



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC CRIMINAL 17 OF 2018

SARAH JOSLYN.....APPLICANT

VERSUS

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

THE DIRECTOR OF CRIMINAL INVESTIGATIONS, NAKURU....2ND RESPONDENT

JUDGMENT

1. Richard Ingram Crawford (“Deceased”) died on 01/02/2014 at Nakuru War Memorial Hospital. By all accounts, he was not married, had no children and no known family in Kenya or elsewhere.

2. It would seem that the Deceased had quite some property. Who the property should be bequeathed to has become a titanic legal battle between two protagonists: Sarah Joslyn (the “Applicant”) on the one hand; and the family of Stephen Ngatia Maina and David Kagunda Ngatia Maina (the “Interested Parties”) on the other hand. That legal battle is taking place in the form of Nakuru High Court Succession Cause No. 356 of 2014 (the “Succession Cause”).

3. In the Succession Cause, the Applicant herein is the Petitioner. She Petitioned for Probate as the Administratrix of the estate of the Deceased. To do so, she relied on a will dated 09/01/2009 (“Will”) and a Codicil to the Will dated 13/11/2009 (“Codicil”). She was initially granted probate. Yet, that was the beginning of the legal battles to follow.

4. As soon as the Interested Parties learnt that probate had been granted, they took two actions. First, they reported to the Police (through their mother, Veronica Wanjiku Maina) that they suspected that the Applicant had relied on forged documents to obtain Probate in the Succession Cause. Second, as expected, they challenged the grant of probate in the Succession Cause. Through their lawyer, they brought a Summons for Revocation of the Grant. The grounds are, of course, that the Will and Codicil relied on to petition for the probate were forgeries. That Succession Cause is on-going.

5. As aforesaid, the Interested Parties reported the matter to the Police. The DCI took over investigations of the case. In particular, PC John Masawi became the Lead Investigator in the case. The official complaint was that the Applicant had forged both the Will and the Codicil with the aim of defrauding the Interested Parties.

6. At this point, it is important to relate the two protagonists to the Deceased. The Applicant was a long-serving Secretary to the Deceased. She does not claim to be a relative. However, the Will and the Codicil left most of the Deceased’s property to her for her use and disposition. On the other hand, the Interested Parties claim to be part of the “adopted” family of the Deceased. They claim that their Deceased father, Joseph Maina Kimani, was a business associate to the Deceased. They say that they ran a business known as BP Shell Lanet Enterprises together until that business collapsed and that thereafter the Deceased allowed the deceased Joseph Maina Kimani to erect a new filing station on his land. For all practical purposes they say that the Deceased had allowed them to use his property as his and had expressed his wish that they should inherit all his property. Indeed, the 1st Interested Party says that he took care of the Deceased for the last three years of his life after he had been attacked by robbers and had become incapacitated mentally and physically.

7. When PC Masawi and his team conducted their investigations, they came to the conclusion that the Will was a forgery. In the main, they relied on examinations and report done by IP Bernard Cheruiyot, a Forensic Document Examiner at the Directorate of Criminal Investigations. He examined several documents with known signatures of the Deceased, compared them with the signature in the Will and came to the conclusion that the signature in the Will was a forgery.

8. Additionally, PC Masawi investigated an alleged Power of Attorney granted to the Applicant by the Deceased and concluded that it was a forgery.

9. As part of his investigations, PC Masawi also formed the opinion that the Applicant had been aided in her forgery and fraud by her present advocate, Mr. Henry Aminga. This is specifically with respect to the charging of some properties belonging to the Deceased to a bank. The charge was registered against the properties of the Deceased after his death. The Investigating Officer is persuaded that this was fraudulent and an attempt to funnel money out of the estate of the Deceased illegally.

10. Following these investigations, PC Masawi recommended to the Director of Public Prosecutions (DPP) and the DPP accepted the recommendation to bring charges against the Applicant. The charges were opened as Nakuru Chief Magistrates Criminal Case No. 350 of 2017. The Charge Sheet contains two counts. The first one is forgery contrary to section 350(1) of the Penal Code. It alleges that on diverse dates between 09/01/2009 and 13/11/2009 at an unknown place within the Republic of Kenya, jointly with others, the Applicant forged a Will purporting to be the Will of Richard Ingram Crawford.

11. The second count in the Charge Sheet accuses the Applicant of uttering a false document contrary to section 353 of the Penal Code. The allegation is that on 30/11/2015, at the High Court of Kenya in Nakuru County, the Applicant knowingly and fraudulently uttered a certain false document namely a will purporting it to be the will of Richard Ingram Crawford.

12. Faced with this criminal charges, the Applicant became convinced that the Interested Parties and the DPP were misusing the Criminal Justice System to aid the Interested Parties in the Succession Cause. She, thus, brought the present Application. The Application has three substantive prayers:

- a. That the Court orders a permanent stay of proceedings in relation to ***Nakuru Chief Magistrate's Court Criminal Case No. 215 of 2018: Republic v Sarah Joslyn***
- b. That the passport belonging to the Applicant Sarah Joslyn be returned to her.
- c. That pending the hearing and determination of ***Nakuru High Court Succession Cause No. 356 of 2014***, my advocate on record, Mr. Henry Aminga, should not be intimidated, threatened and apprehended by the CID, Nakuru on the basis of giving me professional services in relation to the matters at hand.

13. The Application is opposed by both the DPP and the Interested Parties. The position of both is that there is sufficient evidence to bring criminal charges against the Applicant (and Mr. Aminga) and that the existence of the Succession Cause does not debar criminal prosecution.

14. As part of the hearing of the present Application, the Applicant's lawyers successfully applied for leave to cross-examine PC Masawi on the content of his affidavit. The crux of the cross-examination was an urged position by the Applicant that PC Masawi did not do any independent investigations but was, in fact, acting under instructions and directions of the Interested Parties.

15. To demonstrate that the Investigating Officer is proceeding with malice, the Applicant presented the following evidence:

16. That the Will had been drafted by the late K.H. Osmond who then instructed the Applicant's current advocates to hold his brief in the Succession matter. She attached a copy of the instruction note from K.H. Osmond.

17. That she charged the properties belonging to the Deceased only after obtaining Certificate of Grant of Probate but before effecting the name changes to her so that she could obtain a loan to start a business.

18. That she has been able to locate the two persons who attested the Will and that they have sworn affidavit as to the authenticity of the Will. They are Lesley Bayman Aniere and Richard Quentin Thompson. She attached the affidavits. Both the attestors no longer live in Kenya.

19. In the course of the proceedings, the Applicant brought an Application to adduce further evidence. It was opposed by both the DPP and the Interested Parties. I reserved a ruling on whether that evidence should be considered or not. I have now considered the question. In the interests of justice, I am persuaded that the Court should consider all evidence available to it in a case of this nature. The only time the Court should decline to consider the additional evidence would be where the evidence was withheld from the other party in bad faith or where it would cause prejudice to the other party if considered. Neither of those conditions obtain here. There is no evidence that the Applicant was gaming the system in delaying to file the additional evidence. The Respondent and Interested Parties have, also, not shown any prejudice they are likely to suffer if the additional evidence is considered. The Court gave them ample time to respond to the additional evidence.

20. But what was the additional evidence brought to the attention of the Court? It is a Report by a Forensic Documents Examiner (Emmanuel Karis Kenga) dated 27/02/2019. This expert considered the same documents the Government Forensic Document Examiner (IP Cheruiyot) and came to the conclusion that the Will was, in fact, not forged but was likely signed by the Deceased.

21. It is important to state at this point that the Interested Parties had themselves presented the documents to their own independent Forensic Document Examiner who had concluded that the Will was fake.

22. The Applicant's position is that the DPP is abusing his constitutional powers in bringing charges against the Applicant. She argues that as long as the Succession Cause is in place before the High Court, it is improper to bring criminal charges against her. She fears that if the present case is not stayed there will be a possibility that the High Court and the subordinate Courts may reach conflicting positions.

23. Finally, the Applicant argues that it is improper for the DPP to threaten Mr. Aminga with criminal charges since he is only executing his official duties as a lawyer. He says that the conduct by the Investigating Officer and the DPP amount to intimidation for doing his professional work.

24. The Office of the Director of Public Prosecutions (ODPP) is established under Article 157 of the 2010 Constitution as an independent office with the monopoly of prosecutorial powers (complete with the power to direct the Inspector General of Police to do investigations) and the only person with the authority to exercise State powers of prosecution – including the power to:

- i. *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;*
- ii. *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*
- iii. *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).*

22. The Constitution also requires 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.*”

23. However, the Applicant is also correct when he points out that while our Courts now recognize the express powers and authority of the DPP as enshrined in the Constitution and the fact that the DPP must exercise those powers independent of any individual or institution including the Courts, like all other constitutional authority, our Courts have equally recognized that the authority must be exercised in an accountable way tethered to the precepts of “*public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.*” (Article 157(11) of the Constitution).

24. In this regard our decisional law is now clear that the Courts have the ultimate duty to ensure that the DPP exercises his discretion in accordance with the constitutional mandate. As our case law has now firmly established, “*the Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation.*” (**Kuria & 3 Others v Attorney General [2002] 2KLR 69.**) Indeed, this position, although now expressly scripted into our Constitution is of vintage judicial ancestry in Kenya. As early as 2001, the High Court had expressed this view which is now scripted in our Constitution in the following iconic words:

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.

25. Similarly, in the more recent **R v Director of Public Prosecutions & 2 Others Ex Parte Praxidis Nomoni Saisi [2016] eKLR**, Justice Odunga, after analysing a long history of similar cases concluded that “*where it is clear that the [prosecutorial] discretion is being exercised with a view to achieving certain extraneous goals other than those recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would...constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion.*”

26. Indeed, in this and other cases, Justice Odunga, with whom I entirely agree, located the duty and authority of the Court in reviewing the exercise of the unfettered discretion of the DPP in the same mould as the exercise of any other executive discretionary power to which Judicial review is available. Hence, Justice Odunga states:

It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive, the Court may interfere. The Court can only intervene in the following situations:

- i. *Where there is an abuse of discretion;*
- ii. *Where the decision-maker exercises discretion for an improper purpose;*
- iii. *Where the decision-maker is in breach of the duty to act fairly;*
- iv. *Where the decision-maker has failed to exercise statutory discretion reasonably;*
- v. *where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;*
- vi. *where the decision-maker fetters the discretion given;*
- vii. *where the decision-maker fails to exercise discretion;*
- viii. *where the decision-maker is irrational and unreasonable.*

27. Consequently, our decisional law has now laid out the role of the Court in policing the exercise of the DPP’s constitutional authority: the Court has the duty and authority to review the charging decisions of the DPP. However, what also emerges from our decisional law is that the Court is extremely cautious in performing that duty. Hence in the **Kuria Case (supra)**, the Court expressed itself thus:

There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.

28. Similarly, in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** the Court held:

The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

29. In similar vein, this Court remarked in **Patrick Ngunjiri Muiruri v DPP [2017] eKLR** as follows:

The law and practice, then, are quite clear: while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the Court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the Court can review the DPP's decisions for rationality and procedural infirmities, it cannot review them on merit.

30. The singular defining question presented in the present Application, therefore, is whether it can be said that the DPP's decision to charge the Application is somehow irrational, unprocedural, informed by ill or ulterior motives or unduly fettered.

31. As I understand it, the Applicant says that the criminal prosecution must be stayed for two reasons:

- a. First, because of the existence of the Succession Cause which is likely to determine the same question;
- b. Second, because the Applicant has contrary evidence that shows that the assertions by the DPP that she committed forgery are demonstrably false.

32. Our case law has now firmly established that existence of a civil case does not necessarily bar the bringing of a criminal charge against a person based on the same facts. The correct position was stated by the Court of Appeal in **Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR** Where the Court stated:

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. However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene. But this power has to be exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice.

33. Hence, Courts only stay criminal proceedings even where they are concurrent with civil proceedings over the same issue when it is clear to the Court that "there has been [an] oppressive or vexatious investigation[which] 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 V. R.[2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR."

34. In the present case, after scouring through the documents presented by the parties, I am unable to say that the Investigation Agencies and the DPP have carried themselves out in a manner that is vexatious or oppressive or in bad faith. I am also unable to say that the purpose of the criminal investigation is to settle scores or to get a leg up in the Succession Cause. The truth of the matter is that the Interested Parties became convinced that the Will was a forgery. They reported the matter to the Police. The Police conducted its own independent investigations and concluded that it was, indeed, a forgery. The Police, then, made a recommendation that the Applicant be charged, a recommendation which was accepted by the DPP.

35. I am unable to see how this chain of events is vexatious or an abuse of the Criminal Justice System. It is true that the Applicant says that she engaged her own independent Document Forensic Examiner who has concluded that the Will is not a forgery. However, that does not demonstrate that her prosecution is oppressive or without basis. It only establishes that she might have a defence; perhaps a good one to the charges she faces. Indeed, the purpose of the Criminal trial is for the Prosecution to try and establish her guilt beyond reasonable doubt. If, as she says, an independent expert contradicts the findings of the Prosecution expert, that is exactly the kind of material which should be canvassed in the criminal trial.

36. In the end, therefore, I see no merit whatsoever in the Applicant's prayer that the criminal trial should be stayed. I dismiss that prayer. I equally dismiss the prayer that her passport be returned to her. That is only a proper application in the Court which is handling the criminal trial and which has imposed bond/bail conditions.

37. What about the curious prayer that "pending the hearing and determination of **Nakuru High Court Succession Cause No. 356 of 2014**,

[the Applicant's] advocate on record, Mr. Henry Aminga, should not be intimidated, threatened and apprehended by the CID, Nakuru on the basis of giving [the Applicant] professional services in relation to the matters at hand"?

38. This is, at best, a tautological prayer. No advocate should be harassed or intimidated on account of giving professional services to the client. The advocate-client relationship is sacred and it is protected by law. No orders need to issue in the present suit to establish that. However, if an advocate, in the course of the representation of their client independently commits a crime, the Police have a right and a duty to detect, investigate and prosecute that crime – just like any other crime. The Police must, however, always be careful to distinguish acts done by the advocate qua advocate which are lawful and protected and those which are criminal in nature. If Mr. Aminga becomes persuaded that he has been targeted with criminal investigations, not because he has committed any crimes but merely because he has represented his client, then he has his own independent cause of action against the Police and the DPP.

39. In the end, therefore, the entire Application dated 18/10/2017 is dismissed with costs.

Dated and delivered at Nakuru this 5th day of December, 2019

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JOEL NGUGI

JUDGE