



CRIMINAL

- **Considering allegation of violation of right to a fair hearing.**
- **Should there be stay of criminal proceeding where the matter in issue is subject of civil action.**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPLICATION CASE NO. 14 OF 2010

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER**

SECTION 77 (1) (C) OF THE CONSTITUTION OF KENYA

BETWEEN

JOSPHAT NJIRU

M'ARUCHA.....PETITIONER

VERSUS

**REPUBLIC.....RESPONDE
NT**

JUDGMENT

Before me is a petition filed by Josphat Njiru M' Arucha (Njiru). Njiru faced before the Chief Magistrate Court at Meru a Criminal Case being Case No. 216 of 2010. In that case, he was charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. By the petition he has

filed in this matter, he prays for:-

- a) *That the charges at Meru Cr. Case No. 216 of 2010 be declared a nullity.*
- b) *That proceedings before Hon. Kiarie W. Kiarie be stopped and matter be heard before an impartial and independent court.*
- c) *The court do find that the charges before the lower court are civil and therefore the criminal case be stayed and or be withdrawn and matter proceed in the Civil Suit No. H.C.C.C No. 148 of 2009*

The petitioner stated in his petition the following:-

- 1) *That the petitioner was arrested on 16/2/2010 on allegation of obtaining money by false pretence C/S 313 of the Penal Code.*
- 2) *The petitioner was held in police custody until 17/2/2010 when he was arraigned in court vide Cr. Case No. 216 of 2010 Meru.*
- 3) *That a hearing date was set for 15/3/2010.*
- 4) *On 15/3/2010 the petitioner lawyer applied for adjournment to enable him obtain witness statements and other document in order to prepare the defence but the court declined to allow him an adjournment and instead gave him 10 minutes to go through them and then proceed.*
- 5) *The advocate was forced by the presiding magistrate to proceed with two witnesses without any preparations or instructions from the petitioner thus contravening the petitioner's constitutional right to fair and impartial trial.*
- 6) *The petitioner was aggrieved by the way the proceedings were conducted on 15/3/2010 and applied for proceedings but the court declined to grant him the request.*
- 7) *That the matter was fixed for hearing on 20/5/2010 and the prosecution called 2 witnesses who had not recorded any statement and when the advocate for petitioner asked for their statements the presiding magistrate ordered him to proceed but the advocate withdraw from acting for petitioner due to the biasness and partiality of the magistrate.*
- 8) *The petitioner is apprehensive that he will not get a fair and impartial trial and that he has not been afforded adequate time and facilities for the preparation of this defence.*
- 9) *That petitioner contend that this matter is pure civil and that the complainant had instituted civil suit No. 148 of 2009 prior to instituting the current criminal proceedings which in itself is abuse of the court process calculated to deny the petitioner the protection of the law.*

In support of the petition, the learned counsel Mr. Kimathi Kiara for Njiru submitted by re-emphasizing that the dispute between Njiru and the complainant before the Chief Magistrate Court was of a civil nature. He therefore said that this court should withdraw the charge before the Chief Magistrate Court. He further submitted that the trial of Njiru before the Chief Magistrate's Court from 20th May 2010 was a

nullity because his constitutional rights under section 77 (1) (2) (c) of the Constitution of Kenya (the former constitution) had been breached. Those sections are in the following terms:-

“77. (1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence.

(a)

(b)

(c) Shall be given adequate time and facilities for the preparation of his defence.

Learned counsel proceeded to submit that the complainant in the criminal case agreed to buy from Njiru 0.35 Ha. of land at Kshs. 2.5 million. After Njiru surrendered all the necessary documents for the transfer, it was submitted that he was surprised to be served with summons and plaint of the High Court Meru Civil Case No. 148 of 2009. By that case, the complainant is seeking the refund of the money paid to Njiru. It was submitted that Njiru filed a defence but before the case could be heard, he was arrested and charged with the offence he now faces before the Chief Magistrate’s Court. Counsel for Njiru argued that the criminal case was an abuse of the process because Njiru is being subjected to two trials contrary to section 77 of the old constitution. The petition was opposed by the learned state counsel Mr. Solomon Kimathi. In opposition, he relied on the replying affidavit of the investigating officer in the criminal case. The investigating officer set out the back ground of the criminal case. The learned state counsel then stated that he also relied on section 193A of the Criminal Procedure Code which section provides as follows:-

“193A. Notwithstanding, the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be ground for any stay, prohibition or delay of the criminal proceedings.”

The petition raises two issues for consideration. The first is whether Njiru’s constitutional rights were breached by the trial magistrate in the Chief magistrate’s Court. Secondly for consideration is whether his trial before the Chief Magistrate whilst the civil case for the refund of the purchase price is pending before High Court at Meru is an abuse of the legal process. In respect of the first issue, I confirm that I had had the opportunity to see what transpired before the Chief Magistrate Court when the criminal trial commenced. It is clear that Njiru was represented by learned counsel Mr. Mwanzia on 17th February 2010. On that day, Mr. Mwanzia applied for bond for Njiru. The proceedings of that day do not show that Mr. Mwanzia sought copies of the prosecution’s statements. He waited until the 3rd March 2010 when the matter was slated for hearing to request for those statement prosecutions. He based his lack of those statements for an application for adjournment. This was two weeks after the plea. It is clear that both Njiru and his counsel knew that the matter was coming for hearing on 3rd March 2010. They obviously knew that on that day the prosecution would ensure that the witnesses were in attendance. There was no adequate explanation by Njiru or his counsel why they did not request for statements earlier. It would have been expected that the learned counsel for Njiru would have ensured by the hearing date he would be ready to proceed. There was no evidence submitted that the witness statements were previously requested and denied. The fact is they were not requested. The learned counsel for Njiru proceeded to attend court on 3rd March 2010 on the assumption that the court would grant him an adjournment. The

code of Civil Procedure of India particular order 17 provides a useful consideration which can inform a court when an adjournment is sought. The learned author Mulla *“The Code of Civil Procedure 16th Edition”* had this to say:-

“This rule gives a discretion to the court to grant time to the parties and to adjourn the hearing of a suit. On the other hand, no adjournment should be granted if no sufficient cause is shown. On the other hand, the court should not refuse an adjournment if sufficient cause is shown.”

“What is sufficient cause is a question of fact in each case. The granting of adjournment being a matter within the discretion of the court, the Supreme Court will not interfere with its exercise nor the High Court.”

The learned senior principal magistrate was exercising his discretion when presented with an application for an adjournment. Having perused his records, I can find no evidence whatsoever of bias or violation of rights as alleged. The learned magistrate stated as much in a letter which was presented before court dated 17th September 2010 and addressed to the Attorney General’s Chambers. Having looked at the record of the criminal trial and having looked at the letter written by the learned magistrate I find that I believe with him. The learned magistrate stated in his letter:-

“My only interest is quick disposal of this matter.”

The major complain of the society at large in this country is that the judiciary is slow in processing the cases before it. It is for that reason I commend the learned magistrate for having the interest of disposing the matter quickly. I therefore find that the constitutional rights of Njiru were not breached when he was denied an adjournment. On the second issue, Njiru argued that to subject him to both criminal and civil trial would lead to double jeopardy. Double jeopardy in the Black’s Law Dictionary is stated to be from the 5th Amendments of the provisions of the American constitution. That amendment states:-

“Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”

In England, it is called the doctrine *“autrefois acquit and convict.”* The doctrine of *“autrefois acquit and convict”* is essential elements of protection of the liberty of the subject and respect for due process of law in that there will be finality of proceedings. By Criminal Justice Act 2003 England provided an exception to this doctrine where *“fresh and viable”* new evidence was found in respect of murder suspect. Where such evidence was found, murder suspects could be subjected to a second trial. With that doctrine in mind, and considering the 5th Amendment of American constitution, I am sure that Njiru did not mean to invoke the doctrine of double jeopardy. It is clear as submitted by the learned state counsel that the fact there is a civil action concerning a matter which is the basis of a criminal trial cannot be the basis of staying or delaying the criminal proceedings. To give but one example is where a person is alleged to have caused a motor accident which leads to injury to a person. Such a motorist is liable to be prosecuted in the criminal court under the Traffic Act. The person who is injured is also entitled to sue the motorist for damages for injuries suffered. There is no basis for the prayer that the criminal case before the Chief Magistrate Court should be withdrawn because of the pending civil action in the High Court. As stated before, the complainant in the criminal trial filed the civil action in the High Court seeking a refund of the purchase price paid to Njiru. In the end I therefore dismiss the petition dated 20th May 2010 with costs being awarded to the respondent. I hereby vacate the stay of the Chief magistrate Court Criminal Case No. 216 of 2010 which stay order was issued on 15th June 2010. I order that this judgment be served upon the Chief Magistrate Meru to ensure that the trial of Criminal Case No. 216 of 2010 does resume.

Dated, signed and delivered at Meru this day of 3rd March 2011.

MARY KASANGO
JUDGE