



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 109 OF 2013

[CORAM: KOOME, KIAGE & KANTAL, JJA]

BETWEEN

MARTIN MAINA.....APPELLANT

AND

ASHRAF SAVANI.....1ST RESPONDENT

MADATALI S. CHARTUR.....2ND RESPONDENT

CHIEF MAGISTRATE COURT KIBERA.....3RD RESPONDENT

KILIMANI POLICE STATION.....4TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS...5TH RESPONDENT

ATTORNEY GENERAL.....6TH RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (C.W. Githua, J delivered by Odunga G.V. on 20th March, 2013

In

The High Court of Kenya at Nairobi

Misc. Application No. 289 of 2011

JUDGMENT OF THE COURT

The appellant, **Martin Maina** is an advocate of the High Court of Kenya practicing law in the name and style of **Maina & Maina Advocates**. The said law firm was engaged by one **Salim Hussein Dungarwalla** in a transaction of a property known as Land Registration **No.1870/X/24** which property was offered for sale. There was an offer to purchase but in subsequent events the said law firm appears to have been bypassed and parties engaged directly with the transaction for the purchase of the said property. The appellant through his law firm placed a caveat over the title to the said parcel of land and filed proceedings at the Environment & Land Court being **ELC No. 2315 of 2007** seeking an injunction and specific performance in the suit in respect of an agreement that had been entered. The caveat was removed through what was alleged to have been acts of forgery and presentation of forged court documents. The appellant being aggrieved by those actions filed a case being Chief Magistrate's Court at Nairobi Misc. Private Prosecution Case **No. 349 of 2011** (private prosecution case) with the appellant being the Intended Prosecutor against 4 parties; **Right-End Properties Ltd**, (the intended purchaser), **Ashraf Savani** (the 1st respondent herein), **Madatali S. Chartur**, (the 2nd respondent herein) and **Stephen Oyugi Okero** (a lawyer), where it was prayed that the appellant be granted leave to institute private prosecution against the said parties, **Right-End Properties Ltd**, **Ashraf Savani**, **Madatali S. Chartur** and **Stephen Oyugi Okero**. It was also prayed that subsequent to grant of leave to institute private prosecution, warrants of arrest be issued against the 1st respondent (Ashraf Savani), the 2nd respondent (Madatali S. Chartur), and the lawyer Stephen Oyugi Okero, and the warrants be executed by the District Criminal Investigations Officer, Kilimani Police Station to apprehend the said persons and compel their attendance to court. It was further prayed that the Director of Public Prosecutions (the 5th respondent herein) be at liberty to take over the matter. In grounds in support of the motion, it was stated that there had been a forgery of a court order; that there had been a forgery of a

notice of withdrawal of a caveat; that the said forged documents had been presented to the Registrar of Titles; and that the said Registrar had been made to use the forged documents to register a transfer in favour of Right-End Properties Limited.

It was further stated that the appellant and his client had made various visits to the Provincial Criminal Investigations Department headquarters where they had recorded statements but that no action had been taken by the police on the complaint made. The appellants swore an affidavit in support of the motion and attached a complaint where particulars of the complaint, the complainant and the accused were stated. Also attached was a charge sheet containing various charges including complaints and particulars thereof but which charge sheet was not signed.

The motion was presented before the Chief Magistrate's Court at Kibera who considered the same and, in an order issued on a date which is not clear from the record, it was ordered in the main that warrants of arrest do issue against the 1st and 2nd respondents and also against the lawyer Stephen Oyugi Okero. The District Criminal Investigations Officer, Kilimani, was ordered to apprehend the said accused persons and compel their attendance to the Chief Magistrate's Court, Kibera, within seven days for them to answer to the charges framed. It was also ordered that the Director of Public Prosecutions, (the 5th respondent herein) was at liberty to take over the conduct of the proceeding.

The respondents herein Ashraf Savani (the 1st respondent), Madatali S. Chartur (2nd respondent), the Chief Magistrate's Court, Kibera (3rd respondent), Kilimani Police Station (4th respondent), the Director of Public Prosecutions (5th respondent) and the Attorney General (6th respondent) challenged the issuance of those orders in High Court Judicial Review Miscellaneous Civil Application No. **289 of 2011**. Leave was granted to institute judicial review proceedings as is required and in the Notice of Motion filed at the High Court of Kenya at Nairobi on **22nd November, 2011** it was prayed in the main that an order of certiorari be issued to bring into that court and quash the order /decision of the Chief Magistrate's court at Kibera to issue a warrant of arrest against the applicants in that cause and that an order of prohibition be issued to prohibit the Chief Magistrate's court from bringing charges or hearing charges in relation to the private prosecution case which had been presented by the appellant.

In the statutory statement, and affidavits in support of the motion, it was stated that proceedings pursuant to which the warrants of arrest was issued were incurably defective, null and void because the application for private prosecution was brought when there was no existing case before the court and before trial had started which it was said to be contrary to law; that there was no formally duly signed charge against the applicants in that cause when the warrants of arrest were issued, which it was said was contrary to law and that the warrants of arrest were issued against the applicants in that cause for non-existent charges. It was also stated that warrants of arrest were issued without the Director of Public Prosecutions and the police investigating the matter; that the said offices had not been given a chance to be heard and that the proceedings before the subordinate court were defective as there was no complainant or proper complainant in the matter.

It was further stated that the proceedings in the subordinate court were unjust, unfair and oppressive to the applicants in that the intended private prosecutor was also the complainant and a witness which it was said would result in an unfair trial. It was also said that the applicant in the subordinate court had no *locus standi* to bring the private prosecution or apply for warrants of arrest and that the intended private prosecutor had suffered no personal injury or damage and the application had been brought to settle a civil dispute over a property.

Placed before the court was a replying affidavit on behalf of Kilimani Police Station (4th respondent) and the Director of Public Prosecutions (5th respondent) sworn at Nairobi on **22nd November, 2011** by **No. 82649 P.C Isaac Ogutu**, a Police Officer serving in the Kenya Police then attached to the Provincial Investigations Office, Nairobi. He deposed that he was one of the investigating officers in Inquiry **File No. 6 of 2011** where a complaint had been made by the appellant involving the complaint he had made about forgery. He deposed that on **18th February, 2011**, their office had received a complaint from the appellant in relation to the subject property which property belonged to **Anglican Church of Kenya registered under Uzima Press Limited** and the matter was under investigations after the appellant had recorded a statement. He further deposed that in the course of investigations, it had been established that the Anglican Church of Kenya intended to dispose of the same and that an agreement had been entered but that the vendor had withdrawn from the transaction after establishing that the appellant and his client **Salim Hussein Dungarwalla** had forged the original sale agreement and altered the purchase price from the agreed sum of Kshs **Twenty Seven million to Kshs Thirty Seven million** which alteration the vendor had not participated in, forcing the vendor to rescind the agreement; further that the vendor had later entered into another agreement with an intended purchaser and the whole matter was under investigations. At paragraphs 13, 14, 15, 16 & 17 of the affidavit, Police Constable Ogutu deposed:

"13. The case under investigations is of a complex nature with voluminous documents from different Departments and Ministries of the Government and witnesses respectively and we are in the process of completing the investigations.

14. I have been advised by the State Counsel under the conduct of this matter which advise I believe to be true that upon the conclusion of the investigations, the Director of Public Prosecution will make appropriate decision once the investigations are completed.

15. It is in the best interest of justice that the police be allowed to complete investigations and the Director of Public (sic) to make appropriate decision based on the evidence on the file.

16. The application for private prosecution is premature and is preempting the outcome of the investigations of the case.

17. The application is made in bad faith and it is an abuse of the court process."

The motion was heard by **C.W. Githua J**, who in a judgment delivered on **14th March, 2014**, found the application merited and allowed it in the event bringing into the High Court and quashing the orders where warrants of arrest had been issued against the 1st and 2nd respondents, and prohibiting the 3rd respondent from bringing charges or hearing charges in relation to the private prosecution case. It is those orders that provoked this appeal which is premised on the Memorandum of Appeal drawn by the firm of **Maina & Maina Advocates** where five (5) grounds of appeal are set out. The grounds challenge the Judge's finding that the appellant had no *locus standi* to institute the private

prosecution proceedings; that the Judge erred in law in holding that the orders obtained by the appellant before the learned magistrate were issued illegally and that there was procedural impropriety in the process leading to issuance of those orders; that the Judge erred in law in granting orders of certiorari and prohibition without the proceedings of the lower court being filed as part of the record and that the Judge erred in law and fact in allowing the application. It is therefore prayed that the appeal be allowed and the judgment of the High Court be discharged and set aside and the orders made therein be vacated and that costs of this appeal be borne by the respondents.

When the appeal came up for hearing before us on 16th January, 2019, **Miss Maitai**, learned counsel instructed by **M/s Maina and Maina Advocates** appeared for the appellant while **Miss Rubeena Dar** instructed by **Miller & Co. Advocates** appeared for the 1st and 2nd respondent. **Miss Joyce Ngelechei** appeared for the 3rd and 6th respondents but there was no appearance for the 4th and 5th respondents who we noted had been served with a hearing notice for the day. In the event we allowed the appeal to proceed for hearing. **Miss Maitai** for the appellant brought to our attention that the appellant had filed written submissions and a digest of Authorities and fully relied on the same and did not wish to highlight.

Miss Rubeena Dar had also filed written submissions and fully relied on the same.

Miss Ngelechei for the 3rd and 6th respondents had not filed submissions and indicated to us that those respondents took no position in the appeal.

We have considered the record of appeal and the submissions made and this is the position we have taken in this appeal.

The central issues that we recognize for our determination are whether the appellant had *locus standi* to institute the proceedings and whether there was a valid complaint or charge laid before the subordinate court to entitle it to issue warrants as it had done.

The Constitution of Kenya 2010, established the Office of Director of Public Prosecutions and under Article 157(6) the Director of Public Prosecutions may take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by other persons or authority with the permission of that person or authority. The power to institute private prosecution is limited in the sense that it can only be exercised with the leave of the court and the intended private prosecutor must satisfy several legal requirements before leave is granted to institute private prosecution and once leave is granted, the intended prosecutor and the magistrate are required to comply with certain procedural steps in order to lawfully commence private prosecutions.

In the case of **Otieno Clifford Richard vs Rep. [2006]eKLR**, the court set out the principles to be followed by subordinate courts in deciding whether or not to grant leave to institute private prosecution. The principles were set out as follow:

“The court must apply the principles and safeguards we have set out above to satisfy itself that before the plaintiff (the intended prosecutor) filed the application in the subordinate court for permission:

(a) he had reported to the police and or the Attorney General; and

(b) reasonable opportunity was accorded to either of the two state agencies to commence public prosecution; and

(c) the two public prosecutorial machineries have declined to institute the criminal proceedings or have acted with culpable inertia and partiality; and

(d) That the decision not to institute public prosecution by the state agencies is mala fide, without reasonable cause; and

(e) the plaintiff has a prima facie case, has suffered injury or damage personal to himself and that he is not actuated by malice, politics or ulterior considerations devoid of good faith.”

We observe from the record that in the proceedings taken in the private prosecution case, the appellant was the intended prosecutor. The complaint related to a transaction where the appellant was instructed as an advocate to represent a party in a conveyance of property. There was no complaint by the party who the appellant was representing who, indeed, was said to have died. It is the appellant as an advocate who presented the complaint on his own behalf.

Then there is the issue of the charge sheet. Section 89 of the Criminal Procedure Code on complaint and charge provides as follows:

“89(3). A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate.

(4).The magistrate, upon receiving a complaint, or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of subsection (5), draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless the charge is signed and presented by a police officer”

The appellant presented a complaint before the Chief Magistrate’s Court at Kibera. He complained that certain criminal offences had been committed and that he had made a report to police but that no action had been taken. He drew up a charge which was attached to the application but the same was not signed and upon receipt by the magistrate, the magistrate did not sign it as required by Section 89 of the Criminal Procedure Code as we have stated in this Judgment. Police Constable Isaac Ogotu in the replying affidavit stated that the police had

received a complaint, that the investigations were complex but were ongoing and that the Director of Public Prosecutions would make appropriate decision once investigations are completed.

There was lack of compliance with procedural steps in the drawing up and receipt of the complaint in the matter before the Chief Magistrate and we agree with the Judge who dealt with the judicial review proceedings that the intended private prosecution was flawed. It was not shown that, after filing complaint the police or the Director of Public Prosecutions had failed to take action within a reasonable time. It was not shown that the said offices had failed or refused to carry out their constitutional duties. It was not shown that the appellant was acting in good faith in a matter where his client was not the complainant or intended private prosecutor. The appellant did not show that he had suffered any damage or injury. Worse still, when the complaint that contained charges to be preferred against intended accused was presented before the magistrate it was not received or signed by the magistrate in any way at all, which flouted the clear provisions of the Criminal Procedure Code as regards the signing of a complaint.

Having considered the whole record and submissions we have reached the opinion that the learned Judge was entitled to reach the findings which she reached and we find no merit in this appeal which we hereby dismiss. In the circumstances that obtained we think that the proper order on costs is that each party bear their own costs. It so ordered.

DATED & Delivered at Nairobi this 5th of April, 2019.

M. KOOME

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR