



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 16 OF 2019

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 27, 47 AND 50 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 249 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 23 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

DAVID MUCHENA NTOMBURA1ST PETITIONER

PROTEASE MIRITI2ND PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL3RD RESPONDENT

AND

JUSTUS KITHELA M'IGWETA.....INTERESTED PARTY

RULING

1. By a Motion on Notice dated 11/11/2019 brought under *Articles 22, 23, 27, 47, 50 and 249 of the Constitution of Kenya 2010, Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules)* and *Sections 1A, 3A of the Civil Procedure Act*, the applicants sought conservatory orders pending the hearing of their petition.

2. In that Motion, the prayers sought were that the decision made by the 1st respondent at the recommendation of the 2nd respondent on the 20/8/2019 to arrest, detain and or charge the applicants be stayed. Further, the applicants sought that the 1st and 2nd respondents be prohibited and/or restrained from arresting, detaining, charging and or arraigning the applicants in court pending the hearing and determination of the substantive petition.

3. The grounds upon which the application was grounded were set out in the body of the Motion and the supporting affidavit of **David Muchena Ntombura** sworn on 11/11/2019. It was contended that; **Plot No. 8 (A and B)** within **Kiorimba market** was the subject matter in **Tigania ELC No. 63 of 2018**. That at the request of the trial court in that case, the 1st respondent carried out investigations and having

sought the views of all parties involved, recommended to the court that the said plot rightfully belonged to the 1st petitioner. The trial court therefore ruled that that plot belonged to the 1st petitioner and dismissed the suit.

4. Pursuant thereto, the Interested Party lodged **ELC Appeal No. 83 of 2019** at Meru against that decision which is pending determination. That the 1st respondent subsequently carried out another investigation without the petitioners' involvement and recommended that the aforesaid plot belongs to the Interested Party. The 2nd respondent therefore had recommended that the applicants be arrested and charged with offences of conspiracy to defraud contrary to **Section 317 of the Penal Code** and forcible detainer contrary to **Section 91 of the Penal Code**.

5. The applicants therefore contended that the said decision was in contravention to **Article 50 and 157 (11) of the Constitution**. That the recommendation for the arrest and prosecution of the applicants was in the wake of an active appeal over the same subject matter before the High Court.

6. The application was opposed by the interested party and the respondents through the replying affidavit of **Justus Kithela M'Igweta** and **CPL Samuel Kona** sworn on 22/11/2019 and 25/11/2019, respectively.

7. **Justus Kithela M'Igweta** deponed that he is the rightful owner of the subject plot. He also gave the history of the dispute and how the second investigation was resorted to after the first one. He admitted that the appeal he had preferred, in **ELC No. 83 of 2019**, was still pending. He contended that it is within the law for the ODPP to direct prosecution of any individual who is suspected of breaking the law of which the applicants are.

8. On his part, **CPL. Samuel Kona**, stated that he was the investigating officer attached to DCI offices in Tigania West Sub – County. He deponed that on 23/7/2018 a complaint was made to the DCI them where the complainant alleged that the applicants had used their influence at the County Government of Meru to deprive him of the subject plot. That he had undertaken investigations which revealed that an offence had been committed. He denied that the applicants had not been consulted during the second investigation.

9. The parties filed their respective submissions which the Court has carefully considered. **Mr. Maranya**, Learned Counsel for the applicants submitted that the plot had been the subject of **Tigania ELC Case No. 63 of 2018**. That the case had been dismissed following the report of the 1st respondent and an appeal is still pending. That the 2nd respondent has two reports with different conclusions and that if the criminal case proceeds, it will likely interfere with the ELC appeal. Counsel therefore urged that the criminal proceedings be halted until the ELC is concluded.

10. **Mr. Namiti**, Learned Counsel for the respondents submitted that; the applicants had not shown that the commencement of criminal proceedings will amount to abuse of court process. That they had failed to establish that there exists any of malice or infringement of their rights. The pendency of the civil case is not a bar to criminal proceedings. The 2nd respondent conduct investigations which can be returned for re-investigations.

11. On his part, the interested party submitted that he is the owner of plot 8B. That constitutional rights apply to all. That the same way the applicants did not want to be tried, the Court is entitled to also consider his right to property.

12. The issue of determination is **whether the conservatory order sought by the applicants should issue**. The Constitution of Kenya has entrenched the governance system of separation of powers. The governmental authority is divided such that, each governmental agency is allocated specific duties which neither can encroach. On their part, courts are always called upon to keep checks and balances to ensure that there is no abuse when it comes to the exercise of power or execution of duties/authority by governmental agencies.

13. **Article 157 of the Constitution** establishes the office of the Director of Public Prosecution and gives that office the power to prosecute. That office has the power to institute any proceedings before the court against any person in respect of any offence alleged to have been committed.

14. In **Republic v Attorney General & another Ex parte Vaya & Another (2004) KLR 281**, the court held:-

“One critical custodian of this public policy is the Attorney General in his prosecutorial role now the DPP; and in a matter such as the one in hand, this Court ought not hold that no prosecutions may be brought against persons suspected of committing offences touching on rational resource use. Accordingly, I hold that there is no public policy to limit the competence of the Attorney General to prosecute persons in the position of the applicants.”

15. In **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**, the court 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”.

16. The foregoing decisions show the importance attached to the doctrine of separation of powers by courts. In this regard, a court will not hold that no prosecution may be brought against persons unless the prosecution fails to act in a reasonable manner. Courts are only concerned with the manner in which a prosecution is conducted and not the merits of any decision making process that lead to a prosecution. This is meant to prevent proceedings being instituted for ulterior motive other than for criminal justice.

17. In Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, the court held:

“In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed.”

18. In the petition before Court, the applicants allege that their constitutional rights have been violated by the 2nd respondent’s recommendation that they be arrested and charged with specific offences. That the matter had been investigated and the 1st respondent concluded that the suit land belonged to them. That by the 1st respondent carrying out another investigation without their involvement and preferring charges against them is a violation of their rights.

19. Criminal proceedings are only to be halted if they constitute an abuse of the court process or are being undertaken in a manner that breaches a person’s constitutional rights. However, if the allegation is that the facts constituting a criminal proceeding is a basis for a civil suit, that *per se* is not a ground for stay of the criminal process. (See: George Joshua Okungu and Another v Chief Magistrate’s Court Anti-Corruption Court at Nairobi and Another (2014) eKLR).

20. In the present case, the applicant did not set out which of their constitutional rights and the related provisions of the Constitution that were being violated. In Anarita Karimi Njeru v Republic [1979] eKLR, it was held that, a party who approaches this Court for a constitutional remedy, he should set out clearly the provisions of the law and the fundamental rights and freedoms that are alleged to be violated. In addition, such an applicant must specify the manner in which those rights are being violated or threatened to be violated.

21. In the present case, all the applicant state is that there are in existence two investigation reports with conflicting conclusions. That the second investigation was conducted without involving them contrary to *Article 47 of the Constitution*.

22. The applicants did not cite any provisions of the law that require the 1st and 2nd respondent to consult them before making a decision to charge. All that is required is that the respondent do act on reasonable apprehension or suspicion that an offence has been committed. In this regard, neither *Articles 47, 49 or 50* are applicable. *Articles 49 and 50 of the Constitution* will only apply after arrest and consequent arraignment in court.

23. Further, the applicants did not allege or prove that the intended prosecution was actuated by malice. The existence of two conflicting reports will be an issue for the investigation to contend with before the trial court. Malice having not been proved to be the root cause of the proceedings complained of, the conservatory order sought cannot issue.

23. Accordingly, the application is without merit and the same is hereby dismissed.

SIGNED at Meru

A. MABEYA

JUDGE

DATED and DELIVERED at Meru this 13th day of February, 2020

F. GIKONYO

JUDGE