



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

MISC. CRIMINAL APPLICATION APPL. NO.24 OF 2013

ELIZABETH NASWA KABURU.....1ST APPLICANT/COMPLAINANT

METRINE NASIMIYU BARASA.....2ND APPLICANT/COMPLAINANT

VERSUS

WYCLIFFE MUKHEBI.....1ST ACCUSED/RESPONDENT

DAVID NYONGESA NAMTALI.....2ND ACCUSED/RESPONDENT

SALIM NAMUTALI.....3RD ACCUSED/RESPONDENT

ALBERT KHWATENGE.....4TH ACCUSED/RESPONDENT

RULING

1. Before me is a Notice of Motion dated 23rd October, 2013. The Applicants invoked the Provisions of Sections 89, 90, 346, 380, 382 and 383 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya. They sought two prayers. That the entire file of **Kimilili PMC Misc. Cr. Appl. No.24 of 2013** be brought to this Court for perusing. Secondly, that upon such perusal this Court do fix the hearing date for the Application dated 6th September, 2013 for hearing and determination.

2. The grounds for the Application were contained on the body of the Motion and the Supporting Affidavit of Elizabeth Naswa Kaburu. It was contended that on 13/09/13, a firm of Wanyama Wanyonyi and Co. had filed an irregular Application yet they were not parties in Misc. Cr. Appl. No. 6 of 2013. That the Application that was meant for hearing on that day before the Kimilili Court was one by the Applicant for contempt proceedings against one AG IP. David Maina, the OCS, Kimilili Police Station. That the OCS had failed to arrest suspects and arraign them in Bungoma Law Court for plea taking. That the Court had caused obstruction of justice in Misc. Cr. Case No.6 of 2013. That no plea had been taken.

3. The Applicants further contended that the Court's independence and impartiality had been compromised from the way it handled the trial. The Applicants set out what Sections 89 (3), 90, 346, 380, 382 and 383 of the Criminal Procedure Code provide.

4. In a lengthy Supporting Affidavit, Elizabeth Naswa Kaburu narrated how she had reported the Respondents to Kimilili Police Station under OB NO.18/4/7/13 but the police were unwilling to arrest them, that the OCS, Kimilili Chief Inspector, Mourice Oyolo had refused to take a statement from her but had instead ordered the arrest of her brother one Patrick Wafula Kaburu on 5th July, 2013. That both the said OCS and the Director of Public Prosecutions, Bungoma, had been compromised by the

Respondents. That an Order made on 5th August, 2013 was served upon the OCS, Kimilili Police Station, AG IP. David Maina who declined to comply. That the said OCS had disobeyed the Orders of this Court and he should be punished. Although the named Respondents were served with the Application, they did not attend Court at the hearing and the same was argued ex-parte. The Applicants relied on the Supporting Affidavit and did not make any submissions.

5. I have considered the Supporting Affidavit on record. What the Applicants seek is an Order from this Court calling for the entire file of **Kimilili Principal Magistrates Court Misc. Crim. Appl. NO.24 of 2013**, peruse the same and fix a date for the hearing of an application dated 6th September, 2013 which the Kimilili court disqualified itself from hearing. I have carefully scrutinized the provisions under which the application was brought. The Applicants properly analysed those provisions in their motion. None of them however, gives this Court the jurisdiction to grant any of the Orders sought. All these Sections are under the Criminal Procedure Code.

6. Section 89, provides how a complaint is to be lodged before a Magistrate and a formal charge made. Section 90 provides for issuance of summons or warrants to compel attendance upon the signing of a charge by a Magistrate. This is not a Magistrate's Court. Section 346 gives power to a Court to amend errors or omissions to its orders. This Court has issued no order which it can be called upon to amend. Finally, Sections 380, 382 and 383 make provision on the fate of proceedings undertaken at a wrong forum, or for irregularity and distress on defective proceedings. From the foregoing, it is quite clear that the powers that this Court is being urged to exercise have not been properly invoked by the Applicants.

7. In any event, I am not aware of any law that allows this Court to call for a file of a lower Court for perusal and fix a hearing particular proceedings pending before that Court. What I am aware of is the powers of this Court upon appeal or revision. The powers of revision can only be resorted to under the circumstances set out in Section 362 of the Criminal Procedure Code. That power is exercisable for purposes of this Court of:

“Satisfying itself as to the correctness, legality or propriety of any finding, sentence or Order recorded or passed; and as to the regularity of any proceedings of any such Subordinate Court.”

8. In the application before me, it was not shown that there had been any finding, sentence, or order recorded or passed in the particular file under reference which this Court is to be called upon to satisfy itself as to its correctness. It was also not alleged that any proceedings had been undertaken in an irregular manner. In my view, for a party who wishes the Court to exercise its revisionary powers under that Section, he must allege or establish the irregularity complained of. This is apart from the power of the Court to *Suo Motto* call for such record and exercise its powers thereunder.

9. What I find in the Application and Supporting Affidavit are grave allegations against various people and institutions. The Applicants accuse the Kimilili Court, the Kimilili Police Station OCS and the DPP, Bungoma of being compromised. These are as follows:-

a) In Paragraph 7 and 8 of the Grounds in the Motion, the Applicants stated:-

“7. That the preferred charges was because the complaint was brought and lodged before the Kimilili LOWER Court and under the Provisions of Section 89 and 90 of the Criminal Procedure Code, that the trial Court was compromised by the Accused's i.e suspects herein in the complaint.”

8. That the trial Court at Kimilili Lower Court proceeded with the substantive trial which in the eyes of reasonable man did compromise the independence and impartiality hence this application before this Honourable Court.”

b) At paragraphs 17, 20, 22 and 26, she stated on oath:-

“17. That when we saw the OCS, CIP Mourice Oyolo, Kimilili Police Station having an opinion and after being compromised and corrupted by the accused suspects herein starting framing up charges against my brother Patrick Wafula Kaburu, we decided to seek for a legal advise.

20. That the suspects herein and the OCS, Kimilili Police Station prevailed upon the DPP, Bungoma compromised him, not to reply or attend Court on the 15th of July, 2013.

22. THAT ON THE 15TH OF JULY, 2013, the DPP, Bungoma was corrupted and compromised to deliberately or recklessly disregard his obligations as empowered by the Constitution to perform his functions as the DPP.

26. THAT the OCS, Kimilili Police Station one AG IP David Maina failed to appreciate the facts that the Applicants/Complainants herein and served the DPP, Bungoma with the Orders of the Court on the 12th of July, 2013 but the DPP failed to appear on 1st of July, 2013 after being compromised by the accuseds herein i.e suspects.”

10. I have deliberately quoted the Applicants said allegations in extenso. These bold and disparaging allegations by the Applicants did not have any accompanying facts or evidence and therefore any basis to support them either by way of specifics i.e the nature of compromise, date, time and place or even exhibit or documentary evidence. This Court is aware of the Constitutional right of every Kenyan to free speech and the privilege in legal proceedings against defamation. But is this freedoms and privilege unbridled and unlimited? I entertain doubt about it. To my mind, the lesser I speak about these allegations the better. They are but a clear depiction of who the Applicants are and their intention.

11. There was no evidence on record to show that the Kimilili Court had disqualified itself from Misc. Cr. Appl. No.24 24 of 2013. Nor was there allegation that that Court had declined to hear the application dated 6th September, 2013.

12. The inescapable conclusion is that the Application dated 23rd October, 2013 is without merit and is hereby dismissed with costs.

Dated and Signed at Bungoma this 7th day of February, 2014.

A. MABEYA

JUDGE

Dated and Delivered at Bungoma this 10th day of February, 2014.

A. OMOLLO

JUDGE