



No.406/14/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION NO. 39 OF 2014

IN THE MATTER OF PARCEL OF LAND L.R. 1504/7 IR 6458 IN SUCCESSION CAUSE NO. 1754 OF 2009 IN THE HIGH COURT OF KENYA NAIROBI AND IN CRIMINAL CASE NO, 747 OF 2012 AT MAVOKO LAW COURTS

NICHOLAS NZIOKA NDAMBUKI ALIAS WILLY KAHORE WANJIKUAPPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1st RESPONDENT

THE SENIOR PRINCIPAL MAGISTRATE, MAVOKO LAW COURTS2ND RESPONDENT

JUDGMENT

1. By way of Notice of Motion dated **13th March, 2014**, the applicant seeks an order staying proceedings in the *Mavoko Principal Magistrate's Court in Criminal Case No. 747 of 2012* pending hearing and determination of *Machakos High Court Misc Criminal Application No. 39 of 2014, Nicholas Nzioka Ndambuki alias Willy Kahore Wanjiku versus the Director of Prosecutions and Another*.
2. The application is premised on grounds that the applicant has already filed an application seeking a declaration that his rights have been violated by the prosecution by bringing charges against him in the **Criminal Case over Land Parcel No. L.R. 1504/7 IR 6458** which is an asset in **Succession Cause No, 1754/2009, Nairobi High Court** whereby he has filed a protest against confirmation of the grant. Failure to stay proceedings as prayed will render the application nugatory.
3. In an affidavit in support of the application, the applicant depones that the prosecution is an infringement of the provisions of **Section 157(11)** of the **Constitution** as the ownership of the property must be determined; in exercise of the powers, the **Director of Public Prosecutions** shall have regard to the public interest of the administration of justice, the need to prevent and avoid abuse of legal process; it is unconstitutional to use criminal process to bar him from contesting for his right to ownership in the Succession Cause and that his attempt to stay proceedings in the Lower Court on constitutional grounds was rejected.
4. In response thereto, relying on an affidavit deponed by **No. 89036923, Inspector Peter Obonyo** the 1st respondent stated that a person claiming ownership of a parcel of land – **LR 1504/7 IR 6458** who purported to have acquired it by virtue of Letters of Administration granted on **14th March 2009** invaded land owned by **Robert Mbugua Chege**. Investigations carried out revealed

- that the original number of the parcel of land was **LR 1504/2/2** that was granted to **Beacon Ranch Limited**. In **1970, 1st October**, the land was transferred to **Margaret Wamaitha Humphrey** at a purchase price of **Kshs. 30,000/=**.
5. **Margaret Wamaitha** disposed off part of the land but did not sell any of the portions to the applicant. The title to subdivision **L.R. 1504/7** is in the possession of the family of **Margaret Wamaitha**.
 6. The applicant swore a false affidavit alleging that his mother **Wanjiku Kahore** died in **1976**, was buried the following day and no death certificate had been issued. Investigations established that a death **No. C/No 285981** in the name of **Wanjiku Kahore** had allegedly been issued by the Registrar of Births and deaths in Machakos on **9th March, 2012** which was disowned by the District Civil Registrar. The applicant's real mother **Mbeti Kiilu** of **Kangundo Division, Isinga sub-location** was traced alive together with his brother **Musau Ndambuki**. This resulted into the applicant being charged.
 7. Further, he stated that the duty of the **Director of Public Prosecution (DPP)** is to safeguard public interest and the administration of justice to ensure the legal process is not abused.
 8. The application was canvassed by way of written submissions which I have considered together with annexures to the affidavits.
 9. In his affidavit the applicant claims that his late mother **Wanjiku Kahore** was a **Director of Beacon Ranch Co. Ltd** and she leased the subject land to **Margaret Wamaitha**. The respondents on the other hand, have demonstrated by way of affidavit evidence that **Wanjiku Kahore** has never been a Director of Beacon Ltd from the outset. Evidence from the Registrar of Titles show that **Land Reference No. 1504/7 (original No. IR 6458)** was transferred to **Margaret Wamaitha Humphrey** at a consideration of **Kshs. 30,000/=** in the year **1970** by **Beacon Ranch Ltd**.
 10. There is a letter from the **District Civil Registry, Machakos** denying having issued a Death Certificate **No. 285981** to **Wanjiku Kahore**. It is not denied that the real name of the applicant's mother is **Mbeti Kiilu**.
 11. Investigations were undertaken following a complaint having been lodged with the police. The said investigations culminated into the applicant being charged. The criminal charges preferred against him must be proved by the State.
 12. Indeed **Article 157(6) (a)** mandates the DPP to prefer charges against any person who is found to have committed an offence. Prior to the numerated charges being preferred against the applicant investigations were carried out. Evidence was collected that resulted into the applicant being arraigned in court.
 13. In his application he argues that the charges are in respect of the same parcel of land, an asset in **Succession Cause No. 1754/2009**.
 14. The constitution provides for protection of fundamental rights but the rights are limited by law. A person who commits an offence cannot be left scot-free just because he has fundamental rights. The complainants are also seized of the same rights that must be protected. Failure to rebut affidavit evidence adduced by the respondent which was overwhelming calls for hearing of the Criminal Case. In the premises, I find no reason to stay the criminal proceedings in the Lower Court.
 15. In the result, the application is dismissed.
 16. The applicant shall appear before **Mavoko Principal Magistrate's Court** on the **21/10/2014** for hearing of his case.
 17. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 8TH day of OCTOBER, 2014.

L.N. MUTENDE

JUDGE