



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA KIAMBU

PETITION NO. 19 OF 2019

JOHN KINYANJUI MACHARIA.....PETITIONER/APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

R U L I N G

1. The undisputed background to the Petition and motion filed herein on 18th June 2019 is as follows. John Kinyanjui Macharia (hereafter the Petitioner) asserts himself to be the chairman of an association known as Kamiti Anmer Association (the Association) which draws its membership primarily from persons residing in or owning plots in the area known as Kamiti Anmer area. Sometimes in 2017 or 2018 two parties, namely **Edith Wangui Githua** and **Carolyn Wanjiku Kimondiu** entered into an agreement for the sale of a plot at Kamiti/Anmer by Edith Wangui Githua (vendor) to Carolyn Wanjiku Kimondiu (purchaser) at the price of KShs.1300,000/= .

2. In the course of the transaction the parties visited the offices of the Petitioner although the purpose of the visit is disputed. It appears that subsequent to the transaction a complaint was lodged with the Directorate of Criminal Investigations (DCI) and **IP Charles Juma** of Kiamumbi Police Station commenced investigations that culminated with the arrest and arraignment of the vendor and the Petitioner herein before the CM's Court at Kiambu in **Criminal Case No. 889 of 2019**.

3. The two were jointly charged with three counts, first, Obtaining money by false pretences contrary to section 313 of the Penal Code. In that on 24th March 2017 at Kiambu Township, within Kimabu County, jointly with others not before the court with intent to defraud, the Accused obtained from Carolyn Wanjiku Kimondiu KShs.1,300,000/= by falsely pretending that they were in a position to sell her a parcel of land within Kamiti/Anmer in Kiambu County. The second count is Conspiracy to defraud contrary to Section 317 of the Penal Code while the 3rd Count is Making of a document without authority contrary to Section 357 of the Penal Code. The particulars in respect of the latter charge are that on 24th march 2017 at Kiambu Township Kiambu County, with intent to defraud, without lawful authority or excuse the Accused persons made allotment letters for parcels of land within Kamiti/Anmer area, purporting to be allotment letters issued by the Department of Lands.

4. This development prompted the filing of the instant Petition and motion, the former which alleges violation of the Petitioner's constitutional rights and seeks several prayers including declarations and what is described as an "order of permanent stay of CM CR. No. 889 of 2019." The motion itself seeks several prayers. While prayer (2) is spent, prayers 4 and 5 as crafted cannot be granted at an interlocutory stage. The live prayer for purposes of this ruling is prayer (3) which seeks an order to stay the proceedings in Kiambu Cr. Case No. 889 of 2019 pending the hearing and determination of the Petition. On grounds *inter alia* that the Petitioner was not a party to the contract giving rise to the criminal case and that the criminal case was brought in a bid to coerce the Petitioner to settle what is essentially a civil dispute and amounts to abuse of the criminal justice system by the Director of Public Prosecutions (DPP).

5. Similar allegations are repeated in the Petitioner's supporting affidavit wherein the Petitioner further deposes that the objects of the Association do not include the buying or selling of land, that the purpose of the visit by the vendor and purchaser who were parties to the subject transaction to the Petitioner's office was the registration of the purchaser as a member of the Association. He further asserts that the DPP is guilty of abusing his prosecutorial mandate in that the criminal case has been initiated for the purpose of pressuring the Petitioner to settle Thika Environment and Land Court (ELC) Case No. 771 of 2017 involving the association and other similar groups which are tussling over the ownership of the land parcel No. Kamiti/Anmer/8390, also the subject of deliberations by the National Land Commission.

6. In opposition to the application and Petition IP Charles Juma swore a lengthy affidavit in defence of the prosecution which he asserts to have been initiated upon a careful review of evidence collected by him essentially tending to connect the Petitioner with the offences preferred against him and his co-accused. The gist of the alleged evidence is set out in the affidavit. The deponent denies knowledge of the existence of civil disputes involving the Association which he asserts in any event cannot be a bar to criminal prosecution where a crime has been committed; that the institution of criminal proceedings of itself does not constitute a violation of constitutional rights of an accused and that the Petitioner has not demonstrated such violation; that all that the Petitioner has attempted to do by his pleadings herein is to canvass his defence which properly belongs to the trial court; and that the mandate of the DPP to institute criminal prosecution cannot be fettered on the grounds alleged by the Petitioner which, for the most part have not been demonstrated and that the application is without merit.

7. In response the Petitioner filed a Further affidavit refuting certain factual matters relating to the criminal case in the lower court and the dispute in respect of the ownership of the land parcel Kamiti/Anmer/8390 , and the plot No.1338 the subject of the sale agreement and asserting that the DPP's malicious institution of criminal charges against him will dent the Petitioner's public image and prejudice his ability to prosecute the ELC case, while achieving the collateral ulterior purpose of exerting pressure on him to settle disputes arising from civil transactions.

8. The court directed that the application be disposed of by way of written submissions. The Petitioner filed his written submissions on 29th July, 2019 through his counsel. It was his submission that the Respondent lacked the proper factual foundation to institute criminal proceedings as all the Petitioner did concerning the sale transaction giving rise to charges against him was register the Complainant purchaser as a member of the Association while confirming to her that the vendor was a member thereof. Reliance was placed on the case of **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** where it was held that a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. The Petitioner further submitted that the Respondent is abusing the criminal justice to achieve ulterior objective as the dominant purpose of the charges is to enforce a contract that the Petitioner was not a party to. The court was urged to allow the application.

9. For the Respondent, it was submitted that the Petitioner did not specifically state which of the rights of an arrested/accused person and of fair trial were violated. Citing the case of **Anarita Karimi Njeru vs Republic (1979) eKLR** the Respondent argued that the Petitioner had failed to set out with precision the rights' violation of which he complains, the provisions infringed, and the manner in which they are alleged to be infringed. Counsel submitted that the Respondent having scrutinized the evidence satisfied himself of its adequacy in relation to preferred charges and that interference with such exercise of the DPP's mandate would amount to usurping the constitutional role of the DPP. Further, it was the Respondent's submission that the Petitioner has failed to prove the allegation that the core dispute is of a civil nature or that the DPP was using the criminal process to pressure him to settle the ELC case. The DPP called to his aid the decision in **Republic vs the Chief Magistrate's Court at Mombasa ex-parte Ganijee and Another (2002) eKLR** as to situations where criminal proceedings can be stayed.

10. It was the Respondent's contention that the Petitioner has failed to show any rights violated during the trial process , hence pendency of the criminal proceedings does not constitute violation of the Petitioner's rights or abuse of the court process as set out in **Republic vs DPP & Another ex-parte Chamanlal V. Kamani & 2 Others (2015) eKLR** and **Shadrack Mwiti Ithinji & 9 others vs Republic (2006) eKLR**, respectively **and the Court ought not to interfere with the proceedings**. In conclusion, it was the Respondent's submission that the Petitioner has not satisfied the legal requirements for the grant of orders sought.

11. The court has considered the rival affidavits and submissions made in respect of the application. Prayer 3 of the motion is essentially a prayer for conservatory orders to stay the proceedings in the criminal case before the lower court. In **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** the court defined the nature of conservatory orders as follows:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

12. Further, in the case of **Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held that:

“In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.”

13. The principles governing the grant of conservatory orders are now settled. In the off-quoted case of **Centre for Rights Education and Awareness (CREAW) and 7 Others v Attorney General Petition No. 16 of 2011 Musinga J** (as he then was) stated that:

“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. 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 real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

14. These principles were further reiterated in the case of **Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 Others, Petition No. 7 of 2014; (2014) e KLR** where the court held that;

[59] In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: “... [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”

[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be

imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.

[61] The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.

[62] The third principle is one recently enunciated by the Supreme Court in the election petition case of *Gatirau Peter Munya v Dickson Mwenda Githinji and 2 Others*, SCK Petition No 2 of 2013. The principle is that the public interest must be considered before grant of a conservatory order. Ojwang and Wanjala JJSC stated that: “[86] ‘conservancy orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes”

[63] Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest.”

15. At this stage, the court cannot make any definite findings on issues, raised even though the submissions especially by the DPP seem to invite such findings. On the question whether the Petitioner has made out a prima facie case with a likelihood of success, or an arguable case, it seems to the court that the Petitioner was principally canvassing what is essentially his defence in the lower court. His chief complaint being that there is no factual foundation to justify the institution of the criminal case as he allegedly played no role in the transactions between the vendor and purchaser that gave rise to the criminal charges. He claimed that the DPP by prosecuting him intended to coerce him to settle the “civil” matter between the purchaser and vendor and the alleged suit before the ELC. The Applicant however did not tender any pleading relating to the latter suit. Nor demonstrate how the prosecution before the lower court was aimed at forcing him to settle alleged civil claims.

16. This is not the proper forum at which contested matters of evidence related to the criminal case are to be resolved. That is the duty and responsibility of the trial court. That said, the assertions by the Applicant appear tenuous at best. The mere fact that charges have been brought against an accused person and that perhaps the evidence gathered may not support a conviction is not *ipso facto* evidence of violation of his constitutional rights or of the Constitution.

17. The independent mandate of the DPP under Article 157 of the Constitution is not to be lightly interfered with. Article 157(6) stipulates that:

“The Director of Public Prosecution shall exercise State powers of prosecution and may-

a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence allege to have been committed

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)”.

18. In securing the independence of the DPP's office and the discharge of his mandate, Article 157(10) provides that:-

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

19. However the stricture provided in Article 157(11) of the Constitution requires that in exercising the powers conferred to him under the Constitution, the DPP will have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. The Petitioner herein repeatedly claims that the evidence upon which his prosecution is based is insufficient, and while that alone is not evidence of abuse, the Petitioner but he has failed to furnish evidence of assertions that the DPP acted contrary to the provisions of Article 157 of the Constitution. A decision by the DPP will be considered an abuse of the legal process if the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; when the person against whom the prosecution has been commenced has been deprived of his fundamental right to a fair trial; and when the prosecution is against public policy. See *Shadrack Mwititi Ithinji and 9 Others v R* [2006] e KLR, citing *Emmanuel Kuria Gathoni and Another v R Cr. App. 1384/01*.

20. The onus lies with the person asserting abuse to demonstrate such abuse to the court. This cannot be done through bald statements which are premised on surmises and innuendo as appears to be the case here. The fact that a criminal case co-exists side by side with a civil matter arising from the same set of facts is not itself evidence of abuse unless the criminal proceedings are shown to have been brought to compel the Applicant to submit to the civil claim. See Section 193 A of the Criminal Procedure Code.

21. Needless to say, it is expected that the Petitioner will have a fair trial as guaranteed under Article 50 of the Constitution and the Criminal

Procedure Code and before a competent court, and he will have the opportunity to challenge the prosecution evidence and to canvass his defence without hindrance. There is nothing to suggest that such fair trial cannot be conducted or that the possibility of such trial has been compromised. In the case of **Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** the Court while declining to stop prosecution of the applicants stated that:

“Our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant’s chances of being acquitted are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.”

22. By his depositions, the Petitioner has not demonstrated how his right to a fair trial has or will be prejudiced, beyond asserting that his public image will suffer and he will be unable or impeded in prosecuting the alleged ELC a suit. In other words, he has not demonstrated *“real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”* Additionally, there is no material proffered by the Applicant to suggest that the Petition will be rendered nugatory if the orders sought are denied.

23. It is in the public interest that persons suspected of committing offences be subjected to the due process of the law, which may occasion them some inconvenience. There is as public interest element underlying every prosecution, namely the vindication of the rule of law by addressing the grievances of the complainant while upholding the private interest of the accused whose rights are to be protected. The court would not be acting in public interest if it were to usurp and interfere, without proper cause being shown, with the DPP’s exercise of his mandate to prosecute those suspected of committing offences. I associate myself with the sentiments of Odunga J in **Republic vs Director of Public Prosecution & Another Ex-parte Geoffrey Mayaka Bogonko & Another (2017) eKLR** where he observed as follows:-

“The circumstances under which the court will grant stay of a criminal process in these kinds of proceedings are now well settled. The court ought not to usurp the constitutional mandate of the Director of the Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legality recognized aim.”

24. Ultimately, reviewing all the material proffered by the Petitioner, this court is unpersuaded that the Petitioner has made out a prima facie case with a likelihood of success and that he is in danger of suffering prejudice arising from violation or threatened violation of his rights or of the Constitution, or that the Petition will be rendered nugatory if the conservatory orders are denied. Moreover, in the circumstances of this case the public interest militates against the halting of the criminal case. The Petitioner’s motion has no merit and is accordingly dismissed.

SIGNED AND DELIVERED ELECTRONICALLY THIS 2ND DAY OF OCTOBER 2020

C. MEOLI

JUDGE