

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.184 OF 2014

TERESIA WANJIKU WAINAINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Teresia Wanjiku Wainaina is facing criminal charges before Kibera Chief Magistrate's Court (**Kibera Chief Magistrate's Court Criminal Case No.179 of 2013**) relating to the alleged forgery of a title deed in respect of parcels of land referred to as LR. No. Ruiru/Ruiru East Block 2/4999 and Ruiru/Ruiru East Block 2/4996. According to the charge sheet, the offence is said to have been committed between 23rd and 26th August 1988. The Applicant has filed an application to this court pursuant to **Article 165(6) & (7) of the Constitution and Rules 24 & 30 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of Individual) High Court and Practice and Procedures Rules, 2006** seeking orders from this court, firstly, to stay the proceedings before the Kibera Magistrate's Court and secondly, to terminate the said proceedings on account of being an abuse of the process of the court and a violation of the Applicant's fundamental right to fair trial and due process. In the grounds in support of the application, the Applicant contends that the criminal charges were brought against her 25 years after the crime was allegedly committed. The Applicant argues that the criminal proceedings against her were brought purposely to vindicate a purported civil right to ownership of the suit property. The Applicant was concerned with the long delay by the prosecution in bringing the proceedings against her. She was of the view that she would be prejudiced. The application is supported by the annexed affidavit of the Applicant. The application is opposed.

During the hearing of the application, this court heard oral rival submission made by Ms. Ontiti for the Applicant and by Ms. Njuguna for the State. Ms. Ontiti reiterated the contents of the application and the supporting affidavit. She submitted that the proceedings against the Applicant were in abuse of the due process of the court. She contends that the dispute between the Applicant and the complainant in the case was essentially a civil one which had been criminalized with a view to giving the complainant in the case an upper hand. She submitted that the said complainant had lodged the criminal complaint on behalf of a third-party: the complainant alleged that she was the wife of the deceased under whose name she had lodged the complaint. She stated that since the criminal proceedings commenced, the same had not taken off because the prosecution had unnecessarily sought adjournments. The Applicant took issue with the fact that the prosecution had on several occasions sought to amend the charges without any justifiable reason. She was of the view that the Applicant's fundamental right to fair trial was being infringed. She relied on the case of **George Joshua Okungu & Another –Vs- Chief Magistrate's Court Anti-Corruption Court Nairobi & Another [2014] eKLR** and **Mwendwa Kilonzo & Another –Vs- Republic [2013] eKLR** in support of her case.

Ms. Njuguna for the State opposed the application. She stated that the Applicant was charged with the criminal offence, specifically forgery. She stated that the complaint made by the Applicant to the effect that the criminal charges were brought against her after a period of 25 years had no merit because criminal cases were not subject to statute of limitation. She explained that under the law, the prosecution has the right to amend the charges at any time before the close of the prosecution's case. For that proposition, she relied on **Section 214 of the Criminal Procedure Code**. She submitted that the complainant was the proper person to lodge a complaint in respect of the suit parcel of land because she

was the wife of the deceased who was the aggrieved party in the case. She urged the court to allow the magistrate's court to proceed with the case to its conclusion. She stated that if the orders craved for by the Applicant was allowed, it would occasion an injustice to the complainant. She urged the court to dismiss the application.

This court has carefully considered the rival submission made by the parties to this application. The issue for determination by this court is whether the Applicant made a case for this court to intervene and terminate the criminal proceedings facing her before the Chief Magistrate's Court at Kibera. The Applicant contends that her constitutional right to be accorded fair trial had been infringed by the fact that a criminal case has been brought against her 25 years after the crime was allegedly committed. The Applicant did not say how she would be prejudiced by the fact that the criminal charges have been brought against her after that long period. She is not contending that witnesses will not be available. Neither is she saying that she will be unable to procure witnesses in her defence. From this court's assessment, it is apparent that the main complaint of the Applicant is that she has been in the suit parcel of land for more than 25 years and therefore it would be unfair to subject her to a criminal process for a matter which is essentially civil in nature. The Applicant further argues that the long delay in bringing the case against her would impact on her constitutional and guaranteed right to fair trial. Again, she did not say how her right to fair trial would be interfered with by the mere fact that she is facing a criminal charge.

This court's evaluation of the facts of this case clearly points this court to the direction that the Applicant's case is without merit. Firstly, there is no limitation of time in criminal cases. The Director of Public Prosecution can bring a criminal charge against any person where he is satisfied that there is sufficient evidence to warrant such case to be brought to court. Of course, a question that arises is why it took such a long period of time before the charge was brought to court against the Applicant. That is an issue that the Applicant can canvass before the trial court. This court is however aware that in cases of forgery, in many cases, it takes a long time before the forgery is discovered. That may be the position in the present case. This court does not know. Suffice for this court to say that there is nothing in law that prevents the Director of Public Prosecution from charging the Applicant for an offence that was allegedly committed more than 25 years ago.

Secondly, cases of forgery are essentially based on documentary evidence. The Applicant will have the opportunity during trial to interrogate the documentary evidence that will be produced by the prosecution during trial. This court does not see how the Applicant will be prejudiced when she has the opportunity to challenge the evidence that will be brought against her. As regard whether the complainant has legal capacity and competence to lodge a complaint against the Applicant (noting the fact that she is alleging that it was her deceased's husband who was entitled to the title to the suit parcel of land), this court holds that in criminal cases any person who becomes aware that a criminal offence has been committed, has the legal right to lodge a complaint with the police. It is not necessary in a forgery case for the complainant to establish a nexus with the particular document that is alleged to have been forged. Suffice for such complainant to state is that the accused knowingly benefited from the forgery. Again, the Applicant will have the opportunity to challenge such evidence before the trial magistrate's court. Regarding whether the complainant should have pursued a civil option instead of lodging a criminal case in respect of the suit parcel of land, this court holds that the fact that a matter may be pursued through a civil process is not a bar for the Director of Public Prosecution to pursue the criminal element of it if a criminal offence is disclosed (see **Section 193A** of the **Criminal Procedure Code**).

Enough said. It is clear from the foregoing that the application lodged by the Applicant lacks merit and is hereby dismissed. The Chief Magistrate's court file is hereby sent back to Kibera for the court to hear the case to its final determination. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE