



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 46 OF 2015

PROTUS HAMISI WAMBANDA.....PLAINTIFF/APPLICANT

VERSUS

ELIZABETH SHIJEYI SHAVA.....DEFENDANT/RESPONDENT

&

ELDORET HOSPITAL.....INTERESTED PARTY/RESPONDENT

RULING

This ruling is in respect of an application dated 4th June 2020 by the plaintiff/applicant seeking for the following orders:

- a) Spent
- b) The Directorate of Criminal Investigations Eldoret West Sub County to investigate the defendant for perjury in relation to her affidavit sworn on 2nd March 2020 and filed in this suit on 3rd March 2020 and a report thereof be filed in this honourable court.
- c) In carrying out the investigations on the said defendant, the Directorate of Criminal Investigations Eldoret West Sub County shall compare the signature on the affidavit sworn on the 2nd of March 2020 with her signatures on the national Identity card number 11237484, the certificate of marriage, number 181971, the notice to act in person dated 18th October 2017 filed in this matter, the notice of settlement dated 6th November 2017 in respect to a children's matter, the consents filed in Eldoret Chief Magistrates Number 15 of 2015 and the Eldoret High Court Civil Appeal No. 37 of 2015 and any other documents to be supplied by the plaintiff.
- d) The honourable court be pleased to order or direct the Directorate of Criminal Investigations Eldoret West Sub County that if it is found that the defendant committed perjury, to arrest, charge and prosecute her for perjury in accordance with the law.
- e) Costs.

Counsel agreed to canvass the application vide written submissions which were duly filed.

APPLICANT'S CASE

Counsel for the applicant relied on the grounds on the face of the application and the supporting affidavit by the applicant. Counsel submitted that the issues raised in the present application have never been raised before in any previous application and that the court has unfettered discretion to punish for perjury especially when it has been brought to the attention of the court.

Counsel for the applicant referred the court to section 108 of the Penal Code and submitted that the defendant perjured herself through her affidavit sworn on 2nd March 2020 and filed on 3rd March 2020 which the court relied on to issue orders prejudicial to the plaintiff.

Mr. Okara stated that the defendant in the said affidavit denied signing the consent that gave rise to the court's order dated 21st September 2017. Counsel cited the case of **David Omwenga Maobe vs Republic (2015) eKLR** on the definition of perjury and submitted that the court must take into account that this can relate to criminal and civil proceedings as the offence committed relates to the wilful statements made in proceedings which s/he knows to be false.

Mr. Okara further relied on the case of **R v Archer (2003) 1 Cr. Appeal R (5) 86 and the case of R v Clegg (1868) 19 LT 47 (EA 1851)** where the courts held that the false statement must be made deliberately, not inadvertently or by mistake.

Counsel also relied on the case of **Chumo Arap Songok v David Kibiego Rotich [2006] eKLR** and submitted that it was unfair for the defendant to claim that she never signed the consent and as a result an injustice was occasioned to the plaintiff. That the court has powers to correct an illegality. Further that it is trite law that where the court finds a party under oath has given false averments and the court basing its findings of such sworn affidavit and where found false, there is inherent power of the court to punish.

Counsel therefore urged the court to allow the application as prayed.

RESPONDENT'S CASE

Counsel for the defendant/respondent submitted that the order is untenable for the reasons that the court is being asked to exercise discretion and give powers that would be contrary to the provisions of article 157 of the constitution.

That the offices of the Inspector General of Police and the Director of Public Prosecutions as established under articles 157 and 245 of the constitution as independent offices and courts would not ordinarily interfere with the running of these offices provided they operate within the constitutional and statutory limits.

Article 157 (4) provides that:

The Director of Public Prosecutions shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such direction.

Article 245 (4) states that

The Cabinet Secretary responsible for the Police Services may give a direction to the Inspector general with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector General with respect to –

- a) The investigation of any particular offence or offences.**
- b) The enforcement of law against any particular person or persons**
- c)**

(5) Any direction given to the Inspector General by the Cabinet Secretary responsible for Police Services under clause (4), or any direction given to the Inspector General by the Director of Public Prosecutions under Article 157 (4) shall be in writing.

Counsel further submitted that no material has been placed before this court indicative of the fact that a report has been made to the Directorate of Criminal Investigations Eldoret West Sub County which report he has failed to act upon. Further that if such report has been made to the Directorate of Criminal Investigations Eldoret West Sub County the applicant's recourse would be an application for mandamus for the reason the office of the DCI is a quasi-judicial office that can only be compelled through an order of mandamus.

Ms Khadenyi for the respondent submitted that the applicant has not demonstrated why he would want this court to interfere with the laid down procedure for criminal investigations as outlined in the constitution and as such the court lacks the jurisdiction to direct such investigations as such powers are only bestowed upon the DPP.

Further that while the defendant recognizes the provisions of section 193A of the Criminal Procedure Code which allows concurrent litigation of civil and criminal litigation arising from the same issues and while it is the prerogative of the police to investigate crime, the same is being used as a pawn to resolve a civil dispute.

Counsel also submitted that the matter is res judicata, the court having pronounced itself on the applicant's earlier application through this application whereby the applicant had the opportunity to interrogate the facts in the now impugned affidavit, cross examine the defendant and if he felt the need to do so as provide in order 9 rule 2 and even apply to expunge the disputed contents from the affidavit.

Counsel therefore urged the court to dismiss the application with costs to the respondent.

INTERESTED PARTY'S CASE

Counsel for the interested party submitted that the court has no jurisdiction to direct, instruct, advise the directorate unless there are special circumstances touching on matters before the court and the court has a reason to believe or reason is shown that such investigations are necessary for the determination of the case.

Mr. Kamau further submitted that the applicant has not informed the court the DCI has refused to investigate complaints. Counsel also submitted that the court had an opportunity to examine the affidavit by the defendant and had no reason to doubt the defendant hence the

ruling that was rendered. Counsel therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issues for determination by the court are as to whether the application is proper before the court and whether the court can grant the orders sought.

From the record and the history of this case, the applicant's advocate signed a consent dated 20th November 2017 withdrawing the entire suit against the defendant. On the day that the consent was adopted in court the defendant was not present and the advocate for the Interested party had asked counsel to hold brief. The consent was adopted as per the filed consent in court but later an application for setting aside the consent was filed and the court rendered a ruling on 26th May 2020.

The court deliberated on the issues of the legality of the consent and set aside the consent order. This in essence makes the current application res judicata as the court had already dealt with the legality of the consent. If the applicant was dissatisfied with the order, then the next recourse or cause of action was to file an appeal against the ruling and not file an application to direct the DCI to investigate the perjury by the defendant in her affidavit.

The applicant had an opportunity to question the affidavit or summon the defendant for cross examination on oath on the contents of the affidavit which was never done. This is now water under the bridge. I find that the court cannot grant the orders prayed by the applicant as they are an abuse of the court process.

On the other limb Article 157(4) of the Constitution provides;

The Director of Public Prosecutions shall have power to direct the Inspector- General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

Article 157(11) of the Constitution provides;

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

Article 245(4) of the Constitution provides;

The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector- General with respect to—

(a) the investigation of any particular offence or offences;

As per the constitutional provisions, it is evident that the offices of the Inspector general and the DPP are independent offices that cannot be directed by the court of law. The constitution also provides circumstances within which the IG would receive instructions to investigate an offence.

What the applicant seeks is to have the court dictate to the independent offices of the Inspector General and the DPP how to do their duty. There is no proof that he has reported the issues raised herein to the offices and that they have failed to carry out their duties.

In the case of **Commissioner Of Police & The Director Of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR** the court held as follows:

“Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.”

I agree with the above decision that it is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. The court can only interfere where a matter is before it and there is reason to believe that such investigations are necessary for the adjudication and determination of the suit before it. There are laid down procedures and processes where the court can compel action through Judicial review and other processes where necessary.

If the consent was obtained with the knowledge and permission of the defendant, then the applicant can use the same process to enter into a valid consent with both the defendant and the interested party and finalize the matter. Why does the applicant want to prolong the matter by involving the police in the civil process? Is there anything that the applicant is afraid of which the court is not aware of?

Having said that I find that the application lacks merit and is therefore dismissed with costs to the respondents.

DATED and DELIVERED at ELDORET this 22nd DAY OF September, 2020

DR. M. A. ODENY

JUDGE