



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JR MISC. APPLICATION NO. 411 OF 2013

IN THE MATTER OF AN APPLICATION BY MARGARET NJERI WANYOIKE

AND

IN THE MATTER OF THE CRIMINAL CASE NO. 5124 OF 2013, MAKADARA LAW COURTS

AND

REPUBLIC VERSUS MARGARET NJERI WANYOIKE

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

MARGARET NJERI WANYOIKE.....APPLICANT

VERSUS

CHIEF INSPECTOR, ANN WARUGURU GITAHU.....1ST RESPONDENT

(Acting District Criminal Investigation officer-Kasarani

DEPUTY COMMISSIONER OF POLICE-LEO NYONGESA

(In-Charge Complaints Police Headquarters.....2ND RESPONDENT

CORPORAL AMBROSE SICHANA

(KASARANI POLICE STATION).....3RD RESPONDENT

CHIEF EXECUTIVE OFFICER,

CHIEF MAGISTRATES COURT –MAKADARA.....4TH RESPONDENT

EX PARTE: REPUBLIC

JUDGEMENT

1. By a Notice of Motion dated 12th November, 2013, filed in Court on 23rd November, 2013, the *ex parte* applicant herein, **Margaret Njeri Wanyoike**, seeks the following orders:

1. **An order of Prohibition prohibiting the 1st and 3rd Respondent from (a) threatening (b) harassing (c) arresting and charging on fabricated charges the Applicant herein.**
2. **An order of prohibition directed at the executive officer- Makadara Law Courts prohibiting him from proceeding with Criminal Case No. 5124 of 2014 – Republic versus Margaret Njeri Wanyoike pending the hearing and determination of the proceedings herein of further orders of the court.**

2. The application was supported by an affidavit sworn by the applicant herein on 12th November, 2013.

3. According to the applicant, she is the accused person in Criminal Case No. 5124 of 2014 – **Republic vs. Margaret Njeri Wanyoike** (hereinafter referred to as the said case) and she was arrested and charged with the offences therein as she was exercising her rights over her parcels of Land 890 and 890A – Kasarani.

4. The applicant deposed that the complainant in the said case one **George Gathecha Kinyanjui** who also claims to own her aid parcels of land is using the 1st to 3rd Respondents to intimidate, threaten and frustrate her into abandoning my rightful proprietary claim over the said parcel of land.

5. According to her, her fear and apprehension is that contrary to a High Court decision Petition No. 461 of 2012 that had taken Judicial notice into the notoriety of the land subject to the said Criminal Case quoted in (1) and prohibited the use of the Criminal justice system to determine adverse disputes as to parties in the land in question, the 1st to 3rd Respondents having been induced have continuously harassed and intimidated her culminating in the said charges being preferred against her.

6. She therefore was apprehensive that she might be dissuaded from claiming her aforementioned property thus occasioning her great loss as it is prime property.

7. In the applicant's view, the actions by the 1st to 3rd Respondents are anything but impartial and unless they are prohibited by this Honourable Court, they will use *ultra vires* powers and disposes her of her parcels of land.

8. In her submissions it was contended that the offences fly in the face of logic and cannot stand and further the charge as drafted is *ultra vires* the powers of the authority granted to the 1st to the 3rd Respondents. It was further submitted that the description of the properties damaged and their value is not realistic.

9. It was further submitted that the criminal charges have been preferred in contravention of the express orders of this Court in Petition No. 461 of 2012. It was therefore contended that the police ought to await the judgement in ELC 1308 of 2013 between the applicant and the complainant.

10. In opposition to the application, the Respondents filed a replying affidavit sworn by **Cpl Ambrose Gichane**, a Police Officer in charge of investigating the said case on 5th May, 2014.

11. According to him, on the 26th day of October, 2013 they received a complaint from the complainant one **George Gathecha Kinyanjui** regarding his perimeter fence that was cut down by around 15 men under the instruction of the Applicant herein and pursuant thereto, the police embarked on an investigation and established that the complainant's property amounting to Kshs 621,000/= had been damaged by the Applicant. It was further established that the Applicant herein is claiming ownership of the plot No. 890 and 890A at Zimmerman Rurie along Thika Highway having been allocated the same by Simman Settlement Scheme Society in 2004.

12. However preliminary investigations revealed that the said plot 890A is not in existence and a keen look at the purported share certificate of plot 890A as annexed by the Applicant in revealed that the same lacks a certificate number thereby raising suspicion as to the legitimacy of her claim. According to the deponent, although the Applicant is alleging that the property belongs to her, which allegation is denied, she did not follow the due process of the law in claiming for the same.

13. Subsequently, as the Applicant was charged with offences known to law, it was contended that section 193A of the **Criminal Procedure Code** provides that notwithstanding the provisions of any other written law, the subsistence of a related civil proceeding shall not be a ground for any stay, prohibition or delay of the criminal proceedings; that the prosecution has sufficient evidence to sustain the respective charge and that the issues meant to vindicate the Applicant should be canvassed in the criminal court and fairly determined and that that the application is frivolous and an abuse of the court process and meant to circumvent the criminal justice system.

14. In the deponent's view, the police did not act illegally or contravene any code of regulation, and neither did they act under the control or direction of any party; but were independently discharging their duties after conducting thorough investigations as mandated by Article 244 of the Constitution of Kenya, 2010 and the **National Police Service Act**, under which sections 24 and 35, *inter alia* mandate the police with the investigations of crimes and apprehension of offenders. In the deponent's view the purported application is based on deliberate concealment, distortion and non-disclosure of material facts made with the latent intent to mislead the Honourable Court as to the facts leading to the subject criminal complaint, investigations and charges.

15. It was therefore contended that the Respondents acted within their respective mandates under the relevant establishing legislation and in the circumstances, it cannot be said that the actions of the Respondents were in breach of the mandate vested upon them and the Court was urged to dismiss the application and remit the matter to the trial court which is equipped to deal with the quality and sufficiency of evidence gathered in support of the charge preferred against the Applicant.

16. On behalf of the Respondents it was submitted that the jurisdiction of the Courts to interfere with the exercise of the discretion of the respondent in making prosecutorial decisions should be sparingly exercised and in the clearest of cases and that the Court ought not to direct the Respondent on how to exercise his constitutional powers though the Court can intervene in cases where that power is proved to have been unfairly, improperly and unjustly exercised.

17. It was submitted that it is not the obligation of the court to supervise how investigations are conducted as long as they are not in contravention of any law which the applicant has not demonstrate.

18. I have considered the foregoing. I am in particular concerned that despite the remarks made by **Majanja, J** in Petition No. 461 of 2012 – **Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions**, more and more criminal cases are being instituted arising from the same subject matter. In that case, the learned Judge expressed himself as follows:

“It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State's coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent.”

19. It is therefore clear that this Court has appreciated that the ownership of the parcels of land the subject of the said criminal case is highly controversial and has given rise to several cases. I however appreciate

that the mere fact that there are civil proceedings pending or that the cause of action can be subject of civil proceedings does not bar criminal proceedings from being commenced where it is shown that a criminal offence has been committed. Therefore the applicant is not permitted to use the pending civil proceedings to commit criminal offences and where that happens the Court would not bar the applicant from being prosecuted. In other words the existence of civil proceedings is not a passport for commission of criminal offences.

20. In this case however, the Respondents apart from contending that a complaint was made relating to damage to the complainant's property by the applicant, the charge however includes a count of forcible detainer and the facts seem to refer to the ownership of the said parcels. In fact this position seems to be supported by the depositions in the replying affidavit to the effect that the allotment letters relied upon by the applicant do not appear to be genuine. That is the very issue that awaits determination by the ELC and for the Respondents to rely on the same to commence criminal proceedings in my view reeks of malice and mischief and one cannot but agree with the applicant that the criminal process is being used to achieve some collateral purpose other than the vindication of the commission of an offence.

21. In Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute.... It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous

considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings....”

22. In this case even from the replying affidavit it seems that the investigation is informed at least in part with the ownership of the disputed land.

23. In the premises just as was held in Petition No. 461 of 2012, judicial resources are not infinite and judges and magistrates have limited time to allocate to each and every case that comes before them and give each case such attention as meets the Constitutional objective of dispensing justice without delay. A multiplicity of cases, dealing with the same parties and issues, are a waste of judicial resources and impose direct and indirect costs on the parties and the body politic. I further agree that continued criminal proceedings in light of the existing court decisions concerning the suit property and between the same parties or parties claiming through them is an abuse of the court process in these circumstances and further action on that front must be halted.

24. Accordingly, whereas I cannot grant a blanket order prohibiting the 1st to 3rd Respondents from arresting and charging the applicant, I issue an order prohibiting the prosecution of Makadara Criminal Case No. 5124 of 2013 pending the hearing and determination of ELC 130 of 2013.

25. As the ownership of the subject properties is yet to be determined each party will bear own costs of this application.

Dated at Nairobi this day 3rd October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Spira for the Respondent

Cc Patricia