



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 298 OF 2013

IN THE MATTER OF ARTICLES 22, 23 AND 165(3) OF THE CONSTITUTION OF KENYA

**IN THE MATTER OF ALLEGED CONTRAVENTION AND OR APPREHENDED
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
3,10, 24, 25, 27, 28, 29, 47, 73(10)(A)(B), 156, 157 OF THE CONSTITUTION OF REPUBLIC OF
KENYA**

AND

**IN THE MATTER OF INTENDED MALICIOUS AND UNLAWFUL ARREST,
INCARCERATION AND PROSECUTION IN CHIEF MAGISTRATE COURT AT MILIMANI
OF GEORGE JAMES KANG'ETHE AND PATRICK KANG'ETHE NJUGUNA ALIAS
NDONGA UNDER THE PENAL CODE**

GEORGE JAMES KANG'ETHE1ST APPLICANT

PATRICK KANG'ETHE NJUGUNA alias NDONGA2ND APPLICANT

VERSUS

THE INSPECTOR GENERAL OF POLICE1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS2ND RESPONDENT

AND

JOHN KARANJA WARUI.....INTERESTED PARTY

RULING

1. This Petition is dated 18th September 2013 and is brought under **Article 22, 23 and 165(3) of the Constitution**, by the Petitioners **George James Kang'ethe** and **Patrick Kangethe Njuguna alias**

Ndonga.

Case for the Petitioners

2. In the supporting affidavit sworn by the first Petitioner and on which learned counsel Mr. Gachie relied, the first Petitioner averred that he was the registered proprietor of a parcel of land known as **L.R. Dagoretti/Riruta/2290** having acquired it for valuable consideration in the year 2008, while the second Petitioner was his father and had no interest in the land. That vide a sale agreement dated 30th August 2008 he purchased the said piece of land from the then registered owner, one Vincent Mungai Mbugua (vendor), for a consideration of Kshs.3,500,000/= (three million five hundred thousand) only.
3. The first Petitioner further asserted that prior to the acquisition he conducted due diligence over the said piece of land and ascertained that the vendor was indeed the registered proprietor and thereafter he followed all the legal steps necessary for the acquisition thereof. That it was after he had taken possession of the property, developed flats thereon and rented them out that the interested party who was completely unknown to him emerged to allege that the property belonged to the estate of his late mother, Elizabeth Muthoni.
4. The first Appellant also contended that the Interested Party has since moved the High Court vide Environmental and land Division civil case No. **415 of 2009**, wherein he sued the two Petitioners herein together with the Vendor. Together with the civil suit the Interested Party filed an urgent application seeking injunctive orders to restrain the Petitioners herein from dealing with the subject land in any manner howsoever pending the hearing of the civil suit, alleging a beneficiaries interest.
5. That in the ruling dated 4th March 2010 the court found that the Interested Party's claim to the suit was not established and declined to grant the injunctive orders sought. The Interested Party did not appeal against the said decision and the suit is yet to be heard in full. Instead he made a report to the Riruta Police who are said to have moved to lay charges against the two petitioners without conducting any independent investigations. Pursuant thereto the police have summoned the petitioners to the police station severally and finally on 16th September 2013 bonded them to appear in court on 20th September 2013 for arraignment.
6. As far as the Petitioners are concerned, the charges are completely unfounded in law, baseless and unjustifiable in an open and democratic society, and it is the Respondents' intent to infringe the Petitioners' rights by settling a civil dispute through the criminal justice system hence this application.

Case for the Respondents

7. The first Respondent, the **Inspector General of Police** and the second Respondent, the **Director of Public Prosecutions** were represented by M/s Ngalyuka learned state counsel who relied on the affidavit sworn by IP Abdullahi Shuria dated 18th October 2013. Briefly she stated that:
 - a. Investigations were conducted in this matter following a complaint on the fraudulent transfer of the property **LR. DAGORETTI/RIRUTA/2290** whose original owner was the late Elizabeth Muthoni, the mother of the Interested Party herein.
 - b. The property is now registered in the name of the 1st applicant George James Kang'ethe, registration having been so obtained in the year 2008.
 - c. Investigations carried out revealed certain anomalies as itemised in the respondent's replying affidavit, hence the conclusion that the subsequent registration of the property herein was obtained fraudulently.

- d. The 2nd respondent upon consideration of all the evidence gathered, directed that charges be preferred against the applicants as appropriate.
8. In sum the Respondents contended that:
 - a. The intended charges are neither malicious nor an abuse of the criminal justice process;
 - b. There is no danger of harassment, intimidation and coercion of the applicants by the respondent;
 - c. The respondents have not acted arbitrarily or unconstitutionally and
 - d. The court should not stay the arrest, incarceration, plea taking or prosecution of the applicants and the same is not an abuse of their fundamental rights.

Case for the Interested Party

9. The Interested Party **John Karanja Warui** filed a replying affidavit dated 13th November 2013 in which he denied the claims and allegations of the Petitioners. The Interested Party deposed that on 14th May 2010 the 2nd Petitioner instituted criminal proceedings against him and his son Anthony Kiarie Karanja on a charge of forcible detainer contrary to **Section 91** of the **Penal Code** in Kibera law courts during the pendency of the civil case alluded to.
10. That the criminal case was heard to conclusion and they were both acquitted. That therefore the Petitioners cannot now be heard to raise the pendency of the civil case as a bar to prosecution. In this they were joined by M/s. Ngalukya who urged that the decision to charge the petitioners was based on available evidence that can only be tested before a trial court.

Issues for Determination

11. The crux of the matter before this court and upon which the court must decide is that the Petitioners charge that their intended prosecution is a nullity, an illegality a gross breach of their fundamental rights and a violation of the Constitution. They aver that it is an abuse of the criminal justice system meant to harass, intimidate and embarrass them for the satisfaction of the Interested Party since the matter is already proceeding in a civil court. For that reason they have asked this court to stay the process of prosecution, in all its stages.
12. On the other hand the Respondents and Interested Party joined in their opposition of the petition and have denied every claim and averment therein seriatim. Both contend that in the investigation and prosecution of the petitioners, both the Inspector General of Police and the Director of Public Prosecution are simply discharging their constitutional duties guided by the sufficiency of the evidence they have gathered. They pray that the orders sought should not be issued.

Findings of Court

13. In **prayer (a)** the Petitioners pray for a declaration that the offices of the Respondents are institutions bound by the Constitution and that they are under a duty to respect, uphold and defend the Constitution in terms of Article 2(1), 3(1), 27, 29, 47, 156, 157 of the Constitution of the Republic of Kenya.
14. What is prayed herein above is the legal position which needs no further declaratory force from the court. I shall therefore, not belabour the issue.
15. In **prayer (b)**, the Petitioners pray for a declaration that any arrest, incarceration and Prosecution of criminal proceedings in the chief Magistrates Court at Milimani or any other Court against the Petitioners relating to a civil land matter already pending before the Environment and Land Court being ELC Case No. 415 of 2009 would be a nullity, illegal and gross breach of their fundamental

rights and freedoms and thus a violation of the Constitution of Kenya, 2010.

16. The Petitioner cited the case of **Mary Wanjiru Njuguna & Njuguna Njoroge vs Republic** (unreported) wherein Ojuk J was satisfied that the dispute involving the ownership of the property formerly known as UMOJA 1-D-84 was essentially a civil matter between all the parties involved and that the criminal jurisdiction of the Court had been improperly invoked by the police. The law on this issue is clear. **Section 193A of the Criminal Procedure Code** provides that:

“Notwithstanding the provisions of any other written law, the fact that any matter is 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”.

There is therefore no illegality in the fact of criminal proceedings being instituted to run concurrently to on-going civil proceedings per se.

17. In **prayer (c)** the Petitioners pray for a declaration that the Petitioners are not criminally culpable for disputes emanating from Civil Courts where a litigant has lost fairly and judicially and that their arrest, incarceration and prosecution in any criminal proceedings relating to the same is a gross violation of their fundamental rights and freedoms.

18. It would appear from their supporting affidavit and the submissions of Mr. Gachie that the Petitioners are calling upon this court to determine from their averments in the said affidavit, that they are innocent and should not therefore be arrested or arraigned in court. The Petitioners relied on the case of **Park View Shopping Arcade vs Kang’ethe & 2 others KLR (E&L) 1 pg 591**, in which the court held that:

“A Certificate of title issued by the registrar Shall be taken by all Courts as conclusive evidence that the person named therein is the absolute and indefeasible owner thereof. Further by the provision of Section 24 of the said Act, it is proved that a party deprived of land through fraud or error can claim damages. It makes no provision for recovery of the land in question”.

19. In my humble view, whether or not the investigations leading to the arrest of the Petitioners disclose an offence, is not to be determined by this court for reasons that the evidence against the Petitioners was not presented to this court for deliberation. The Petitioners’ protestations of innocence should be presented to the trial court and not this court. See - **Petition No. 79 of 2012, Francis Mbugua vs Commissioner of Police and 2 others**.

20. In **Misc. Application No. 68 of 2011, Michael Monari and another vs The Commissioner of Police and Anor**, on which M/s Ngalukya relied, the court faced with a similar scenario, also held that it is not the duty of the court to go into the merits and demerits of any intended charges 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. I find no reason to depart from this position.

21. In **prayer (d)** the Petitioners pray for an order for compensation to the Petitioners for the undue harassment, intimidation and embarrassment caused to them by the unlawful acts of the 1st Respondent through his officers at Riruta Police Station by attempting to arrest them and laying unfounded Charges before a Criminal Court and intimidating them to facilitate the Interested Party to satisfy his intent.

22. The Petitioners relied on the case of **Republic vs Chief Magistrate’s Court at Mombasa Exparte Ganijee & Ano. [2002] 2 KKR pg 703** in which Waki J held that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution

to help individuals in the advancement or frustration of their civil cases. This is an abuse of the process of the Court. No matter how serious the criminal charges may be, they should not be allowed to stand if their pre dominant purpose is to further some ulterior purpose”.

23.The Constitution under **Article 243**, establishes the National Police Service and empowers it to maintain law and order, preserve peace, carry out investigations and apprehend offenders. The said powers are also enshrined in **Section 24** of the **National Police Service Act**. The mandate of the National Police Service under **Article 245(5)** of the **Constitution** extends to investigation of any offence and enforcement of the law against persons who are in contravention thereof. They operate under the directive of the Inspector General of Police or the Director of Public Prosecutions and no other person.

24.In **Petition No. 251 of 2012, Beatrice Ngunyo Kamau & 2 others vs Commissioner of Police and others** the court held that it behoves a petitioner to show by tangible evidence that the Director of Public Prosecution, in exercising his wide prosecutorial powers had acted against the public interest and against the interest of the administration of justice. The applicants have not in any way demonstrated the manner in which the decision of the Inspector General of Police to investigate or that the Director of Public Prosecution to prosecute are an abuse of the criminal justice system nor that the predominant purpose of the prosecution is to further cause ulterior motive.

25.There is no evidence that the Respondents have acted arbitrarily or unconstitutionally in the performance of their duties, nor that the Interested Party is actuated by the desire to punish or oppress the Petitioners by brandishing the rod of punishment under the criminal law. A court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution. In addition, the court cannot prevent the police or the Director of Public Prosecutions from carrying out investigations on reasonable suspicion that an offence has been committed, since they are executing their constitutional duty and obligation. See - **Petition No. 518 of 2012, Paul Ng’ang’a Nyaga & 2 others vs The Hon. A.G. & others**.

26.Having considered all the material placed before me, it is my decision that it is not appropriate for this court to intervene on behalf of the Petitioners. This court cannot weigh whether there is evidence that is sufficient to sustain criminal prosecution or charges. There is also no bar to the exercise of concurrent criminal and civil jurisdictions. The evidence available seems to disclose criminal acts and omissions which must be investigated, prosecuted and determined by a court of competent jurisdiction.

Consequently, the application dated 18th September 2013 is dismissed with costs to the Respondents and Interested Parties.

SIGNED DATED and DELIVERED in open court this **14th** day of **May 2014**.

.....

L. A. ACHODE

JUDGE