Republic v Principal Magistrate Maralal & another; Eregai & another (Exparte Applicants); Lengupae (Interested Party) (Miscellaneous Civil Application 17 of 2023) [2024] KEHC 3985 (KLR) (23 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3985 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

MISCELLANEOUS CIVIL APPLICATION 17 OF 2023

AK NDUNG'U, J

APRIL 23, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

PRINCIPAL MAGISTRATE MARALAL ..... 1ST RESPONDENT

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
2ND ..... 2ND RESPONDENT

AND

MARY EREGAI ..... EXPARTE APPLICANT

EBENYON AIYUTE ..... EXPARTE APPLICANT

AND

JENERICA LENGUPAE ..... INTERESTED PARTY

JUDGMENT

1. By way of a Notice of Motion dated 13/4/23 filed pursuant to the leave of this court (Waweru J) dated 23/3/23, the Applicants seek the following orders;

    1. An order of Certiorari do issue to remove to this court the proceedings in Maralal Principal Magistrate's Criminal Cases No.s E089 OF 2020, E034 of 2022 and E062 for purposes of quashing the same and prohibiting any further proceedings and prosecution of the subjects on the said cases.

    2. An order that the costs of this application and for obtaining the leave in Nanyuki High Court Miscellaneous Civil Application no. 3 of 2021 be awarded to the applicants.

2. The application is based on grounds as seen in the chamber summons dated 2nd March 2021, the Statement of facts and supporting affidavit of even date.

3. The gist of the Applicant's case as can be gleaned from the pleadings and affidavit evidence is that the applicants are the owners of plot No. 825 Maralal Township (LOIKAS AREA) having been allocated the same by the defunct Maralal Town Council. The interested party has instituted civil proceedings in Maralal Principal Magistrate Civil Suit No. 12 of 2020 seeking the eviction of the Applicants from the premises purporting the same to be her plot No. 825 A.

4. It is contended that the said interested party has during the pending of the Civil Suit instigated the charging of the 1st Applicant in Maralal Principal Magistrate's Criminal Case Nos. E089 OF 2020, E034 OF 2022 AND E062. The Applicants maintain that the said charges are meant to intimidate, harass, coerce and compel the Applicants to abandon their claim to the suit premises.

5. The application is opposed and in a replying affidavit CPL Cyrus Keter has deponed that investigations were carried out with due diligence and utmost professionalism to establish the rightful owner of plot 825 A which had 2 allocation letters. A forensic audit showed the applicants had forged papers.

6. CPL Keter adds that the 2nd Respondent was guided by the ''Decision to change guidelines'' and considered the evidence disclosed, the ingredients of the offences and the public interest.

7. I have considered the application the grounds and affidavit evidence relied upon. I have had regard to the replying affidavit. In addition, I have applied my mind to the learned submissions by Counsel and case law cited.

8. Of determination is whether the applicants have established the legal threshold for the grant of the judicial review orders sought.

9. Section 193 A of the Criminal Procedure Code provides that the existence of a civil suit is not a bar to the institution of a criminal case. The two can run concurrently.

10. As correctly put by counsel for the Respondents, the aggregate issue in the claims in the civil suit, both in the plaint and counter claim is the ownership of plot 825 (or 825A from the Interested Party's perspective).

11. On the other hand, the charges facing the applicants relate to forgery and making a document without authority. The subject document is letter REFMTC letter for plot No. 825. The said letter is the basis upon which the applicants claim the said plot.

12. It is the 2nd Respondent's case that these allegations have been investigated and evidence gathered which evidence includes a forensic document examiner's report. There is no evidence at all that in the institution of the criminal changes there was abuse of the process of the law or the subjugation of the right to a fair trial. The mere existence of a civil suit relating to the same facts is not of necessity a bar to criminal prosecution as clearly provided under Section 193A save where safeguards to a fair trial are breached.

13. In Kuria & 3 Others Vs Attorney General [2002] 2 KLR the court held:-

> " ...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced There should be concrete grounds

for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds.... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society& which are immense... an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial. (Emphasis added).

In the circumstances of this case, it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names"

14. I have looked at the submission by counsel for the Applicants. He correctly picks out the issue of the ownership of plot 825 (or 825A as variously described). He rightly asserts that the question of ownership of the plot ought to be determined in the right forum, the Environment and Land Court and indeed there is a suit already filed. It is urged that the criminal charges have been filed to pressurize the Applicants into abandoning their claim.

15. There is no iota of evidence that the rights of the Applicants under Article 49 and 50 of *the Constitution*, that is, the right of arrested persons and the right to fair hearing were breached.

16. It is worth nothing that the charges were instituted after investigations and sanctioned by the 2nd Respondent, the office of the Director of Public Prosecutions. Under Article 157 (6), the DPP may institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. Under Sub-Article 10, in doing so the DPP shall not require the consent of any person or authority and shall not be under the direction or control of any person or authority.

17. In Hon. James Ondicho Gesami vs The Attorney General & Others, Petition No. 376 of 2011, it was held that: -

> The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges...In my view, requiring that the petitioner subjects himself to the normal criminal prosecution process mandated by law where he has all the safeguards guaranteed by *the Constitution* does not in any way amount to an attack on his human dignity in violation of his constitutional rights".

18. On the duty of the police to investigate, the decision in Republic vs The Commissioner of Police & the Director of Public Prosecution ex parte Michael Monari & Another Misc. Application No. 68 of 2011, Nairobi, illuminates the law. The court stated;

> " .... the Police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left

to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice system. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene.

19. In this particular matter, the DPP has decided to charge the Applicants. No person or authority, and not even this court, can direct the DPP on who to change or not to charge. The Court's jurisdiction to Supervise the DPP's action is in ensuring that the decision to charge and which is an administrative action conforms to the ethos of a fair administrative action as envisaged under Article 47 of *the Constitution* and in Section 4 of the *Fair Administrative Action Act*.

14. Certainly, where the decision does not meet the legal muster of lawfulness, reasonableness and procedural fairness, the DPP shall be stopped in his tracks and the prosecution halted. Such a decision will not be made in a vacuum but will be based on congent evidence of illegality, unreasonableness, bias, breach of natural justice and procedural impropriety. In Leonard Otieno vs Airtel Kenya Limited [2018] eKLR the Court rendered itself as follows: -

> It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues.
>
> Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses. In any case, Article 24 (1) of *the Constitution* provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

20. The above parameter of proof is applicable in a judicial review application like the one before the court. The mere existence of a civil case relating to the same facts will not suffice as the co-existence of both criminal and civil cases is sanctioned by the law.

21. The burden is on whoever alleges the violation to demonstrate by way of evidence that the violation to the safeguards of a fair trial exists.

22. What emerges clearly is that so long as a prosecution is based on a fair process, the DPP has the powers to undertake it and it matters not that there is a civil suit or not. In our instant suit, even if the interested party was to withdraw her Civil suit from the court, the DPP would still be within his powers to pursue the criminal prosecution and, in a sense, the two cases are independent of each other.

23. This court must emphasize that it is not within its province to evaluate the strength or lack thereof of the evidence to be relied upon by the DPP. That is the preserve of the trial court.

24. It is at the trial court that the Applicants will have the opportunity to defend the charges and offer evidence. The court can only intervene if a fair trial is vitiated by, not only the DPP, but also by the 1st Respondent, (the trial magistrate).

25. The cumulative effect of the above is that the Applicants have not established the legal threshold for the grant of orders of judicial review sought. The Application fails and is dismissed. Each party to bear its own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF APRIL 2024.

JUSTICE A.K. NDUNG'U

JUDGE