



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL PETITION NO. 35 OF 2014

IN THE MATTER OF: ARTICLES 22 & 165 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 23, 27, 47, 50 & 244 OF THE CONSTITUTION OF
KENYA**

BETWEEN

CHRISTOPHER OKUN.....PETITIONER

VERSUS

1. THE DIRECTOR OF PUBLIC PROSECUTIONS

2. THE INSPECTOR GENERAL OF POLICE.....RESPONDENTS

AND

1. THE OFFICER COMMANDING STATION (OCS), KIEMBENI POLICE STATION

2. JAMES DODOY

3. BENTER DOLA.....INTERESTED PARTY

RULING

1.This Ruling relates to the Petitioner's Notice of Motion dated 3rd June, 2014 and filed on 5th June, 2014 together with a Petition of even date therewith in which Christopher Okun (the Petitioner) sought various declarations *inter alia* that his constitutional rights protected under Articles 22, 23, 27, 47 and 50 of the Constitution were being infringed by the Officer Commanding Station, Kiembeni Police Station and an officer named Mr. Kamau. In the Notice of Motion, the Petitioner sought the following orders:-

(1) spent

(2) a stay of further investigations by the OCS Kiembeni Police Station against the Petitioner (Applicant) pending the hearing and determination of the Application, and subsequent Petition thereto;

(3) a stay of any impending criminal prosecution, arraignment in court and plea in CRIMINAL CASE NO. 523 OF 2014 at Shanzu Law Courts against the Petitioner, pending the hearing and determination of the Application and subsequent Petition thereto.

(4) the costs of the Application be provided for.

2. Temporary orders of stay of the prosecution of the Applicant were granted on 30th June, 2014, and have been extended from time to time over the last year to date, as the Application was not heard until 14th May, 2015.

3. The genesis of the Petition and the Notice of Motion lies in an agreement between the Petitioner and Second and Third Interested Parties, (trading as “**Harusi Zetu**”) for the provision of decorative services for the Petitioner’s wedding which took place on 2nd May, 2014. The Petitioner paid Kshs. 55,000/= for the services but the Interested Parties, for reasons not pertinent to the determination herein, failed or was unable to provide on the material date, then refused to refund when the Petitioner demanded a refund of the money he paid.

4. It is the Petitioner’s case that the Second Interested Party (James Dodoy) became abusive when the Petitioner demanded a refund on 11th May, 2014. The Petitioner had an altercation with the Second and Third Interested Parties at the residence of the said Interested Parties. In the course of that altercation, the Petitioner is said to have become violent and smashed a flower vase against the television set of the Second and Third Interested Parties. These Interested Parties consequently made a complaint against the Petitioner at Kiambeni Police Station. Following investigations by the Police, charges were preferred against the Petitioner, being Shanzu SRMCR. Case No. 523 of 2014 on 29th May, 2014, in the absence of the Petitioner, but in the presence of Mr. Matheka, his Advocate.

5. Thereafter the Petitioner filed the Petition herein, together with the Notice of Motion, the subject of this Ruling, claiming **inter alia** that the criminal case against him is a violation of his rights, that the proceedings be quashed and the Police be prohibited from harassing him over the issue, and that the conduct of the First Interested Party and an officer called Kamau attached to Kiambeni Police Station be investigated for alleged undue influence over the matter. In the Notice of Motion, the Petitioner also sought a stay of further investigations, and the prosecution against him pending the hearing and determination of the application and the Petition.

6. M/S Kenga & Company Advocates entered appearance for the Second and Third Interested Parties and filed Grounds of Opposition dated 24th July, 2014 responding to the application, that the application was incompetent, vexatious, an abuse of the process, lacking in merit and any reasonable cause of action, and the orders sought were unavailable against the Second and Third Interested Parties.

7. On behalf of the Respondents, No. 74513, PC Martin Kamau swore two Affidavits, the first one on 30th June, 2014, and the second on 26th March, 2015, that he was the investigating officer on the criminal case against the Petitioner, having received a complaint from one James Edward Dodoy, the Second Interested Party, for malicious damage to property, vide OB No. 40 of 11th May, 2014, that he personally called the Petitioner on his cell-phone given to him by the Second Interested Party, over the matter and that the Petitioner undertook to appear at the Station and record a statement, but instead, the Petitioner proceeded to file a report against the Second and third Interested Parties for allegedly obtaining money by false pretences at Central Police Station, in Nairobi, through OB No. 84 of 22nd May, 2014, but never pursued that report. PC Martin Kamau denied that criminal investigation was based on a civil matter, but rather on the allegation that the Petitioner had stormed into the house of the Second and Third Interested Parties, harassed them before smashing a flower vase against a television set of the Interested Parties.

8. PC Martin Kamau further deposed that the Petitioner had been very uncooperative during the investigations, prompting the prosecution to apply for a warrant of arrest which was still in force at the time, and termed the Petition an abuse of process of court, intended partly to stop the National Police Service through its officers from discharging their mandate and thus entertaining the Petition or allowing

any of the prayers sought would be setting a very bad precedent as the same borders on impunity on the part of the Petitioner. He deponed that the investigations he undertook were entirely on a criminal matter, and that the Petitioner should abide his time in court.

9. Through the prosecution counsel, Mr. Masila E. Masila, the First Respondent filed grounds of opposition dated 11th May, 2015 stating that the institution of civil proceedings is not a bar to initiation of criminal proceedings as provided in section 193A of the Criminal Procedure Code [Cap 75, Laws of Kenya]. Counsel also argued that the orders sought would not be issued without offending the provisions of Article 157(4) and 245(5) of the Constitution of Kenya which respectively vests the Director of Public Prosecutions with power to direct the Inspector-General of the National Police Service to investigate any information or allegations of criminal conduct and the Inspector-general shall comply with any such direction, (Article 157(4)), and that any direction given to the Inspector-General by the Cabinet Secretary or the Director of Public Prosecutions shall be in writing (Article 245(5)).

10. In an application seeking conservatory orders whether to stay acquisition of property, or sale thereof, an applicant needs to show the action proposed to be stopped is either illegal or procedurally irregular, or against the rules of natural justice. In an application such as the subject of this Ruling in which the Applicant/Petitioner seeks to stay his prosecution, he needs to establish a prima facie case that the prosecution is motivated either by malice, or some ulterior motive unconnected with the offence for which the Petitioner/Applicant is being prosecuted and in respect of which he/she seeks an order to stay the prosecution.

THE APPLICANT'S CASE

11. The Applicant's case as summarized in the grounds of the Notice of Motion are merely that the issue in dispute between him and the Interested Parties is a civil dispute, which an officer (PC Martin Kamau) under the orders of the Officer Commanding Station (OCS) Kiembeni Police Station has **"instigated a one sided investigation against the Petitioner/Applicant without giving him a fair hearing or no hearing at all"** and that the said investigation is shrouded in mystery, one sided and uncalled for, for the reasons that **"the dispute is purely a civil matter where a debt of Kshs. 55,000/= was owed to the Petitioner/Applicant by the Second and Third Interested Parties."**

12. The Applicant claims that the OCS Kiembeni Police and his officers have hurriedly sought the outcome of the civil dispute by preferring unwarranted criminal charges against the Petitioner/Applicant for malicious damage to property and creating a disturbance and hence refused to summon him to record a statement on his side of the events, and have instead preferred charges against him in Shanzu SRM Cr. Case No. 524 of 2014.

13. For those reasons the Applicant seeks orders to prevent the continued or further infringement of the Applicant's fundamental rights, including the right to fair hearing, fair trial, unbiased investigation, unrivalled administrative justice, impartiality of a state office, applicable rule of law, utmost legitimate expectation, and protection against arbitrary arrest by the police. The Applicant claims that he is currently feeling intimidated, sorrowful, scared, fearful and insecure and that unless he is granted the orders he seeks, he will remain apprehensive that his rights will be trampled upon on a purely civil matter.

THE RESPONDENTS' CASE

14. The Respondents' case is set in the Replying Affidavit of No. 74513, PC Martin Kamau (the Investigating Officer), sworn and filed on 30th June, 2014, and the Grounds of Opposition dated 11th May, 2015, and filed on 12th May, 2015 on behalf of the Respondents.

15. The Investigating Officer denies the Applicant's claim that the dispute was purely civil in nature, that what he was investigating is not the debt, but rather the report by the complainant's that the Petitioner stormed into their house, harassed them before smashing a flower vase against the complainant's television set, an act which is purely criminal in nature.

16. The deponent also avers that the Applicant/Petitioner has proved completely uncooperative, he made a report at Central Police Station in Nairobi of alleged obtaining money by false pretences, by the two Interested Parties but has never pursued the complaint, he is alleged to be on the run, hence the application for a warrant of arrest so that he can face the charges pending before the court at Shanzu. The deponent states that he was doing no more than discharging the mandate entrusted to the National Police Service under the Constitution and the Police Service Act.

17. Likewise, counsel for the Interested Parties (complainants) filed grounds of opposition dated 24th June, 2014 on the same day. Their case is that the application is vexatious, incompetent and abuse of the court process.

THE SUBMISSIONS

(a) Submissions by the Petitioner

18. In addition to the pleadings, the Applicant's counsel also filed a list of authorities in support of the application. For the Applicant reliance was placed on the dicta in:-

(1) KENYA COMMERCIAL BANK LIMITED & 2 OTHERS, VS. COMMISSIONER OF POLICE & ANOTHER (Nairobi Petition Number 218 of 2011 – unreported) –

“The Office of the Director of Public Prosecutions and Inspector-General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.”and

“Although this matter is not one where criminal proceedings have been commenced, it is one where the risk of criminal proceedings hangs over the heads of the petitioners. It is recognized even in light of section 193A of the Criminal Procedure Code, the High Court may stop proceedings where such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of fundamental rights and freedoms.”

(2) In PETER GEORGE ANTONY D’COSTA VS. ATTORNEY GENERAL & ANOTHER (Nairobi Petition No. 83 of 2010 – unreported) the court said –

“The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is a breach of the petitioners’ fundamental rights as the petitioner will not receive a fair trial. It is the duty of court to stop such abuse of the justice system.”

19. In FIDELITAS SHIPPING COMPANY LIMITED VS. V/O EXPORTCHLEB [1965] 2 ALL ER 4, the English Court said –

“The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances.”

20. In **C.K. (A CHILD) through RIPPLES INTERNATIONAL as her guardian and Next Friend and 11 OTHERS VS. COMMISSIONER OF POLICE/INSPECTOR-GENERAL OF THE NATIONAL POLICE SERVICE & 3 OTHERS [2013] e KLR, (Petition No. 8 of 2013 at Meru)**, where it was alleged the Police had failed to carry out investigations, the court found and held:-

“that the neglect, omission, refusal/and/or failure of the Police to conduct prompt, effective, proper and professional investigations into the eleven petitioners’ complaints of defilement violated the first eleven petitioners’ fundamental rights and freedoms –

1. **to special protection as members of a vulnerable group;**
2. **equal protection and benefit of the law;**
3. **not to be discriminated against,**

and

an order of mandamus was issued directing the Respondent to conduct prompt, effective, proper and professional investigations into the petitioners’ complaint of defilement and other forms of sexual violence.”

(b) Submissions by the Second and Third Interested Parties

21. The Second and Third Interested Parties sought the dismissal of the Application and relied on the decisions of the court in **MALINDI H.C. PETITION NO. 17 OF 2011, (Sofia Abdillahi Chacha vs. DPP & Another), Petition No. 153 of 2013 at Nairobi, consolidated with Petition No. 369 of 2013, Thuita Mwangi & Others vs. the Ethics & anti-Corruption Commission & Others [2013] eKLR.**

22. In both Petitions, the court declined to grant the orders sought to suppress the prosecution of the Petitioners.

(c) The Respondents’ Submissions

23. The Respondents’ submission were comprised in the Grounds of Opposition dated 11th May, 2015 and filed on 12th May, 2015 –

- (1) the institution of civil proceedings is not a bar to initiation of criminal proceedings as provided under section 193 A of the Criminal Procedure Code, (Cap 75, Laws of Kenya);
- (2) the orders sought cannot be issued without offending the provisions of Article 157(4) and 295(5) of the Constitution of Kenya 2010;
- (3) the Police powers to investigate a crime suspected to have been committed are not amenable to review;
- (4) any order granted to stop the investigation of the Petitioner could run counter to Article 10(1) and (2) of the Constitution with regard to upholding the rule of law.

DETERMINATION

24. I have considered carefully the submissions by counsel for the Applicant/Petitioner, and submissions of counsel for the Respondents, and the Interested Parties (complainants). There is basically one issue raised by the Petitioner/Applicant, and that is whether his prosecution is a matter which he claims to be a purely civil matter is vexatious, oppressive, and an abuse of the process of court against him.

25. The terms, vexatious, abuse of process, frivolous, are used interchangeably in litigation. A vexatious proceeding is a proceeding which has little or no basis in law; the effect of which (whatever its intention) is to subject the defendant to inconvenience, harassment and expense out of all proportion to any likely gain to the claimant, which involves abuse of the court’s process that is to say, using that process for a purpose or in a manner significantly different from its ordinary and proper use; **Lord Beingham A.G. VS. BAKER [2000], the TIMES, 7 March.**

26. **Firstly**, under Article 10, every state organ and every person holding a state office is bound by the

national values set out in that Article. Whenever such state organ, state officer, public officer, and all persons whenever OR any of them enacts, applies or interprets any law. The national values include the rule of law, equality, non-discrimination, good governance and sustainable development.

27. **Secondly**, on the question of exercise of power to prosecute, the court in **GITHUNGURI VS. REPUBLIC [1986] KLR 100**, said of the then Attorney-General under section 26 of the former Constitution (now repealed) –

“the Attorney-General in Kenya by section 26 of the constitution is given unfettered discretion to institute and undertake criminal proceedings against any person in any case in which he considers it desirable so to do. – [underlining added]. “This discretion should be exercised in a quasi-judicial way, that is, it should not be exercised arbitrarily, oppressively or contrary to public policy.”

28. Today that prosecutorial power is vested in the independent Office of the Director of Public Prosecutions under Article 157 of the Constitution of the Second Republic, and under Article 157 (6), the Director of Public Prosecutions shall exercise state powers of prosecution and may - **inter alia**

(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; and

(b) subject to permission of the court, may 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 sub-paragraph (b).

29. Again, as well expressed by Odunga J. in **THUITA MWANGI & 2 OTHERS VS. ETHICS AND ANTI-CORRUPTION COMMISSION & 3 OTHERS (SUPRA)** the discretionary power vested in the Director of Public Prosecutions **“is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably, within the law and to promote the policies and objects of the law which are set out in section 4 of the Office of the Director of Public Prosecutions Act.”** These objects are –

(i) the diversity of the people of Kenya;

(ii) impartiality and gender equity;

(iii) the rules of natural justice;

(iv) promotion of public confidence in the integrity of the office;

(v) the need to discharge the functions of the office on behalf of the people of Kenya;

(vi) the need to serve the cause of justice;

(vii) prevent abuse of the legal process and public interest;

(viii) protection of the sovereignty of the people;

(ix) secure the observance of democratic values and principles and promotion of constitutionalism.”

30. This court will intervene as indeed courts have done in many cases, where it is shown that the impugned criminal proceedings are instituted for other reasons other than the honest enforcement of the criminal law, or are otherwise an abuse of the court process. Indeed as Kuloba J. observed in **VINCENT KIBIEGO SAINA VS. ATTORNEY-GENERAL**, (Nairobi HC Misc. Civil Application No. 839 of 1999) – unreported, at page 20 – 21:-

“If a criminal prosecution is seen as amounting to an abuse of the process of the court, the court will interfere and stop it. This power to prevent such prosecutions is of great constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of court, the court will unhesitatingly step in to stop it.”

31. The Petitioner/Applicant has challenged his prosecution not because the charges are defective (and this can be amended if they are, and there is no claim that they are defective). He has challenged his prosecution because the matter is a civil dispute; the recovery of some sum of money for a job not done, or service not rendered by the Interested Parties. He made a report or a complaint at Central Police Station in Nairobi about the Interested Parties obtaining money (from him) by false pretences. He has never followed it. He is said to be on the run, hence a warrant of arrest was issued for his arrest to face charges of malicious damage to the property of the Interested Parties that the charges arising from that complaint lie with the Shanzu Court and Kiembeni Police Station, not Central Police Station in Nairobi.

32. The Replying Affidavit of the Investigating Officer says that he is not aware of the civil dispute. What he investigated and is subject of the prosecution in Shanzu SRM Criminal Case No. 523 of 2014 is the **“storming by the Petitioner/Applicant into the residence of the Interested Parties, harassing them, before smashing a flower vase against the Interested Parties television set, an act which is purely criminal.”**

33. The Petitioner/Applicant has not filed any further or supplemental affidavit to rebut the averments by the Investigating Officer. The Notice of Motion to scatter the Petitioner’s prosecution is a typical case of abuse of the process of court. This as the cases show, the court will not allow. The process of court is jealously guarded. It must not be abused, whether by the prosecution or the accused.

34. For those reasons the Petitioner’s Notice of Motion dated 3rd June, 2014 and filed on 5th June, 2015 is dismissed with costs.

35. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 16th day of July, 2015

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Wameyo holding brief Matheka for Petitioner

Miss Ochola holding brief Masila for Respondents

Mr. Odiada holding brief Akenga for Interested Parties

Mr. Kaunda Court Assistant