



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: G.B.M. KARIUKI, M'INOTI & J. MOHAMMED, JJA)**

**CIVIL APPEAL NO.51 OF 2014**

**PETER ODIWOUR NGOGE T/A**

**O. P. NGOGE & ASSOCIATES.....APPELLANT**

**AND**

**JOSEPHINE AKOTH ONYANGO.....1<sup>ST</sup> RESPONDENT**

**SIMON OTIENO ONYANGO.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS....3<sup>RD</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL**

**INVESTIGATIONS DEPARTMENT.....4<sup>TH</sup> RESPONDENT**

**SEHIT INVESTMENTS LIMITED.....5<sup>TH</sup> RESPONDENT**

**KENYA COMMERCIAL BANK LTD.....6<sup>TH</sup> RESPONDENT**

**(An appeal from the Judgment and decree of the High Court of Kenya**

**at Nairobi (Majanja, J.) delivered on 10<sup>th</sup> day of March, 2014**

*in*

**PETITION NO. 471 OF 2013**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. The record in this appeal shows that the appellant, Peter Odiwour Ngoge T/A O.P. Ngoge & Associates is an advocate of the High Court of Kenya. He was aggrieved by the decision of Majanja J made on 10<sup>th</sup> March 2014 in the High Court at Milimani, Nairobi, in a constitutional petition No. 471 of 2013 in which he was the 2<sup>nd</sup> interested party while Ms. Josephine Akoth Onyango and Mr. Simon Otieno Onyango were the petitioners. The Directors of Public Prosecutions and Criminal Investigations were the 1<sup>st</sup>

and 2<sup>nd</sup> respondents, respectively. Besides the appellant, there were two other interested parties named in the petition, to wit, Sehat Investments Ltd and Kenya Commercial Bank Ltd who were the 1<sup>st</sup> and 3<sup>rd</sup> interested parties, respectively.

2. The petitioners had filed the said petition (No.471 of 2013) in the High Court to stop the respondents from prosecuting them in the Chief Magistrate Court at Kibera in Criminal Cases Nos.6531/2012 and 2178/2013 because, they contended, the issues in the criminal cases were “intricately the subject of the Suit” No.705 of 2009 pending in the High Court at Nairobi in which they and Savings & Loan Kenya Ltd and the Attorney General were the defendants while Sehat Investments Ltd was the plaintiff. In the said constitutional petition, the petitioners sought from the High Court two declaratory orders and an injunction as follows –

*i. A declaration that the Respondents have infringed the Petitioners’ Constitutional rights contrary to Article 27, 47, 48 and 50 of the Constitution.*

*ii. A declaration that the respondents have abdicated and/or abused their authority by charging the Petitioners in criminal cases No.6531 of 2012 and 2178 of 2013 at the Chief Magistrate’s Court at Kibera on issues intricately the subject of the High Court Civil Case Number 705 of 2009.*

*iii. An injunction restraining the respondents either jointly or severally or through any person claiming their authority from prosecuting the petitioners in Criminal Case No.6531 of 2012 and 2178 of 2013, or a consolidation thereof, or in any matter concerning the transfer of all that piece or parcel of land known as Land Reference Number 1160/784 to the 1<sup>st</sup> petitioner until the conclusion of High Court Civil Case No.705 of 2009 and any reviews or appeals therefrom.*

*iv. And such other side (s) as this Honourable Court shall deem just in the circumstances.*

3. As is apparent, no order or declaration was sought against the appellant in the petition and as shown below, none was given against the appellant.

After hearing the petition, Majanja J determined it by making the following order which gave rise to this appeal –

***“(a) An injunction be and is hereby issued restraining the respondents either jointly, or severally or through any person claiming their authority from prosecuting the petitioners in Kibera Criminal Case No.6531 of 2012 and 2178 of 2013, or a consolidation thereof, or in any matter concerning the Transfer of all the piece or parcel of land known as Land Reference Number 1160/784 to the 1<sup>st</sup> petitioner until the conclusion of High Court Civil Case No.705 of 2009 and any review or appeals therefrom or upon further directions from the Court.”***

***“(b) There shall be no order as to costs.”***

4. The facts emerging from the petition show that in the year 2002 Josephine Akoth Onyango, the 1<sup>st</sup> respondent in this appeal, entered into a contract to buy from the 5<sup>th</sup> respondent, Sehat Investments Ltd, a property known as LR 1160/784 (“the suit property”) at a price of Shs.18 million. The suit property was transferred to the 1<sup>st</sup> respondent after payment of Shs.9.5 million and the balance of Shs.8.5 million was to be procured from Kenya Commercial Bank Ltd, the 6<sup>th</sup> respondent, upon a charge to secure the repayment being registered in the latter’s favour against the title. According to the 1<sup>st</sup> respondent, the 5<sup>th</sup> respondent received the balance of Shs. 8.5 million from the Kenya Commercial Bank, the 6<sup>th</sup> respondent. Although the 1<sup>st</sup> respondent became the proprietor of the suit property following completion of sale, the 1<sup>st</sup> respondent stated that she did not require it immediately and, therefore, when one Rose Mbithe Mulwa, a director of the 5<sup>th</sup> respondent, the vendor company, requested the 1<sup>st</sup> respondent to allow her and her family to continue living in the suit property as they had been doing prior to the sale,

the 1<sup>st</sup> respondent obliged on the understanding that Rose Mbithe Mulwa would pay Shs.40,000/= as rent. According to the 5<sup>th</sup> respondent, this rent was paid up to the year 2008.

5. Curiously, four years later, a suit No.705 of 2009 was instituted in 2009 in the High Court at Milimani Courts by the 5<sup>th</sup> respondent (as plaintiff) against the 1<sup>st</sup> and 2<sup>nd</sup> respondents who were named as the 1<sup>st</sup> and 2<sup>nd</sup> defendants and a subsidiary of the 6<sup>th</sup> respondent, savings and loan Kenya Ltd (which was named as the 3<sup>rd</sup> defendant) to which the suit property was charged to secure the repayment of Ksh.8.5 million. The Attorney General and the Director of Public Prosecutions (DPP) were named as the 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively.

6. The 5<sup>th</sup> respondent, *qua* plaintiff, averred in the suit that the 1<sup>st</sup> respondent was unable to complete the purchase of the suit property although not only was the property transferred to the 1<sup>st</sup> respondent but and the 5<sup>th</sup> respondent also had accessed the sale proceeds from the 6<sup>th</sup> respondent following the transfer of the property and registration of the charge in favour of Savings & Loan (K) Ltd.

7. In the said suit No.705 of 2009, Sahit Investment Ltd, the 5<sup>th</sup> respondent, sought, inter alia, a declaration that the transfer of the suit property to the 1<sup>st</sup> respondent was null and void due to want of consideration, misrepresentation and fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 5<sup>th</sup> respondent prayed for cancellation and revocation of the transfer and discharge of the charge and a reconveyance of the suit property to its name.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents denied these allegations and in particular the allegation that they did not pay the full purchase price. They also denied the fraud alleged. That suit is still pending.

8. In February 2013, the appellant filed Suit No.48 of 2013 in the High Court at Milimani, Nairobi against the 1<sup>st</sup> and 6<sup>th</sup> respondents, and Walker Kontos, advocates, and the Attorney General as defendants Nos. 1, 2, 3 and 4 respectively. The appellant averred that he did not witness payment by the 1<sup>st</sup> respondent to Sahit Investments Ltd, the 5<sup>th</sup> respondent and that the sale of the suit property was fraudulent. He sought cancellation of the registration of the 1<sup>st</sup> respondent as proprietor of the suit property and all the entries relating to the registration of the transfer to the 1<sup>st</sup> respondent.

9. Following a complaint to the police by Sahit Investments Ltd (the 5<sup>th</sup> respondent) that the 1<sup>st</sup> respondent had forged the transfer and charge relating to the suit property, the 1<sup>st</sup> respondent was arrested and charged on 20<sup>th</sup> December 2003 in Criminal Case No.6531 of 2012 and the 2<sup>nd</sup> respondent was subsequently arrested and charged with conspiracy in criminal case No.2178 of 2013 and the two cases were then consolidated.

10. It is in those circumstances that 1<sup>st</sup> and 2<sup>nd</sup> respondents went to the High Court and instituted the constitutional petition No.471 of 2013, contending that their constitutional rights as they related to fair hearing, access to justice and fair administrative action pursuant to Articles 27, 47, 48 and 50 of the Constitution had been violated.

11. The High Court (Majanja, J.) determined the petition on 10<sup>th</sup> March 2014. In his judgment, the learned Judge stated –

***“...in ascertaining whether there is an abuse of the court process I must assess the facts to make a determination. I must point to the fact that the Company appointed the firm of Musyoka Wambua and Company Advocates to act on its behalf to complete the purchase transaction and to receive the balance of the purchase price on its behalf. The deposition filed on behalf of the Bank shows that the Company participated in the perfection of the security through the firm of Musyoka and Wambua Advocates. At no time did the issue of the sale and subsequent transfer of the suit property being fraudulent arise. The respondent and the Company have not said***

*anything about the balance of the purchase price of Ksh 8.5 million forwarded to Musyoka and Wambua Advocates as per the instructions from the Company. I find it rather puzzling that the 2<sup>nd</sup> respondent has not disclosed whether in fact it took a statement from the advocate who dealt with the transaction on the Company's behalf or from the Bank to confirm the authenticity of the transaction.*

*"I also note that the charges facing the petitioner revolve around the genuineness of the transfer. The transfer document dated 22<sup>nd</sup> December 2003 is the central document which forms that basis of the charges against the petitioners. It is signed by the directors of the Company. It is one of the documents which the Company referred to as "completion documents" in its letter dated 9<sup>th</sup> March 2005 which would be forwarded to Walker Kontos advocates by Musyoka and Wambua Advocates. The Company's letter confirms that the transfer was in its possession and was to be forwarded to its advocates. How could the Company forward a transfer document, which was not signed by its directors, to its advocates as part of the completion documents and then complain several years later that the transfer itself was a forgery. If indeed the directors did not sign the transfer, on what basis did they authorize their advocate to receive the balance of the purchase price.*

*"My assessment of the facts I have outlined above lead to the conclusion that if the criminal proceedings are permitted to continue at this stage they will amount to an abuse of the Court process. All the parties' grievances are, in my view, capable of being settled in HCCC No.705 of 2009 which is now being heard.*

12. The appellant, aggrieved by that decision, lodged this appeal, on 25<sup>th</sup> March 2014 in this court. He proffered 20 grounds of appeal in the memorandum of appeal and prayed that the judgment of the High Court be set aside and the criminal proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> respondents be allowed to continue. He also prayed that "*the fraudulent transfer instrument*" of the suit property dated 22<sup>nd</sup> December 2003 be set aside *ex debito justitiae*. In addition he sought, general and exemplary damages to be assessed on account of violations of alleged fundamental rights. The main thrust of the grounds of appeal is that the learned Judge erred in his decision because he insulated the 1<sup>st</sup> and 2<sup>nd</sup> respondents from criminal prosecution and that the appellant's rights in Articles 25, 27 and 48 of the Constitution were infringed. But the High Court was not called upon in the petition to consider whether the appellant's rights under the Constitution were violated. That was not an issue before the court. Indeed the petition did not seek any reliefs from the appellant and the court did not grant any.

13. When the appeal came up for hearing before us, the appellant appeared in person while the 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by learned Counsel, **Mr. Joshua Nyawara**, who also held brief for advocate **Marete** for the 6<sup>th</sup> respondent. The 3<sup>rd</sup> and 4<sup>th</sup> respondents were represented by learned counsel **Mr. F. S. Shimosi and Mr. D. N. Ndege** while the 5<sup>th</sup> respondent's advocates on record, Messrs **Miller & Company**, though served, were absent.

14. At the commencement of the hearing of the appeal, all the parties through their respective advocates consented to have as additional evidence in the appeal and as part of the record in line with Rule 29 of this Court's Rules, the appellant's replying affidavit sworn by him on 2<sup>nd</sup> September 2008 and filed in H.C. Misc Civil Application No.87 of 2006 at Milimani Law courts, Nairobi. We have duly perused it as we have done the rest of the record of appeal.

15. **Mr. Ngoge** merged grounds 1, 3, 4, 10, 12, 14, 15 and 16 of appeal into one and submitted that while he did not dispute that the suit property was transferred to the 1<sup>st</sup> respondent, he did not draw the instrument of transfer or conveyance and the 1<sup>st</sup> respondent never paid fees to him. He however stated that he drew the sale agreement. In his view, the trial Judge should not have stopped the prosecution of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Mr. Ngoge submitted that there was fraud in the transaction which should have been exposed if the High Court had not stopped the criminal proceedings. He was however, at pains to put a finger at the alleged fraud

16. It was Mr. Ngoge's further submission under grounds 2 and 11 of the memorandum of appeal that the trial Judge ignored suit No.48 of 2013 in which Mr. Ngoge had sued the 1<sup>st</sup> respondent, the 6<sup>th</sup> respondent, the Attorney General, and Walker Kontos Advocates seeking a permanent injunction to restrain the 6<sup>th</sup> respondent from selling the suit property which he contended was owned by the 5<sup>th</sup> respondent whose "*fundamental rights under Article 40 of the Constitution and Article 4 of the African Charter was being violated with impunity.*" Dealing with grounds 14, 17 and 19, Mr. Ngoge termed the transfer of the suit property to the 1<sup>st</sup> respondent as fraudulent and null and void and sought orders for its cancellation along with all the entries related to the transfer. He had a further prayer for damages and costs. It was his submission that his law firm was exposed and the firm of Walker Kontos had no authority to deal with the documents from his office without his consent. According to him, Walker Kontos obtained the transfer from other sources and not from him. It was Mr. Ngoge's submission that the impugned judgment by Majanja J was inconclusive and erroneous and that the learned trial Judge exercised jurisdiction which he did not have. He contended that the appeal has merit and urged us to allow it.

**17. Mr. Nyawara** in opposition to the appeal, termed the appeal absurd.

He alluded to the matter in the High Court which he said was provoked by the aforesaid criminal proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> respondents. He told the Court that the appellant (Mr. Ngoge) was a witness in the civil case instituted by the 5<sup>th</sup> respondent, Sahit Investments Limited. The 5<sup>th</sup> respondent, he said, has not appealed the decision by Majanja J neither have the 3<sup>rd</sup> and 4<sup>th</sup> respondents. He drew our attention to the substantive submissions made in the case in the High Court and urged us to consider whether a party can give evidence in a civil case that is contrary to what such party has given in a criminal case. Mr. Nyawara submitted that the effect of Section 47 of the Evidence Act is that a conviction is deemed to be conclusive evidence against the person convicted. It was his submission that the criminal complainant against the 1<sup>st</sup> respondent in 2009 regarding the transfer of the suit property in 2005 was improper and was intended to circumvent the civil suits and that as such the criminal process was clearly an abuse of the court process which the trial Judge had a duty to stop. He urged us to dismiss the appeal as being devoid of merit.

**18. Mr. Ashimosi**, on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> respondents supported the appeal. He was of the view that Majanja J erred in the impugned judgment. In his view, there was no ground for halting the criminal proceedings.

19. In his reply, the appellant told the Court that his law firm was used to perpetrate fraud and that he had recorded a statement with the police regarding the matter.

20. We have perused with circumspection the record of appeal and have given due consideration to the submissions made by all the counsel. This appeal appears bizarre because no orders were sought against the appellant in the petition and, the court did not grant any against the appellant in the impugned judgment. So why and in respect of what is the appellant aggrieved?

His grievance is that the decision of the court in the impugned judgment "insulated" the 1<sup>st</sup> and 2<sup>nd</sup> respondents from prosecution. To address the appellant's said grievance, we have to make a determination in this appeal whether the impugned decision was correct or not. The appeal has a melancholy ring to it. It is not your normal appeal where the issues appertaining to legal rights asserted are unambiguous. Glaringly, the appellant's interest is to see the 1<sup>st</sup> and 2<sup>nd</sup> respondents prosecuted. At the centre of the legal imbroglio is the suit property which is sought to be wrestled from the 1<sup>st</sup> respondent.

21. The appellant is his own lawyer. First, he was named as the 2<sup>nd</sup> interested party in the constitutional petition filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents who alleged that the Director of Public Prosecutions (DPP) and the Director of Criminal (CID) Investigations "*in cohort with the appellant and Sehit*

*Investments Ltd colluded to maliciously prosecute the 1<sup>st</sup> and 2<sup>nd</sup> respondents on a false report made to the DPP”. The Petition also alleged that “the issues in the said criminal cases numbers 6331/2012 and 2178/2013 being the same as in the civil cases Nos.705 of 2009 and 155 of 2004 and with the Sehit Investments Ltd not only taking different positions in the cases but also contradicting the position taken by the appellant, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were bound to be prejudiced if the criminal cases were allowed to proceed.”*

22. As pointed out above, it is salient that while no orders or relief was sought in the petition against the appellant, the impugned judgment did not issue any order against the appellant. It however had references relating to or touching on the appellant but the order issued on determination of the petition was only directed against the Director of Public Prosecutions (DPP) and the Director of Criminal Investigations (DCIO), the 3<sup>rd</sup> and 4<sup>th</sup> respondents. Was the learned Judge correct in his decision? This is the issue for our consideration and determination. That is the issue raised in this appeal.

23. The learned Judge in his determination of the petition made the aforementioned order against the 3<sup>rd</sup> and 4<sup>th</sup> respondents neither of whom appealed against it. The factors that the learned judge took into account in reaching his decision included the fact that Sahit Investments Ltd, the 5<sup>th</sup> respondent, instituted High Court Civil Suit No.705 of 2009 4 years after completion of the sale and registration of the transfer in favour of the 1<sup>st</sup> respondent. The 5<sup>th</sup> respondent sought in the said suit a declaration that the transfer of the suit property to the 1<sup>st</sup> respondent was null and void. The 5<sup>th</sup> respondent in its pleadings in the suit made averments that were at variance with the complaint to the police including admission that the 5<sup>th</sup> respondent had executed the transfer instrument of the suit property in favour of the 1<sup>st</sup> respondent and the fact that the 5<sup>th</sup> respondent did not allege forgery of the transfer instrument. The 5<sup>th</sup> respondent also embraced the transfer of the suit property to the 1<sup>st</sup> respondent as genuine and confirmed receipt of the full purchase price. It was telling that the complaint to the police was not made until three years after the filing of the suit No.705 of 2009 and there was no explanation. More importantly there was evidence that he 5<sup>th</sup> respondent participated in the perfection of the transfer and appointed the firm of advocates to act for it in the finalization of the transaction and in receiving the balance of the purchase price.

24. The combined effect of these and other factors were considered by the learned judge in his determination of the petition and in his view which we uphold, the 1<sup>st</sup> and 2<sup>nd</sup> respondents made out a case that their prosecution was clearly an abuse of power. The prosecution of the 1<sup>st</sup> and 2<sup>nd</sup> respondents seems ostensibly designed to circumvent the civil suit No.705 of 2009 and wrestle from the 1<sup>st</sup> respondent the suit property. As observed by the learned judge, the 5<sup>th</sup> respondent was intent on using “criminal process for an ulterior purpose.” The learned judge expressed himself thus-

***“It intends to ensure that it gets the transfer of the suit property to Josephine (1<sup>st</sup> respondent) reversed by whatever means. In the HCCC No.705 of 2009, the company (5<sup>th</sup> respondent) clearly admits that it executed the transfer on the basis of fraudulent misrepresentation being made to it. Three years later, it brings a complaint to the police that the transfer was forged. On the basis of the time taken to lodge the complaint and such contradictory facts from the company (5<sup>th</sup> respondent) made on oath in the civil suit, I find and hold that to permit the criminal proceedings to go on will amount to an abuse of the court process.”***

25. The High Court was enjoined by the Constitution to determine whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ fundamental rights enshrined in the Bill of Rights had been or were being violated, infringed or threatened. The record of appeal shows that the court directed itself correctly to the issues before it and took into account relevant factors in reaching its decision. The court had a duty to ensure that the 3<sup>rd</sup> respondent adhered to Article 157(11) of the Constitution which enjoins the 3<sup>rd</sup> respondent as follows:

***“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to***

***prevent and avoid abuse of the legal process.”***

In our view the High Court discharged the mandate given by Article 23(1) of the Constitution which stipulates:

***“23(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine the applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”***

In ***Commissioner of Police & Others v. Kenya Commercial Bank Ltd & 4 Others***, CA No. 56 of 2012, this Court considered the terms of Article 157(11) and stated as follows:

***“If it comes to the attention of the Court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice and restrain (abuse) of power that may lead to harassment or prosecution.”***

26. Earlier in ***Joram Mwenda Guantai v. Chief Magistrate, Nairobi***, CA No 228 of 2003, this Court expressed itself thus, in an appeal where it was contended that the prosecution of the appellant was oppressive and in abuse of power:

***“Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. It was succinctly put in Stanley Munga Githunguri vs Republic [1985] KLR 91 that if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious the Judge has the power to intervene and that the High Court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court. This dictum is now an everyday edict in our courts and we are indeed surprised that the learned Judge was shy to so declare.”***

We respectfully agree.

27. In the result, we uphold the decision of the High Court. We find no merit in the appeal which we hereby dismiss with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> respondents.

**Dated and delivered at Nairobi this 2<sup>nd</sup> day of October 2015**

**G. B. M. KARIUKI**

.....

**JUDGE OF APPEAL**

**K. M’INOTI**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**