



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION NO. 134 OF 2015

GEOFFREY MAINA WANJAMA.....PETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS2ND RESPONDENT

STEPHEN MWANIKI MACHARIA3RD RESPONDENT

ROBERT MAINA KAMANJA4TH RESPONDENT

THEURI MUNYI5TH RESPONDENT

RULING

Introduction

1. In his application dated 10th April 2015, the petitioner/applicant seeks the following substantive orders:

1. ...

2. That this Honourable court be pleased to stay any further proceedings as against the petitioner in Milimani Criminal Case No 858 of 2014 Republic vs Geoffrey Main Wanjama as well as Milimani Criminal Case No 24 of 2015, Republic vs Geoffrey Maina Wanjama pending the hearing and determination of this application inter partes.

3. That this Honourable court be pleased to stay any further proceedings as against the petitioner in Milimani Criminal Case No 858 of 2014, Republic v Geoffrey Maina Wanjama as well as Milimani Criminal Case No 24 of 2015, Republic vs Geoffrey Maina Wanjama pending the hearing and determination of this petition herein.

4. That pending the hearing and determination of this application, a conservatory order do issue restraining the respondents whether by themselves, their agents, officers or employees from arresting or preferring charges or further and any charges or offences against the petitioner emanating from or in connection with the alleged sale and purchase of plots within Kamae settlement scheme or complaint in respect to and in connection with the charges already preferred against the petitioner.

5. That pending the hearing and determination of this petition herein a conservatory order do issue restraining the respondents whether by themselves, their agents, officers or employees from arresting or preferring charges or further and any charges or offences against the petitioner emanating from or in connection with the alleged sale and purchase of plots within Kamae settlement scheme or complaint in respect to and in connection with the charges already preferred against the petitioner.

6. That this Honourable court be pleased to grant any other orders that it would deem just

7. That the cost of the application be provided for.

2. The basis of the application is that the arrest and prosecution of the petitioner is oppressive and an abuse of the Court process as the matters in dispute between him and the 3rd, 4th and 5th respondents are civil in nature and should be dealt with through the civil, rather than criminal process. It is therefore his contention that the respondents have violated his constitutional rights guaranteed under Articles 27, 28, 29, 31, 47, 48, 49, 50 and 157(6) of the Constitution.

3. The respondents oppose the application and have filed affidavits in reply. All the parties also filed written submissions on their respective positions, and the application was argued before me on 28th July 2015.

The Petitioner's Case

4. The facts relating to the arrest and prosecution of the petitioner are captured in his affidavit in support of the application. He deposes that he is the chairman of an organization known as New Kamae Self Help group registered by the Ministry of Gender, Children and Social Development on 23rd July 2010. He was arrested on or about 6th June 2014 by Police Officers from Central Police Station and charged in court on two counts of obtaining money by false pretences and giving false information to a public servant.

5. He claims that the charges against him were instigated by the 3rd and 4th respondents on the allegations that he had obtained money from them on the promise that he would sell to them several parcels of land. He contends that prior to the charges, he had been subjected to various forms of harassment by the 3rd and 4th respondents through their agent, a Mr. Charles Mutahi, with the assistance of two policemen from Huruma Police Station.

6. The petitioner alleges that he had been approached on or about 24th April 2014 by the said Charles Mutahi accompanied by two men who introduced themselves as policemen from Huruma Police Station. He claims that they alleged that they had been sent to collect Kshs2,380,000 from him by the 3rd respondent, Mr. Stephen Mwaniki, who works with Equity Bank, allegedly being in respect of payment for a parcel of land.

7. The petitioner alleges further that he was forced to write two cheques in favour of the said Stephen Mwaniki in settlement of the said debt, though he alleges that the cheques were written in the handwriting of Mr. Charles Mutahi. He also deposes in his affidavit that fearing for his life, he complied with the instructions and wrote three cheques, two of which were for Ksh900,000/- each and the third one for Ksh580,000/-. He deposes further that he later cancelled the cheques owing to the fact that he was forced and intimidated into writing them, and also alleges that the said Mr. Mutahi and his alleged police colleagues demanded a bribe of Ksh50,000/- so that they could go slow on the matter.

8. The petitioner states that he reported the incident at the Buruburu Police Station under OB No. 69/8/5/2014 and complained of harassment by Mr. Mutahi and others. He was, however, arrested by police officers from Central Police Station and charged in court on 8th May 2014 with several counts, one of which apparently related to the complaint he had made to Buruburu Police Station on 8th May 2014.

9. He was also charged with another offence of obtaining money by false pretences concerning the same parcel of land on 7th January 2015. According to the petitioner, the two cases against him relate to the same parcel of land, though he does not name the said parcel of land.

10. The petitioner alleges that his harassment by the 3rd, 4th and 5th respondents with the assistance of the police officers violate his constitutional rights to dignity and protection of the law. He contends that the complaints relate to sale of a parcel of land, are purely civil in nature, and the attempt by the respondents to use the criminal process to coerce him to settle a civil debt is unconstitutional. His case is that his arrest and prosecution are oppressive, vexatious and an abuse of the criminal justice system.

The Response

11. A different scenario emerges from the affidavit sworn on behalf of the 1st and 2nd respondents by PC No 92208 Emmanuel Kanyungu, a police officer attached to the Directorate of Criminal Investigations, Lands Fraud Investigation Unit.

12. PC Kanyungu states that he was assigned the duty of investigating the current matter. On 30th June 2013, his office received a complaint from Mr. Theuri Munyi, the 5th respondent, regarding a plot that was to be excised from LR No 27710 IR 69733. The complainant alleged that he was introduced to a society, the Kamae Self-help Group that deals with the sale of property, and that he subsequently met the petitioner who stated he was the chairman of the said society. The 5th respondent was taken by the petitioner to view the parcel of land, situated near Kenyatta University on the Northern Bypass, and a purchase price of Ksh1,000,000/- for two plots, payable to the petitioner's personal account via bankers cheques, was agreed on. The 5th respondent was issued with two receipts by the petitioner, S/no 321 for Ksh100,000/- and S/No 322 for Ksh900,000/- and a scanned copy of a title deed for parcel of land LR 27710 IR 69733.

13. Investigations by the CID also revealed that the 4th respondent also bought plots from the said property. He received two allotments letters, which had no reference number but were dated 1st January 1999, a date which PC Kanyungu deposes was a public holiday, and various Department of Lands receipts, inter alia S/no E820412 and E820407 in the names of the 4th respondent and a Ms. Lucy Wambui Mureithi.

14. Cpl. Kanyungu deposes that through a letter dated 17th November 2014, his office sought information regarding the legitimacy of the documents that were purportedly issued by the Ministry of Lands. They were informed by Mr. John M Osano, Assistant Lands Officer at the Records Office, Nairobi, that the documents were forgeries and had a lot of inconsistencies starting from lack of reference number in the allotment letter, which is a requirement of a valid allotment letter; and further, that the official receipts were not generated by their office and did not form part of their records. This position was also confirmed by the National Land Commission in its letter dated 4th August 2014.

15. Investigations further revealed that the IR No 69733 on the copy of the title given by the petitioner relates to another parcel of land, namely L. R. No. 209/13033, registered in the names of one Vijay Shamji Patel and Kurji Manji Hiran.

16. A third complaint against the petitioner was received on 20th April 2015, this time from a Ms. Christine Kirinya. Ms. Kirinya alleged that she deposited Ksh1,000,000/- vide cheques nos. 00011 and 00012 dated 20th August 2013 to the petitioner's account at Equity Bank Kariobangi and the petitioner gave her two letters of allotment unreferenced but dated 1st January 1999 for surveyed residential plot Block 24/230 and Block 24/231 respectively. She was later informed at the Lands Office that the documents were forgeries, and her efforts to reach the petitioner were unsuccessful.

17. The petitioner was therefore arrested on 7th January 2015 and charged in court on 8th January 2015 in Milimani Chief Magistrate's Court Criminal Case No. 24 of 2015 with offences that are known in law.

18. Cpl. Kanyungu further avers that the 3rd respondent lodged a complaint against the petitioner alleging that he deposited Kshs1.2 million into the petitioner's account, but the petitioner never transferred to him any plots. He requested for a refund of his money, and the petitioner drew various cheques amounting to Ksh2,380,000/-. He states that before the cheques could be banked, the 3rd respondent got information that the petitioner had reported that the 3rd respondent had fraudulently acquired the cheques, and so the cheques had been flagged by the bank as "red hot." The petitioner was as a result charged in Milimani Criminal Case No 858 of 2014 with the offence of obtaining money by false pretences and giving false information.

19. The 3rd, 4th and 5th respondents have also sworn affidavits in opposition to the application and petition which roughly echo what PC Kanyungu found in the course of his investigations as set out in his affidavit. A sampling of some of the averments will suffice.

20. In his affidavit sworn on 22nd June 2015, the 4th respondent, Robert Maina Kamanja, states that he has known the petitioner for a while as he was a frequent customer of Equity Bank, Kariobangi Branch, at which Mr. Kamanja was a Branch Manager between 2011 and 2014.

21. He narrates how, during one of the petitioner's visits to the Bank towards the end of 2011, the petitioner informed him that his society, New Kamae Self Help Group, had a piece of land along the Northern Bypass near Kenyatta University and was recruiting new members who would later benefit from allocation of plots within the land. He visited the site with the petitioner, was shown a parcel of land and a letter of allotment from the Department of Lands showing an allocation of a surveyed residential land parcel known as L.R No 24704 measuring approximately 60 hectares, together with a development plan.

22. He states that he was encouraged by the petitioner to make payment, pursuant to which he deposited Kshs120,000/- into the petitioner's bank account number 0320190233690 and delivered his deposit slip to him. Two weeks later, he states that he received letters of allotment for properties known as "Surveyed Residential Plot Block no 24/762 and 24/755" both backdated to 1st January 1999, as well as official receipts from the Department of Lands serial Nos 382266 and 382267 acknowledging payment for Kshs13,300/-. He also made further payments of Kshs130,000 which he transferred to the petitioner's account.

23. The 4th respondent deposes that he later learnt from the 5th respondent in January 2014 that the documents he had received from the petitioner were forgeries, and upon checking the position with respect to the documents that he had received, he discovered that he was also holding forged papers. His attempt to get a refund of his money failed, and so he reported the matter to the CID headquarters. It was pursuant to the investigations by the CID that the charges which the petitioner now challenges were preferred against him.

24. What emerges from the averments set out above is that complaints that the petitioner had obtained money from various parties, purportedly in order to sell to them parcels of land near Kenyatta University, were made to the CID. Investigations established that indeed such payments had been made, but that the documents that the petitioner gave to the prospective purchasers turned out to be forgeries. The petitioner acknowledges that he issued three cheques to the 3rd respondent. He claims, first, that the cheques were drawn in another person's handwriting, and in the next paragraph, that he was compelled to draw the cheques.

25. The question is whether the petitioner has made out a case that would justify the grant of conservatory orders in his favour. In his submissions on behalf of the petitioner, Learned Counsel, Mr. Mwangi, submitted that the Court had discretion under Articles 22 and 23 of the Constitution to grant the conservatory orders that the petitioner was seeking. He drew the Court's attention to various decisions in support of the petitioner's case. Among these were the decision in the case of **Muslims for Human Rights (MUHURI) and 2 Others vs The Attorney General Mombasa High Court Petition No 7 of 2011** for the principles which the Court should consider in granting conservatory orders.

26. It was his submission that the petitioner has established the violation of his rights under Articles 27, 28, and 29, and that he would suffer prejudice if the orders are not granted. In his view, the balance tilts in favour of granting the conservatory orders sought by the petitioner as the respondents will not suffer any prejudice. Reliance is also placed on the decision of this Court in the case of **Rosemary Wanja Mwangi vs Republic High Court Petition No. 165 of 2013**.

27. While conceding that the DPP is independent as provided under Article 157(10), it was Mr. Mwangi's submission that the respondents have failed to appreciate Article 157(11) on the need to pay regard to the public interest and to prevent an abuse of the court process.

28. The submissions in response by the 1st and 2nd respondents are three-pronged. They submit, first, that the petitioner has not established a prima facie case. This is because the 1st and 2nd respondents, being the constitutional bodies that investigate and prosecute, had received several complaints from the 3rd, 4th and 5th respondents in regard to sale of plots, had instituted investigations which revealed that the petitioner had on several occasions obtained money from the 4th, 5th and 6th respondents and others purporting to be in a position to sell them the said plots.

29. The investigations further revealed that the responsible government departments, the Ministry of Lands and the National Land Commission, had confirmed that the documents used by the petitioner were forgeries. Criminal offences had therefore been disclosed, and there was therefore no basis for alleging abuse of process.

30. The 1st and 2nd respondents argue, secondly, that the petitioner, though he seeks to stay his prosecution, has not demonstrated how his rights have been violated. He has not shown how his being arrested and interrogated or charged in court amounts to a violation of his rights. Though he has listed the rights allegedly violated, he has not demonstrated the manner of violation. It is their contention, thirdly, that in any event, the enjoyment of individual rights must be in tandem with the rights of others.

31. The respondents observe that the Court dealing with a constitutional petition is not the forum for examining the sufficiency or otherwise of evidence; that the trial court has enough safeguards to protect the rights of the petitioner, and a delay of the proceedings in the criminal trials against the petitioner would be to deny the 3rd, 4th and 5th respondents their rights.

32. The 3rd respondent in his oral and written submissions agreed with the submissions of the DPP. Mr. Mwendwa pointed out in particular, with regard to the argument by the petitioner that the issues in dispute should be handled through a civil process, that this would have been possible had the petitioner had genuine or any title to the land parcels in question which he could pass to the purchasers, which he did not.

33. The 4th and 5th respondents also supported the dismissal of the application. While associating himself, on behalf of the 4th and 5th respondents, with the submissions of the 1st, 2nd and 3rd respondents, Mr. Kinyua, Counsel for the 4th and 5th respondents, pointed out that the petitioner was also seeking, in his application, to stop the 1st and 2nd respondent from preferring any further charges against him. Mr. Kinyua was of the view that this was in recognition that beyond the charges now facing the petitioner, there were likely to be other charges against him.

Determination

34. I am grateful to the parties in this matter for the extensive written submissions and authorities, as well as the brief oral highlights made before me at the hearing. In determining this matter, however, I am mindful of the principle that at this stage, I should not delve into an examination of the facts and the law, and of the burden placed on an applicant in such a matter. In **Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General Petition No. 16 of 2011**, the Court (Musinga J (as he then was) stated as follows:

“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order 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 real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.” (Emphasis added)

35. I agree also with the sentiments expressed by Ibrahim J (as he then was) in the case of **Muslims for Human Rights (MUHURI) & 2 Others vs Attorney General & 2 Others, Petition No 7 of 2011** relied on by the petitioner in which he stated that, with reference to the views expressed by Musinga J in the **CREAW** case, that:

“I would agree with my Brother, that an applicant seeking Conservatory Orders in a constitutional case must demonstrate that he has a “prima facie case with a likelihood of success.”

36. The petitioner cites in his submissions the doctrine of irretrievability enunciated in the MUHURI case to support his application for conservatory orders. However, he must first meet the principles for grant of the said orders as pronounced in the two cases above, and recently summarized in the case of **Martin Nyaga Wambora vs Speaker of The County Assembly of Embu & 3 Others Petition No. 7 of 2014** as follows:

[59]”In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: “... [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”

[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 allegedly threatened violation that is remote and unlikely will not attract the court’s attention”.

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

37. He must also satisfy the Court that the public interest tilts in favour of granting the conservatory orders that he seeks. The principle requires the Court to consider the public interest in determining whether or not to grant conservatory orders, particularly in cases where orders are sought to stop a public agency from carrying out its mandate. In enunciating this principle, the Supreme Court (Ojwang and Wanjala, JJSC) in the case of **Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013** stated as follows:

[86]”...Conservancy Orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. 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 conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative

body should take into account the need to allow for their ordered functioning in the public interest.”

38. The petitioner alleges violation of his rights under Articles 27, 28, 29, 47 and 50 of the Constitution, but I have not seen anything in his pleadings that demonstrates how any of the rights guaranteed under these Articles have been violated. Article 27 guarantees to everyone the right to non-discrimination and equal protection of the law. Article 28 guarantees the right to human dignity, while Article 29 relates to liberty and security of the person. At Article 47, the Constitution protects the right to fair administrative action, while Article 50 guarantees the right to fair hearing. Where is the evidence that any of these rights has been violated, or is threatened with violation with respect to the petitioner?

39. The 1st respondent, through the CID, investigated complaints by the 3rd -5th respondents that the petitioner obtained certain monies from them, ostensibly for sale of parcels of land. Investigations revealed that the documents given to the three respondents were forgeries. The 2nd respondent, in accordance with his mandate under Article 157, preferred charges against the petitioner. He was presented in court, took a plea, and was released on bond in accordance with Article 49. His trial is yet to start, so there cannot be said to be a violation of Article 50.

40. From the material before me, I am unable to find anything that remotely resembles a prima facie case. The contention that the matters in issue are civil matters and should be dealt with through a civil process cannot be sustained in light of the provisions of section 193A of the Criminal Procedure Code which provides that:

193A. 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.

41. The petitioner avers that he is elderly and suffers from diabetes, but aside from requiring that he be given bail or bond conditions under which his illness can be treated and properly managed, I do not think that is any reason to stop his prosecution. It does not excuse conduct that may be criminal in nature.

42. I have therefore come to the conclusion that the present application is without merit, and it is hereby dismissed with costs to the respondents.

Dated, Delivered and Signed at Nairobi this 1st day of September 2015

MUMBI NGUGI

JUDGE

Mr. Mwangi instructed by the firm of Mwangi & Partners & Co. Advocates for the petitioner.

Ms. Spira instructed by the Director of Public Prosecution for the 1st and 2nd respondents.

Mr. Mwendwa instructed by the firm of Mwendwa Macharia Mwangi & Co. Advocates for the 3rd respondent.

Mr. Kinyua instructed by the firm of Eric Kinyua & Co. Advocates for the 4th and 5th respondents.