



**Kalaiya v Director of Criminal Investigations & another (Petition E527 of 2021)
[2023] KEHC 17751 (KLR) (Constitutional and Human Rights) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E527 OF 2021

HI ONG'UDI, J

MAY 26, 2023

BETWEEN

NEERAJ JAYATILAL KALAIYA PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

JUDGMENT

1. The petitioner filed the amended petition dated 31st January 2021 date which is an error since the original petition was dated 9th December 2021. Leave to amend the petition was granted on 26th January 2022. In the said amended petition the petitioner claims violation of his rights under Articles 25(c), 40 of the Constitution. He therefore prays for the following orders:
 - i. An Order of Certiorari to remove into this honourable court for purposes of quashing any and all criminal prosecutions preferred against the petitioner in respect of offences related to the claim in ELC No E394 of 2021 and the property known as land reference number 1/1392 until the suit in ELC No 394 of 2021 is fully heard and determined.
 - ii. An order restraining the 1st respondent from prosecuting the Petitioner in respect of offences related to the claim in ELC No E394 of 2021 and the property known as Land Reference Number 1/1392.
 - a. declaration be and is hereby issued that investigations on the petitioner by the DCI and the DPP's Respondents intention to institute of criminal proceedings against the petitioner in Milimani Criminal case number violates his constitutional rights, is an abuse of court process and therefore unlawful, null and *void ab initio*.



- iii. Punitive damages for abuse of court process, abuse of police power, unlawful arrest and detention.
- iv. Costs and interest on prayer 3 above.
- v. Such other orders that this Honourable court may deem experience to meet the ends of justice.

Petitioner's Case

2. The petition is grounded on the supporting affidavit by the petitioner sworn on 8th December 2021 in the original petition. He has deponed that he is the registered proprietor of land reference No 1/1392 (I.R. No 235130) within the City of Nairobi. It measures 1.591 hectares. He has had a dispute with one Duncan Cheruiyot over this property. That the said Mr. Cheruiyot purports to be an employee of the Zambian High Commission. Following the said dispute he filed ELC case No E394/2021 Neeral Jayatilal Kalaiya vs. Duncan Cheruiyot, where he is seeking damages for trespass. The ELC issued an order for the status quo to be maintained by the parties.
3. He depones that before the hearing of the case which was slated for 21st January 2022 he was summoned to appear before the 1st respondent on 7th December 2021 which he did in company of his advocate. He was interrogated and even recorded a statement, and furnished the officers with all his documents and the site was visited. Thereafter his fingerprints were taken and a charge sheet prepared, but the 2nd respondent requested for time to give its report. He is asking the court to determine whether the respondents have acted within their mandate by ordering for his prosecution.
4. He has deponed further that the respondents are acting contrary to the law and are being used by unknown third parties to investigate the veracity of the title documents in his possession. He therefore asks this court to stop his prosecution. His documents are produced as NJK1.

The Respondents Case

5. The respondents relied on the grounds of opposition dated 11th January 2022 and the Replying Affidavit by No 236816 C.I. George Nyakundi. In the grounds of opposition counsel states that an arrest does not strip the petitioner of his constitutional rights under Articles 22, 49 & 50, and where there is proof of an infringement then he can seek for relief from the court. Secondly that by dint of Article 245(4)(a) & (b) of the *Constitution* and sections 24, 27 & 35 of the *National Police Service Act* Cap 84 Laws of Kenya. That the 1st respondent has a constitutional and statutory duty to investigate offences, and there was no evidence of an intended or current criminal charge against the petitioner.
6. It has been deposed by C.I. Nyakundi that the Ministry of Foreign Affairs lodged a complaint with the 1st respondent vide a letter dated 18th October 2021 Ref No MFA/PRIV/GEN/06 / (67) – GN-1. The said letter contained a note verbal 196/2021 being a complaint by the Zambian High Commission dated 01/10/2021 alleging trespass to their parcel of land No LR1/9B (GN-2). A search was conducted and confirmed that the said land does not belong to the petitioner (certificate of search GN-3). He averred that their investigations as noted from the documents marked GN-6-10 revealed that the petitioner had been involved in forgery of documents.
7. Further that the petitioner had filed Milimani C.M's Court ELC Misc. Application No E351 of 2021 where he obtained a restraining order after misrepresenting facts to the said court. He then used the said order to evict Mr. Cheruiyot an employee of the Zambian High Commission from the suit land. When the office of the Attorney General challenged the order in the Miscellaneous Application the petitioner rushed and filed ELC Civil Suit No E394 of 2021 and this petition.



8. The petitioner was released on police bail pending the 2nd respondent's decision on whether to charge him or not. The 2nd respondent has issued its decision to have the petitioner and 4 others charged (GN-14). The petitioner and others were thus charged before the Milimani Chief Magistrate's Court in CR. Case No E327 of 2022 (GN-15).
9. He deponed that the petitioner filed this petition to unjustly curtail the authority, exercise of constitutional and statutory powers and functions of the respondents as provided for under Articles 157, 244 & 245 of the Constitution and enabling statutory provisions.
10. In reference to section 193A of the Criminal Procedure Code he deposed that the criminal case should be allowed to proceed.

Submissions

The Petitioner's submissions

11. These were filed by Daniel Orege advocate and are dated 10th March 2022. Counsel referred to the averments in the supporting affidavit. He submitted that in terms of Article 157(11) of the Constitution and while exercising the powers donated by the law including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP must among other considerations have regard to the need to prevent and avoid abuse of the legal process.
12. He submitted that the 1st respondent did not allow the 2nd respondent sufficient time to allow him process the matter before approving the same. He was of the view that there were forces pushing the matter and harassing the petitioner out of the property. Referring to Article 29 of the Constitution counsel submitted that the respondents had not satisfied the court of the need to arbitrarily deny the petitioner his freedom of liberty.

The Respondents' submissions

13. These were filed by Litigation counsel M/S E. Makori and are dated 20th February 2023. On whether the petition raises any constitutional issues she submitted in the negative, saying the Petitioner had failed to show how his constitutional rights or freedoms were violated. In support she relied on the case of Bernard Murage vs. Fine Serve Africa Limited & others [2015] eKLR where the court stated:

“Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

14. On whether the respondents abrogated the rule of law and fair administrative action by unfairly prosecuting the petitioner in any criminal case relating to ELC E394 of 2021, she answered in the negative. She submitted that the 1st respondent only acted after receiving a complaint from the Ministry of Foreign Affairs. Investigations which were conducted in accordance with the law, revealed that the allotment letter which was in the name of the petitioner's late father was forged hence a criminal offence, had been committed.
15. Further that in view of the findings, the petitioner should have shown how the respondent failed to accord him protection and benefit of the law as set out in the case of Lt Col. Peter Ngairi & 7 others vs. Attorney General [2009] eKLR where the Court observed:

“...when the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove allegation. I have gone through the



entire court record and there is absolutely nothing to support the allegations made by the petitioners.”

16. It’s her submission that the petitioner failed to demonstrate how the 1st respondent acted illegally arbitrarily, unjustly, irregularly and/or oppressively in conducting investigations and preferring charges against him. Further that he had not shown how his rights were violated or that there was any threat to do so. It’s her contention that the petitioner’s rights are not absolute and he is misguided on the role of the 1st respondent. She prayed for dismissal of the petition with costs.

Analysis and Determination

17. I have carefully considered the pleadings, responses submissions by both parties and the law. I find the main issues falling for determination to be whether the respondents acted outside their mandate in investigating and recommending the charging of the petitioner with a criminal offence.
18. The respondents through the replying affidavit of C.I. Nyakundi stated that the petitioner had filed a Civil Application No E351 of 2021 – *Neeraj Jayatilal Kalaiya v. Duncan Cheruiyot* in the Chief Magistrate’s Environment and Land Court where he obtained an order to evict Duncan Cheruiyot an employee of the Zambian High Commission. The documents revealed that the orders issued by the Chief Magistrate’s were issued ex parte in early October 2021 or earlier (GN1 & 2). It is when the Attorney General challenged this order that the petitioner filed the ELC Civil Suit No 394 of 2021. Despite being served with the replying affidavit the petitioner never rebutted these averments.
19. Following what had happened the Zambian High Commission did a complaint to the Ministry of Foreign Affairs (GN2-2) dated 1st October 2021, who in turn raised a complaint with the 1st respondent (GN1). The letters are dated 18th October 2021. In the meantime the petitioner filed a Notice of Motion dated 17th November 2021 before ELC in E394/2021 where the following orders were issued by Justice Oguttu Mboya:
- i. That the subject application be and is hereby certified as urgent.
 - ii. That the same to be served forthwith upon the defendant/respondent, in any event, within the next 3 days henceforth and same to be heard on the 2nd December 2021.
 - iii. That in the meantime, the status quo currently obtaining in respect of the subject property shall be maintained, in particular, there shall be no further developments and/or construction on the suit property, whatsoever and/or howsoever.
20. These orders were specific and related to the land. There was no order stopping any investigations related to any criminal activities related to the land. The complaints by the Zambian High Commission to the Ministry of Foreign Affairs were of a serious criminal nature. Section 24 of the *National Police Service Act* which enlists the functions of the Kenya Police Service provides as follows:
- “ The functions of the Kenya Police Service shall be the—
- (a) provision of assistance to the public when in need;
 - (b) maintenance of law and order;
 - (c) preservation of peace;



- (d) protection of life and property;
- (e) investigation of crimes;
- (f) collection of criminal intelligence;
- (g) prevention and detection of crime;
- (h) apprehension of offenders;
- (i) enforcement of all laws and regulations with which it is charged; and
- (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.”

21. The 1st respondent took up the matter and investigated. The petitioner and the Zambia High Commission are both laying claim to the suit property. Looking at the documents in possession of the parties alone without investigating the source of the documents will not resolve the issue. I will not want to analyze the findings by the 1st respondent in his investigations as that will be the duty of the court or courts hearing the matter.
22. The file was forwarded to the 2nd respondent for action. In a letter dated 11th March 2022 (GN-14) the 2nd respondent recommended for the charging of the petitioner. Article 157 sets out the duties / functions of the 2nd respondent. Article 157(6)(a) provides:
- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
 - (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - (9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
 - (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
23. For the petitioner to claim that the respondents went beyond their powers in arresting and charging him, he had a duty to demonstrate any malice, illegality arbitrariness, injustice, irregularity and/or oppression. None of these was demonstrated as having been the case. It is the petitioner’s prayer that the respondents should be barred from charging him because of the existence of ELC Civil Suit No 394/2021.
24. Section 193A of the *Criminal Procedure Code* provides:

193A. Concurrent criminal and civil proceedings 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 a ground for any stay, prohibition or delay of the criminal proceedings.

If there was such a serious need to have the criminal proceedings stayed then the best placed forum to deal with that would have been the Environment & Land Court since the matter in dispute is before the said court.



25. Even with that it is still the criminal court that will determine whether the documents relied on by the parties to claim ownership of the parcel of land are genuine or not. There is no way the petitioner will avoid appearing before that court for such determination.
26. Granting the orders sought by the petitioner will amount to uncalled for interference with the respondents' mandate. For the reasons above I find the petition lacking in merit and I dismiss it with costs to the respondents.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 26TH DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

