



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 217 OF 2014

AZZURI LIMITED.....PLAINTIFF

VERSUS

GEORGE KADENGE ZIRO (As Legal Representative of the Estate of the

late LAWRENCE KADENGE ZIRO.....1ST DEFENDANT

KAMBI KADENGE ZIRO.....2ND DEFENDANT

VALERIO BUSSICARELLI.....3RD DEFENDANT

KADZIRO BEACH LIMITED.....4TH DEFENDANT

SETTLEMENT FUND TRUSTEES.....5TH DEFENDANT

KILIFI LAND REGISTRAR.....6TH DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated 2nd November 2019. By the said Motion, the 1st and 4th Defendants pray for orders that:-

1.

2. The Officer –in-charge, Directorate of Criminal Investigations Malindi is joined in these proceedings for his role in pretended or sham investigations of forgery of title deed for Kilifi/Chembe Kibabamshe/356, commenced on 1st November 2019 at the behest of Azzuri Limited;

3. The Court do by Order, forthwith stop any investigations by DCI Malindi or any other investigative arm of the executive, into the property or otherwise of title Kilifi/Chembe Kibabamshe/356 on the ground that such investigations would or have already contravened the sub-judice principle and are solely intended to interfere with or subvert the course of justice to the prejudice of the Defendants.

4. The Court do censor the DCI and Azzuri Limited for the intimidation of the Defendants herein and for interfering with or subverting the course of justice; and

5. The DCI and Azzuri Limited be ordered to pay the costs of this application.

2. The said application which is supported by an Affidavit sworn by the 1st Defendant George Kadenge Ziro is grounded on the facts inter alia that:-

i. This is a claim for specific performance of an Agreement for sale of Plot No. Kilifi/Chembe Kibabamshe/356 made between Azzuri Ltd and Lawrence Kadenge Ziro, Kambi Kadenge Ziro and others on 14th June 2014;

ii. Mr. Anthony Safari Kitsao, a Director of Azzuri Ltd testified on 24th October 2019 and the Plaintiff closed its case;

iii. That on 1st November 2019, at the instance of the Plaintiff, George Kadenge Ziro who has been joined in the proceedings in the place of his deceased father and who is a key witness for the Defence was arrested by DCI officers who informed him that his father had a fake title deed and required him to explain how the father acquired the same; and

iv. The involvement of the DCI at this stage of the civil proceedings is suspect, and the Court is invited to prevent a breach of the sub-judice principle by a party who has already closed its case.

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 25th November 2019 by its Director Anthony Safari Kitsao, the Plaintiff company avers that it has not made a claim of forgery after closing its case and asserts that it has absolutely nothing to do with the alleged arrest and incarceration of the 1st Defendant.

4. The Plaintiff's Director however asserts that he was also summoned to Malindi Police Station to shed light on a complaint by one Edward Wanje Ziro a member of the larger Ziro family on 17th September 2019. The Plaintiff further asserts that the complaint lodged had nothing to do with these proceedings and this application is only meant to paint the Plaintiff in bad light in the eyes of the Court.

5. The Plaintiffs assert that to enjoin the DCI herein after the Plaintiff has closed its case will have the effect of re-opening the pleadings as the same will have to be amended to reflect the same and the added party will have a right to file their response hence complicating the suit herein.

6. On their part, the 4th and 5th Defendants have by Grounds of Opposition filed herein by the Honourable the Attorney General on 3rd December 2019 opposed the application on the grounds inter alia:-

1. That the application is an abuse of the Court process and is intended to circumvent the positions of the law;

2. That the application filed herein except for joinder does not raise issues under the jurisdiction of this Honourable Court;

3. That the issues and facts as raised in the application can only be properly dealt (with) upon conclusion of the investigations and parties subjected to necessary action under the law where they will have ample time and opportunity to address and seek necessary redress.

4. That any orders made in regard to stop the investigations will only interfere with the mandate of the Respondents hence unconstitutional (sic) and lead to miscarriage of justice.

5. That the institution of the Petition herein (sic) is calculated to delay the matter and exert undue pressure upon the Court and the Respondents in carrying out their lawful duties and is therefore an abuse of the Court process.

6. That under Article 247 of the Constitution of Kenya 2010, the Director of Criminal Investigations have the mandate to carryout investigations against any person before any Court in respect of any offence alleged to have been committed.

7. I have perused and considered the application as well as the various responses thereto. I have also considered the oral submissions as made before me by the Learned Advocates for the parties herein.

8. From a perusal of the record herein, this suit was instituted by the Plaintiff on 19th November 2014 against some three Defendants. It was the Plaintiff's claim that on or about 14th June 2014, it had executed a Sale Agreement with the 1st and 2nd Defendants for the sale of land reference No. Chembe/Kibabamshe/356. It was further the Plaintiff's claim that after partial compliance with the Sale Agreement, the 1st and 2nd Defendants colluded with the 3rd Defendant to frustrate the contract and deny the Plaintiff vacant possession of the land by instituting another suit being Malindi ELC Case No. 198 of 2014.

9. The Plaintiff therefore sought an order of a permanent injunction restraining the Defendants from selling, alienating, trespassing and/or obstructing it from taking vacant possession of the suit property. In addition it sought an order of specific performance directing the 1st and 2nd Defendants to honour the contract of sale. The then 1st Defendant Lawrence Kadenge Ziro, would later on pass away on 13th December 2015 and his son George Kadenge Ziro was substituted in his stead.

10. Subsequently following an application they made to Court, the 4th Defendant was enjoined in these proceedings as a necessary party. The trial thereafter commenced and the Plaintiff has since called its witnesses and closed its case.

10. From the application presently before me, it would appear that while the matter was pending the hearing of the Defence case, the newly substituted 1st Defendant was on 1st November 2019 arrested by officers from the Directorate of Criminal Investigations whereafter he was subjected to questioning and interrogation in regard to the circumstances under which his father the late Lawrence Kadenge Ziro came into possession of the title deeds for the suit property in dispute herein.

12. It is the 1st and 4th Defendant's case that the said arrest and incarceration of the 1st Defendant is intended to intimidate the 1st Defendant and scare away the Defendants and their prospective witnesses who are then likely to fear police harassment. It is further the Applicant's case that it is an abuse of the Court process to pursue the same remedy through civil and criminal processes more so by a party who has

already testified and closed its case.

13. Both the Plaintiff as well as the Honourable the Attorney General appearing for the 5th and 6th Defendants are opposed to the application. It is their case that there is no bar to a civil case and criminal proceedings going on concurrently by virtue of Section 193A of the Criminal Procedure Code. It is further their argument that the Police are acting in pursuit of their mandate under Article 247 of the Constitution and that in actual fact the complaint made to the Police was by a third party and the complaint has nothing to do with the proceedings herein.

14. From annexure “ASK 1” of the Replying Affidavit of Anthony Safari Kitsao it is evident that a complaint was made by a member of the Ziro family to the Police on 17th September 2019. That Complaint is captured in the Police Occurrence Book of that date as follows:-

“REPORT MADE: To Station is one male adult namely Edward Wanje Ziro of phone No. -0716293884 and a resident of Ghahaleni. He do report that they sold a piece of Plot to Kazuri Limited as a family. Later one George who is our family claim that the land belong to his father Lawrence. Now need Police help.”

15. While on the surface of it, the complaint makes no reference to the proceedings before the Court, it is evident that it refers to the sale transaction giving rise to these proceedings. That transaction reportedly occurred way back in the year 2014 and it is not clear why the complaint is being made to the Police more than five years later and at a time when the proceedings herein have reached a rather advanced stage.

16. Indeed while the Plaintiff together with the 5th and 6th Defendants denied any relation thereto to these proceedings, a perusal of the Court record reveals that by a Letter dated and received herein on 4th December 2019, slightly over a month after the Plaintiff closed its case herein, the Malindi Sub-County Criminal Investigations Officer one A.L Sunguti wrote to the Executive Officer Malindi Law Courts in regard to these proceedings as follows:-

“RE: ELC Case No. 217 of 2014

PLAINTIFF –AZZURI LIMITED

This office is investigating an alleged case of forgery of documents of title contrary to Section 350(1) of the Penal Code.

Kindly furnish us with certified copies of documents that were presented in Court by the Defendants.

- 1. Copy of the title deed bearing the name LAWRENCE KADENGE ZIRO.**
- 2. Copy of title deed bearing the name Kadziro Beach Ltd.**
- 3. Copy of Green Card for the parcel No. 356 Chembe/Kibabamshe.**
- 4. Any other document that may assist us in our investigations.**

.....”

17. From the tenor and purport of the said letter, it was clear to me that what the Police want to investigate at this juncture are the very same matters that are subject to these proceedings. While it is true that in terms of Section 193A of the Criminal Procedure Code, the fact that any matter in issue in any Criminal Proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings, I did not think that this Court’s hands are tied where it can be shown that the criminal proceedings are oppressive, vexatious and aimed at aiding one party to steal a match against the other.

18. Considering a similar matter in *Commissioner of Police & the Director of Criminal Investigations Department & Another –vs- Kenya Commercial Bank Ltd & 4 Others(2013) eKLR*, the Court of Appeal observed as follows:-

“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the Police, it is too fairly well-settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why Courts in this Country have consistently held that it would be an unfortunate result for Courts to interfere with the Police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The Courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157(11) of the Constitution quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The Court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and in compliance with the law. If it comes to the attention of the Court that there has been a serious abuse of power, it should in our view express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution (see *Githunguri –vs- Republic (1985) LLR 3090*).

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the Police in conducting criminal investigations are bound by the law and the decision to investigate a crime(or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The Court has inherent power to interfere with such investigation or prosecution process. See Ndarua –vs- R (2002)1EA 2005. See also Kuwa –vs- Attorney General (2002) 2KLR (Emphasis supplied).

19. In the matter before me, I am in agreement with the 1st and 4th Defendants/Applicants that the present investigations instituted by the Police are nothing but a round about way of having the civil suit determined in another forum. In light of the clear decisions emerging from the Courts, this Court will express its clear disapproval of such tactics by putting a stop to those investigations.

20. In the premises, I will grant the application before me dated 2nd November 2019 in terms of Prayer No. 3 thereof.

21. The costs of this application shall be in the cause.

Dated, signed and delivered at Malindi this 6th day of February, 2020.

J.O. OLOLA

JUDGE