

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL DIVISION

CRIMINAL CONSTITUTIONAL PETITION NO. 10 OF 2016

(In the matter of an intended Appeal)

BETWEEN

JAMBROSE KALU NGUYA APPLICANT

VERSUS

REPUBLIC RESPONDENT

(Intended Appeal from Conviction and Sentence of the Senior Principal Magistrate's Court at Kilifi in Criminal Case No. 337 of 2016)

RULING

The application dated 30.09.2016 seeks a stay of the proceedings in Kilifi Court Criminal Case Number 337 of 2016, REPUBLIC V JAMBROSE NGUYA & ANOTHER pending the hearing and determination of the petition. The application is supported by the affidavit of the petitioner. The 1st respondent filed a replying affidavit sworn by inspector Christopher Cherop.

Mr. Obaga, counsel for the petitioner submitted that the Deputy Public Prosecutor (DPP) did not carry out investigations in public interest. The petitioner was not called upon to record his statement and give his side of the dispute. It is submitted that the dispute is grounded on several civil suits that were pending in court. The petitioner had injunctive orders restraining the complainant from interfering with his property. The criminal case relates to the same property. The complainant had been restrained from entering the property.

Mr. Fedha, prosecution counsel, opposed the application. Counsel submitted that section 194 of the Criminal Procedure Act allows both civil and criminal proceedings relating to the same issue to run parallel and at the same time. Civil proceedings cannot bar criminal prosecution. There is enough evidence to charge the petitioner. Incitement to violence is a criminal offence.

I have read the affidavit in support of the application. It is stated that the petitioner's wife is the registered owner of Plot Number KILIFI/NGERENYE SCHEME/908. The complainant has been trespassing on the land. The petitioner's wife filed Civil Suit Number 337 of 2016 against the complainant in the criminal case and obtained injunctive orders on 17th July, 2015. The orders were disobeyed and reports were made at the Kilifi police station. Several occurrence Book (OB) numbers have been stated. The petitioner was about to seek court's intervention through contempt of court proceedings when he was arrested and charged.

The affidavit of Inspector Christopher Cherop indicate that the complainant made a report at the Kilifi police station. The case was investigated and witness statements taken. The petitioner was then charged in court.

The documents annexed to the respective pleadings show that the petitioner's order of injunction was obtained on 17th July, 2015. The incidents complained of as per the charge sheet occurred on 3rd July, 2016 and 2nd April, 2016. The petitioner is charged with the offence of incitement to violence and disobedience of the law contrary to section 96 of the penal code. The alleged incident occurred on 3rd July, 2016. He is also charged with the offence of malicious damage to property contrary to section 339 (1) of the Penal Code. That incident is alleged to have occurred on the 2nd day of April, 2016.

Although the petitioner had orders of injunction issued in favour of his wife, it could be possible that the orders were disobeyed and the petitioner wanted to remove the complainant from the suit land forcefully. The charge sheet does not give the tile number of the land where the crops were damaged. Even if the court order could have been disobeyed, the petitioner has no powers to effect the orders. The police investigated the case and decided to charge the petitioner. The petitioner cannot rely on the injunctive orders to stop his prosecution. Incitement to violence and malicious damage to property is a crime. An injunctive order is not a licence to destroy other people's properties. It could be possible that no property was destroyed or that there was no incitement to violence. That issue will be determined by the trial court. The petitioner's reports to the police will form part of his evidence during the hearing.

Given the pleadings herein, I do find that the prosecution of the applicant is not made in bad faith. The police have a duty to maintain law and order. The application herein lacks merit and is hereby dismissed. The interim orders are vacated.

Dated and delivered in Malindi this 9th day of March, 2017.

S.J. CHITEMBWE

JUDGE