



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO.345 OF 2018

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 19,20,21,33,23,24,27,28,160,232,249,29,31,40,47 AND 50(4) OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

BILLY AMUGUNE SHIGHOLI.....PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

RULING

Petitioner's Case

1. The petition through a petition dated 5th October 2018 prays for:

- a) THAT the Honourable Court be pleased to certify this application urgent and to hear the same exparte in the first instance due to the said urgency.
- b) THAT a conservatory order be issued staying all police investigations, questioning, arresting, detaining, charging, or prosecuting the applicant arising out of land dispute over the petitioner's legal fees for acting for clients in a sale over L.R. No. Nairobi/Block 72/418, Onyonka Estate, Langata, Nairobi, pending interpartes hearing of this application.
- c) THAT a conservatory order be issued quashing all police investigations relating to questioning, arresting, detaining, or prosecuting the petitioner arising out of the petitioner's legal fees for acting for clients in a sale over L.R. No. Nairobi/Block 72/418, Onyonka Estate, Langata, Nairobi, pending interpartes hearing of this application.
- d) THAT the Applicant be at liberty to apply to this Honourable Court for such further or other orders for the purposes of meeting the ends of justice and to preventing the abuse by the Respondents of the process of the court.
- e) THAT the costs of this application be provided for.

2. The petitioner simultaneously filed a Notice of Motion dated 5th October 2018 seeking conservatory orders staying all police investigation, questions, arresting, detaining, charging or prosecuting the applicant arising out of land dispute over petitioner's legal fees for acting for clients in a sale over **L.R. No. Nairobi/Block 72/418**, Onyoka Estate, Langata, Nairobi.

3. The grounds in support of the Notice of Motion are on the face of the application being inter alia:- that the applicant at all material time was an advocate representing a client and whose professional fees are subject of taxation before the High Court; that the applicant is protected by the constitution from civil and criminal proceedings arising out of a *bona-fide* dispute of his advocate's fees in the brief he was

handling; that the protection is for public good; that the dispute over fees with the said client has not been determined; that the 1st and 2nd Respondents have now decided to arrest and charge the petitioner; that the Applicant is apprehensive that the action by the police to arrest and detain him is an attempt to compel him to forgo his rights to demand fees for his work; that the arrest and prosecution of the Applicant arising out of the dispute which is pending before court is unconstitutional, null and void and the same amounts to an abuse of the process of the court; that the taxation in High Court Misc. Application No. 151 of 2018 has not been determined and the Respondents intention to found a criminal charge over the same is unlawful and the same is contrary to public policy and public interest.

4. The notice of motion is supported by supporting affidavit of Billy Amugune Shigholi; sworn on 5th October 2018 and annexures thereto being **BAA-1, BAA-2, BAA-3, BAA-4** and **BAA-5**. The petitioner avers, that the clients property **L.R. No. Nairobi/Block 72/418** was sold at Kshs.13,500,000 as per annexure **BAA-2** out of which the Applicant transferred Kshs.9,000,000 to the client account with National Bank of Kenya Ltd as per annexure **BAA-3**. The Applicant retained Kshs.4, 500,000 out of which the sum of Kshs.2, 052,733.93 the Applicant claim as his fees, Kshs.300, 000/- personally paid to James Agufa and Kshs.600, 000 used for rates and land rent. The Applicant contend, that he informed the sellers that the only sum that was due from him in full settlement of account is Kshs.1,548,000 which sum the Applicant contend he was ready to transfer but the clients herein demanded and insisted, that the Applicant should transfer to them the full consideration pending discussion and agreement over the Applicant's fees.

The 1st and 2nd Respondents Response

5. The 1st and 2nd Respondents filed a Replying Affidavit through No. 66032 P C Dickson Gitonga, the investigating officer in this matter. He has deponed, that a complaint was lodged on 10th July 2018 by Caroline Chevendi, that in the year 2016 the estate of the late Arthur Henry Kiiru Agufa, decided to sell a house in **L.R. No. Nairobi/ Block 72/418** and sought legal services of the petitioner. That a buyer, Francis Angwenya Omode, purchased the property at Kshs. 13,500,000. The purchase price was to be made to the Advocates Account M/s Billy Amendi and Company Advocates, account Number 046XXXXXXXXXX Family Bank Kilimani Branch.

6. The 1st and 2nd Respondents contend, it was agreed that the petitioner was to be paid 3.5% of Kshs.13, 500,000 thus Kshs. 473,000/- as the professional fees. That the full purchase price of Kshs.13, 500,000 was paid as agreed on 2/2/2017 and on 6th March 2017. The Applicant paid Kshs.9, 000,000/0 to sellers through the given account leaving a balance of Kshs.4, 027,500/- which todate the petitioner has not paid.

7. It is further deponed by the 1st and 2nd Respondents, that the petitioner in his statement to police he alleged, that he paid the balance of Kshs.4, 027,000 to James Agufa, which amount could be verified.

8. That on 19th July 2019 through Miscellaneous Civil Application Number 2575 of 2018 an order was granted by the Chief Magistrate Milimani to investigate and obtain a certified copy of the Bank statement Number 046XXXXXXXXXX in the name of Billy Amendi & Company Advocates, between 15th February 2017 and 6th March 2017 **(DG-1)**.

9. The Respondents contend that in undertaking the investigation herein the **DPP** or any member of staff of office of **DPP** or National Police Service acted without or in excess of the power conferred upon them by the law nor have they infringed, violated, contravened or in any other manner failed to comply or respect and observe the provisions of the Constitution of Kenya 2010 or any other provisions thereof or any other provisions of the law.

Analysis and Determination

10. I have very carefully perused the Applicant/Petitioner's notice of motion dated 5th October 2018, the Replying affidavit, counsel rival written submissions and the issues arising for consideration can be summarized as hereunder:-

a) Whether the petitioner has made a case for grant of the prayers sought in the Notice of Motion?

b) Whether the Respondents actions are fair, legal or undertaken within the prescribed legal provisions and standard of the law?

c) Whether an order to prohibit investigations against the Applicant can issue?

A. Whether the petitioner has made a case for grant of the prayers sought in the Notice of Motion?

11. **Article 22(1) of the Constitution of Kenya 2010** provides that every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill has been denied, violated or infringed or is threatened. Further Article 24(1) of the Constitution of Kenya 2010 provides, that a right or fundamental freedom in the Bill shall not be limited except by law and then only to the extent, that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

12. The independence of judiciary is a key tenet in the administration of justice. The court is independent and impartial. Article 160 of the constitution provides, that in the exercise of judicial authority, the judiciary, as constituted by Article 161 of the Constitution 2010, shall not be subject to the control or direction of any person or authority. In deciding the present application I shall consider whether the petitioner has met the threshold for granting conservatory orders before granting or rejecting to grant prayers sought.

13. In the instant application, the Applicant has demonstrated that he was instructed to act for his clients, in transaction of sale of a property, a fact that the Respondents concede to the purchase price was duly paid into the Applicant's account being Kshs. 13,500,000/- out of which the Applicant paid Kshs.9,000,000/- to the client remaining with the balance being part of his professional fees before he made further

payment of Kshs.300,000/- to the client, Kshs.600,000/- as land rates and land rent. The Applicant claims he offered to pay Kshs.1, 548,000 to client in full settlement which the client declined.

14. It is trite, that an Advocate has the right to exercise a retaining lien found on general law. This therefore means an Advocate is entitled to withhold possession of personal property of his client which came into the Advocate's possession in the cause of professional employment with the sanction client. The lien secures the Advocate's costs for work done in respect for acting for the client pending determination of the advocate's fees through taxation at the High Court.

15. In the instant suit, the Applicant claims his due fees as per untaxed Bill of costs is Kshs.2,052,733.68 whereas in his affidavit under paragraph 7, he avers the sum due to the client from him in full settlement of account with his client is Kshs.1,548,000/-. Taking into account the amount claimed by the Applicant as his outstanding fees awaiting taxation and amount Applicant avers is due to the clients the total amount that the Applicant should be holding (thus 2, 052,733.68 + 1,548,000) equally to Kshs.3, 600,733.68.

16. The Respondents sought and obtained the Applicant's Bank statement for the account, where the full purchase price was deposited Acc. No. 046XXXXXXXXX in the name of Billy Amendi & Company Advocate for the period between 15th February 2017 and 6th March 2017. The statement reveal that Kshs.13, 500,000/- was deposited on 22nd February 2017; Kshs.9, 000,000/- paid to client on 8th March 2017. That as of the time of filing the Advocates/client Bill of costs on 14th September 2018 as per the Applicant's Bank statement with Family Bank availed by the Respondents for period of upto 28th February 2018 had a debt of Kshs.2, 527.82.

17. That where there is a dispute between client and Advocate as regards the professional fees and though the Advocate has the right to exercise a retaining lien founded on general law, this does not in my view entitle an advocate who is withholding possession of the personal property of his client which came into his possession in the name of professional/employment with sanction of the client to make use of the sum withheld pending taxation of his Bill of costs. The sum withheld belongs to both the client and the Advocate pending taxation and such the Advocate has no right to part with the sum retained in lien.

18. In the instant suit and notwithstanding pending taxation the Applicant has not demonstrated what became of the sum held in his account that now has a debt of Kshs.2, 527.82. The amount that he admitted to be due and payable to the client of Kshs.1, 548,000 is nowhere to be found. Had he demonstrated, that the account had the sum intact, that he is claiming together with the clients sum, he would have demonstrate, that he has a prima facie case with probability of success as the only impediment to pay the client would only be pending taxation. In absence of demonstration that upon the taxation he has the money safely held in his account awaiting payment once is done, I find the Applicant has not demonstrated that he deserves conservatory orders as sought. He has no money that he can take as his fees and pay client account. This application is an abuse of court process.

19. In the case of **Booth Manufacturing Africa Limited Vs. Dumbeya Nelson Muturi Harun T/A Nelson Harun & amp; Company Advocates (2017) eKLR**, the Court held:

“A review of case law in the context of an Advocate – Client relationship, will reveal that there is the general lien which confers upon the advocates the right to retain all papers, money or other chattel the property of their client which came into possession of the advocates as their clients' advocate until all the costs and charges due to the advocates are paid. The lien is general and not restricted to costs owing in respect to the property which the client is claiming possession. It is simply a retaining lien premised upon the advocate having actual physical possession of the property the subject of the lien.

The policy underlying liens briefly put is that it would be unfair for a party to enjoy the result of an advocate's work without paying the advocate and then let the advocate seek payment elsewhere when payment could be easily gathered through the lien.”

20. I agree entirely with the principles laid in the above suit, however I am of the view that the principles stated in the above case would only be applicable for the advocate costs and to be entitled to withhold possession of the personal property of his client only if the property which came into the advocate's possession in the case of professional employment with the sanction of client remains intact or is not disposed of till the issue of taxation of the advocates professional fees is completely determined as regards the fees due to him and being in a position to release the sum due to the client before he can collect his due professional fees.

B. Whether the Respondents actions are fair, legal or undertaken within the prescribed legal provisions and standard of the law?

21. The Applicant contends, that the action of police to arrest and detain him is an attempt to compel him to forgo his right to demand fees for his work. It is Applicant's submission, that the prosecution arising out of the dispute which is pending before court is unconstitutional, null and void. That though the dispute of Applicant's fees has not been determined the Applicant has not demonstrated, that he still has the money and is ready and willing to pay upon the taxation of the Bill of costs. He has not even challenged the Respondents annexure **DG-1**, a copy of the court's order and the Applicant's Bank statements showing that his account had a debit of – 2,527.82 as of 28th February 2018.

22. The Director of Public Prosecution is empowered by **Article 157(6) of the Constitution of Kenya 2010**, to institute, undertake and take over prosecutions of all criminal proceedings. The **DPP under Article 157(10) of the Constitution** do not require the consent of any person or authority for commencement of criminal proceedings and in exercise of his or her power or functions is not required to be under the direction or control of any person or authority.

23. On part of the Inspector General under **Article 157(4) of the Constitution and Article 249(5) of the Constitution of Kenya 2010** the Inspector General can only be directed to investigate a matter by the Director of Public Prosecution.

24. In the case of **Matalulu vs DPP (2003) 4 LRC 712** the Court set out the grounds upon which the powers of the **DPP** conferred under the constitution may be subject to review. These were enumerated as:-

i) In excess of the DPP's Constitutional or statutory powers;

ii) Contrary to the provisions of Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and failed to exercise his or her own independent discretion;

iii) In bad faith;

iv) In abuse of the process of the court in which it was instituted;

v) Where the DPP has fettered his discretion by a rigid policy obtained that it is thought desirable.

25. In the instant application, the Applicant has failed to demonstrate that **DPP** lacked the requisite authority, that he acted in excess of jurisdiction or departed from the rules of natural justice in directing that the Applicant be charged with the offences disclosed by the evidence gathered thus; stealing contrary to **section 268(1)** as read with **section 275 of the Penal Code**.

C. Whether an order to prohibit investigations against the Applicant can issue?

26. The Applicant seeks a conservatory order to issue quashing all investigations relating to investigation and/or prosecuting the Applicant arising out of the petitioner's legal fees for acting for clients in a sale over **L.R. No. Nairobi/Block 72/418**, Onyoka Estate, Langata, Nairobi pending *inter-partes* hearing of the application.

27. An order of prohibition is discretionary and is only tenable where a public body or official has acted in excess of their powers and as such the order requires the public body to cease from performing a certain act. For the order to be granted the Applicant is required to state the nature of the complaint, with precision and it is not sufficient to generally allege that the Respondents have failed to carry out sufficient investigation in the matter or that the arrest and prosecution is unconstitutional, null and void and amounts to the abuse of the process of court. The power to stay or prohibit criminal proceedings is meant not only to advance the Rule of law but not to frustrate it. The provision of Article 157 of the Constitution is meant to ensure the **DPP** has independence in discharging his mandate, which is core to protecting the integrity of criminal justice system since the decision to prosecute or not is free of any external influence. **Article 157(11) of the constitution** provides in exercise of the power conferred by the Article, the **DPP** shall have regard to public interest, interest in administration of justice and the need to prevent and avoid abuse of the legal process. This is intended to ensure the rule of law and justice becomes everyone's shield and defender. Further to the above **section 193(a) of the criminal procedure code, Cap (75) Laws of Kenya** confirms concurrent criminal and civil proceedings can proceed at the same period by stating as follows:-

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

28. In Malindi Court petition No. 4 of 2017 **Katana Kazungu Kitsao & Another vs DPP & Another**. **Korir J.** stated:-

"The fact that the facts constituting the basis of a criminal proceedings may similarly be a basis for a civil suit, is no ground for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse for 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 recognized aim."

29. In view of the aforesaid the continuing of the criminal case and the Applicant Bill of Costs separately at the same time shall not constitute an abuse of the court process unless the commencement of the criminal proceedings is meant to force the petitioner to submit to the civil claim, which is not the case herein, as the Applicant/Petitioner is the claimant in the civil suit nor can it be said to be unconstitutional to have both criminal and civil proceedings going on at the same time. The Applicant has not demonstrated, that undertaking investigations into complaint lodged with the National Police Service and in making a decision to prefer criminal charge against him, either the **DPP** or any member of staff of the office of **DPP** or National Police Service acted without powers or in excess of powers conferred upon them by law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the relevant provisions of the Constitution of Kenya 2010 or any other provision thereof in any way or other relevant provisions of the law.

30. From the contents of the Respondents affidavit and that of the Applicant, I find, that the decision to charge the Applicant was informed by sufficiency of evidence gathered and public interest and not any ulterior or other consideration as provided under Article 157(11) of the Constitution of Kenya 2010. The accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court, which is best equipped to deal with the quality and sufficiency of the evidence, that may be adduced before it in support of the charges. The Applicant at the hearing will have an opportunity to give the side of his story and challenge the prosecution case. The Applicant would not be prejudiced as he will have an opportunity to raise the issues raised in the application herein, the court shall consider the same and make a decision; whether to acquit or convict the Applicant. That notwithstanding, the court may agree with the Applicant's defence and acquit him. Even if the Applicant is not acquitted, the Applicant will not be prejudiced as he will have a chance to appeal. Having said that much, I find that the Applicant has not demonstrated that the Respondents intention to institute criminal proceedings against the Applicant was done in bad faith and is an abuse of the court process.

31. The upshot is that the Applicant's application dated 5th October 2018 is without merit and is dismissed. In view of the nature of the application and considering all relevant facts I direct that each party bears its own costs.

Dated, signed and delivered at Nairobi this 17th day of October, 2019.

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J .A. MAKAU

JUDGE