



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 415 OF 2012

BETWEEN

JULIUS KANGARA NDEGWAPETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

JUDGMENT

1. The petitioner has brought this petition dated 19th September 2012 seeking the following orders;
 - a. *A declaration that the intended move to charge the petitioner vide Criminal Case No. 1410/2012 (Nairobi) in respect of LR No. NAIROBI/BLOCK 63/591 is unfair, unjust and unconstitutional to the extent that the same infringes on the petitioner's right to a fair trial given the factual circumstances surrounding the matter herein.*
 - b. *A declaration that the move to charge the petitioner herein vide Criminal Case Number 1410/2012 (Nairobi) in respect of L R Number Nairobi/Block 63/591 is null and void for infringing on the petitioner's right to a fair trial as envisaged under Article 50 of the Constitution.*
 - c. *Any other relief that the court may deem just and fit to grant.*
 - d. *Costs of this petition.*
2. The petitioner's case relates to a property known as NAIROBI/BLOCK 63/561 situated in Jamhuri Phase II Estate, Nairobi. The petitioner avers that he purchased the property from one Virginia Muthoni Kabuu way back in July 2001. Since then he has enjoyed quiet and peaceful possession of the same and has indeed managed to put up apartments on the property.
3. The petitioner was shocked when he received information in November 2011 that the property was being investigated by the police given that he had been occupying the property since 2001. The complaint was by one Abduraham Farah Osman who was a stranger to him. The petitioner has now been arraigned in court to face several counts of forgery contrary to **section 250** of the **Penal Code** relating to the transaction where he purchased the suit property.

4. Mr Kabue, counsel for the petitioner, argued that this court should terminate the proceedings as they are an infringement of the petitioner's fundamental rights and freedoms particularly given the inordinate delay in preferring the charges. Counsel relied on dicta in ***Githunguri v Republic [1985] KLR 91*** and ***Republic v Kamlesh Pattni Nairobi HC Crim. Case No. 229 of 2003 [2005]eKLR*** where the courts noted that inordinate delay would amount to an infringement of a right to a fair trial.
5. The petition was opposed by way of the replying affidavit of Sergeant Patrick Khaemba, an Investigating Officer at the Land Fraud Unit at the CID Headquarters, sworn on 24th October 2012. He depones that he received a complaint by Adulrahman Farah Osman, investigated it and found that there was reasonable evidence to charge the petitioner. Mr Njogu, counsel for the respondents submitted that this was a matter where the police acted in accordance with its mandate contained in the ***National Police Service Act, 2011*** to investigate offences and charge persons where there was reasonable evidence. He further submitted that in light of the Director of Public Prosecution power under **Article 157(a)** there was nothing on record to entitle the court to intervene in the criminal proceedings.
6. I have considered the material before me and I take the following view of the matter. The police have authority to investigate any complaint and prefer charges where reasonable evidence exist to support a charge (see **sections 2 and 24** of the ***National Police Service Act, 2011***). Similarly, the DPP has discretion under **Article 157** to institute criminal proceedings where reasonable evidence exists to support a prosecution. In both cases, the court will not interfere with these constitutional and statutory duties unless there is an abuse of process or infringement of fundamental rights and freedoms.
7. In a case such as this, it is not for the court to conduct a mini trial of the evidence but rather to direct its mind to its key obligation to ensure that the enforcement act in accordance with the law. I have considered the material and whereas it may be subject to various interpretations. I think the trial court is best placed to deal with the evidence. After all, the prosecution must prove its case beyond reasonable doubt. Moreover, there is no evidence that the petitioner will not have the Constitutional protection of a fair trial.
8. Whether there has been inordinate delay is always a question of fact. Both ***Githunguri*** and the ***Kamlesh Pattni cases*** can be distinguished. In ***Githunguri's case***, the Attorney General had made an initial decision not to prosecute the applicant but he later changed his mind years later. In ***Kamlesh Pattni***, the Attorney General was condemned for failing to prosecute a case after a period of nine year when evidence was available. In this case, the complaint was investigated as soon as it was raised. I do not think nor would I subscribe to the view that a police should refuse to investigate a complaint merely because a citizen has taken long to complain. Once a complaint has been lodged by any person the police should proceed to act on it expeditiously. I therefore find and hold that delay is neither inordinate nor is it a reason for stopping proceedings commenced in the subordinate court.
9. The result of my findings is that the petition is dismissed with no order as to costs and the conservative orders discharged.

Dated and Delivered at Nairobi this 4th February 2013

D.S. MAJANJA

JUDGE

Mr Kabue instructed by Kabue Thumi and Company Advocates for the petitioner.

Mr Njogu, State Counsel, instructed by the Director of Public Prosecutions.