



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 22 OF 2019

AHMED YUSUF ALI.....PETITIONER

VERSUS

1. HUSSEIN YUSUF ALI

2. DIRECTOR OF CRIMINAL INVESTIGATIONS.....MOMBASA

3. DIRECTOR OF PUBLIC INVESTIGATIONS.....RESPONDENTS

JUDGMENT

1. By a Petition dated 11.03.2019, the Petitioner **Ahmed Yusuf Ali**, moved this Court seeking for an order of injunction prohibiting the Respondents from proceeding with any Criminal investigations, intended arrest and arraignment in Court of the Petitioner. The petition is supported by the Verifying Affidavit sworn on 11.03.2019 by **Ahmed Yusuf Ali**.

2. The Petitioner accuses the 1st Respondent for reporting alleged criminal activities including forgery vide OB number 65/11/12/2018 at Bamburi police station. The petitioner claims that there has been dispute between himself and the 1st Respondent with regard to ownership and sub-division of land title Number CR 36602 Subdivision No. 12529 (original number 288/2) Section 1 Mainland North. He claims that the said dispute culminated at filing of ELC Case No. 2 of 2016 which is to date pending before the Environment and Land Court. The Petitioner's case is that the 1st Respondent intends to turn purely civil land matter into a criminal case.

3. The Petitioner further claims that the 1st Respondent has prompted the 2nd and 3rd Respondents, to initiate malicious and unjustified investigation and therefore an attempt to arrest the Petitioner in bad faith.

4. Alongside the petition, the petitioner also filed Notice of Motion dated 11.03.2019. However, that application has never been heard and there are no interim orders. The said application was overtaken by events when parties decided to deal directly with the Petition herein.

5. The Petition is opposed by the Respondents herein. The 1st Respondent filed a Replying Affidavit sworn by himself on 28/5/2019, whereas the 3rd Respondent filed grounds of opposition dated 3rd June. The second Respondent never participated in these proceedings.

6. The 1st Respondent's case is that he did not sign any transfers in favour of the Petitioner and that the alleged transfers were done fraudulently. The 1st Respondent avers that he procured the services of a handwriting expert and investigations carried out confirmed the forgeries as he alleged. He then reported the matter to the local authorities. According to the 1st Respondent, the ongoing civil matter does not bar any criminal investigations in any way.

7. The 1st Respondent avers that Petitioner cannot commit an offence and then attempt to use the court to stop his prosecution over the offence. The 1st Respondent's Case is that in any event an accused person is presumed innocent until proven guilty. Therefore, the 2nd and 3rd Respondents are justly exercising powers conferred upon them under the Constitution.

8. On his part the 3rd Respondent's case is the Petition offends section 193 A of the Criminal Procedure Code in that any proceeding which is also directly or substantially in issue in any pending civil proceeding is not a ground for any stay, prohibition or delay of the criminal proceedings. It is the 3rd Respondent's Case that it is mandated to institute and undertake criminal proceedings against any person before any court other than the court martial in respect of any offence alleged to have been committed by virtue of Article 157 of the Constitution and the ODPP Act. As such no violation has been committed as against the Petitioner.

Submissions

9. The petitioner submitted that he is involved in a land dispute with the 1st Respondent which is still pending in court. As a result of the said dispute the Petitioner alleges that the 1st Respondent has occasionally made attempts to criminalize the matter by making reports to Bamburi and Nyali Police stations complaining of forgery, assault and attempted murder against the Petitioner. It is argued that the 1st Respondent is using the criminal process to favour him in the civil dispute. The Petitioner relied on **Republic –vs- Director of Public Prosecutions & 3 other ex-parte David Mathenge Ndirangu [2014] eKLR** and urged the court to grant the Petition.

10. On his part the 3rd Respondent submitted that he is protected by Article 157 of the Constitution of Kenya. That Article 157 (6)(a) provides that:-

“THE Director of Public Prosecutions shall exercise state powers of prosecution and mandate to:-

(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...”

11. As such the 3rd Respondent submitted that it acted in good faith within the provisions of Article 243 and Section 193A of the Criminal Procedure Code in investigating the reports of forgery made by the 1st Respondent. It was further submitted that the Petitioner has not placed before this court any evidence to show that the alleged offence as reported in OB 65/11/12/2018 did not occur, or that it is not an offence.

12. It was further submitted that the Petitioner has not shown what prejudice he is likely to suffer should investigations continue. The 3rd Respondent submitted that the Petition lacks merit and should be dismissed.

The Determination

13. I have considered the pleadings of the parties, their respective submissions, and the authorities relied on. The Petitioner seeks injunction prohibiting the Respondents from proceeding with any Criminal investigations, intended arrest and arraignment in Court of the Petitioner.

14. It is clear that the whole dispute between the parties herein rests on the ownership of the parcel of land known as land title Number CR 36602 Subdivision No. 12529 (original number 288/2) Section 1 Mainland North. The Petitioner alleges that the 1st Respondent transferred the said parcel of land before M/s Isaac Onyango Advocates. A copy of the said transfer was annexed as AYA-1. The 1st Respondent however denies having executed the said transfer and deposed that his signature was forged.

15. Further there exists a civil case involving the same parties, to wit E.L.C CASE NO. 2 OF 2016 Nizam Juneja Yusuf Ali –vs- Hussein Yusuf Ali & Others. The 1st Respondent has not denied the existence of E.L.C. CASE NO. 2 OF 2016. The existence of that dispute did not attract any criminal investigations or prosecution. It is argued that the 1st Respondent is using the criminal process in his favour in a bid to settle the civil dispute.

16. In my view, the mere existence of a civil dispute or a civil case between parties would not automatically insulate a party who is suspected of commission of a criminal offence from criminal investigation, unless there is material upon which it may be inferred that the criminal justice system is being employed to achieve ulterior motives. In ***Francis Kirima M’Ikunyua & Others vs Director of Public Prosecutions Petition No. 461 of 2012*** the Court stopped a criminal prosecution when it found that there were several decided and pending civil suits concerning the disputants but the criminal justice regime had been maliciously employed to give undue advantage to one disputant. It was a case of the criminal process being employed to ‘score points’ in a bid to assert ownership rights over disputed property.

17. In this petition the Petitioner has not demonstrated how the criminal justice regime is misused to the advantage of the 1st Respondent.

18. The investigating agency carried out investigations which made them conclude that there was some kind of forgery. That report was annexed as AYA-5 on the Petitioner’s application. The Director of Public Prosecutions in exercise of his Constitutional power under Article 157 of the Constitution considered the inquiry file and accepted that there was sufficient evidence to sustain the charge. In those circumstances, this court shall exercise restraint and will not short circuit the criminal justice system by making an assessment of the strength or weakness of the intended prosecution.

19. In ***Christopher Mbugua Kiiru vs Inspector General of Police & 3 Others Mombasa Constitutional Petition No. 38 of 2013*** the court quoted from ***Republic vs Inspector General of Police & 2 Others ex parte Zelea Jakaa Akiru*** as follows;

“The Director of Public Prosecutions (DPP) has constitutional duty to prosecute offences under Article 157 of the Constitution and in the exercise of such mandate, the DPP may use the police investigators and prosecutors as may have happened in this case, and I would therefore, find that the 2nd respondent acted within his powers to file criminal prosecution. The prosecution would, of course be expected to bring charges only where the investigations reveal an offence. However, whether the investigations leading to the arrest and charge of the applicant were properly done, if at all, will be established before the trial court in its decision whether the applicant has a case to answer or whether the prosecution proves the case beyond reasonable doubt upon full hearing in accordance with section 215 of the Criminal Procedure Code. The court cannot, in exercise of its Judicial Review jurisdiction of Order 53 of the Civil Procedure Rules, consider the merits of the criminal charges facing the applicant and determine whether proper investigators were conducted into the alleged offence, and consequently whether the applicant is guilty or not guilty.”

20. For the foregoing reasons, the Petition before the Court is not proved and is devoid of merit and is dismissed with costs to the Respondents

It is so ordered.

Dated, Signed and Delivered at Mombasa this 21st day of May 2020.

E. K. O. OGOLA

JUDGE

In the presence of:

No appearance for Petitioner

Mr. Kaunda Court Assistant