



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.223 OF 2018

IN THE MATTER OF ARTICLES 22(1), 23(1), 165(3) (b) & (6) & (7) & 258(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 10,19,20,21,29,40,47,48,49,50,157(11),232(a,c & e), 238(b), AND 244 (a & c) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULES 3, 4(1) 10 & 13 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

GODFREY NGATIA NJORGE.....PETITIONER

- AND -

THE INSPECTOR GENERAL OF POLICE.....1^S RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS...2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner through a petition brought pursuant to Articles 10,19,20,21,29,40,47,48,49,50,157(1), 232, 238 and 244 of the Constitution of Kenya 2010 seeks the following reliefs:-

- a) A declaration that the Respondents herein have contravened Article 10 of the 2010 Constitution of Kenya in that the National Values and Principles of Governance set out have not been observed and that the decisions relating to the institution of criminal proceedings against the Petitioner vide **Chief Magistrate's Court at Ngong' Criminal Case No. 64 of 2018** is an abuse of social justice.
- b) A declaration that the Respondents herein acted unlawfully when they arrested, arraigned and prosecuted the Petitioner herein in the **Chief Magistrate's Court at Ngong' vide Criminal Case No. 64 of 2018**.
- c) A declaration that the Petitioner's rights to a fair trial have been violated.
- d) An order to the effect that the Criminal proceedings against the Petitioner at the **Chief Magistrate's Court at Ngong' vide Criminal Case No. 64 of 2018**, are a nullity and should be quashed.
- e) The Respondents herein be restrained from prosecuting the Petitioner and his employees in respect of offences related to **ELC Civil Suit No. 2099 of 2007** and the suit property.

f) The Respondents be restrained from intermeddling in the due Court process as regards **ELC Civil Suit No. 2099 of 2007**.

g) Any further Relief or Orders that this Honourable Court shall deem just and fit to grant.

h) Costs of this Petition.

2. The petitioner herein had been in occupation of suit property being **L.R. 13400** Karen since 2004 as a tenant pursuant to tenancy Agreement executed between the petitioner and Kenya Commercial Bank Limited and Elizabeth Oganja. There is an existing suit being Milimani Elc Civil Suit No. 2099 of 2007 between the Kenya Commercial Bank Limited and Elizabeth Oganja (*suing as the executor of the estate of the late Prof. Simon Ominde*), which suit is still on going.

3. The Environment and Land Court in Milimani Elc Civil Suit No. 2099 of 2007 has delivered 3 Rulings dated 25th February 2010; 29th May 2012 and 8th November 2012 (**see annexures 6NN (a); 6NN (b) and 6NN (c)**). In all the three Rulings, the Plaintiffs/Applicants were seeking to have the petitioner herein evicted from the suit property but the Elc court declined to grant orders for evictions in its three Rulings. The Plaintiffs/Applicants in Milimani Elc Civil Suit No. 2099 of 2007 sought to have assistance of Karen Police Station which prayer was not granted by the court. That thereafter the 1st Respondent police officers attached to Karen Police Station tried a number of times to threaten the petitioner herein into vacating the suit premises (**see GNN-3**).

4. The Karen Police Station officers proceeded to arrest the petitioner and his farm hand men at the petitioner's premises, **L.R. 13400** Karen. The petitioner was on 13th February 2018 charged with the offence of preparation to commit a felony contrary to section 308(1) of Penal Code.

5. The petitioner is seeking therefore to quash the criminal proceedings in the Chief Magistrate's court at Ngong' Criminal Case No.64 of 2018 and that the Respondent be restrained from prosecuting the petitioner and his agents in respect of offences relating to Milimani Elc and Civil Suit No. 2099 of 2007 amongst other prayers as set out in the petition.

The 1st and 3rd Respondent's Case

6. The 1st and 3rd Respondents filed grounds of opposition in response to the petition. The 1st and 3rd Respondents contend, that the petition lacks clarity and precision pleading section 193A of the Criminal Procedure Code Chapter 75 of the Laws of Kenya.

The 2nd Respondent's Case

7. No. 235995 I.P. William Abele swore an affidavit on behalf of the 2nd Respondent on 10th September 2018; deponing that he is currently undertaking investigations into an offence of preparation to commit a felony currently pending before the Chief Magistrate's Court Ngong' in Criminal Case No. 64 of 2018. He avers that on 14th February 2018, at around 1950 hours he received a report at Karen Police Station that a gang of about 30 people armed with crude weapon were trying to enter the premises of House of Encounter Church along Lang'ata Road in Karen. That they visited the scene and found over 30 people aboard KBJ 145 V Pick-up Double Cabin allegedly driven by the petitioner. The petitioner and four others were arrested, escorted to Karen Police Station and crude weapon recovered from them. That upon investigation, it was established that the complainants were the petitioner's tenants who he wanted to evict due to rent dispute. The petitioner and his con-accused were later arraigned in the Chief Magistrate's Court in Ngong' vide criminal case No. 64 of 2018. It is further averred by the deponent I.P. William Abele the criminal matter at Ngong' Chief magistrate court No. 64 of 2018 and the Milimani Elc Civil suit No. 2099 of 2007 have nothing in common and the criminal matter ought to be allowed to proceed to its logical conclusion.

Analysis and Determination

8. I have very carefully considered the petition, the grounds of opposition and Replying affidavit. The rival written submissions and from the aforesaid the issues arising for consideration can be reduced to the following:-

a) Whether the petitioner has met the threshold for granting reliefs sought in the petition and whether there was an abuse of constitutional mandate by the Respondents?

b) Whether an order to bring to the High Court the proceedings in Chief Magistrate Court at Ngong' Criminal Case No. 64 of 2018 can issue?

A) Whether the petitioner has met the threshold for granting reliefs sought in the petition and whether there was an abuse of constitutional mandate by the Respondents?

9. The test for constitutional matters has been settled and laid down in the celebrated case of **Anarita Karimi Njeru vs The Attorney General (1976-1980) KLR 1272**, where it was stated as follows:-

a) A party seeking redress for alleged violation of a Constitutional right should set out, with a reasonable degree of precision, that which he complains of;

b) The party must set out the precise provision said to be infringed; and

c) The manner in which that provision of the Constitution has been violated.

The Rule is further fortified under Rule 10 of the Constitution of Kenya (*Protection of Rights and Fundamental Freedom*) Practice and Procedure Rules, 2013.

10. The petitioner contends, that he had laid out with utmost specificity the precise constitutional rights that he purports to have been violated and how they have been violated.

11. The petitioner contends, that the Respondents carried out shoddy investigations and by relying on shoddy investigation to prosecute the petitioner.

12. **Article 157 and 249 of the Constitution of Kenya 2010**, respectively establishes the office of the Director of Public Prosecutions and Inspector of General and confer upon of them power to investigate any information or allegation of criminal conduct and offence and to carry out prosecution. The power to investigate given to the 1st Respondent and to prosecute given to the 2nd Respondent can only be challenged where the same has been exercised ultra-vires or in a manner that infringes the constitution.

13. The burden of proof lies on who alleges. The petitioner contend, that though the 2nd Respondent is an independent constitutional body, this court ought not to interfere with its mandate unless cogent reasons are given and further the court can interfere where the discretion has been abused or where the effect of the proceedings may result in the abuse of the court process (see **Musyoki Kimanthi vs Inspector General of Police and 2 others, Hc Petition No. 442 of 2013**).

14. I have carefully perused the petition and supportive affidavit by the petitioner, as well as the replying affidavit. The petitioner contend the arrest is not an isolated incident but part of the bigger scheme, that was hatched a long time ago which drew in the highest ranking police officer in Karen Police Station. That the plaintiffs in Milimani Elc suit No. 2099 of 2007 have all along been involved in actively trying to evict the petitioner from the suit premises despite the court orders issued. I find to the contrary, as the replying affidavit by **No. 235995 I.P** William Abele dated 10th September 2018 describes a different incident from where the petitioner was arrested and points at the petitioner and four others were arrested on 14th February 2018 armed with crude weapons trying to enter the premises of House of Encounter Church along Lang'ata Road in Karen. The petitioner has not filed any supplementary affidavit to controvert the contention in the said Replying affidavit. Further I have not found evidence to prove that the Respondents acted against the constitution or against relevant statute in exercise of their constitutional mandate or function. No malice has been demonstrated or abuse of their power. Further no connection of the criminal case and civil case at Milimani has been established.

15. **Section 193A of the Criminal Procedure Code, (Cap 75) Laws of Kenya** does not bar concurrent criminal and civil proceedings proceeding at the same time. It provides:-

"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."

The above-mentioned prerogative of police is not however absolute and as such it must be exercised responsively in accordance with the laws and good faith. It is not a licence for police to act ultra vires or in a manner that is malicious and/or in contravention of the constitution. That if police in exercise of their mandate acts contrary to the statute or constitution or with malice in prosecuting a citizen then the criminal prosecution ought to be barred against the concerned citizen.

16. The petitioner allege his rights as provided by Articles 10,19,20,21,29,40,47,48,49,50,157(ii); 232 and 244 of the constitution has been violated by the Respondents by preferring the prosecution in Chief Magistrate's Ngong' Court in Civil case No. 64 of 2018, but he has not demonstrated how his rights has been violated; by the respondents in discharging their mandate in accordance with the law and the provision of the constitution.

17. In the case of **Nairobi High Court Petition No.361 of 2017 Hassan A.A.H. Zubeidi vs DPP & 2 Others** it was held that:-

"Except where there is clear disclosure of some element of violation of the constitution, human rights and fundamental freedoms, the court would not intervene merely because a party has alleged violations. There must be clear and demonstrable facts to support such claim. This is because the issues raised in this petition are more of factual than legal or constitutional."

18. I am upon perusal of all the pleadings, of the view, that the petitioner has not sufficiently demonstrated with particularity how his rights have been infringed. The petitioner has not met the threshold of proofing his case. He has not discharged the burden of proof as provided for under sections **107(1) (2) and 109 of the Evidence Act** which section provides:-

"107 (1) and (2). Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

19. Further to the above, in the case of **Michael Monari and Another vs Commissioner of Police and 3 Others Miscellaneous Application No. 68 of 2011**, it echoes the circumstances under which this Honourable court can interfere with the prosecution of the petitioner. In refusing to stop prosecution against the applicant, the Honourable Court expressed itself to the view that;

"It is not the duty of the Court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

20. I have pointed out, that a criminal process entails safeguards which are meant to ensure, that an accused person is accorded a fair trial, which includes the right to be presumed innocent until proven guilty, to be informed of the charge with sufficient detail, to challenge evidence, to refuse to give self-incriminating evidence. The trials are conducted by competent court and it is the trial court which is better placed to consider the evidence and decide whether or not to place the petitioner on his defence. It is also where the petitioner can raise his defence for consideration by the court. That even after being placed on his defence and upon hearing the petitioner the court may as well find the petitioner not guilty and acquit him.

21. The petitioner even by being prosecuted and facing his accusers, the petitioner may stand to lose nothing as there are other remedial avenues that he can choose to pursue whether acquitted or convicted. The issue of Elc Civil case No. 2099 of 2007 is in my view is and on evidence is not related to the criminal case No. 64 of 2018; that will be heard and decided on its own merit in spite of the outcome of the Criminal Case No.64 of 2018. The court in **Republic vs Director of Public Prosecutions & 4 others Ex-parte Simion Nyamanya Ondiba[2018] eKLR** held as follows:-

"89. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquitted are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited."

22. I find that for court to halt criminal investigation and/or prosecution it is for the petitioner to demonstrate that there is no prosecutable case against him, a burden which is heavy, as it has the result of barring the 1st and 2nd Respondents from executing their constitutional and statutory mandate if a petition is determined in petitioner's favour. I therefore find that it is in the interest of the petitioner, the Respondent and the complainant and the public at large that the criminal prosecution be heard and determined promptly in order to establish the guilt or innocence of a petitioner and set the issues to rest once and for all, this resulting in preserving the petitioner's right to a fair trial.

23. Article 157(6) of the Constitution of Kenya 2010 establishes the office of the 2nd Respondent which is an independent constitutional office empowered to conduct its duties free from any influence or control by any authority. Article 157(6) of the constitution vests prosecutorial powers on the Director of Public Prosecution (**DPP**). **Article 157(10) and (11) of the constitution** provides:-

"(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.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

The actions of the **DPP** must however be within the law and in accordance with the constitutional dictates. **DPP** should have due regard to the public interest when discharging its duties.

24. The Inspector General can only be directed to investigate a matter by the Director of Public Prosecution as per Article 157(4) and Article 245(5) of the constitution. (See in the case of **Matalulu vs DPP (2003) 4 LRC 712**). The grounds upon which the powers of the DPP conferred under the constitution may be subject to a review was set out as enumerated hereunder as follows:-

- i) In excess of the DPP's Constitutional or statutory powers;
- ii) Contrary to the provisions of Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and failed to exercise his or her own independent discretion;
- iii) In bad faith;
- iv) In abuse of the process of the court in which It was instituted;

v) Where the DPP has fettered his discretion by a rigid policy.

25. Upon consideration of the petitioner’s petition and submissions, I find the petitioner has failed to demonstrate, that Respondents lacked the requisite authority or acted in excess of their jurisdiction or departed from the rules of natural justice in having the petitioner charged with the offence as disclosed by the evidence gathered. That the Respondents upon receipt of the complaint and/or report, commenced investigations with a view to ascertaining the genuineness of the complaint and at the conclusion of the investigation, a decision was made to prefer charges against the petitioner probably based on the evidence gathered and not otherwise. From the aforesaid I find that the petitioner has not demonstrated that there was indeed an abuse of constitutional mandate by the Respondents.

B) Whether an order to bring to the High Court the proceedings in Chief Magistrate Court at Ngong’ Criminal Case No. 64 of 2018 can issue?

26. The petitioner is seeking an order to quash and prohibit the trial court, the prosecutions office and the police from exercising their constitutional and statutory mandate. The petitioner contend, the criminal case 64 of 2018, is with regard to suit property in Milimani Elc Civil suit No.2099 of 2007. In the civil matter, what is in issue and what has the court been called upon to determine is ownership of the suit property. The criminal case on the other, is dealing with an offence of preparation to commit a felony contrary to section 308(1) of the Pena Code, (Chapter 63) of the Laws of Kenya. The Respondent’s Replying affidavit avers that the two suits are not related as the petitioner and four others were arrested preparing to commit a felony while demanding unpaid rent from the petitioners’ tenants who are not party to the civil suit. The petitioner has not controverted the contents of the Respondent’s Replying affidavit. I find that the civil and the criminal case are not intertwined nor related at all. I find if the orders sought are granted the criminal process would be stalled for no reasonable and justifiable cause. Further the fact that there is a civil suit pending, that may not be a basis for staying the criminal process when the cause of action is totally different. I am of the view that a concurrent existence of criminal proceedings and civil proceedings would not, *ipso facto* constitute an abuse of the process of this court unless the commencement of the criminal proceedings was meant to force the petitioner to submit to the civil claim, in which case the institution of the criminal process would have been for achievement of a collateral purpose other than its legally recognized action.

27. The plaintiffs in Elc suit No.2099 of 2007 are not complaints or parties to the criminal case No. 64 of 2018. The Criminal Case under investigation has nothing to do with the suit property. The petitioner in this petition has not demonstrated, that the machinery of criminal justice is being used in aid of personal civil feuds and individual vendetta. I find that the decision to charge or not to charge is the mandate of the Respondents. I find the petitioner has not laid basis for the court to order the Respondents not to discharge the constitutional function to investigate, charge and prosecute. I find that it would not be proper and in accordance with the relevant provisions of the law to order the charge be quashed, the Respondents having demonstrated that the institution of the charge was on the basis of the evidence gathered during the investigation. I therefore find the petitioner has failed to satisfy, that the proceedings before the Chief magistrate court Ngong’ Criminal Case No.64 of 2018 should be quashed.

28. The upshot is that, I find the petitioner’s petition to be without merit and proceed to dismiss the same. Costs to the Respondents.

Dated, signed and delivered at Nairobi this 29th day of July 2019.

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J .A. MAKAU

JUDGE