



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 227 OF 2018

1. HASSAN SHEIKH ABDALLA
2. ZAFFER EBRAHIM TAYABALI KARIMJEE
3. MUSTAFA FAZALABBAS MOHAMMEDDALI
4. HASHIM GOTSAT.....PETITIONERS

VERSUS

1. DIRECTOR OF PUBLIC PROSECUTIONS
2. THE INSPECTOR GENERAL OF POLICE
3. DIRECTOR OF CRIMINAL INVESTIGATIONS
4. THE CHIEF MAGISTRATE COURT, MOMBASA
5. IBRAHIM SHEIKH ABDULLA.....RESPONDENTS

RULING

The Application

1. By a Notice of Motion application dated 26.9.2018, the Petitioners herein pray for the following orders:

1. Spent.

2. Spent.

3. Pending the hearing and determination of this application, a Conservatory Order be issued to stay the proceedings in Mombasa Chief Magistrate Court criminal case No.1631 of 2018 and the consequential orders made therein. Further, the Respondent be restrained from initiating any other criminal proceedings against the petitioners in relation to the parcel of land known as Mombasa/Block XVI/137.

4. That costs of this application be provided for

2. The application is premised on the grounds set out therein, and is supported by affidavit sworn by the 1st Petitioner on 26.9.18.

3. The 1st Petitioner avers that the suit property was initially registered in the names of **Rukiyabai Lukmanji, Taibali E.T Karimjee, Gulamabbas E.T Karimjee and Mustafa Ebrahimjee**. When **Rukiyabai** passed on, the 2nd Petitioner and **Mustafa Ebrahim Tayabbhoy Karimjee** (deceased) filed Mombasa Succession Cause No. 380 of 2010 (in the matter of revocation of grant) seeking grant of letters of administration of his estate. On the 14.3.2012, they were issued with a confirmed grant to represent the interest of the late **Rukiyabai Lukmanji** and the said confirmed grant was lodged with the office of the 4th Petitioner who registered the said interests on the suit property.

4. It is averred that the 3rd Petitioner holds power of attorneys' from **Tailbali E.T Karimjee, Mustafa Ebrahim Tayabbhoy** (deceased) and **Zaffer Ebrahim Tayabali Karimjee** for purposes of running the affairs of the suit property and the 5th Respondent has been a tenant on the suit property and it is only when he learnt of the demise of **Rukiyabai Lukmanji** that he started abusing the legal process in order to protect himself from paying rent and being subjected to a rent increase. The cases allegedly filed by the 5th Respondent are as follows:-

a) **Mombasa BPRT CASE NO. 135 of 2006.**

b) **High Court Civil Appeal No. 160 OF 2007.**

c) **Mombasa Senior Resident Magistrate Civil case no. 3025 of 2009.**

d) **Succession cause No. 380 of 2010(objection proceedings). Mombasa High Court Civil Case 78 of 2013.**

e) **Mombasa Judicial Review No. 45 OF 2013.**

f) **Mombasa BPRT CASE No. 163 of 2009.**

g) **Mombasa High Court Civil Appeal no. 82 of 2016.**

h) **Constitutional Petition No. 18 of 2017.**

5. The 1st Petitioner depones that Vide letter dated 3.3.2016; the 5th Respondent lodged a complaint with 1st to 3rd Respondents to the effect that the 1st and 3rd Petitioners procured the proprietorship of the suit property by false pretences as the personal representative of **Rukiyabai Lukmanji** with the assistance of the 4th Petitioner herein. In reply vide letter dated 16.3.2016, the other registered owners of the suit property indicated to the 1st to 3rd Respondent that they had absolutely no complaint with the registration of the 2nd and 3rd Petitioners as the personal representatives of **Rukiyabai Lukmanji** (deceased).

6. It is deponed that the 5th Respondent having been unable to challenge the 2nd and 3rd Petitioners' title and failed to revoke the grant issued to them in Mombasa, he approached the 1st and 3rd Respondents in Nairobi to have them charge the Petitioners so as to avoid payment of rent. Consequently, criminal proceedings were instituted against the Petitioners without their knowledge as the 1st to 3rd Petitioners never notified of the said proceedings. They only learnt of the said proceedings when a warrant of arrest was issued against the them to attend Court and take plea.

7. The 1st Petitioner depones that the issues raised in the charges against the Petitioners are the same as the issues raised in the aforementioned suits which are pending determination and he is apprehensive that he will be charged as indicated in the letter dated 3.3.2016, alongside the other Petitioners.

8. It is also deponed that the criminal proceedings against the petitioners are an abuse of the court process and it is paramount for this Court to intervene and halt the gross misuse of the criminal process.

Respondents' Case

1st to 3rd Respondents

9. The 1st to 3rd Respondents opposed the application by filing a Replying Affidavit sworn by **PC Daniel Muteshi** on 19.2.19. Their case is that from investigations conducted, there is sufficient evidence linking the accused persons in CR .1631 of 2018 for an offence of making false declaration under the Oaths and Statutory Declaration Act, and that the 4th petitioner failed in his duty as a Land Registrar to carry out due care by registering fake powers of attorney.

10. It was averred that the 1st Petitioner has not been charged with any criminal offence to warrant him to challenge the criminal proceedings in CR.1631 of 2018 and that he was only investigated, but charges were never preferred against him.

5th Respondent Case

11. The 5th respondent opposed the application via his Replying Affidavit sworn on the 15. 2.2019 and Notice of Preliminary Objection filed on the 26.10.2018.

12. He averred that the 1st Petitioner was never instructed to collect rental income on the building standing on the suit property, as there is no proof that **Rukiyabai Lukmanji** the person to whom the suit property was registered, passed away and that the grant issued on the 14. 3.2012 is currently undergoing revocation proceedings in succession 380 of 2010 due to fraud on the part of the petitioners.

13. He further depones that his complaint to the police was based on his concern due to the unlawful activity that was affecting his business, and as a law abiding citizen, he felt it was his duty to report the criminal activities. He further states that, it was not possible for the 2nd and 3rd petitioners to be summoned by the directorate of criminal investigation as they are not Kenyan citizens and they don't reside in Kenya.

14. In his Notice of Preliminary objection, the 5th Respondent stated as follows:

1. **The 1st Petitioner has no locus standi to institute the instant Petition and consequently, the main Petition and accompanying Application is incompetent for lack of a Supporting Affidavit.**
2. **The 1st Petitioner has not established any nexus between himself and the 2nd, 3rd and 4th Petitioners.**
3. **The Application is fatally defective, misconceived, bad in law and an abuse of the Court process.**

Submissions

15. **Mr. Gikandi** Learned Counsel for the Petitioners reiterated the content of the Application dated 26.9.2018 and for authority he relied on **Republic vs. DPP & Another ex-parte Patrick Kangethe Njuguna & 4 others [2017] eKLR**, where the Court held that a power which is abused should be treated as a power which has not been lawfully exercised.

16. Counsel submitted that there was an ulterior motive on the part of the police from Nairobi in instituting the present proceedings, whereas in Mombasa, the police found no fault. Mr. Gikandi submitted that the 5th Respondent is using the criminal process to get an advantage over the Petitioners as the alleged criminal offence were committed even before the institution of the civil cases pending in Court.

17. **Mr. Fedha**, Learned Counsel for the 1st to 3rd Respondents submitted that the 5th Respondent made a complaint to the 2nd Respondent and thereafter, investigations were carried out and the file was forwarded to the 1st Respondent who upon perusal confirmed that the investigations were proper and preferred charges against the 2nd, 3rd and 4th Petitioners under Article 157(6)(a) of the Constitution.

18. Counsel further submitted that the Petitioners have not demonstrated what prejudice they will suffer if the criminal case proceeds.

19. **Mr. Cheloti** Learned Counsel for the 5th Respondent relied on his Replying Affidavit and submitted that Section 193(A) of the Criminal Procedure Code allows criminal and civil matters to go hand in hand and that the Petition and the Application are based on hearsay and as a result should be dismissed.

20. I have considered all the material canvassed in respect of the Motion and the Notice of preliminary objection. The following issues in my view are up for determination namely:

- a) **Whether the Court has the jurisdiction to determinate the dispute herein.**
- b) **Whether the applicant herein has the locus standi to bring the suit herein.**
- c) **Whether the petitioners are entitled to conservatory orders.**

a) **Whether the court has the jurisdiction to determinate the dispute herein.**

21. The law on preliminary objections is settled. A preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, *Law JA* stated:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further on, Sir Charles Newbold JA, stated:

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.....”

22. For a preliminary objection to succeed, the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

23. In the present case, the Preliminary Objection has been raised on the basis that the 1st Petitioner was not charged and as a result he has no locus standi to institute this Petition. In my view, an issue that calls for the establishment of any nexus between the 1st Petitioner and the other petitioners’ cannot be determined as a preliminary point of law. It calls for evidence and further ascertainment of facts. It follows that a demurrer does not raise issues of fact instead its determined on the basis of the claim and pleadings. Hence this objection does not qualify as a Preliminary point of law nor is the 1st Petitioner’s claim scandalous, vexatious or an abuse of the court process. I accordingly dismiss the 5th Respondent Notice of Preliminary Objection.

b) Whether the 1st Petitioners had the locus standi to institute the Petition on his behalf and on the behalf of the 2nd, 3rd and 4th Petitioners

24. From the onset, it must be remembered that this is a constitutional petition. **Article 22** of the **Constitution** provides as follows:

22. Enforcement of Bill of Rights

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members**

25. Further, Article 258 (1) of our Constitution 2010 provides: -

“1) Every person has the right to institute court proceedings claiming that this constitution has been contravened, or is threatened with contravention.

2) In addition to a person acting on their own interest, court proceedings under clause (1) may be instituted by:

- a) A person acting on behalf of another person who cannot act in their own name.**
- b) A person acting as a member of, or in the interest of a group or class of persons.**
- c) A person acting in the public interest; or**
- d) An association acting in the interest of one or more of it’s members”.**

26. These provisions in the Constitution allow anyone to bring a matter to court including the 1st Petitioner herein. The 1st Petitioner is also allowed to bring a matter to court for his own self-interest or beven on behalf of others.

27. This Petition involves the initiation of criminal proceedings against the registered owners of the suit property who are, the 2nd and 3rd Petitioners. The 1st Petitioner herein is one of the directors of Jithiada Agencies Limited, a company mandated by the 2nd and 3rd Petitioners to collect rent on their behalf as their agent. In my view, the 1st Petitioner has the *locus standi* to institute this Petition either on his behalf or on the behalf of the other Petitioners since, the institution of criminal proceedings against the registered owners of the suit property will have an adverse effect on the 1st Petitioner who is a director of the company that collects rent on behalf of the 2nd and 3rd Petitioners. Consequently, I do hold that the 1st Petitioner has the locus standi to institute the present Petition on his behalf and on behalf of the 2nd, 3rd and 4th Petitioners.

c) Whether the petitioners are entitled to issue of conservatory orders.

28. The Petitioners herein are seeking conservatory orders, which this Court is empowered to grant pursuant to Article 23 (3) of the Constitution which states:

“(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including:-

- (a) a declaration of rights;**
- (b) an injunction;**
- (c) a conservatory order;**
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
- (e) an order for compensation; and**

(f) an order of judicial review.”

29. In order for the court to grant the orders sought, it must be satisfied firstly, that the Petitioners have demonstrated a *prima facie* case with a probability of success; and secondly, that they stand to suffer prejudice if the prayers sought are not granted. **Musinga J** (as he then was) observed in the case of **Centre for Right Education and Awareness (CREAW) & 7 Others Vs. Attorney General [2011] eKLR** that:

“It is important to point out that the arguments that were raised by counsel and that I will take into account in this ruling relate to the prayer for a Conservatory order.....

At this stage, a party seeking a Conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as result of the violation or threatened violation.”

30. The rights cited in the Petition herein are those guaranteed under Article 23(1) (3), 25, 27, 47, and 48 of the Constitution. These Articles relate to protection of the right to a fair trial, right to equality and freedom from discrimination, right to fair administrative action and access to justice. The case of **Anarita Karimi Njeru** is settled authority for the proposition that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and particulars of such infringement, or threat.

31. The issue for determination is whether on the evidence and material placed before this Court, the petitioners have satisfied the conditions upon which a conservatory order can be granted.

32. The principles to consider in granting equitable remedies were laid down in the celebrated case of **GIELLA VS. CASSMAN BROWN & COMPANY LTD [1973] EA 358**. The court held as follows:

“(a) The applicant must show a *prima facie* case with a probability of success.

(b) Secondly, the applicant must demonstrate that he will suffer irreparable loss or injury which would not be adequately compensated by an award of damages.

(c) Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

33. Similarly, in the case of **Kenya Small Scale Farmers Forum vs. Cabinet Secretary Ministry of Education High Court Petition No. 399 of 2015 eKLR**, the Court stated the guidelines and principles applicable as follows:

- *the applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others vs The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi vs The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others vs Attorney General & Others HCCP No. 7 of 2011.*
- *The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others vs Registered Trustees of Kenya Railways Staff Benefits scheme [2011] eKLR and also Peter Musimba vs The National Land Commission & 4 Others (No. 1) [2015] eKLR.*
- *If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora vs speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.*
- *The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya’s decision in Gatarau Peer Munya vs Dickson Mwenda Githinji & 2 Others [2014] eKLR.*
- *The circumstances dictate that the discretion of the court be exercised in favour of applicant after a consideration of all material facts and avoidance of immaterial matters: See Centre for Human Rights and Democracy & 2 Others vs Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman vs Amboseli Resort Ltd [2004] 2 KLR 589.*

34. The gravamen of the Petitioners’ complaint herein is that the impugned charges are malicious, vexatious, and a gross abuse of the Court process as a warrant of arrest against the 2nd and 3rd Petitioners was issued against them, without having notified them of the existence of the criminal proceedings and there is a threat that they might be arrested pursuant to the warrant of arrest issued on the 21.9.2018 and ultimately, they complain that they will suffer infringement of their constitutional rights. At this stage, this Court ought to be merely satisfied that the Petitioners have a *prima facie* case and whether based on available evidence, it would be prudent to issue interlocutory conservatory orders. After considering the Application and rival submissions, it is my view that the process of instituting the impugned criminal proceedings may raise constitutional issues which will be determined in the Petition.

35. It is also not contested that there exists a total of five (5) civil suits in connection with the suit property, pitting the petitioners against the 5th Respondent. I therefore find and hold that the Application herein satisfies the *prima facie* principle in the grant of conservatory orders. The said criminal proceedings are likely to prejudice the Petitioner’s right to a fair administrative action since it is admitted that they were not summoned by the 2nd Respondent before a decision was made to prosecute them. It will be in public interest if the impugned criminal proceedings are stayed pending the outcome of the Petition.

36. In the upshot, I am satisfied that the Petitioners have met the threshold for issuance of conservatory orders pursuant to their notice of motion dated 26.9.2018. Accordingly, I allow the application and make the following orders:

(1) The interim conservatory orders issued on 2.10.2018 are hereby confirmed pending the disposal of Constitutional Petition No. 227 of 2018 or until such other or further orders of this court.

(2) The costs of this application shall be in the cause.

37. It is so ordered.

Dated, Signed and Delivered at Mombasa this 5th day of May, 2020.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Gikandi for Petitioners

No appearance for Respondents

Mr. Kaunda Court Assistant