REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 82 OF 2016

In the matter of Articles 19 (1), (2), (3), 20 (1), (2), (3) (b), (4) (a) & (b), 22 (1), (2) (b), , 23(1) & (3) (a) & (e), 157 (6), 159, 165 and 258 of the Constitution of Kenya, 2010

AND

In the matter of alleged contravention of Fundamental Rights and Freedoms under Articles 27 (1) & (2), 47, 48, 49, 50 of the Constitution of Kenya, 2010

AND

In the matter of the Criminal Procedure Code, Cap 75, Laws of Kenya

AND

In the matter of Criminal Case Number 1998 of 2010 Between the Republic of Kenya & Graham Rioba, Obadia Nyambane, Gladys Moraa and Robert Moseti

BETWEEN

Graham Rioba Sagwe.....1st Petitioner

Obadiah Gwaro Nyambane.....2nd Petitioner

Gladys Moraa Gichana.....3rd Petitioner

versus

Fina Bank Limited.....1st Respondent

Director of Public Prosecutions & 3 Others.....2nd Respondent

The Hon. Attorney General.....3rd Respondent

JUDGEMENT

The petitioners herein seek declarations that the proceedings against them in criminal case number 1998

of 2010, *Republic vs Graham Rioba Sagwe & 2 Others* are constitutionally null and void under Articles 27 (1) & (2), 47, 48, 49, 50, 157 (6) and 159 of the constitution of the Republic of Kenya and a declaration that the action by the 1st Respondent to reinstate criminal the said case and set it down for hearing and any other process consequential thereto are constitutionally invalid for denying, violating, and infringing upon the rights and fundamental freedoms of the petitioners therefore not justified under the constitution. I find the term "reinstate" rather in appropriate because there is nothing to show that the said proceedings were ever withdrawn in the first instance. The petitioners also claim damages for alleged Human Rights violations and costs of the petition.

The petitioners aver that their constitutional rights will be violated if the said criminal case proceeds to trial. The petitioners face several counts in the said case among them conspiracy to defraud and stealing and or handling stolen property. They pleaded not guilty on 22nd November 2010 and were released on bond/bail.

On 6th January 2011 the Banking Fraud Investigation Unit obtained court orders freezing the accounts listed in paragraph 11 of the petition in which the alleged funds had been deposited but subsequently vide criminal revision number 78 of 2011, they obtained orders unfreeze the aforesaid accounts in order to facilitate the transfer of the said amounts back to the 1st Respondent Bank.

It also pleaded that the 1st Respondent engaged the petitioners herein in negotiations with the aim of reaching an out of court settlement during the pendency of the criminal petition a fact that was disclosed to the court on 27th March, and the court stayed the said case at the parties request. It is also pleaded that without prejudice the petitioners and others continued making payments towards the settlement sum and that two of the accused persons have since had their charges dropped, that is Don Bosco Gichn and Albert Simiyu Kuloba with the later having completely remitted all the sums owing to the 1st Respondent and that as at February 2013 a total of Ksh. 88,000,00/= had been reimbursed to the 1st Respondent leaving a balance of Ksh. 15,673,538.01 inclusive of interest.

The petitioners further plead that owing to the arrest in Tanzania of Don Bosco Gichana who was their financier the petitioners experience financial constraints and were unable to constantly repay the 1st Respondent a balance of Ksh. 15,673,538.01 and without further demands, the 1st petitioner sought to pursue the criminal proceedings contrary to sections 88 and 89 of the Criminal Procedure Code.[1]

The petitioners state that the criminal proceedings are premature, ill motivated, vexatious, oppressive and frivolous and offend Article 50 of the constitution and that the proceedings are meant to coerce the petitioners to settle the amount in question. The petitioners further aver that the 1st Respondent will through the aforesaid out of court settlement be compensated and that the criminal proceedings have been overtaken by events and will only vex the petitioners twice for the alleged offence and that it would be illegal, unfair and prejudicial to the petitioners herein if they compensate the 1st Respondent and then face criminal sanctions for the same alleged offence. It is the petitioners case that in the course and during the negotiations, crucial information was diverged hence they risk being prejudiced if the criminal trial proceeds and that the nature of the dispute mutated into civil dispute from criminal.

It is the petitioners position that by instigating the criminal revision referred to above, and securing an order unfreezing the petitioners accounts and reimbursement of funds to the tune of Ksh. 88,000,000/=, the first Respondent compromised the criminal case and crucial evidence was interfered with. Alternatively, the petitioners plead that in exercise of its inherent power, this court do transfer this suit to the civil division and that the 1st Respondent is only interested in recovering the money as evidenced by his act of discharging a one Albert Simiyu Kuloba after he paid his debt, hence the criminal proceedings are aimed at pressuring the petitioners to pay the said sum, hence in the event of the said trial proceeding, the petitioners Aver that there right to a fair trial will be compromised.

On behalf of the first Respondent is the Replying affidavit filed on 23th May 2016 in which he avers *inter alia* that this suit is yet another attempt by the petitioners to frustrate the continuance and conclusion of

criminal case no. 1998 of 2010 and that prior to filing the present proceedings, the petitioners had filed an application dated 30th November 2012 seeking *inter alia* that the criminal case be admitted into the civil division for determination of negotiations which were going on, that the issue for determination of constitutional rights is not novel to this case, that the same issue was raised in the above cited application and further in dismissing the said application the court ruled that the criminal case ought to proceed to conclusion, hence the present application is *res judicata*. It is also averred that it is the learned judge who ordered that the said criminal trial be set down for hearing. Further, it is also averred that Warsame J on 12th November 2012 did lift the stay in criminal case number 1998 of 2010 and directed that it proceeds. The stated that under Article 157 (6) of the constitution by instituting the proceedings in question, the DPP was fulfilling his legal mandate.

The first Respondent also complained about the long delay in determining the criminal trial and insisted that under section 193A of the Criminal Procedure Code,[2] parallel criminal and civil proceedings are permitted, hence, the fact that the petitioners have paid Ksh. 88,000,000/= does not extinguish their criminal culpability. It is also pleaded that the applicants filed this petition in total blatant disregard of the orders of Justice Kimaru dated 8th October 2015 nor has the petitioners demonstrated that the 1st and 2nd Respondents acted in a vexatious manner, oppressively, in bad faith or improperly in conducting the prosecution in question.

The second Respondent filed a Replying affidavit on 21st June 2016 sworn by a police officer attached to the Banking Fraud Investigations Unit who was the investigating officer in the criminal case in question, and he stated *inter alia* that the petitioners are complaining about the criminal case proceeding and not disputing the charges, that he investigated the complaint and established that a crime had been committed and gave details of his findings, and that in the course of the investigation a total sum of Ksh. 58,667,594.99 was recovered and after assembling the evidence the petitioners were charged in court. The deponent also acted within the provisions of Article 157 (6), (10) & 249 (2) of the constitution and insisted that the DPP independently made the decision to charge the petitioners and that section 193 of the Criminal Procedure Code permits parallel civil and criminal proceedings.

In their submissions, the petitioners' counsel submitted that it is the first Respondent who urged the court to proceed with the criminal trial, an act which in his view offends section 88 of the Criminal Procedure Code.[3] Counsel also submitted that the that the criminal trial is an abuse of court process, and that the said case is aimed at coercing the petitioners to pay the said sum and that pursuing both the criminal trial and the agreement to pay is illegal. Counsel also denied that the issues raised in the petition are *Res judicata* and insisted that the petitioners have met the threshold to warrant issuance of the orders sought.

Counsel for the first petitioner submitted that the petition is *Res judicata* in that the issues before the court were determined in Criminal Revision No. 78 of 2011 and that the petitioners have not offered sufficient grounds to warrant the court to stay the criminal trial. Counsel for the second Respondent urged the court to dismiss the petition for lack of merits.

On the issue of *res judicata* , annexture DS2 attached to the first Respondents affidavit is an application filed by the petitioners in Criminal Revision number 78 of 2011 in which the petitioners herein sought orders *inter alia* that the court reviews orders issued in the criminal trial and also in the revision file and grant the petitioners time to pay the outstanding amount, and an order seeking to have the cases admitted to the civil division. The said application was heard and a ruling delivered on 8th October 2015 by Kimaru J and he dismissed the said application for lack of merits and directed that the criminal trial proceeds. The learned judge also considered the effect of section 193A of the Criminal Procedure Code[4] which states that 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.

Looking at the petition no before me, the application referred to above and the said ruling, it is clear that the issues now raised in this petition are substantially similar to the issues raised in the said application made in the Criminal Revision file. This court cannot revisit the same issues nor can I purport to sit on

appeal against the decision of the learned judge. The orders sought are in my view aimed at circumventing the above orders and also aimed at delaying or defeating justice and to me amount to abuse of court process.

As Somervell LJ stated in *Greenhalgh v Mallard* [5] it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. Clearly, the issues now raised by the first applicant are the same issues she raised in her application that was dismissed or could have been raised then. I find that this petition must fail on this ground.

If any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicuta*. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

In my view, this petition is founded on issues that have been dealt with as outlined above and to me this suit constitutes abuse of court process. It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black law dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use "An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use".[6]

The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[7] The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

> ***(a)*** *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
>
> ***(b)*** *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*
>
> ***(c)*** *Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.*
>
> ***(d)*** *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*
>
> ***(e)*** *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.**[8]***
>
> ***(f)*** *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*
>
> ***(g)*** *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*

> ***(h)*** *Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.**[9]***

In the words of **Oputa J.SC** (as he then was) in the Nigerian case of *Amaefule & other Vs The State**[10]*** he defined abuse of judicial process as:-

> *"A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process."*

In yet another Nigerian case of *Agwusin Vv Ojichie*. Justice Niki Tobi JSC observed:-

> *"that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.''*

It's settled law that a litigant has no right to purse *paripasua* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available to the petitioners. They ought to have appealed against the above mentioned decision if they were dissatisfied. The petitioners cannot lawfully file this petitions and seek similar reliefs relying on substantially the same grounds as the application referred to above. The pursuit of the second process, that is this petition constitutes and amounts to abuse of court/legal process."[11]

Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[12] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[13]I find no difficulty in concluding that this petition is based on similar grounds as the application referred to above.

The other issue for determination is whether or not the petitioners demonstrated a case to warrant this court to grant the reliefs sought in the petition. The basic principle is that it is for the prosecution, not the court, to decide whether a prosecution should be commenced and, if commenced, whether it should continue. In *Environment Agency v Stanford*,[14] Lord Bingham LCJ said:-

> *"The jurisdiction to stay, as has been repeatedly explained, is one to be exercised with the greatest caution ... The question of whether or not to prosecute is for the prosecutor……."*

The DPP is required to act independently in the discharge of his duties. Article **157 (10)** of the Constitution of Kenya 2010 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 powers or functions, shall not be under the direction or control of any person or authority. This position is also replicated under Section **6** of the Office of the Director of Public Prosecutions Act.[15]

The above provisions require the DPP to not only act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. The decision to institute or not institute court proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. I find nothing in the petitioners case to suggest, even in the slightest manner that the DPP did not act independently in arriving at the decision to prosecute.

Section **24** of the *National Police Service Act**[16]*** sets out functions of the Kenya Police Service. In my

view, the petitioners have not demonstrated that the investigations and prosecution in question constitute an abuse of process or police powers, nor has the petitioner proved malice or bad faith. The duty and mandate of the police was appreciated in ***Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another***[17] where it was held that **the police have a duty to investigate 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. 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.**

However, the courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution in the magistrates' courts) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of the petitioners fundamental rights.

Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case. [18] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. I am afraid, from the material before this court, there is nothing to show that the prosecution is unfair, wrong, baseless or an abuse of police powers or judicial process. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.[19]

The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[20] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is none, then the court ought to allow the prosecution to continue.

In my view, the high court should prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process** because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[21] These categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.[22]The power to stay or stop a prosecution should only be exercised if exceptional circumstances exist which would result in prejudice to the accused which cannot be remedied in other ways.

A criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. There is nothing to suggest that there was no proper factual foundation in undertaking the prosecution in question.[23] The decision whether or not to prosecute is very important. It can be very upsetting for a person to be prosecuted even if later found not guilty. However, a decision not to prosecute can cause great stress and upset to a victim of crime. I find nothing in the material before me (even mere reasonable suspicion) to suggest that the DPP acted in violation of article **157 (10)** of the Constitution and Section **6** of the Office of the Director of Public Prosecutions Act[24] cited above.

The Constitution contains, in material respects, a fundamental commitment to human rights. Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), stated that:-***[25]***

> *"..... The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law required a criminal trial to be initiated or conducted...."****[26]***

The right to a fair trial is guaranteed by Article 50 of the Constitution. The prosecution of an accused person must be conducted with due regard to traditional considerations of candour, fairness, and justice.

In the Indian Case of *Pulukiri Kotayya Vs Emperor*[27] the court held that where a trial is conducted in a manner different from what is prescribed under the law, the trial is bad.

Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism. And again decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused.[28]

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).[29]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.

The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized**.[30]** There is no material before me to show that the criminal trial will be unfair or that the decision to charge was arrived at unfairly. Also there is nothing to explain why the trial of the criminal case has not proceeded as ordered by the court.

In all honesty, I find nothing in the material before me to show that the petitioners right to a fair trial has been hampered or threatened in the criminal trial in question nor is there is tangible evidence to demonstrate that the police acted maliciously or outside their powers or that the prosecution in question was commenced without proper or reasonable foundation. It is my view that the petitioner has not demonstrated even in the slightest manner that his rights to a fair trial have been or will be infringed if the prosecution in Criminal case number **1998** of 2010 proceeds nor has it been shown that the said trial is an abuse of court process or it will inherently violate his rights to a fair trial as enshrined in the constitution. I also find it disturbing that a 2010 criminal trial is still pending awaiting trial.

As correctly submitted by the Respondents counsels, the fact that a civil case has been instituted is not a bar to a parallel criminal process. Section 193A of the Criminal Procedure Code provides:-

> ***"193A 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 proceeding."***

In the present case no civil case has been instituted. The petitioners had sought time to repay the amount and even if a civil suit had been instituted, the same cannot be a ground for staying the criminal proceedings.

The petitioners also pray for damages. In all honesty, I find no basis for awarding damages nr has evidence been adduced to demonstrate any basis for awarding the damages sought.

I find that this petition has no merits. Consequently, I dismiss this petition with costs to the Respondents and direct that Chief Magistrates Criminal case Number **1998** of **2010** proceeds for hearing and determination.

Orders accordingly

Dated at Nairobi this **13th** day of **February** 2017

John M. Mativo

Judge

---

[1] Cap 75, Laws of Kenya

[2] Ibid

[3] Ibid

[4] Ibid

[5] (1) (1947) 2 All ER 257

[6]Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[7] Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 415

[8] Jadesimi V Okotie Eboh (1986) 1NWLR (Pt 16) 264

[9] (2007) 16 NWLR (319) 335.

[10] (1998) 4SCNJ 69 at 87.

[11] Supra note 1

[12]Ibid

[13] Ibid

[14] {1998} C.O.D. 373, DC

[15] Act No. 2 of 2013

[16] **No 11 A of 2011**

[17] **{2012} eKLR**

[18] *Hui Chi-Ming v R [1992] 1 A.C. 34, PC*

[19]*DPP v Meakin [2006] EWHC 1067.*

[20] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[21] *See Bennett v Horseferry Road Magistrates' Court and Another [1993] 3 All E.R. 138, 151, HL; see also R v Methyr Tydfil Magistrates' Court and Day ex parte DPP [1989] Crim. L. R. 148.*

[22] *R v Birmingham and Others [1992] Crim. L.R. 117*

[23] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[24] Supra

[25] Shabalala & 5 others vs A.G of Transvaal & Another CCT/23/94

[27] L.R. 74 Ind App 65

[28]The Supreme Court of India in *Rattiram v. State of M.P*.[28], a three-Judge Bench

[29] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

[30] Natasha Singh v. CBI{2013} 5 SCC 741