



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 158 OF 2018

IN THE MATTER OF: ARTICLES 2, 4, 10, 19, 20, 21, 22, 23, 27, 28, 29, 48, 50, 157, 159, 258 & 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES 27, 29, 48 AND 50 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: PENAL CODE CAP 63 LAWS OF KENYA

BETWEEN

ABEDNEGO ATITI SAMOKA.....PETITIONER

VERSUS

1. THE DIRECTOR OF PUBLIC PROSECUTIONS

2. THE CHIEF MAGISTRATES' COURT –MOMBASA

3. MEHUL NADLAL SHAH..... RESPONDENTS

JUDGMENT

1. The Petitioner has approached this Court seeking orders that:

- a. A declaration that the initiation, maintenance and prosecution of Mombasa Chief Magistrate's Court Criminal Case No. 769/2018 against the Petitioner herein is an abuse of the Criminal Justice process and contravention of the Petitioner's Constitutional rights to freedom and security of the person right to equality and freedom from discrimination and access to justice.*
- b. A declaration that the institution, maintenance and prosecution of Mombasa Chief Magistrate Court Criminal Case No.769/2018 against the Petitioner herein is oppressive, malicious and an abuse of the Court process.*
- c. An order prohibiting continuance of Criminal Case No.769/2018 Mombasa Chief Magistrate Court against the Petitioner herein.*
- d. A declaration that the Petitioner is entitled to damages as redress in respect of each of the above rights that were and continues to be breached by the Respondents.*
- e. An order consequential to the above declaration quantifying the amount of damages in respect of each and every declaration and order granted.*
- f. That the cost of this suit Petition be borne by the respondents.*

Petitioner's case

2. The Petitioners' case may be gathered from the Petition as well as the Affidavits sworn in support of the Petition.
3. The Petitioner avers that on the 23rd August 2013 the High Court in Mombasa civil case No. 6 of 2011 granted Kingfisher Properties Limited an order for vacant possession of the property known as Manyara/Mombasa/Block 1/351("the property") against the 3rd Respondent herein whom together with others traded as Jivaco Agencies.
4. The Petitioner further avers that he was instructed by Kingfisher Properties Limited's Advocates **Messers Walker Kontos** to request for vacant possession from Jivaco Agencies which he did and the said request conceded and vacant possession given on the 20th September 2013.
5. In a surprising turn of events while applying for a stay of execution, Jivaco Agencies made a mischievous complaint alleging that what happened on the 20th September 2013 was in fact an irregular eviction by unlicensed auctioneers who damaged its property maliciously.
6. That the said complaint was addressed in Mombasa HCC no. 6 of 2011 and the same was ultimately dismissed vide ruling dated 20th March 2014. An Appeal against the ruling was heard and dismissed by the Court of Appeal on the 4th December 2015.
7. The Petitioner avers that Jivaco Agencies have refused to vacate the property and have filed Mombasa ELC Case No. 152 of 2017 claiming massive compensation against Kingfisher properties limited which suit is pending for determination.
8. On the 4th May 2018 the Petitioner was arrested in Nairobi on an alleged complaint from the 3rd Respondent that the Petitioner had unlawfully broken into Jivaco Agencies premises and stole office equipment valued at Kshs. 22,000,000/=while in transit. The Petitioner spent a night at Makindu Police station without food and water and he was later charged at Mombasa law Courts in Criminal case no. 769 of 2018(**R v Abednego Atiti Samoka**)
9. The Petitioner avers that his arrest was supervised/coordinated by the 3rd Respondent who drove them in his personal vehicle from Nairobi to Mombasa and was present at the time he was recording his statement. The 3rd Respondent boasted that he controlled officials at the D.P.P.'s office and threatened to have the Petitioner jailed for 10 years if he did help in a settlement with Kingfisher properties limited.
10. The Petitioner alleges that the 3rd Respondent threatened to permanently destroy his reputation by publishing his arrest in the newspaper. In furtherance of this threat on the 8th May 2018, the 3rd Respondent caused to be published in the Standard Newspaper an Article of the Petitioners Prosecution on charges of breaking and stealing from Jivaco Agencies.
11. The Petitioner avers that the charges leveled against him are malicious and a gross abuse of the Court process and this Court has powers to stop such proceedings at any time as they are in violation/infringement of his right to freedom and security of his person, fair trial and equality before the law.

The Respondents case

12. The 1st Respondent in opposition to the Petition filed Grounds of Opposition dated the 10th July 2018 stating that the Petitioner Petition intends to interfere with the powers of the D.P.P provided for under Article 157(6) of the Constitution and that the mere fact that facts disclose both a criminal offence and a civil liability does not entitle this Court to halt the criminal proceeding. This is pursuant to Section 193(A) of the Criminal Procedure Code.
13. The 2nd and 3rd Respondent filed their grounds of opposition dated the 11th March 2019 which grounds can be summarized as follows:
 - a) **that the petition is misconceived, frivolous and vexatious.**
 - b) **that the Petitioner is guilty of material non-disclosure for having failed to place the certified typed proceedings in criminal case No. 1553 of 2015.**
 - c) **that the petitioner has not particularized the rights alleged to have been violated**
 - d) **the orders sought violate the express provisions of Article 157(10) of the Constitution and the Petitioner's rights are subject to limitation under Article 24 of the Constitution.**
14. The Petition is opposed by a Replying affidavit sworn on the 18th June 2018 by **Mehul Nandlal Shah** and accompanied by an affidavit sworn on the same day by **TITUS MWANZIA** who was a security guard at the property in 2013.
15. The 3rd Respondent avers that he and his brother **Vimal Shah** trade as Jivaco and that it is true that an eviction order was issued on the 23rd August 2013 in favour of Kingfisher Properties Limited and he immediately filed a Notice of Appeal against the Order and applied for certified copies of the proceedings.
16. The 3rd Respondent avers that on the 20th September 2013 a gang of 50 men (employees of the Petitioner) descended upon the property

and illegally evicted him under the supervision of the petitioner and one **Muna**. During the said eviction the gang violently threw their goods in trucks while some office equipment were handed to strangers.

17. The 3rd Respondent avers that the eviction was illegal since no Court order had been obtained in respect of the eviction. There were no warrants of eviction against Jivaco Agencies, there were no policemen to supervise the eviction and the Petitioner was not an auctioneer at the time of the eviction.

18. Jivaco Agencies made a report to the police and after the matter was investigated, a decision to charge the director of Kingfisher Properties Limited was made but the directors of Kingfisher properties limited moved to the High Court via a Constitutional Petition No 49 of 2016 seeking to stop their arrest and any further investigations.

19. The 3rd Respondent states that by an order dated 6th March 2017, it was directed that the Petitioner and one **Sebastian Gitonga Muna** were the right persons to be charged in respect to the aforesaid illegal actions and pursuant to the said order, the Petitioner was arrested and the arrest has no bearing in the outcome Mombasa **E.L.C 152 of 2017**.

20. The 3rd Respondent avers that the Petitioner had been in hiding and that the 3rd Respondent travelled to Nairobi for the purposes of identification of the Petitioner and the merits of his complaint against the Petitioner can only be determined in the Chief Magistrate Court

Issues for Determination

21. I have considered the petition and submissions. I raise the following issues for determination

- 1. Whether the maintenance and prosecution of the Petitioner on account of the 3rd Respondent's complaint is an abuse of the criminal justice.***
- 2. Whether the maintenance and prosecution of the Petitioner in Mombasa Criminal case 769/2018 is a contravention of the Petitioner's Constitutional rights.***
- 3. What remedies are available to the Petitioner?***

22. The Constitution establishes an independent office of the DPP. His independence is provided under Article 157 (10) which declares that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority.

1. Whether the maintenance and prosecution of the Petitioner on account of the 3rd Respondent's complaint is an abuse of the criminal justice.

23. Article 157 provides as follows

- (1) There is established the office of Director of Public Prosecutions.***
- (2) The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.***
- (3) The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.***
- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.***
- (5) The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.***
- (6) The Director of Public Prosecutions 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 alleged 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 clauses (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).***
- (7) If the discontinuance of any proceedings under clause (6)(c) takes place after the close of the prosecution's case, the defendant shall be acquitted.***

(8) *The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.*

(9) *The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.*

(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.*

(11) *In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.*

(12) *Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.*

15. Also, Section 193 of the Criminal Procedure Code allows criminal proceedings to run parallel to civil proceedings. The Section states:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

16. The issue here therefore is whether the Director of Public Prosecutions has misused or abused his powers by charging the Petitioner herein, and whether or not this is a matter in which Section 193 CPC does not apply.

17. It is also important to note that under Article 245 (4) (a) of the Constitution, "no person may give direction to the Inspector General with respect to the investigation of any offence or offences." Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.

18. The Inspector General can only be directed to investigate a matter by the Director of Public Prosecution as per Article 157(4) and Article 245(5) of the constitution. (See in the case of **Matalulu vs DPP (2003) 4 LRC 712**).

2. Whether the maintenance and prosecution of the Petitioner in Mombasa Criminal case 769/2018 is a contravention of the Petitioner's Constitutional rights.

18. It is an established principle of law that a petitioner who is alleging violation of a constitutional right must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. See **Anarita Karimi Njeru –Vs- Republic (1979) KLR 154** where the Court stated that: -

“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (See also **Meme v Republic & another [2004] 1 KLR 637**).

19. The principle in **Anarita case** (supra) was emphasized by the **Court of Appeal in Mumo Matemo vs. Trusted Society of Human Rights Alliance [2014] eKLR** where it was stated as follows:

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

20. The Petitioner has alleged violation of several of their Constitutional rights under Articles 25(c) 27, 48 and 50.

21. The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR). The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article 25 (c) of our constitution, it is among the fundamental rights and freedoms that may not be limited.

22. In **George Joshua Okungu & another vs. Chief Magistrate's Anti-Corruption Court at Nairobi & another [2014] eKLR** the Court captured the applicable principle as follows:

“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 Petitioner 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 legally recognised aim.”

23. In **Katana Kazungu Kitsao & another vs. Director of Public Prosecutions & another** [2017] eKLR -

“Whereas the commencement of criminal proceedings, while there are civil proceedings in existence over the same subject between the same parties, may be deemed to be an abuse of the court process, an applicant who desires to quash the criminal proceedings on this ground must go ahead to demonstrate that there is nothing criminal about the dispute or that justice is better served by resolving the dispute through civil proceedings.”

24. In the case at hand, the petitioner alleges that his prosecution was commenced when there was already civil proceedings regarding the issue of detainee, conversion and illegal distress. A perusal of the file will show that the petitioner was arrested on 4th May 2018 and taken to court on 7th May 2018. The stamp on the plaint filed vide HCC No. 35 of 2014(ELC 152 of 2017) by the 3rd Respondent against Kingfisher Properties limited show that the claim was received by Mombasa High Court on 18th March, 2014. This Court notes that the 3rd Respondent has filed a Notice of Appeal lodged on the 10th August 2018 against the ruling in **ELC 152 OF 2017**. The civil case was thus filed before the petitioner had been charged in court.

25. The 3rd Respondent averred that in Petition No. 49 of 2016 Kingfisher properties limited or its director were found not criminally culpable and that the person criminally culpable was the Petitioner herein and **Sebastian Muna**. This Court notes that the order in High Court Petition 49 of 2016 was as a result of a letter dated 18th November 2016 from the office of the Director of public prosecution and that The Inspector General can only be directed to investigate a matter by the Director of Public Prosecution as per Article 157(4) and Article 245(5) of the constitution. (**See in the case of Matalulu vs. DPP (supra)**). Also, the decision to charge the petitioner was communicated 18th November 2016 and the Ruling in **ELC 152 of 2017** being appealed against was delivered on the 25th July 2018. Therefore, it cannot be said that the 3rd Respondent has retorted to the criminal Justice system to try his luck against the Petitioner.

26. This Court upon perusal of all the pleadings, is of the view that the petitioner has not sufficiently demonstrated with particularity how his rights have been infringed. The petitioner has not met the threshold of proof required in this Petition. He has not discharged the burden of proof as provided for under sections 107(1) (2) and 109 of the Evidence Act which section provides: -

"107 (1) and (2). Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

26. From the foregoing, this Court is persuaded that the arrest of the Petitioner on the 4th May 2018 was not instigated by the 3rd Respondent or by the Court order in Petition 49 of 2016. Further this Court is satisfied that the trial Court is best placed to hear and determine the guilt or otherwise of the Petitioner after weighing all evidence produced before the Court.

27. The law with regard to the circumstances under which a court can interfere with a prosecution has been echoed in the case of **Michael Monari and Another vs. Commissioner of Police and 3 Others Miscellaneous Application No. 68 of 2011**.

28. In refusing to stop a prosecution against the applicant in the matter, **Warsame J** expressed the following view:

"It is not the duty of the Court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

29. In **Republic vs. Director of Public Prosecutions & 2 others Ex-parte Joseph Gathuku Kamuiru & another** [2014] eKLR it was stated that:

“Whether a prosecution will be quashed or prohibited will therefore depend on the facts of each case. The existence of civil proceedings arising out of the same set of facts is, however, not in itself a bar to commencement or continuation of criminal proceedings. Section 193 A of the Criminal Procedure Code, Cap 75 is clear on this.”

30. In **Meixner & Anor vs. AG [2005] KLR, Kuria & 3 Others vs. AG [2002] KLR 69** the Court of Appeal stated thus:

“It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge.”

31. In view of the above reasoning, the conclusion becomes irresistible that the Petitioner’s Petition dated 22nd May 2018 does not satisfy the threshold to warrant the orders sought.

32. Accordingly, I hereby dismiss the Petition dated 22nd May 2018 with costs and direct that Mombasa Chief Magistrates Criminal Case number 769 of 2018 proceeds to hearing and determination.

33. Orders accordingly

Dated, Signed & Delivered at Mombasa this 19th day of September, 2019.

E.K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for 1st and 2nd Respondents

Mr. Ondego holding brief for Mr. Wafula for Petitioner

Ms. Kiptum for 3rd Respondent

Mr. Kaunda Court Assistant