has been committed. It is also true that under **Article 157(10)** the independence of the Director of Public Prosecution is guaranteed. However, a look at **sub Article (11)** of the same Article shows that the exercise of the powers are limited and cannot be exercised arbitrarily or capriciously. The sub Article provides as follows: -

“In exercising the powers conferred by this Article, the Director of Public Prosecution 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”.

24. In the light of the above Constitutional provision, the question posed is whether the decision to prosecute the Petitioners by the Office of Director of Public Prosecution was made fairly and in the interest of administration of justice.

25. The gist of this petition is that, because the dispute between the Interested Party and the Petitioners is of a Civil nature and the same, having been determined by the Environment and Land Court, the same cannot be subject of Criminal proceedings again and that even if there are unresolved issues, the same ought to be resolved through a Civil process rather than a Criminal Process. The arguments to some extent is legitimate but to some extent it is diversionary and escapism.

26. It is true that Civil disputes should be resolved in Civil Courts which in this instance is Environment and Land Court as the matter touches on land but the provisions of **Section 193** of Criminal Procedure Code states as follows: -

“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 stay, prohibition or delay of the Criminal Proceedings”.

27. My reading of the above statute shows that, while **Section 13 of Environment and Land Court Act, 2011** grants the **Environment and Land Court** jurisdiction to determine disputes related to land, the existence of a case before that court does not bar or stop a competent Criminal Court from entertaining a matter brought before it. The same also applies that matter brought under the **Law of Succession Act (Cap 160 Laws of Kenya)**. In **obiter** there is no dispute that the subject matter in this petition was a matter clearly under the preview of probate and Administration Court but that as it may, is now water under the bridge. Suffices to State that when one is dealing with estates of deceased persons and the manner in which the estates are administered or interfered with, (read intermeddled with) and general administration of the assets forming the estate of a deceased person, the proper court seized with the jurisdiction in my respectful view is the probate and administration court. But as I have observed the sentiments expressed here are completely **obiter dictum** and has no bearing on the determination of matter before me. The issue at hand is the provisions of **Section 193 A of the Criminal Procedure Code**, and my take is that the pendency of a matter before a probate court or any other Civil Court, is not in itself a bar to a Criminal proceeding over the same issue unless it can be demonstrated that the criminal proceedings have been commenced with a view to giving one of the parties an upper hand in the Civil case. If a party can show or demonstrate on a balance of probabilities that the decision made by Office of the Director of Public Prosecution to prosecute is intended achieving an ulterior objective other than fair administration of justice, then this court under **Article 165 (3)** as read with **Article 157 (11)** of the Constitution can intervene in any of the ways stipulated under **Article 23(3) of the Constitution of Kenya 2010**.

28. This court has keenly gone through the pleadings filed in this petition and undeniable facts have come to my attention.

a) For one, the 1st Petitioner perhaps with the knowledge of two or the other Petitioners dealt with an estate (parcel in dispute) of deceased person and received some payments from the Interested Party.

b) Secondly, it is apparent that upon paying the consideration the Interested Party took possession of the parcel in dispute and was in active possession before he was evicted courtesy of eviction orders from the Environment and Land Court.

c) Thirdly, the 1st Petitioner took out the letters of administration in respect to the estate of her late husband, Kitili Mwengi Mwai (deceased) via Kitui Chief Magistrate's Court Succession Cause No. 223 of 2013 and part of the assets listed in that cause was the property in dispute perhaps unbeknown to the Interested Party, he was not included in the distribution of the estate.

d) The 1st Petitioner after being paid and upon giving possession to the Interested Party filed a Civil Suit and sought inter alia eviction orders on the basis that the agreement she had entered with the Interested Party willingly over the parcel in dispute was illegal, null and void. The Environment and Land Court agreed with the 1st Petitioner and nullified the transaction in view of clear provisions of **Section 82 of Land Succession Act (Cap 160)**.

29. The chronology of the above facts makes one to arrive at one and inevitable conclusion. One party in the impugned transaction was intent at having his/her cake and eating it at the same time. There is no need of second guessing here as to who the culprit is but in view of the need not to prejudice any of the parties here, given that the matter is still alive (both in the Criminal Court and perhaps in the appeal) this court finds it just to leave the matter at that.

30. It suffices to state that this court is not persuaded that the Respondents have either overstepped their mandate or have acted in bad faith. I am also much less persuaded that the trial court is like sitting on appeal over a matter determined in the higher court. As observed above, the

existence of a civil matter in a civil court is not in itself a bar to a Criminal Court from interrogating any criminality that may have occurred in the transaction giving rise to the civil dispute.

31. This court further takes the position that, a criminal matter pending in a criminal court with competent jurisdiction should be left there for adjudication unless an accused person can demonstrate that he/she is being subjected to unfair trial or that any of his/her Constitutional rights have been infringed or likely to be infringed by the trial. In such event, courts can intervene but I must add that jurisdiction to intervene is used sparingly and only in clear cut cases because courts should be careful not deny a party (read complainant) access to justice and an accused person(s) always a chance to ventilate whatever issue(s) he or she has in his/her defence. So rarely would prejudice be suffered.

32. This court is not persuaded that the respondents have violated any of the Petitioner's rights listed and alleged to have been violated. This court finds that the Criminal Court or the Magistrate's Court is well seized with the jurisdiction to determine case before it. It is obvious that while the Environment and Land Case Court may have found that the transaction between the Interested Party and the 1st Petitioner was not enforceable in law in the face of the provisions of **Section 82 of Law of Succession Act**, from where I sit (usually known as seat of judgement), it is totally unfathomable that a party can be allowed to benefit from an illegality/wrong, because of the doctrine "**in pari delicto est conditio defendtis**" ("**of equal guilt or fault**") which is translated to mean a wrong doer shall not be allowed to benefit from his/her wrongful conduct. Simply put a wrongdoer should not be allowed to benefit from her own wrong doing. So from the legal standpoint, the Petitioners cannot take back the disputed parcel and at the same time keep the money paid out to them in consideration. That is wrong and untenable.

In sum, this court finds no merit in this petition for the reasons advanced. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 8TH DAY OF MARCH, 2021.

HON. JUSTICE R. K. LIMO

JUDGE