



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.93 OF 2015

(An Appeal arising out of Ruling and Orders of Hon. P.M. Mugure – RM

delivered on 4th June 2015 in Nairobi CMC. Private Prosecution Case No.8 of 2015)

SHAMSHER KENYA LIMITED.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

AND

**FARYD ABDULRAZAK SHEIKH.....INTERESTED
PARTY**

JUDGMENT

The Appellant, Shamsheer Kenya Limited was aggrieved by the decision of the magistrate's court (PM Mugure (Mrs.) – RM) in which she declined to grant the Appellant leave to institute private prosecution against the Interested Party. The Appellant filed an appeal to this court challenging the said decision. In his petition of appeal, the Appellant raised several grounds of appeal faulting the trial magistrate's decision. The Appellant stated that the trial magistrate had failed to apply the guiding principles and condition enunciated by courts when it declined to grant the Appellant leave to institute private prosecution. The Appellant was aggrieved that the trial court had failed to properly evaluate the evidence placed on record which indeed established that there was basis for the Appellant to be granted leave to institute private prosecution. He was aggrieved that the trial court failed to appreciate that the police and the Office of the Director of Public Prosecutions had been indolent in carrying out investigations and concluding the said investigations as provided under **Article 47** of the **Constitution**. He faulted the trial magistrate for misapprehending and misapplying the facts of the case and thereby reaching the conclusion that the Appellant did not meet the threshold to enable the court grant him leave to institute private prosecution. The Appellant was concerned that the trial court had failed to consider the applicable principles as enunciated in the **Floriculture Case** and thus reached the erroneous determination declining to grant the Applicant such leave. The Appellant was of the view that the trial court placed undue weight to the affidavit sworn in opposition to the application by the police and attached little weight to the evidence that the Appellant placed before the court. In the premises therefore, the Appellant urged the court to allow the appeal, set aside the decision of the trial court and grant leave to the Appellant to institute private prosecution against the Interested Party, Faryd Abdulrazak Sheikh.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Maingi for the

Appellant, Ms. Aluda for the State and Mr. Bowry for the Interested Party. Mr. Maingi submitted that the trial court misapprehended the facts and the applicable law and thus reached the erroneous determination that the Appellant had not placed sufficient material before it for the said court to grant leave to the Appellant to institute private prosecutions. He submitted that the trial court selectively evaluated the facts of the case and in the process ignored the facts that supported the Appellant's case that sought leave to institute private prosecution. He explained that the police and the Director of Public Prosecution had not placed any evidence on record to support their contention that there were active ongoing investigations, and secondly whether action had been taken in regard to the said investigations. The Appellant was of the view that even though investigations had concluded, the Director of Public Prosecutions had taken unduly long time to make a decision on whether or not to prosecute the Interested Party. The Appellant interpreted this delay as reluctance on the part of the Director of Public Prosecutions to prosecute the Interested Party hence the reason why he sought to privately prosecute the interested party. He urged the court to re-evaluate the facts placed before the trial court in light of the applicable principles and allow the appeal.

Mr. Bowry for the interested party opposed the appeal. He submitted that the Appellant was acting in abuse of the due process of law. The subject matter of the case was a parcel of land which the Appellant had filed a civil suit before the High Court sitting at Malindi. That case is pending hearing and determination. He also stated that there was another complaint lodged in respect of the same parcel of land with the National Land Commission. That complaint is yet to be determined. Learned counsel was of the view that in seeking to privately prosecute the interested party, the Appellant was involved in forum shopping. During the pendency of these cases, the Appellant cannot be allowed to seek to privately prosecute the interested party over the same subject matter. He was of the view that the Appellant was seeking to short-circuit the judicial process by seeking the determination of validity of a title over land through the criminal process. In his opinion, this cannot be. Learned counsel submitted that the complaint lodge by the Appellant with the police was still being investigated. The Director of Public Prosecution had stated so. He stated that there was no basis upon which the trial court could have granted leave to the Appellant to institute private prosecution. He urged the court to dismiss the appeal.

Ms. Aluda for the State opposed the appeal. She submitted that the Appellant had not established to the satisfaction of the court that the police had failed to investigate the complaint that he lodged with the police. She explained that upon receipt of the complaint lodged by the Appellant, the Director of Public Prosecutions directed the police to conduct investigations. The investigations were still ongoing. She submitted that the subject matter of the dispute was land which the Appellant had filed a civil suit before the court. She explained that **Article 157(11)** of the **Constitution** compelled the Director of Public Prosecutions to have regard to public interest in the exercise of its powers in determining whether or not to institute prosecution. She was of the view that the Appellant was infringing the Director of Public Prosecution's constitutional right to independently evaluate the outcome of any investigation undertaken by the police and independently reach determination whether or not to prosecute the person being investigated. She attributed the delay in investigation to the fact that there were many public bodies, including the National Land Commission, which were investigating the case and the fact that the Appellant had refused to cooperate with the investigative agencies so that a proper case could be presented before court. She stated that the Appellant was intent on running his own independent investigation without reference to the duly mandated agencies which the **Constitution** had granted power to conduct such investigations. She urged the court to dismiss the appeal.

This being a first appeal, this court is required to re-evaluate and reconsider afresh the arguments placed before the trial court before reaching its own independent determination whether or not to uphold the decision of the trial court. In the present appeal, the issue for determination by this court is whether the Appellant placed sufficient material before the trial court that would entitle that court to grant it leave to institute private prosecution against the Interested Party. It is important to set out the background of the dispute between the Appellant and the Interested Party.

The Appellant and the Interested Party both claim to own a parcel of land registered as LR. No. Kilifi/Jimba/332. From the documents filed in support of and in opposition to the application, it was evident that the Appellant and the Interested Party both claimed to have title to the said parcel of land.

The Appellant is of the view that the title in the name of the Interested Party was procured by acts of forgery. It was in that regard that the Appellant lodged a complaint with the police to investigate the case. There is evidence that investigations were conducted and the file sent to the Director of Public Prosecutions for advice. The Director of Public Prosecutions returned the file to the police to conduct further investigations. Meanwhile, the Appellant had filed suit against the Interested Party and other parties before Malindi High Court in **Civil No.71 of 2008 (OS)** and **Malindi ELC. Suit No.139 of 2011**. These suits were consolidated and are pending hearing and determination. The Appellant has also lodge another complaint before the National Lands Commission. The notice of the lodgment of the complaint was published in the Daily Nation Newspaper of 18th August 2014. The determination of the said complaint is still pending.

From the proceedings, it was apparent that the Appellant was not satisfied with the slow pace in which the police and the Director of Public Prosecutions were taking to make a decision on whether or not to prosecute the Interested Party. It filed an application before the magistrate's court seeking to be granted leave to institute private prosecutions. The Appellant predicated his application on **Article 157** of the **Constitution**, **Sections 88, 89 and 90** of the **Criminal Procedure Code** and **Section 28** of the **Director of Public Prosecutions Act**. There is no dispute that any person may be granted leave to institute private prosecution provided such person is able to establish certain conditions precedent. These conditions were set out in the case of **Floriculture International Limited & Others –vs- The Attorney General Nairobi High Court Miscellaneous Civil Application No.114 of 1997** and were reiterated with modifications in **Nairobi High Court Petition No.339 of 2013 Isaac Oluochier -vs- Stephen Kalonzo Musyoka & 217 Others**. In this case, Mumbi Ngugi J citing Kuloba J (as he was then) in the **Floriculture Case** held that for a person to be granted leave to institute private prosecution he must establish that he had made a complaint to the police and had accorded reasonable opportunity for the police to investigate the case; that the Director of Public Prosecutions had been seized of the case and had declined to institute or conduct criminal proceedings; that the failure by the State agencies to prosecute is culpable, unreasonable and without any legally justifiable reason; that unless the suspect is prosecuted there is likelihood there will be failure of public and private justice; that the person instituting private prosecution has suffered special, exceptional and substantial injury or damage that is personal to him and is not motivated by malice, politics or some other ulterior consideration devoid of good faith, and finally, that there was demonstrable ground that grave social evil will occur if the police and the Director of Public Prosecutions have acted capriciously, corruptly and in a biased manner that the only remedy is to grant leave to the aggrieved party to institute private prosecution.

In the present appeal, the Appellant argued that his attempts at prodding the police and the Director of Public Prosecutions to institute criminal charges against the Interested Party had failed despite the fact that there was sufficient evidence to institute such charges. The Director of Public Prosecutions explained that it had indeed taken action and had examined the evidence that was initially gathered by the police and formed the opinion that further investigations needed to be done. The Director of Public Prosecution explained that since there were other agencies, including the court and the National Land Commission, which were dealing with the dispute, it could not institute criminal charges without taking cognizance of the existence of these dispute resolution mechanisms. The Appellant formed the view that the reluctance by the police and the Director of Public Prosecutions to institute criminal charges against the Interested Party was a clear indication that unless the court allowed the Appellant to institute private prosecution, there would be no justice in the case. The Appellant argued that he had established that it suffered exceptional or special injury that compels the court to grant it leave to institute private prosecution. In response to this, the Respondent and the Interested Party argued that the Appellant had lodged complaints before various forums in respect of the same parcel of land and thus, to grant it leave to institute private prosecution of the Interested Party, would be an abuse of the due process of the law.

This court has carefully re-evaluated the facts of this case, the applicable law and the submission before this court on this appeal. This court takes the following view of the matter: it was evident to this court that the Appellant has presented the resolution of the dispute involving the ownership of the suit parcel of land to various forums. There are two cases pending resolution before the Malindi Environment and Land Court. There is a complaint pending determination before the National Land Commission. During the pendency of resolution of the dispute before these forums, the Appellant sought the leave of the

magistrate's court to institute private prosecution. In the considered opinion of this court, the application to institute private prosecution is not made in good faith. Whereas a case may arise where civil and criminal proceedings arise out of the same subject matter, in the present appeal, it was clear to this court that the Appellant intended or intends to institute private criminal prosecution of the Interested Party to achieve the ulterior motive of inducing the Interested Party to give up his claim over the suit parcel of land.

Odunga J in Republic -vs- Attorney General & 4 Others Ex-parte Diamond Hashim Lalji & Another [2014] eKLR cited with approval the decision in Republic -vs- Chief Magistrate's Court Mombasa Ex-parte Ganijee & Another [2002] 2 KLR 703 where it was held that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in their advancement or frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil case of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. Where a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process.”

In the present appeal, it was clear to this court that the sole reason why the Appellant seek to institute private prosecution against the Interested Party is to advance its claim for the suit parcel of land. Nothing in law prevents the Appellant from presenting the evidence of what it alleges to be fraudulent conduct of the Interested Party to the Environment and Land Court sitting at Malindi or the National Land Commission in order to establish its case. By seeking to institute private criminal prosecution against the Interested Party to achieve the objective of advancing its claim over the suit parcel of land, the Appellant is abusing the due process of the court. The trial court correctly found no merit with the Appellant's application that sought leave to institute private prosecution against the Interested Party.

It is clear from the above reasons that the appeal lacks merit and is for dismissal. It is hereby dismissed. The decision of the magistrate's court in declining to grant leave to the Appellant to institute private prosecution is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF JUNE 2017

L. KIMARU

JUDGE