



IN THE HIGH COURT OF KENYA AT KERICHO

PETITION NO. 5 OF 2013

ROSELINE CHEPNGETICH MUTAI.....1ST PETITIONER
GLADYS CHEROTICH MUTAI.....2ND PETITIONER
WINNY CHEMUTAI.....3RD PETITIONER
VICTOR TOO.....4TH PETITIONER

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT
THE OFFICER COMMANDING POLICE DIVISION,
KONOIN POLICE DIVISION.....2ND RESPONDENT
THE OFFICER COMMANDING STATION,
KONOIN POLICE STATION.....3RD RESPONDENT
LIVINGSTONE KIPYEGON MUTAI.....4TH RESPONDENT
BENARD KIPKORIR ROTICH.....5TH RESPONDENT

RULING

ROSELINE CHEPNGETICH MUTAI, GLADYS CHEROTICH MUTAI, WINNY CHEMUTAI, VICTOR TOO being the 1st, 2nd, 3rd and 4th Petitioners took out the Amended Petition dated 10th December, 2013 in which they sought for the following orders:

- a. **All the criminal charges against the Petitioners pending before the Senior Principal Magistrate's Court at Sotik in respect to the estate of the late Philip Sesat Mutai particularly Criminal Case No.638 of 2013 and Criminal Case No.679 of 2013 be dismissed as being vexatious.**
- b. **An order restraining the Respondents from further interfering in the estate of the late Philip Sesat Mutai which is the subject of a succession matter pending before this Honourable Court until the process of succession is completed.**
- c. **Costs of this Petition.**

d. Such other order(s) as this Honourable Court shall deem just.

The Petition is supported by the affidavit of Roseline Chepngetich Mutai. The **Director of Public Prosecutions, The Officer Commanding Police Division, Konoin Police Division, Konoin Police Station, Livingstone Kipyegon Mutai** and **Benard Kipkorir Rotich** were named as the 1st, 2nd, 3rd, 4th and 5th Respondents respectively. The 1st, 2nd, and 3rd Respondents filed the Replying Affidavit of S. P. Alphonse Munga to oppose the Petition; The 4th Respondent on his part filed a Replying Affidavit he swore to oppose the Petition. When the motion came up for hearing, learned counsels appearing in the matter made oral submissions.

I have considered the grounds set out on the face of the Petition and the facts deponed in the affidavits filed in support and against the Petition. I have also considered the rival oral submissions. It is the Petitioners' submission that the 4th Respondent has colluded with the 2nd and 3rd Respondents to harass and threaten them because they had sought to have the grant of letters of administration intestate issued to the 4th Respondent in respect of the Estate of **Philip Sesat Mutai**, deceased, revoked and or annulled. They further alleged that they were forcefully evicted from the estate land known as **L.R.no.Kericho/Cheptalal/320** yet they have been in occupation since time immemorial. They claim that they sought for assistance from the police and the provincial administration in vain. It is argued that the 2nd, 3rd and 4th Respondents ganged up to frame up criminal charges of stealing and malicious damage to property against the Petitioners. The Petitioners further argued that the criminal charges are being used to intimidate the Petitioners to abandon their quest for justice in the succession dispute.

The Respondents vehemently opposed the Petition. It is deponed by S. P. Alphonse Munga that the police investigated a complaint lodged by the 4th Respondent and found that the 4th Respondent's property had been destroyed and some goods stolen prompting them to arrest the 4th Petitioner after which they preferred charges of theft and malicious damage against them. The deponent denied the allegation that police colluded with the 4th and 5th Respondents to harass the Petitioners. The 4th Respondent denied trying to disinherit the Petitioners nor forcefully evicting them from the land belonging to the estate of Philip Sesat Mutai, deceased. The 4th Respondent accused the 4th Petitioner of trespassing and plucking tea from a portion which does not belong to him but when arrested he turned around accusing him of wanting to disinherit him. In sum, the Respondents aver that the criminal cases sought to be stayed were cases preferred against the Petitioners after police carried out investigations on their criminal culpability.

There is no dispute that the Petitioners, the 4th and 5th Respondents are beneficiaries of the estate of Philip Sesat Mutai, deceased. It is also not in dispute that the 4th Respondent has obtained a grant of letters of administration of the aforesaid estate before the Sotik Resident Magistrate's court. The Petitioners have sought to have the grant revoked and or annulled in the High Court. They further denied that criminal charges were preferred against the Petitioners on the basis of complaints lodged by the 4th Respondent who alleged that the Petitioners have neglected their portion of land and have encroached on his portion. There is no doubt that the succession dispute pending before this court is yet to be determined. It has been admitted by Mr. Lopokoiyit, learned prosecution counsel that the Petitioners had lodged a complaint at the police station but the police saw no need to record it in the Occurrence Book since it had no merit. In my humble view, this is a very curious submission because there is no iota of evidence that the police took seriously the Petitioners' complaint. It would appear the police took seriously the complaint lodged by the 4th and 5th Respondents. With respect, I agree with the submissions of Mr. Langat, learned advocate for the Petitioners that the investigations carried by the police appear to be discriminatory and lopsided in favour of the 4th and 5th Respondents. A critical examination of the averments contained in the affidavit of Roseline Chepngetich Mutai sworn on 10th December 2013, will show that the deponent specifically stated that the Petitioners reported a complaint to Konoin Police Station but the police declined to act on it. In fact, it took the intervention of Mr. Joseph Koskei a human rights activist based at Litein to contact the Rift Valley Provincial Police Officer to send the Bomet and Kericho County Police Commanders to visit the land to investigate. It is said the police stated that the land in dispute belonged to the 4th Respondent. The above averments were never controverted by the police. Though the police denied knowledge of the order issued by Hon. Mr. Justice Emukule vide Kericho H.C.Misc.Application no.11 of 2012 on 11th April 2013, it is now clear that the

orders are in existence. Despite knowledge of this fact, the police are saying that they are ready to soldier on with the criminal cases. In my view, the dispute between the beneficiaries is purely a succession dispute. Mr. Orina, learned advocate for the 4th and 5th Respondents was of the view that the issues raised by the Petitioners could easily be dealt with as defences by the court hearing the criminal cases complained of. The Petitioners are basically saying that they have been discriminated by the Prosecuting Authority. I have critically looked at the criminal charges preferred against the Petitioner and it is clear that the Petitioners are facing charges of theft, malicious damage, trespass and cutting down crops. However, the underlying dispute is over the inheritance of L.R.no.Kericho/Cheptalal/320, a parcel of land belonging to the estate of Philip Sesat Mutai, deceased. The Court of Appeal in Joram Mwenda Guantai =Vs= The Chief Magistrate, Nairobi, C.A no.228 of 2003 (unreported) at page 8 stated as follows:

“Equally so, the High Court has inherent jurisdiction to grant an order of Prohibition to a person charged before a subordinate court and considers himself a victim of oppression. It was succinctly put in Stanley Munga Githunguri =Vs= R (1985) K.L.91 that if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and that the High Court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

The question is: would the trial of the Petitioners amount to an abuse of the court process? Is it discriminatory? The nature of the dispute pits a family member against another. There are accusations and counter accusations over inheritance. The police who investigated the case chose to side with one party and completely ignored the other or it simply gave lip-service to their complaints. The police had been told that there was a succession dispute pending before court but again, they chose to ignore that critical piece of evidence and instead rushed to court to prefer criminal charges.

This court in Macharia & Another =Vs= Attorney General and Another (2001) K.L.R 448 held inter alia that:

The Court can declare a prosecution to be improper if:

- “(a) It is for a purpose other than upholding the criminal law;**
- (b)It is meant to bring pressure to bear upon the applicants to settle a civil dispute;**
- (c)It is an abuse of the criminal process of the Court;**
- (d)It amounts to harassment and is contrary to public policy;**
- (e)It is in contravention of the applicant's rights under Section 77 of the Constitution.”**

The police in the case against the Petitioners appear to have been actuated by other factors other than upholding criminal law. It would appear they wanted to assert pressure on the Petitioners to abandon their quest of inheritance. This court also in Kuria & 3 Others =Vs=Attorney General (2002)2 K.L.R 69 held inter alia:

- 1. The court has the power and indeed the duty to prohibit the continuation of criminal prosecutions if extraneous matters divorced from the goals of justice guide their instigation.**
- 2. It is the duty of the court to ensure that its processes are not used as tools for vilification on issues not pertaining to that which the system was even formed to perform.**
- 3. An order of prohibition should be granted where compelling an accused to stand trial would**

violate the fundamental principles of justice which underlie on society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious.

4. The machinery of criminal justice is not to be allowed to become a pawn in personal feuds and individual vendetta. The power of judicial review is invariably invoked so as to jealously guard it from this abuse.

5. It is the duty of the court to ensure that the utilization and or invocation of its processes and the law is not actuated by other considerations so divorced from the goals of justice as to make the court virtually a scapegoat in personal score settling and vendetta”.

This court must intervene at this early stage and prevent the rights of the Petitioners being trampled on. The right forum to ventilate the issues forming the dispute is the succession court and not via a criminal trial. In the end, I find those charges to be oppressive and an abuse of the process of court. The criminal charges brought against the Petitioners appear to be vexatious and meant to harass them. I find the Amended Petition dated 10th December, 2013 to be well founded. With respect, I agree with the submissions of Mr. Orina, that prayer (b) cannot be granted through this Petition but can only be agitated through the succession file. In the end, I allow the Amended Petition in terms of prayer (a). I find it inappropriate to grant the order on costs. Consequently, I direct that each party meets its own costs.

Dated, Signed and delivered in open court this 13th day of June, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mr. Langat for 1st Petitioner

Miss. Kivali for 1st – 3rd Respondents

N/A Mr. Orina for 4 & 5th Respondents