



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS CRIMINAL APPLICATION NO. 9 OF 2014

IN THE MATTER OF JAMES NJUGUNA MAHURIA AND ELIZABETH WANGARE KIRAGU

JAMES NJUGUNA MAHURIA.....1ST APPLICANT

ELIZABETH WANGARE KIRAGU.....2ND APPLICANT

AND

REPUBLIC.....1ST RESPONDENT

ADEL NYANGE.....2ND RESPONDENT

RULING

The applicants filed an originating notice of motion dated 21st February 2014 under **articles 29(a) and (d); 22(1); 23(10) and 163(3) of the Constitution and section 123 of the Criminal Procedure Code**. In the motion, the applicants sought the following orders:-

- 1. That the matter be certified as urgent and heard ex parte in the first instance and a date be appointed for the application to be heard inter partes.*
- 2. That the applicant be granted anticipatory bail before arrest and/or charge.*
- 3. That a date be appointed for the applicant to appear before the appropriate Police Station or Criminal Investigation Department Headquarters together with his advocate to enable the police undertake normal procedures and/or investigations without taking the applicant into custody.*
- 4. That a day be appointed for the applicant to appear in court for the purpose of arraignment, charge and trial in the event that criminal charges are preferred and filed in court against the applicant.*
- 5. That pending a formal charge and arraignment of the Applicant the Second Respondent, his agents, surrogates be restrained from taking title deed numbers Chinga/Gikige/645, Chinga/Gikige/646, Chinga/Gikige/664, Othaya/Thuririo/754 and Othaya Ihuririo/211.*
- 6. Costs of the application be provided for.*

When the motion came up for hearing on 31st March, 2014, neither the applicants nor their

representatives appeared in court and in their absence the court dismissed it for want of prosecution and for the reason that the application was an abuse of the process of the court in any event.

In the wake of the dismissal of the originating motion, the 2nd applicant filed a motion dated 8th May, 2014 in which she sought to have the dismissal order of 31st March, 2014 set aside and the originating notice of motion reinstated and heard *inter partes*. It is this motion that is the subject of the determination herein.

The motion was supported by the applicant's own affidavit sworn on 8th May, 2014 in which, among other things, she swore that on 13th March, 2014 she was charged with five counts of various offences in the Othaya **Principal Magistrates' Court Criminal Case No. 70 of 2014**. The applicant has also deposed that on 6th April, 2014 she received a telephone call from the first applicant to the effect that their originating notice of motion had been dismissed on 31st March, 2014.

At the hearing, counsel for the applicant submitted that the hearing of the originating notice of motion was fixed for 30th April, 2014 and that is why they were not in court on 31st March, 2014 when the matter was dismissed. The records, however, show that on 14th March, 2014 the deputy registrar fixed the motion for hearing, in the presence of the applicant, on 31st March, 2014 and not on 30th April, 2014 as suggested by the applicant's counsel.

Counsel for the state Mr Njue opposed the application on the ground that the matter is now *res judicata* and if the applicant was dissatisfied with the decision of the court dismissing her application, she should have appealed against it. Counsel's argument was based on the fact that apart from dismissing the application for want of prosecution the court also found that the application itself was an abuse of the process of the court so that the attendance of the applicant or his counsel would have been of no consequence.

It was also Mr Njue's argument that since the applicant had already been charged, the application for anticipatory bail had already been overtaken by events.

Having considered the submissions by counsel for the applicant and the respondent, it appears that there is no explanation, satisfactory or otherwise for the applicant's failure to attend court on 31st March, 2014 when her motion was scheduled for hearing *inter partes*. In her affidavit in support of the motion, she does not say that she was mistaken as to the hearing date; instead she says that the motion was slated to be heard on 30th April, 2014. This information, however, contradicts the record which is clear that the originating motion was set to be heard on 31st March, 2014. In these circumstances, I find that there is no explanation given for the applicant's absence from court on 31st March, 2014 and in the absence of such an explanation, the application to have the originating motion reinstated is deficient of any merit.

Even if the application for reinstatement of the applicant's originating motion was merited, the motion itself has been overtaken by events and the grant of the orders sought would have been, in the least, an exercise in futility. The orders sought in that motion were premised on the presumption that the applicant had not been charged or rather that the motion would have been heard before the applicant was charged. However, by her own admission, the applicant was charged in court on 13th March, 2014 and having been so charged there was no basis upon which any of the substantive prayers sought could possibly have been granted; as always with the orders of the court, the orders sought could not be issued in vain.

In the result, I do not find any merit in the applicant's motion dated 8th May, 2014 and I hereby dismiss it with costs.

Dated, signed and delivered in open court on 6th March, 2015

Ngaah Jairus

JUDGE