



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL PETITION NO. 2 OF 2015

IN THE MATTER OF ARTICLE 22 (1) 157 (11) AND 165 (6) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF ALLEGED CONTRVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 50 (1)

JADIEL KARITHI.....PETITIONER

AND

THE O.C.S MERU POLICE STATION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

ANTHONY GITONGA KIRIMI.....3RD RESPONDENT

JUDGMENT

Before me is a Petition brought pursuant to Article 22 (1) 157 (11) and 165 (6) of the Constitution of Kenya in which the Petitioner seeks the following orders:

- 1. A declaration that the proceedings of the Meru Chief Magistrate's Criminal Case No. 1273 of 2015, Rep V Jadiel Karithi contravenes the Petitioner's rights to a fair trial under Article 50 (1) of the Constitution.**
- 2. A declaration that the dominant purpose for the institution and maintenance of the Meru Chief Magistrate's Criminal Case 1273 of 2015 Rep V Jadiel Karithi is to achieve a purpose other than what is intended that is to frighten, threaten and eventually coerce the Petitioner to doing what the Respondent want that is to have the parcel no. Ntima/Igoki/8136 transferred into the 3rd Respondent's names.**
- 3. An order of permanent stay of Meru Chief Magistrate's Criminal Case No.1273 of 2015, Rep V Jadiel Karithi.**

Briefly the Petitioner's case was that he was the registered owner of parcel No. Ntima/Igoki/8136 as at 1/11/2014 and that he wanted to sell the said parcel whereupon he got willing buyers namely Anthony Gitonga Kirimi (the 3rd Respondent), Laura Gakii and Sophia Mwendwa as per the copy of the sale agreement dated 1/11/2014 (JK2).

It was his contention that he sold the parcel of land at a consideration of Kshs.3,600,000/= and that at the time his title deed was held by K-Rep bank, a fact which was well known to the parties and their advocates; that the purchasers paid Kshs. 700,000/= vide a bankers cheque and Kshs 800,000 later on 7th November 2014 through his account at Barclays Bank; that unfortunately the release of the title document was delayed by K-Rep bank prompting the purchaser's advocates to write a demand letter to him.

He further contended that a rejoinder was issued on 26th February 2015 by his then advocate to the effect that the title had been submitted to his chambers as agreed and requested for performance of the agreement; that the purchasers were not ready to pay the balance in whole as per the agreement and his advocate wrote to them a letter dated 19/3/2015 but they were not able to raise the balance; that due to financial constrains he was not able to wait but looked for a potential purchaser and got a willing buyer by the names of Kiogora Ikiara; that he asked for the 3rd Respondent to meet him in order to arrive at some agreement but he declined and instead the 3rd respondent reported the matter to the Police at Meru causing his arrest, whereupon he was charged with obtaining money by false pretences contrary to **Section 313 of the PC**.

The Petitioner contends that there was a breach of contract on the part of the 3rd Respondent, which contract is governed by the Law of Contract Act which has its own civil remedies. Instead, the 3rd Respondent chose to intimidate, punish, exert pressure and coerce the Petitioner into selling the parcel to him.

Mr. Mwanzia, Counsel for the applicant, submitted that the 1st and 2nd Respondents were using their powers contrary to the interests of administration of justice; that the dominant purpose of the criminal case against the petitioner is to coerce him to settle the civil case. For this Proposition, the Petitioner sought to rely on the case of **Chuka High Court Petition No. 1 Of 2015, Lucy Karauki Kirambia (suing as the next friend of Joram Mugambi (minor) v D.P.P & James Muthengi**, where the courts have considered similar petitions. Consequently he urged the court to allow the instant Petition.

The petition was not opposed. Mr. Mulochi, Counsel for the 1st and 2nd Respondent observed that the sale agreement between the petitioner and 3rd Respondent, at paragraph 8 thereof, addressed the issue of remedy in the event of breach, which was by way of damages and that the parties should have invoked that provision first. The 3rd Respondent was represented by Mr. Ondari who did not file any reply nor did he attend the hearing. In any event, I doubt that he would have had any role since the orders can only tie against the 1st and 2nd Respondents.

I have carefully considered this Petition, the affidavits and submissions made herein. The powers of the DPP are derived from **Article 157 of the Constitution**.

Article 157 provides as follows:

“4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

6. The Director of Public Prosecutions shall exercise State powers of persecution and may –

(a) 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;

(b) 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

(c) 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)”.

Article (11) of the Constitution 2010 provides that:-

“In exercising the powers conferred by this article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”

From the aforesaid provisions, it is clear that the 1st respondent has wide powers in the institution, prosecution and discontinuance of criminal proceedings. The only restraint or fetter is that found in ***Sub-Article 157 (11)***. In ***Musyoki Kimathi v Inspector General of Police and 2 others (2014) KLR***, when considering the above provision, J. Majanja said:

“In light of the mandate conferred upon the DPP in Article 147 (sic) of the Constitution, the High Court therefore ought not to interfere with the above mandate unless cogent reasons are given thus, that the DPP has acted without due regard to public interest, against the interest of the administration of justice and has not taken account of the need to prevent and avoid abuse of the court process. Although the DPP has the discretion to determine which complaint should lead to criminal prosecution, the High Court may intervene where that discretion has been abused or where the effect of the proceedings results in the abuse of the court process.”

Again, in the case of ***John Muritu Kigwe & Another v Attorney General & Another HCCC NO. 223 OF 2000 (UR)*** Rawal J as she then was rendered herself thus:

“Over the period this court has established a well considered dictum of law to govern this kind of application. It is to find out what is the predominant purpose in the institution and prosecution of criminal proceedings. If the predominant purpose of the other party in using the legal process has been one other than that for which it is designed the court will intervene.”

I am alive to the fact that petitions of this nature are allowed in rare and exceptional circumstances. See ***Goddy Mwakio & Another v Rep [2011] eKLR*** where it was stated

“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances”.

The question for determination is whether the fetter in ***Sub-Article 157 (11)*** applies herein. In view of the fact that the sale agreement between the Petitioner and the 3rd Respondent provided for clear civil remedies in case of breach of the same, I find that the proceedings were brought to achieve other purposes other than those which the criminal process is meant to achieve and the same is tantamount to exerting pressure and harassment of the Petitioner and hence an abuse of the court process. It is also contrary to Public policy.

In the end result, I find the instant petition has merit and accordingly allow the same. I grant the three prayers sought in the petition.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF OCTOBER, 2016.

R.P.V. WENDOH

JUDGE

6/10/2016

PRESENT

Mr. Mulochi for 1st and 2nd Respondents

Ms. Njenga Holding Brief for Mr. Mwanzia for Petitioner

Ibrahim/Peninah, Court Assistants

In Court, Petitioner