



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAROK
PETITION NO. 1 OF 2016
IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL
FREEDOMS
UNDER ARTICLES 29 (a) (b) (c) (d) AND (e) OF THE CONSTITUTION OF KENYA 2010
AND ANY OTHER ENABLING PROVISIONS OF THE CONSTITUTION
BETWEEN
JOEL KIPLANGAT BARCHOK.....1ST PETITIONER
DAVID KIPROISI CHELULE.....2ND PETITIONER
JULIUS KIPKOECH KIRUI.....3RD PETITIONER
-VERSUS-
NAROK COUNTY CRIMINAL INVESTIGATION OFFICER.....1ST RESPONDENT
HON. ATTORNEY GENERAL.....2ND RESPONDENT
THE CHIEF MAGISTRATE’S COURT, NAROK.....3RD RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

R U L I N G

1. Before me is an amended Notice of Motion filed on 29/7/2016. The Notice of Motion has five key prayers, but for purposes of this ruling the only live prayer is b, seeking:-

“THAT further proceedings in Narok CMCC 885 of 2016 be stayed until the hearing and determination of this Petition and the fate of the said case to abide the outcome of this Petition.” (sic)

2. The Respondents are named as **Narok County Criminal Investigations Officer, the Attorney General, the Narok Chief Magistrate's Court** and the **Director of Public Prosecution (DPP)**, respectively. The amended Notice of Motion is expressed to brought under Articles 22 and 23 of the Constitution, in enforcement of rights in Articles 29 (a), (b), (c), (d) and (e) of the Constitution, and is supported by the affidavit of **Joel Kiplangat Barchok**, sworn on behalf of all the Applicants. The Notice of Motion was filed contemporaneously with the amended Petition.

3. The grounds upon which the Notice of Motion is brought are that:-

“a) THAT the criminal proceedings against the 3rd Petitioner/ Applicant and the threatened, arrest and prosecution of the 1st and 2nd Petitioner/Applicants are without probable cause and are meant to subvert proceedings and the cause of justices in Narok CMCC 162 of 2011 and Nakuru High Court ELC 415 of 2013.

b) THAT the actions of the 1st Respondent are an abuse of criminal justice system.

bb) THAT the actions of the 1st and 4th Respondents in prosecuting the 3rd Petitioner/Applicant and the threatened arrest and intended prosecution of the 1st and 2nd Petitioner/Applicants are an abuse of the criminal justice system.

c) THAT the constitutional rights and freedoms of Petitioners/Applicants will be violated and/or infringed unless the orders herein are granted.

4. I do not understand the contents of paragraph 3 of the affidavit of **Joel Kiplangat Barchok** as it makes reference to an essentially withdrawn Notice of Motion filed on 28th June, 2016, and annexes the amended petition. It seems that the deponent of the supporting affidavit intended vide paragraph 3 above to ‘support’ the withdrawn motion and its affidavit and “to adopt and incorporate into this affidavit the contents of the Petition herein dated 27th day of June 2016 and annexures thereto”. This kind of cross referencing in depositions is undesirable as it obfuscates pleadings needlessly.

5. Thus for purposes of the present application the only valid reference is to the amended petition and its supporting affidavit. However, unlike in the previous deposition in the Notice of Motion of 27th June 2016 there is no express attempt in paragraph 3 of the present affidavit to adopt the contents of the amended petition as affidavit material, itself an unusual style of deposition. Rather, the documents are merely bracketed at the end of the deposition in paragraph 3 as annexures “**JKB 1 and JKB 2**”. I will return to this matter later in my ruling.

6. Suffice to say that the gist of the affidavit supporting the current notice of motion appears to be that the arrest and prosecution of the 3rd Applicant by the Respondents was malicious and intended to aid the complainant who is the Interested Party herein in the subversion of two civil cases, namely **Narok CMCC 162 of 2011** and **Nakuru ELC 415 of 2013**. Ditto the alleged threatened arrest and prosecution of the 1st and 2nd Applicants. That the said actions are unreasonable and without probable cause as the Applicants have “**been in occupation of the subject of land for over 10 years since the year 2012.....**” (sic). The 1st Respondent has allegedly infringed upon the Applicant’s rights through failure to conduct proper investigations of the complaint by the Interested Party.

7. I do not see on record any grounds or affidavit in opposition to the application. However on the date set for the hearing of the Notice of Motion, Mr. Mutinda appeared on behalf of the 1st and 4th Respondent and opposed the motion. The 2nd and 3rd Respondent were absent despite service. The Interested Party also appeared

8. The Applicants were represented by Mr. Koskei. His submissions were that the subject matter of the impugned criminal proceedings and the civil causes pending before the Chief Magistrate’s Court, Narok and the Nakuru ELC was a land parcel **LR. No. CIS MARA/NKOBEN/108**. He submitted that the

present prosecution has been brought to circumvent an order issued in the former court, a copy of which is annexed as **JKB3** to the supporting affidavit. And further that the impugned prosecution violates Article 29 of the Constitution and constitutes a threat of violation of the Applicant's rights. Mr. Koskei urged the court therefore to stay the prosecution in **Narok Criminal Case Number 885 of 2016** pending the outcome of the present Petition.

9. In opposing the Notice of Motion, Mr. Mutinda disputed the Applicants' assertion and submitted that the Criminal case was brought pursuant to a proper exercise of the DPP's powers under Article 157 of the Constitution. He argued that the Applicants have not demonstrated how their rights have been infringed upon and/or threatened and that the true purpose of the present Notice of Motion is to delay the criminal trial. That the DPP can only direct arrest in respect of a prosecutable offence and hence the Applicants' fears of arrest are unfounded.

10. In response, Mr. Koskei took issue with the DPP's failure to advise the 1st Respondent against bringing a criminal prosecution while the civil suits are pending. That the criminal system should not be abused when there are subsisting orders restraining the parties to the civil suits. That such criminal prosecution is an attempt to subvert the civil suits. The Interested Party who appeared in person urged that the criminal case should be allowed to proceed.

11. Following the directions given by the court at the close of oral submissions, parties filed legal authorities addressing the questions raised by the application. The Applicants relied on **Josephine Akoth & Ano. -Vs- Director of Public Prosecutions & 4 Others [2014] eKLR**; **Peter Gichuki & 2 Others - Vs- Copyright Board of Kenya & 3 Others [2014] eKLR**; and **Samuel Roro Gicheru -Vs- OCS Nanyuki Police Station & Another [2014] eKLR**.

12. For their part, the 1st and 4th Respondents placed reliance on **Manilal Jamnadas Ramji Gohil -Vs- Director of Public Prosecutions [2014] eKLR**; **Goddy Mwakio & Another-Vs- Republic [2011]** and **Attorney General for and on behalf of the Inspector General of Police & 3 Others exparte Nganga Munene [2014] eKLR**.

13. I have considered the parties' submissions and authorities relied on in support of and opposition to the Amended Notice of Motion. There is no dispute that the 3rd Applicant stands charged in **Narok Criminal Case No. 885 of 2016**. The copy of charge sheet annexed to the supporting affidavit in a bundle of documents (marked as annexure **JKB1** and **JKB2**) contains two counts of Forgery Contrary to Section 345 as read with Section 349 of the Penal Code; two counts of Uttering a false document Contrary to Section 353 of the Penal Code; one count of Making a document without authority Contrary to Section 357 (a) of the Penal Code; and one count of Obtaining Land Registration by false pretence Contrary to Section 320 of the Penal Code.

14. These offences relate to land parcel **L. R. No. CIS MARA/NKOBEN/108**, while the Complainant is named as **Michael Warui Wachanga**. Without doubt, there are two pending civil suits in respect of the same land parcel. These are **Nakuru ELC Suit No. 415 of 2013** between the three Applicants as the Plaintiffs and **David Kiplangat Sielei; Joseph Mosonik; Samuel Kipsiele Kalya; Paul Cheruiyot Kirui; Julius Kiprono Siele; Samuel Kisioto; Elizabeth Sirwa; Alice Sigilai and Grace Belel** as Defendants.

15. In the Plaintiff filed in June 2013 the Plaintiffs claim to have 'negotiated to purchase' the land from one **Michael Warui Wachanga** the registered owner, in 2010 and seek the eviction of the Defendants described as trespassers. **Narok SPMCC No. 163 of 2011** filed in October 2011 by **Michael Warui Wachanga** claiming to be the registered of the subject land proprietor was against **Daniel Siele; Joseph Mosonik and Samuel Kalya**. The said Plaintiff avers that the Defendants in the suit have since 2011 interfered with his quiet enjoyment of the suit land.

16. In the latter suit, a consent order was made by the court on 28th October 2014. The certified copy of the court order contained in the Applicant's bundle of documents **JKB3** additionally reflects the names of the three Applicants herein, who are described as Applicants therein. I have called for my perusal the file

in respect of **Narok Civil Suit No. 162 of 2011** to confirm the status of the Applicants therein. The same could not be traced in the registry but the records indicate that the suit exists.

17. The constitutional right to freedom and security of the person which the Applicants have sought to enforce through these proceedings is found in Article 29 of the Constitution. The provision states:

“Every person has the right to freedom and security of the person, which includes the right not to be-

(a) deprived of freedom arbitrarily or without just cause;

(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(c) subjected to any form of violence from either public or private sources;

(d) subjected to torture in any manner, whether physical or psychological;

(e) subjected to corporal punishment; or

(f) treated or punished in a cruel, inhuman or degrading manner.”

18. With regard to the third Applicant, he has already been arraigned before the court on six counts of offences under the Penal Code. However, beyond submissions made in this court and the deposition alleging ‘threatened’ arrest and prosecution, there is no tangible material placed before the court to assert that the Respondents have evinced an intention to arrest and prosecute the 1st and 2nd Applicants. But even if that were assumed to be true, the 1st and 2nd Applicants have the onus, like the 3rd Applicant to demonstrate that the actions taken or threatened against them constitute a violation or threat of violation of their rights under Article 29 of the Constitution.

19. From the grounds and arguments in respect of the Amended Notice of Motion, the Applicants’ complaint is firstly, that the prosecution of the third Applicant and further threats of arrest and prosecution of the 1st and 2nd Applicant are “without probable” cause and only intended to subvert the pending civil causes. Secondly, that they amount to an abuse of the criminal justice system.

20. The order sought by the Applicants is conservatory by nature. What is therefore required of such an Applicant is a demonstration of a prima facie case. **Musinga J** (as he then was) stated in the case of **Centre for Rights, Education and Awareness & 7 Others –Vs- Attorney General, Petition 16 of 2011** that:

“At this stage, a party seeking orders only requires to demonstrate that he has a prima facie case with a likelihood of success, and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation.”

21. In the case of **Martin Nyaga Wambora -Vs- Speaker of the Country Assembly of Embu & 3 Others – Petition No. 7 of 2014** the court emphasised the importance of a demonstration by an Applicant, of real danger, and quoting **Musinga J**’s words above proceeded to state:

“[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious so much so that it deserves immediate remedial attention or redress by the court. Thus, an alleged threatened violation that is remote and unlikely will not attract the court’s attention.

[62] The second principle which naturally follows the first, is whether if a conservatory order is not granted, the matter will be rendered nugatory.”

22. The foregoing authorities relate to interim applications for stay of proceedings or conservatory orders made in petitions and the like. Having perused the authorities tendered by the parties, I note that all of them with the exception of **Manilal Jamnadass** and **Goddy Mwakio & An.** (supra) are decisions rendered after the court had fully heard the respective petitions or substantive matter. Although much assistance by way of principles may be gleaned from the respective judgments, this court must not lose sight of the interlocutory nature of the application before it.

23. Since the promulgation of the 2010 Constitution, there have been several pronouncements by the courts in respect of conservatory orders. While the concept was still inchoate in our jurisprudence, **Ibrahim J** (as he then was) made what are still useful observations in the case of **Muslims for Human Rights (MUHURI) & 2 Others –Vs- Attorney General & 20 Others [2011] eKLR** when he stated that:-

“In the fullness of time, the Kenyan courts will have to define and construe what is meant by the relief of a “conservatory order” under the new Constitution what is clear to me from the authorities is that strictly a conservatory order..... is an order that tends to and is intended to preserve the subject matter or set of circumstances that exist on the grounds in such a way that the Constitutional proceedings and cause of action is not rendered nugatory.....

A conservatory order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would still be possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not just an academic exercise.”

24. The court must look at all the relevant material as well as consider the public interest element before granting such an order. The Supreme court stated in the case of **Gatirau Peter Munya -Vs- Dickson Mwenda Githinji & 2 Others SCK Petition No. 2 of 2013** that:

[86] “Conservatory orders” bear a more decided public-law connotation: Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

[63] Thus where a conservatory order is sought against a public agency like a legislature assembly that is mandated to carry out certain fictitious in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislature body should take into account the need to allow for their ordered function in public interest.”

25. A further question therefore is whether the Applicants have demonstrated that there is a real and imminent danger of violation of rights and that the denial of the orders sought will destroy the substratum of their Petition. Or in other words whether they will be unable to vindicate their rights at the hearing of the Petition if the stay orders are denied; and finally whether the grant of the orders sought is consistent with public interest.

26. The chief complaint by the Applicants, as far as I can tell, is that the existing criminal case **Narok No. 885 of 2016** has been brought for the ulterior purpose of subverting the two pending civil causes. It is true that the complainant in the former is **Michael Warui Wachanga**. However Section 193A of the Criminal Procedure Code envisages the concurrent litigation of civil and criminal proceedings arising from similar facts. Section 193A of the Criminal Procedure Code is in following terms:

“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 proceedings.”

27. But as stated in several cases, and in particular, in **Commissioner of Police & Director of Criminal Investigations Department –Vs- Kenya Commercial Bank & Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR**:

“While the law (Section 193 A of the Criminal Procedure Code) allows the concurrent litigations of Civil and Criminal proceedings arising from the same issues, and while it is prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly. In accordance with the laws of the land and in good faith..... It is not in the public interest or in the interest of administration of justice to use criminal process as a pawn in civil disputes.” (sic)

28. Now, looking at the pleadings annexed to the Applicant’s Affidavit which I must state is sketchy, it is clear that while Applicants are the Plaintiffs in **ELC 415 of 2013** against the Defendants therein, **Michael Wachanga** is not a party in that suit even though the subject matter is land parcel No. **CIS MARA/NKOBEN/108**. At paragraph 12 and 13 of the plaint it is averred by the Plaintiffs that they are registered owners thereof. And at paragraph 14, it is stated that:

“The Plaintiffs aver that in 2010 they negotiated with the registered owner Michael Warui Wachanga to purchase this land LR CIS MARA/NKOBEN/108 which at all the material times was registered in his name under the provision of the registered land Act.....”

29. In the present case, the Applicants have not repeated these assertions, peculiarly, and have not annexed the sale agreement or title in their name. On the contrary, a copy of title deed and search certificate in the name of **James Wachanga Warui** are attached to the order in respect of **Narok Civil Suit No. 162 of 2011**. The pleadings in respect of the said suit (plaint and defence) do not include the Applicants as parties.

30. Indeed, it is quite obvious that the Applicants’ names were squeezed into the copy of the annexed order of the court in that suit, dated 28th October 2014. The title heading of the order purports that the Applicants herein are ‘Applicants’ in the suit, among the Defendants. That is obviously an anomaly that has not been explained by the Applicants herein, who from all accounts have been quite reticent about the circumstances of their dealing with the suit land.

31. Notably, there is no express averment in **ELC 415 of 2013** or in their present application that the Applicants purchased the suit land from the recognised owner, **Michael Warui Wachanga**. Ditto for the Amended Petition herein – apart from asserting the existence civil disputes, the amended Petition makes no attempt to demonstrate why the Applicants believe that the prosecution has been brought maliciously. There is therefore no evidence of an existing civil dispute between the complainant in the criminal case and the Applicants herein.

32. I have previously alluded to the contents of paragraph 3 of the Applicants’ affidavit. It states:-

“THAT I swear this affidavit in support of the Notice of Motion herein dated the 27th June, 2016 and my supporting affidavit and annexures sworn on the 27th June, 2016 as it the same were set out herein and deponed to (annexed herein a copy of Petition marked Exhibit “JKB1” and copy of the supporting affidavit and annexures marked exhibit “JKB2”

33. The Petition affidavit of 27th June 2016 itself in turn adopted the assertions in the Petition, but as I have indicated that affidavit and Petition are spent by virtue of amendment. Why are the Applicants reluctant to expressly set out the very contents of their amended petition in their present affidavit? The annexures referred to in paragraph 3 thereof have basically been thrown at the court without any corresponding deposition in the affidavit. A party who approaches the court by way of a Petition and opts to swear an affidavit must disclose his grounds fully in the affidavit. A petition is a pleading and cannot replace an affidavit which ought to contain evidential material.

34. The evasive nature of the depositions in the affidavit of the Applicants and the use of a doctored court order is to my mind mischievous. Where is the evidence to support the Applicants' complaint in the grounds, that the criminal proceedings have been brought without cause; to subvert the civil suits and amount to an abuse of the criminal system? The mere existence of other suits which do not involve the Complainant in the criminal case without more is not evidence that the criminal proceedings are malicious.

35. There being no existing civil dispute between the Applicants and the complainant in the criminal case, it is difficult to conclude at this moment, that the criminal cases are intended to defeat the civil suits. Indeed, in one of those suits before the ELC the Applicants have acknowledged the complainant's title to the suit property, only averring that they had "negotiated" with him in respect of purchase of the said property. The 1st and 2nd Applicants though not yet arrested appear to fear that they will face similar charges as the 3rd Applicant. That is speculative on their part as there is indeed no evidence that the Respondents will charge them in the same connection. As a result an order staying the criminal case may not be efficacious in respect of the 1st and 2nd Applicants.

36. Whatever the case, it is my view that the three Applicants have failed to demonstrate prima facie, the grounds upon which their Notice of Motion is based. The court is not satisfied that there is a real danger that the Applicants' rights under Article 29 of the Constitution are threatened with, or have been violated by the Respondents. Or that the Petition herein will be rendered nugatory should the orders sought be denied. The court of appeal in the **Manilal case** reiterated its finding in **Goddy Mwakio's** case that

"We are mindful that an order staying criminal proceedings would be granted only in the most exceptional circumstances. See Goddy Mwakio & Another -Vs- Republic [2011] Eklr where this court in illustrating this point, stated that:

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

37. No such exceptional circumstances have been demonstrated herein and it would militate against public interest to prohibit the Respondents from carrying out their lawful function to bring suspects to account for their alleged actions before a court of law. The rights of the Applicants must be balanced against societal interest – **(See Githunguri -Vs- Republic [1986] KLR 1 and Julius Kamau Mbugua [2010] eKLR)**. What the Applicants have done is attempt to create what appears to me an attenuated nexus between the impugned criminal proceedings and the existing civil suits, purely based on the subject matter of the cases in question. However the parties and disputes in the civil suits differ from the impugned criminal proceedings and indeed do not appear to arise from the same set of facts.

38. I must also add that the court, is in the circumstances of this case, reluctant to move itself in favour of the Applicants herein who have demonstrated a curious reluctance to swear upon core material in respect of their application, while tendering an obviously distorted court order in a bid to induce the court to grant the orders sought. For all the foregoing reasons I have found no merit in the Amended Notice of Motion filed on 29/7/2016 and will dismiss it accordingly.

Delivered and Signed at **Narok** this 2nd day of **December, 2016**.

Mr. Kilele holding brief for Mr. Koskei for the Applicants

Mr. Koima for the Respondents

CC : Barasa

C. MEOLI

JUDGE