



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 140 OF 2013

**IN THE MATTER OF THE SUPERVISORY JURISDICTION OF THE HIGH COURT OVER
SUBORDINATE COURTS UNDER ARTICLE 165(6) OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED VIOLATION OF CONSTITUTIONAL RIGHTS OF THE
PETITIONERS PROTECTED BY ARTICLES 10, 27, 28, 40, 50 AND 159 OF THE
CONSTITUTION AND FUNDAMENTAL FREEDOMS IN CRIMINAL PROCEEDINGS
BEFORE THE CHIEF MAGISTRATES' COURT AT MILIMANI, NAIROBI, CRIMINAL CASE
NO. 1526 OF 2011, REPUBLIC VS. JAMES NG'ANG'A WANJIKU & ANOTHER**

BETWEEN

JOSEPH KIMANI KAGOMBE.....1ST PETITIONER

JAMES NG'ANG'A WANJIKU.....2ND PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE CHIEF MAGISTRATES' COURT, NAIROBI.....3RD RESPONDENT

AND

MOHAMMED ABUBAKAR HABIB.....INTERESTED PARTY

RULING

1. The Petition before me is brought under **Article 165 (6)** and **Articles 10, 27, 28, 40 50** and **159** of the **Constitution**. The Petition dated 27th May 2013, is supported by the Affidavit of Joseph Kimani Kagombe sworn on the same date. In the Petition, the Petitioners are seeking for a declaration that the institution, prosecution and maintenance of the criminal proceedings against them constitute an abuse of court process and a violation of their rights, and are therefore, null and void *ab initio*. The Petitioners also seek an order of certiorari to bring to the Court and quash the proceedings and all orders made in the said criminal proceedings and a declaration that the orders

of the lower Court of 8th Feb. 2013 violate the Petitioners' rights. The Petitioners also seek compensation by way of damages for contravention of the Petitioners' rights.

2. Filed contemporaneously with the Petition is a Notice of Motion dated 27th May 2013 and brought under a Certificate of Urgency filed on 28th May 2013. The Application brought under **Rule 33 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court (Practice Rules)** and **Articles 22 and 23 of the Constitution** is seeking for an order of stay to stop criminal proceedings in **Nairobi (Milimani) CMCC No. 1526 of 2011, Republic v James Nganga Wanjiku & Another** pending the hearing and determination of the Application. The Application is supported by the Affidavit of Joseph Kimani Kagombe sworn on 27th May 2013, the 1st Petitioner.

The Petitioner's Case

3. The Petitioner are licensed Auctioneers operating the firms of Pyramid Auctioneers and Little Vineyard Auctioneers respectively. At the material time, the 2nd Petitioner was operating as an agent under the direction of the 1st Petitioner. The Petitioners' case is that by a letter dated 3rd October 2011, they were instructed by the law firm of Kinuthia Kahindi & Co. Advocates to levy distress on the goods of Mohamed Abubakar T/A Down Town Hotel in Nairobi in order to recover rent arrears. Pursuant to those instructions, the Petitioners by a proclamation dated 4th October 2011, levied distress for rent by proclaiming the movable property in the suit property, L.R. No. Nairobi/ Block 209/4356. A copy of the proclamation was served upon the tenants by affixing on the main door of the suit property.
4. On 3rd November 2011, the Court in **Milimani Chief Magistrates Court Misc. Criminal Case No. 734 of 2011, Joseph Kimani T/A Pyramid Auctioneer and John Kagonye Ngururi vs. Mohammed Abubakar T/A Down Town Hotel**, authorized the removal of the distrainable assets from the suit property and directed the police to maintain law and order during the process. On 26th November 2011, the Petitioners proceeded to sell by public auction the items attached from the said property. It is the Petitioners' case that the distress and attachment of the property were carried out in accordance with the law, and in the presence of police officers. Therefore the institution of criminal proceedings is motivated by bad faith, and meant to defeat the lawful purposes of recovery of rental arrears.

The Respondent's Case

5. The 1st and 3rd Respondents opposed the Application by their Grounds of Opposition dated and filed on 27th June 2013. The Respondents faulted the procedure adopted by the Petitioners which renders the Application and the Petition defective and therefore improperly before the Court and amounts to an abuse of the process of the court. The Respondents stated further that the Petitioners, moved to Court too late, adding that it is not the jurisdiction of this Court to determine matters of evidence to reach a finding as to whether or not the Petitioners have a case to answer in the proceedings in the lower court. Furthermore, the Respondents add, **Section 193A of the Criminal Procedure Code** permits concurrent civil and criminal proceedings on the same subject matter. The Respondents state that the Petitioners ought to advance their defence to controvert the allegations made against them in the lower Court's proceedings. Further, the Petitioners did not demonstrate how their rights have been violated by the Respondents.

The Interested Party's Case

6. The Interested Party is the director of Faiza Holdings Limited, trading as Downtown Hotel and is the principal complainant in the criminal proceedings. He opposed the Application through his Replying Affidavit sworn on 26th June 2013. He deposes that he is the administrator to the Estate of Abubakar Mohammed Habib (deceased) who is the registered owner of LR No. 209/4356, on

which land parcel the Down Town Hotel is located. According to the deponent, the issue surrounding the ownership of the suit property has been the subject matter in civil proceedings in particular: **High Court ELC No. 25 of 2010, Faiza Holdings Limited, t/a Downtown Hotel v John Kagonye Ngururi & Kang'eri Wanjohi t/a Kindest Auctioneers**. In this matter, he states, a temporary injunction had been granted on 26th July 2011 against the Respondent from interfering with the quiet enjoyment of LR No. 209/4356.

Submissions

7. The matter was canvassed by way of written submissions. The Petitioners submitted that they undertook their instructions in accordance with the law and in the presence of police officers. Thus the criminal proceedings were instituted in bad faith and are sought to defeat the lawful process of attachment of property for rental arrears. In addition, the subject matter in the criminal proceedings is of a civil nature. The Petitioners, citing the case of **J.R. Misc. Application No. 363 of 2013, Republic v Richard Langat Kerich & 5 Others**, submitted that it is never too late to seek justice. They add that the DPP is under obligation, in undertaking his duties, to consider the need to avoid the abuse of the Court process. Thus, the DPP failed in this respect by instituting the criminal proceedings, which decision is misguided, malicious and oppressive. The Petitioners also cited **Article 165(6)** and **(7)** which grants the High Court supervisory powers to ensure fair administration of justice.
8. The Respondents on their part submitted that the matters complained of by the Petitioners are premature and improperly before the High Court since they form the defence that the Petitioners ought to canvass before the trial Court. Therefore, the allegations that the criminal proceedings are an ill-motivated abuse of process of the court cannot stand. Further, it was submitted that an order of certiorari only issues to quash a decision made without or in excess of jurisdiction or where the rules of natural justice are violated. The criminal proceedings were initiated by the DPP in exercise of his constitutional powers. The Petitioner did not demonstrate that the DPP acted in excess of those powers. The Respondents added that only the trial Court is best-placed to make a finding as to whether or not a criminal offence was committed after hearing the evidence, citing the case of **Thuita Mwangi & 2 Others v Ethics and Anti-Corruption Commission High Court Petition No. 369 of 2013**.
9. The Respondents further submitted that an order of prohibition could not issue in this case since it would be tantamount to interfering with the DPP's powers in executing his constitutional mandate. Several decisions were cited to support this view. The Respondents having acted within their relevant enabling provisions of the law, the orders sought cannot therefore issue. The Respondents added that the law also provides for safeguards for fair trial and the Petitioners have not demonstrated that they will not be accorded a fair trial and will have an opportunity to challenge allegations against them by tendering evidence. The case of **Surjit Singhunjam v The Principal Magistrate, Kibera, Misc. Application No. 519 of 2005** was cited to advance the position that a police officer has a duty to investigate once a complaint is made and only needs to establish reasonable suspicion before preferring charges.
10. The Interested Party challenges the Petitioners' failure to disclose to the lower Court the existing orders of the High Court concerning the property when they sought orders to execute distress for rent on 28th October 2011, in **CMCC Misc. Application No. 734 of 2011 Joseph D.K. Kimani t/a Pyramid Auctioneers & John Kagonye Ngururi v Mohammed Abubakar t/a Downtown Hotel**. He adds that the contempt proceedings commenced against one, John Kagonye, who is also claiming ownership of the property, in Notice of Motion dated 26th June 2013 are yet to be concluded. Therefore, the Interested Party urges, the orders sought by the Petitioners are in bad faith and aimed at defeating the pursuit of justice. He urges the Court to uphold the trial Court's ruling, adding that the Director of Public Prosecutions (hereinafter he DPP), has unfettered powers of instituting criminal proceedings against any parties. Further, he depones that it is too late for the Petitioners to come to court as the prosecution has concluded its case.

Issues for Determination

11. Having had an in-depth appreciation of the issues raised, the duty of this Court is to determine the following:
 - a. Whether the proper procedure has been followed in invoking the jurisdiction of this Court.
 - b. Whether the institution of criminal proceedings against the Petitioners is an abuse of the process of the court and whether it violates the Petitioners' rights.

Analysis

12. On the **Procedure for moving the Court** the Respondents have challenged the Petitioners for failing to follow the proper procedure in invoking the jurisdiction of the Court, stating that the Petitioners ought to have cited the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006** (the Gicheru Rules, (now repealed)). The Notice of Motion dated 27th May 2013 cites Rule 33 of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice Rules and Articles 22 and 23 of the Constitution** while the Petition is brought under **Article 165(6) of the Constitution**.
13. The Jurisdiction of the High Court to determine matters concerning the fundamental freedoms and human rights of an individual is predicated upon the provisions of **Articles 22 and 23 Constitution of Kenya, 2010**. **Article 22** provides *inter alia* that:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

While **Article 23 (1)** provides that:

The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

14. **Article 165(6)** provides for the supervisory jurisdiction of the High Court over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. To this extent, I find that the Court has been properly moved. The only procedural issue lies with the Rules applied by the Petitioners to move the Court. This matter having arisen before the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** were published, the Petitioners correctly cited the **Gicheru Rules, 2006**. **Rule 33** of the **Gicheru Rules, 2006** that was cited is not procedurally relevant to this matter since the Petitioners are not appealing from a ruling of the Court and have already filed a formal application.
15. **Part III** of the **Gicheru Rules** provides for the procedure to be followed when moving the High Court under the **‘enforcement jurisdiction’** concerning violation of fundamental rights and freedoms. Rules 19 and 20 were the proper provisions to cite in the Application and Petition respectively. The **Gicheru Rules** have been saved under the **Sixth Schedule** of the **Constitution** at **Paragraph 19** and therefore remained applicable under the new Constitution as follows:

“Until the Chief Justice makes the rules contemplated by Article 22, the Rules for the enforcement of the fundamental rights and freedoms under Section 84 (6) of the former Constitution shall continue in force with the alterations, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with Article 22.”

16. Failure to follow the proper procedure should not jeopardise the substance of the matters before

me. Furthermore, under **Article 22 (3)(d)**, *the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities*. Ultimately, the right of the Petitioners to institute proceedings for the purpose of preserving their fundamental freedoms and rights ought not to be overshadowed by a minor procedural failure on the mode of invoking the Court's jurisdiction. I shall therefore proceed to consider the application on its merits.

17. On the **Abuse of Court process** it is not in dispute that the events leading to the institution of criminal proceedings emanated from the execution of distress for rent conducted by the Petitioners. The Petitioners believe that having conducted the said process in accordance with the law and in the presence of police officers, institution of criminal proceedings against them was motivated by ulterior motives, and was meant to circumvent a lawful process of levying distress for rent. The Petitioners are facing several counts of theft of property. The record of proceedings of the lower Court shows that the criminal case proceeded and the trial Court having considered the prosecution case ruled that the Petitioners ought to be put on their defence. This finding seems to have precipitated the proceedings before me.

18. The prerogative of instituting and conducting criminal proceedings against any person lies with the office of the DPP. This power is reserved under **Article 157** which in part provides that;

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.”

19. The independence of the DPP is protected under **Article 157(10)** which provides that the DPP, in exercising his mandate *shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.*”

20. Contrary to submissions made by the Interested Party, that power is not unfettered. **Article 157 (11)** defines the parameters within which that power ought to be exercised, enjoining the DPP to 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*. This requirement is reiterated by **Section 4 of the Office of the Director of Public Prosecutions Act**. The Court therefore has a duty to ensure that those principles are adhered to in order to preserve the integrity of proceedings before it. It is also the duty of the Court to uphold the principles set out by the Constitution in exercising its judicial authority.

21. In this respect, I adopt the words of Nyamu, J. in the case of *Mohammed Gulam Hussein Fazal Karmali & Another vs. The Chief Magistrates Court Nairobi & Another* [2006] eKLR where he stated:

“Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any Prosecution which is vexatious, oppressive, malafides, frivolous or taken up for other improper purpose such as undue harassment of a party or abuse of the process of court.”

Adding that

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before institution of criminal proceedings, there must be in existence material evidence on which the Prosecution can say with certainty that they have a probable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”

22. In *Meme v Republic & Another* [2004] 1 KLR 637, the Court described abuse of court process in

the following terms:

“An abuse of the Court’s process would, in general, arise where the Court is being used for improper purposes, as a means of vexation and oppression, or for ulterior purposes; that is to say, Court process is being misused.”

23. The complaints leading to the criminal proceedings in the lower Court emanated from the process of levying distress for rent of goods belonging to the Downtown Hotel, associated with the Interested Party. The Petitioners stated that they executed distress for rent pursuant to instructions by Kinuthia Kahindi & Co. Advocates, which then resulted in the proclamation of the movable goods in the suit property on 4th October 2011. The proclaimed goods were subsequently removed and sold by public auction. However, it was alleged that in the process of seizing goods from the hotel, the Petitioners took properties belonging to the Interested Party and some of the guests who were residing at the hotel in question. The affected persons lodged complaints with the police and recorded their statements. These complaints were the basis for instituting criminal charges against the Petitioners.
24. While exercising their duties in levying distress, the auctioneers had a duty to conduct themselves lawfully. If therefore, it is alleged that certain criminal acts were committed in the process, any person aggrieved by the Petitioners’ conduct had a right to make a complaint. The police, as is their duty, are in the same light enjoined to investigate into allegations of criminal conduct. The duties of the police as defined under **Section 24 of the National Police Service Act, No. 11A of 2011**, include the investigation of crimes, apprehension of offenders, and maintenance of law and order. Like all other authorities, the police are subject to the rule of the law.
25. It has not been shown that the police acted with ulterior motives. The mere fact that the institution of criminal proceedings is premised on same facts as a pending civil suit is not a ground for staying the criminal proceedings. **Section 193A of the Criminal Procedure Code**, recognizes that the institution of civil proceedings does not preclude the State from instituting and maintaining criminal proceedings against a party with respect to an issue which is also directly in issue in a pending civil suit.
26. Prosecution of crimes is in the interest of the public. The mere fact that a person was exercising his mandate as an auctioneer in this case pursuant to a civil process, does not prevent the police from investigating allegations of criminal conduct where complaints have been made. I am alive to the fact that the parties herein are embroiled in civil proceedings where ownership of the subject property and the legality of the process of levying distress for rent are matters in issue. There is therefore a likelihood of existence of acrimony between the parties. However, it has not been shown that reporting to the police was motivated by malice. Besides the Interested Party, other persons who were guests residing at the Hotel complained of having lost their personal property in the process. Considered in totality, I see no evidence of ulterior motives in the institution of criminal proceedings.
27. The motive of the Petitioners seeking to stop the criminal proceedings was also put in question. The Respondents submitted that the Petitioners moved the Court rather late when the proceedings in the lower Court had reached an advanced stage. While the Petitioners have a right to move to Court, I find their action in this matter quite telling. A consideration of the Petition shows that the Petitioners are materially challenging the trial Court’s finding that the Petitioners have a case to answer. At paragraph 16, the Petitioners aver that the prosecution did not establish its case on a *prima facie* basis to warrant them to be put on their defence. The Petitioners stated that the prosecution did not prove key ingredients of the charges against the Petitioners in that it was not shown that the goods allegedly stolen ever existed and that some of the charges were not supported by any witness testimony. Further, the Petitioners averred that there was evidence that the Petitioners conducted themselves in a lawful.
28. These issues touch on the merits of the trial case, and amount to a defence that they ought to

canvass before the trial Court. These are matters of evidence that ought to be advanced in evidence. The complaints raised by the Petitioners are manifest of a grievance towards the decision of the trial Court to place them on their defence. It is not the realm of this Court to delve into the merits or demerits of the charges against the Petitioners. That is purely the province of the trial Court. In exercising its mandate under **Article 165(6)** this Court remains alive to the fact that matters of evidence are the province of the trial Court.

29. The Petitioners have alleged that they were being prosecuted for acting within the law while executing distress for rent under instructions, which is a violation of their rights. The 1st and 3rd Respondents countered that the Petitioners did not demonstrate how their rights have been violated by the Respondents herein. The Petitioners state that their right to have their dignity protected under **Article 28** and their right to property under **Article 40** as embodied in their license to trade as auctioneers were violated by the Court in its finding. This proposition lacks merit for the reason that the finding of a case to answer and putting them on their defence is not a finding as to their guilt, since they still enjoy the presumption of innocence. It has also not been shown how the lower Court's proceedings are prejudicial to the fair administration of justice and violates Petitioners' rights under **Articles 10, 27, 28, 40, 50 and 159**.

30. The law provides for safeguards for persons accused of crimes, and it has not been demonstrated that those safeguards have been violated. The Petitioners seemingly aggrieved by the trial Courts finding is asking this Court to look into the substance of the charges and the evidence. Agreeing to this proposition would be usurping the jurisdiction of the trial Court. However, having appreciated the issues leading to these proceedings, I do not find any abuse of process or violation of the Petitioners' rights. The issue of the levying of distress is a civil process and the subject matter of the lower court touches on the criminal conduct in the process of executing the distress for rent. The issue of the legality of the said execution and the ownership of the subject property are matters to be settled in the civil proceedings. I therefore, do not find that the Petitioners are prejudiced in any way in answering to charges of criminal conduct during the execution process. The criminal trial process is guided by the principles of the law within which the rights of all parties, including the Petitioners', are preserved. The Applicants have therefore, in my view, not satisfied to this Court that the prayers sought ought to be granted.

31. For the foregoing reasons I find that the Application lacks merit and I hereby dismiss it.

SIGNED DATED and DELIVERED in open court this **4th** of **June 2014**

L. A. ACHODE

JUDGE