



REPUBLIC OF KENYA
HIGH COURT OF KENYA
AT VOI
PETITION NO. 1 OF 2014
IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FREEDOMS
OF AN INDIVIDUAL AND VIOLATION ARTICLES 22, 23, 49, 50, 157 (1)
(2) (6) (11), 159 AND 165 (1) OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF VOI SENIOR PRINCIPAL MAGISTRATE'S COURT
CRIMINAL CASE NO. 877 OF 2013
BETWEEN
ELIUD TIMOTHY MWAMUNGA.....PETITIONER
-VERSUS-
SENIOR PRINCIPAL MAGISTRATE'S COURT, VOI....1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT
WILMOT MWADILO.....INTERESTED PARTY
JUDGMENT

Introduction

1. The Petition herein is dated 27th August 2014 but, interestingly, it was filed on 26th August 2014, a day earlier. It is supported by the Affidavit sworn by the Petitioner on 14th November 2014. The Petitioner seeks the following orders in the Petition:

- a. **A conservatory order staying further proceedings against the Petitioner in Voi Senior Principal Magistrate's Criminal Case No. 877 of 2013.**
- b. **A declaration that Criminal Case No. 877 of 2013 against the Petitioner is an abuse of the criminal process and that it is null and void**
- c. **All such orders writs and directions as are just and appropriate to safeguard the**

constitutional rights of the Petitioner and his fundamental rights under the Constitution of Kenya.

d. All such orders as this Honourable Court shall deem just to grant.

e. A declaration that the Respondents are liable to pay costs of this Petition.

2. On 8th November 20013, the Petitioner was charged in **Voi Senior Principal Magistrate's Criminal Case No 877 of 2013** with two counts of libel contrary to section 194 as read with section 36 of the Penal Code, Cap. 63 of the Laws of Kenya. The particulars of the first count were as follows:

“ELIUD TIMOTHY MWAMUNGA: On or about 9th day of May 2013 at Sarova Whitesands Hotel, within Mombasa County, unlawfully published defamatory information by writing to Mr. Mohamed Hersi, the General Manager of Sarova Whitesands Hotel to the effect that the complainant namely Mr. Wilmot Mwandilo had fraudulently caused Messrs Sagalla Ranchers Limited to lose 21,000 acres of land which is a portion of land known as Title No. 12177 situated in Taita Taveta County to Messrs Westermanns Safari Camp Limited and Izera Enterprises Limited and that in the process the complainant was a fraudster and a thief when you knew the said information to have been false.”

3. The particulars of the second count were as follows:

“ELIUD TIMOTHY MWAMUNGA: On 8th day of July 2013, at Nairobi, within Nairobi County, unlawfully published defamatory information by writing to Dr. Mohamed Swazuri, an officer working with National Land Commission to the effect that the complainant namely Mr. Wilmot Mwandilo had fraudulently transferred and falsely acknowledged receipt of over Kshs. 100,000,000/= (one hundred million shillings), causing Messrs Sagalla Ranchers Limited to lose some part of land which is a portion of land known as Title No. 12177 situated in Taita Taveta County to Izera Enterprises Limited and that in the process the complainant was a fraudster and a thief when you knew the said information to have been false.”

The Petitioners' Case and Submissions

4. In addition to the Petition and the Supporting Affidavit, the Petitioner relied on his Written Submissions filed on 20th May 2015. The Petition contains 45 paragraphs which were replicated, almost verbatim, in the Supporting Affidavit. I have carefully read the Petition and the Supporting Affidavit. Although in the title to the Petition it is indicated that the matter relates to alleged violation of Articles 22, 23, 49, 50, 157 (1) (2) (6) 911), 159 and 165 (1) of the Constitution of Kenya, 2010, I must point out at the outset that the Petition is bereft of the specific particulars of the constitutional rights of the Petitioner alleged to have been breached. The closest I have seen are paragraphs 40, 44 and 45 of the Petition which are repeated at paragraphs 41, 45 and 46 respectively of the Supporting Affidavit and which are in the following terms:

“40. That the Petitioner's rights have been infringed completely and the current trial is an abuse of the process of the court.

44. That your Petitioner's constitutional and fundamental rights have been and continue to be further infringed by the abuse of the criminal justice process.

45. That there is every likelihood of further infringement of your Petitioner's fundamental rights and freedom in contravention of your Petitioner's rights as stipulated in the Constitution of Kenya.”

5. In his Written Submissions, the Petitioner contended that the letters forming the basis of his criminal prosecution were not written by him in individual capacity but rather were written by Sagalla Ranchers Limited which has nine (9) directors. The Petitioner contended that by electing to charge him alone, the

Respondents acted with malice.

6. The Petitioner submitted that the contents of the letter dated 8th July 2013 written to the National Land Commission were true and therefore there was nothing to try him for. That this court has jurisdiction under the Constitution to interfere with any trial at the lower court if it finds that the trial does not raise any offence like in the instant case. That allowing the trial to proceed will infringe on the Petitioner's rights.

The Respondents' Case and Submissions

7. There was no appearance for the 1st Respondent. There was a Notice of Appointment of Advocates by WILMOT MWALIDO, the Interested Party but no documents were filed or active participation undertaken in the proceedings on that behalf.

8. The 2nd Respondent opposed the Petition through Grounds of Opposition dated 28th November 2014 and filed on 3rd December 2014 as well as through Replying Affidavits both sworn on 28th November 2014 by DAMA KARANI, prosecution counsel in the Office of the Director of Public Prosecutions and by PAUL MWANGI, the Investigating Officer in the subject criminal case. The 2nd Respondent further relied on the Written Submissions filed on 8th June 2015 and two Lists of Authority which I have duly considered.

9. The gist of the Respondents' Grounds of Opposition is that the Petition as drawn does not plead and/or particularize any breach of the provisions of the Constitution of Kenya, 2010.

10. The 2nd Respondent submitted that the prosecutorial powers of the Director of Public Prosecutions (DPP) emanate from Article 157 of the Constitution of Kenya, 2010 and that in the exercise of that power, the 2nd Respondent is not subject to the direction or control of any authority.

11. The 2nd Respondent also submitted that the Petitioner's contention that he was charged selectively did not hold any water as the decision to charge the Petitioner was based on available evidence. In any event, submitted the 2nd Respondent, it is not the duty of this court to determine whether the charges against the Petitioner raised any offence or not as that would be handled by the trial court seized of the criminal matter. The 2nd Respondent in that regard relied on the case of **Hussein Khalid and 16 others v Attorney General & 2 others [2014] eKLR** where Lenaola, J. stated as follows:

“48. I have considered the law and the arguments by the Petitioner and it is my view that there is no evidence before me that the trial Court did not follow the above procedure or adhere to the law as set out above and in any event, I wish to reiterate the sentiments of the Court in the case of William S. K Ruto and Another v AG Civil Suit No.1192 of 2005 where the learned Judges stated thus;

“In our view, it is not for this court to determine whether or not the charges as framed disclose an offence. There are adequate provisions in the CPC for instance Section 89 (5) which can be used to address that issue. The applicants only need to move the trial magistrate to strike out the charge for being incompetent or the prosecution can seek to substitute the charges. The fact that a charge is defective/incompetent does not raise a constitutional issue.”

49. I agree and also wish to reaffirm what I had stated earlier that the contention that the charges are vague was settled by the Chief Magistrate's Court and furthermore, issues of competency of charge sheets are matters perfectly within the jurisdiction of the trial court and are catered for under Section 89(5), 137 and 214 of the Criminal Procedure Code.”

Issue for Determination

12. In my view, the main issue for the court's determination is whether the Petitioner's constitutional

rights have been infringed to warrant the nullification of the subject criminal proceedings against the Petitioner.

Analysis and Determination

13. Article 157 of the Constitution creates the Office of the Director of Public Prosecutions with the mandate to exercise state powers of investigation and prosecution. Specifically Article 157 (6) of the Constitution of Kenya, 2010 provides that:

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may

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(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).”

14. The Office of the Director of Public Prosecutions must be allowed to carry out its constitutional powers without interference from the courts, unless for just and reasonable cause. In the case of **REPUBLIC V ATTORNEY GENERAL & 4 OTHERS EX-PARTE KENNETH KARIUKI GITHII [2014] eKLR**, Odunga, J. stated that:

“The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office.”

15. I have observed earlier that the Petitioner did not specify which of his constitutional rights have been infringed. He did not plead the specific Articles of the Constitution that the Respondents have violated let alone specify how the alleged violations have taken place. In the case of **MWANAHAWA ANYONA CHIYAYI & 5 OTHERS v. SWALEH AURA & 3 OTHERS [2015] eKLR**, Mrima, J. held that:

“Petitioners are always under a duty to demonstrate with particularity how their rights have been or are threatened with infringement and to further demonstrate the damage suffered or likely to be suffered by the alleged infringement.”

The Petitioner's allegations contained in paragraphs 40, 44 and 45 of the Petition do not disclose which rights have been infringed and which specific provisions of the Constitution have been violated. The Petitioner has therefore fallen short of the requirement to demonstrate with particularity how his rights have been infringed and therefore on that basis alone this Petition must fail.

16. The other allegation by the Petitioner relates to the contents of the letter he is accused to have written. The Petitioner contends that he was charged selectively because the letters in issue were written by himself as an officer of Sagalla Ranchers Limited and not in his personal capacity. The Petitioner further alleges that the contents of the letter that he wrote to the National Land Commission were true and therefore there was nothing to try him for. In other words, the Petitioner's contention is that the charges he is facing in the lower court disclose no offence. To answer the Petitioner on whether this court should nullify the criminal proceedings on the basis that the charges disclose no offence, I will reiterate the holding of Lenaola, J. in the case of **PAUL NG'ANG'A NYAGA & 2 OTHERS V ATTORNEY GENERAL & 3 OTHERS [2013] eKLR** where the learned judge cited with approval the decision in **Francis Mbugua vs. Commissioner of Police and 2 Others Petition No. 79 of 2012** as follows:

*“Whereas every person has a right to the protection of the Constitution, it is not in all cases that Orders as prayed should be granted. I say so because the Petitioner has conveniently forgotten that the Constitution must be read holistically for its real meaning and import to be discerned. **Our judicial system is not one where a judge is granted such powers as to investigate criminal complaints. That power lies in Article 157(4) of the Constitution. Further, whether or not the investigations leading to the Petitioner’s arrest disclosed an offence is not for this court to determine as I am not seized of the evidence to be presented against him.** The Petitioner has literally jumped the gun because he has presented his defence of innocence not before the trial Court but this Court. His actions are premature.”*

17. It is not the duty of this court to investigate whether the charges facing the Petitioner have basis or whether the evidence to be used in the criminal trial are sufficient to sustain the charges. In my view, it is not a constitutional issue that the evidence against the Petitioner is insufficient to sustain the charges he is facing. It is the duty of the trial court to weigh the evidence against the charges and come to the conclusion whether the charges are sustainable or not. The Petitioner cannot plead his innocence here because it is not the duty of this court to go into the merits and demerits of the charges he is facing. Perhaps to make that line of thinking clearer, I reiterate the holding of Lenaola, J. in **PAUL NG'ANG'A NYAGA & 2 OTHERS V ATTORNEY GENERAL & 3 OTHERS (supra)** where the learned judge cited with approval the findings of Warsame, J. (as he then was, now JA) in **Miscellaneous Application 68 of 2011 Michael Monari & Anor vs. The Commissioner of Police & 3 Others** where he held that:

“It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”

Conclusion

18. Looking at the facts of this case and the law as I have analysed above, it is my view that the Petition has not met the constitutional threshold necessary to warrant interference with the criminal process at the lower court. I find no merit in the Petition. As regards costs, the 2nd Respondent has strenuously opposed this Petition. The 2nd Respondent went to great length to file two sets of affidavits in response to the Petition, Grounds of Opposition, two sets of List Authorities and Written Submissions. They clearly deserve costs. The final orders of the court are therefore as follows:

- i. The Petition dated 27th August 2014 is hereby dismissed.**
- ii. The Petitioner shall pay costs of the 2nd Respondent.**

Orders accordingly.

Judgment written and signed by:

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MARY KASANGO

JUDGE

Dated and Delivered at Voi this 9th day of July 2015.

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E.M MURIITHI

JUDGE

Coram:

Before Justice E.M Muriithi

C/A

For Petitioner:

For 1st Respondent:

For 2nd Respondent:

For Interested Party:

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E.M MURIITHI

JUDGE