



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 135 OF 2016

TAJ MALL LIMITED.....APPELLANT

VERSUS

SIESTA INVESTMENT.....1ST RESPONDENT

VIJAYKUMAR SHAMJI PATEL.....2NDRESPONDENT

PATEL AMRATBEN VIJAYKUMAR SHAMJI.....3RDRESPONDENT

PETER K. KAHUHO.....4THRESPONDENT

JUDGMENT

The Appellant was aggrieved by the decision of the trial court (Hon. T. Nyangena – PM) delivered on 6th October 2016 in **Milimani CM’s Court Miscellaneous Criminal Application No.11 of 2016**. In the application, the Appellant had sought to be granted leave of the court to institute private prosecution against the Respondents. It was the Appellant’s case that its effort to have the Respondents prosecuted for fraud had been frustrated by the police and the Director of Public Prosecutions who had refused or neglected to investigate and prosecute the Respondents. After presenting its case before the trial court, the trial court held that the Appellant had not established that it had lodged a complaint with the police to entitle the trial court make a finding that the police had failed to investigate the case. The Appellant’s application was therefore dismissed. The dismissal of the application provoked the present appeal.

In the memorandum of appeal (it ought to have been a petition of appeal), the Appellant faulted the trial magistrate for failing to find that the Appellant was a bona fide purchaser for value of the parcel of land that was the subject matter of the case. The Appellant was aggrieved that the trial magistrate failed to appreciate that there was compelling evidence furnished by the Appellant which demonstrated that the Respondents acting in cahoots had fraudulently procured a title in favour of the 1st Respondent yet the Appellant was the legal owner of the suit parcel of land. The Appellant took the view that the trial court failed to appreciate the fact that the police refused to conclusively and exhaustively investigate the fraud and therefore placed the Appellant at a disadvantage. The Appellant faulted the trial magistrate for failing to properly evaluate the evidence placed before it and thereby reached the erroneous determination that the Appellant had failed to establish that he had lodged a complaint with the police or that he had not exhausted all the avenues to have the matter investigated. The Appellant was aggrieved that the trial magistrate failed to take into consideration the fact that the 1st to 3rd Respondents had forcefully taken possession of the suit parcel of land yet there was pending dispute as to the ownership of the land. In the premises therefore, the Appellant urged the court to allow the appeal, set aside the decision of the trial court and instead grant it leave to institute private prosecution against the Respondents.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Masinde for the Appellant, Mr. Ochwo for the 1st to 3rd Respondents and by Ms. Nyauncho for the 4th Respondent. Mr. Masinde submitted that the Appellant was aggrieved by the decision of the trial court which denied it the opportunity to privately prosecute the Respondents. Learned counsel explained that the police had refused to investigate the complaint lodged by the Appellant regarding the fraudulent procurement of a title of a parcel of land which the Appellant was legal owner thereof. He submitted that the police’s reluctance to investigate the case had frustrated the Appellant to the extent that he was even denied the opportunity to lodge a complaint. The Appellant was informed by the police that they would not conduct the investigation because the Director of Public Prosecutions had refused to sanction the investigation. It was on that basis that the Appellant sought the leave of the trial court to institute private prosecution against the Respondents. Learned counsel submitted that the Appellant had laid sufficient grounds for the trial court to grant it leave to institute private prosecution. It had established that the police were unwilling to receive the complaint lodged by the Appellant. The police had refused to investigate the case despite there being justifiable cause for such investigation to be conducted. Learned counsel urged the court to allow the appeal and grant leave to the Appellant to institute private prosecution.

Mr. Ochwo for the 1st to 3rd Respondents opposed the appeal. He submitted that no basis had been laid by the Appellant for leave to be

granted by the court to mount a private prosecution. The trial court had properly considered the evidence placed before it and reached the correct determination that the Appellant had not made any complaint to the police and therefore it could not complain that the police had failed to investigate its complaint. Learned counsel urged the court to take into consideration the fact that a director of the Appellant was already facing the charge of forging a title in relation to the matter in dispute. The Appellant was therefore trying to frustrate the trial facing its director by attempting to institute parallel criminal proceedings to that which is pending before the court. In essence, learned counsel accused the Appellant of attempting to abuse the due process of the court with the object of frustrating the trial and determination of the charge facing the Appellant's director. He urged the court to dismiss the appeal.

Ms. Nyauncho for the State opposed the appeal. She submitted that the application was made in bad faith. It was an abuse of the due process of the court. She explained that the Appellant made the application seeking leave to institute private prosecution after a director of the Appellant had been charged with fraud. She was of the view that the application was meant to delay the trial of the pending criminal case. On the merits of the appeal, the Appellant had not placed any evidence to support its assertion that it had made a report to the police and that the police had failed to investigate the complaint. Learned counsel asserted that the truth of the matter was that the complaint was investigated and it was established that it was a director of the Appellant who had perpetrated the fraud hence the decision was made to prosecute him. In the premises therefore, she urged the court to dismiss the appeal.

This court has carefully considered the rival submission made by the parties to this appeal. This court will not make any comment regarding the ownership of the suit parcel of land with two disputing titles *i.e.* Embakasi/Nairobi Block LR No.20273 IR 141915 and Embakasi/Nairobi Block LR No.20273 IR 238416. That is a matter which shall be determined by the court in the trial and other proceedings that are pending. This court will deal with only one issue on whether the Appellant laid sufficient basis for the trial court to grant it leave to institute private criminal prosecution against the Respondents. **Section 28 of the Office of the Director of Public Prosecutions Act** grants any person the right to institute private prosecution. It provides thus:

“(1) Notwithstanding any provision under this Act, (or any other written law, any person may institute private prosecution.

(2) Any person who institutes private prosecution shall, within thirty days of instituting such proceedings, notify the Director in writing of such prosecution.

(3) In accordance with Article 157 of the Constitution and this Act, the Director may undertake, take over or discontinue any private prosecution.”

Article 157(10) of the Constitution provides that:

“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.”

There is no dispute that any person may be granted leave to institute private prosecution provided such person is able to establish certain conditions precedent. These conditions were set out in the case of **Floriculture International Limited & Others –vs- The Attorney General Nairobi High Court Miscellaneous Civil Application No.114 of 1997** and were reiterated, with modifications, in **Nairobi High Court Petition No.339 of 2013 Isaac Oluochier -vs- Stephen Kalonzo Musyoka & 217 Others**. In this case, Mumbi Ngugi J citing Kuloba J (as he was then) in the **Floriculture Case** held that for a person to be granted leave to institute private prosecution, he must establish that he had made a complaint to the police and had accorded reasonable opportunity for the police to investigate the case; that the Director of Public Prosecutions had been seized of the case and had declined to institute or conduct criminal proceedings; that the failure by the State agencies to prosecute is culpable, unreasonable and without any legally justifiable reason; that unless the suspect is prosecuted there is likelihood there will be failure of public and private justice; that the person instituting private prosecution has suffered special, exceptional and substantial injury or damage that is personal to him and is not motivated by malice, politics or some other ulterior consideration devoid of good faith, and finally, that there was demonstrable ground that grave social evil will occur if the police and the Director of Public Prosecutions have acted capriciously, corruptly and in a biased manner that the only remedy is to grant leave to the aggrieved party to institute private prosecution.

In the present appeal, the Appellant seeks to institute private prosecution against the Respondents because it claims that the police had frustrated its effort to have its complaint investigated, and upon completion of investigation, those found to culpable be prosecuted. The conditions precedent that the Appellant was supposed to fulfill before he sought leave of the court to be allowed to institute private prosecution is that it ought to have established that it had lodged a complaint to the police and that the police had either refused or neglected to investigate the case. In the present appeal, there is no evidence that the Appellant lodge a complaint with the police to investigate the matter. On the contrary, there is evidence that the 1st, 2nd and 3rd Respondents lodged a complaint with the police concerning alleged fraudulent conduct by the Appellant's directors. The matter was investigated by the police resulting in the one of the Appellant's directors being charged with criminal offences before the trial court.

From this court's evaluation of the facts of this appeal, it was clear that the complaint that the Appellant alleges had not been investigated by the police relate to the same issue that the 1st, 2nd and 3rd Respondents lodged complaint with the police. Even if this court were to take the expansive view that the Appellant had indeed lodged a complaint with the police, the issue relating to the legal ownership of the suit parcel of land shall be resolved during trial in the criminal case. The contention by the Respondents that the Appellant sought to institute private prosecution to frustrate the criminal trial facing its director is not off the mark. This court failed to comprehend what kind or type of investigation the Appellant was seeking the police to conduct when in actual fact the police had conducted investigations over the same subject matter and made a determination that charges ought to be brought against one of the Appellant's director. This court agrees with the Respondents that the Appellant sought leave of the court to institute private prosecution for the ulterior purpose of frustrating the pending criminal trial.

In any event, this court holds that the Appellant failed to establish, as correctly held by the trial court, that it had lodged a complaint with the police to entitle the court to reach a conclusion that the police had either neglected or failed to investigate the case. The Appellant failed to cross the first hurdle that the law requires of it to fulfill before it can exercise discretion in its favour. The upshot of the above reasons is that the appeal lodged by the Appellant is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF MAY 2019

L. KIMARU

JUDGE