



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 117 OF 2017

DAVID MWAURA NDURUHU.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

AND

JOHN MWANGI KAMAU.....INTERESTED PARTY

JUDGMENT

1. *David Mwaura Nduru*, the petitioner, is involved in a civil litigation at the ELC Nairobi being *ELC No 17 of 2014* against *Jane Wambui Kabaru* and *Teresia Nyambura* as well as *Philomena Njoki Muiruri* who are personal representatives of the Estates of *Peter Kabaru Muiruri* and *John Muiruri Kaburu*, deceased respectively. At the time of hearing this petition, the ELC case was still pending in that Court. *John Mwangi Kamau*, the Interested Party, has also sued the petitioner at the Business Rent Tribunal in BRT Case No 12 of 2017, *John Mwangi Kamau v David Mwaura Nduru & 3 others*, claiming to be the petitioner's landlord and the owner of the property which he claim to have purchased in 2013. The dispute pitting the parties herein relates to Parcel No 4953/34/1V situate in Thika Town within the former Thika Municipality. The petitioner claims to have purchased the said property in 2009 and has enjoyed quiet possession of the property since then, but it is now the subject of the dispute before the ELC.

2. The petitioner avers that while the issue remains unresolved in the ELC, he was arrested and charged in *Criminal Case No 161 of 2017* now pending at the Chief Magistrates Court, Thika. The petitioner contends that the respondent abused the Court process by instituting the criminal case against him before the issue of ownership of the parcel of land is determined by the ELC. The petitioner states that the aim of instituting the Criminal Case was for accomplishing improper purpose collateral to the proper object of the process thus offends the course of justice.

3. The petitioner further avers that the commencement and continuation of the criminal proceedings despite the existence of the dispute before the ELC, amounts to an attempt by the interested party who is also the complainant in the criminal case, to use the criminal process to settle the civil dispute which violates his constitutional rights. He contends that the respondent's action violates Articles 47(1) and (2) of the Constitution in that the respondent has failed to accord the petitioner an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; and further, that the respondent has not given the petitioner written reasons.

4. The petitioner also contends that his rights under Article 50(1) have been violated and that the respondent has abused his powers donated by Article 157 of the Constitution. Based on the above averments, the petitioner sought the following reliefs:-

a. A declaration that the initiation, maintenance and prosecution of Thika Criminal Case No 1611 of 2017 against the petitioner herein, is an abuse of the criminal justice process and contravention of the petitioner's constitutional rights is oppressive, malicious and an abuse of the court process.

b. An order of prohibition prohibiting the respondent and or any officer acting on his instructions from proceeding with Thika Criminal Case No 1611 of 2017, Republic v David Mwaura Nduru.

c. An order of certiorari be and is hereby issued for the purposes of bringing before this Honorable Court and for purposes of quashing Thika Criminal Case No 1611 of 2017, Republic v David Mwaura Nduru.

d. Any other or further orders, writs and directions the Honourable Court considers appropriate and just to grant in the interest of justice.

e. That the costs of this petition be provided for.

Respondent's response

5. The respondent filed a replying affidavit by **Corporal Eusebius Kizito Masimbwa**, the investigating officer, sworn on 16th February 2018. **CPL Masimbwa** deposed that a complaint was lodged by the interested party over the ownership and possession of LR No 4953/34 1V within Thika, town; that following the report, investigations were undertaken and established that the interested party purchased the disputed parcel of land from four sisters namely; **Mary Njeri Kamiri, Francisca Nyambura Nganga, Ann Waithera Muiruri and Teresia Nyambura Kariuki**, beneficial owners and beneficiaries of their fathers estate, **John Muiruri alias Kaburu Muiruri** (deceased), and that the interested party acquired title to the property on 4th July 2016.

6. It was deposed that in 2017 when the interested party attempted to bring down the property to give way for construction of a modern building, a dispute arose despite having given notice to all tenants in the premises when the petitioner refused to move out although all other tenants had left.

7. The deponent further stated that further investigations revealed that the agreement the petitioner was using to claim ownership of the property was suspect given that the advocate who is alleged to have witnessed that agreement disowned it, while the 4 sisters who are the beneficiaries of the estate identified the interested party as the person they had sold the parcel of land to.

8. **CPL Masimbwa** further deposed that their investigations established fraud and as a result, they recommended that the petitioner be prosecuted, and that the petitioner was charged in exercise of powers conferred to the respondent by Article 157 of the Constitution. He therefore denied that there was violation of the petitioner's fundamental rights and freedoms. He stated that the respondent exercised his mandate under Article 157 and that there was sufficient evidence for institution of the criminal proceedings. He maintained that cases before Civil Courts are not dealing with the criminal conduct but different issues. He contended that section 193A of the Criminal Procedure Code permits concurrent criminal and civil proceedings.

Interested party's response

9. The interested party filed a replying affidavit sworn on 15th May 2018 and filed in Court on the same day, contending that his inclusion in the petition amounts to a misjoinder. The interested party, however, admitted that indeed the petitioner had been charged in criminal case No 1611 of 2017 at the Chief magistrates Court – Thika and that he is the complainant.

10. The interested party further deposed that he is aware of the civil cases more so ELC No 17 of 2014 but denied that the institution of the criminal case violated the petitioner's rights. On the other hand he contended that the BPRT case No 12 of 2017 was directed at tenants who had refused to vacate the premises despite notices having been issued and served. He contended that all tenants had vacated leaving the petitioner in the premises and maintained that he is the proprietor property with valid title documents. The interested party maintained that a part from being the complainant; he had no control over the investigators' actions or those of the DPP regarding the execution of their constitutional mandate.

Petitioner's submissions

11. **Mr. Mugendi**, learned counsel for the petitioner, submitted highlighting their written submissions dated 1st September 2017, that the petition was seeking to stop the petitioner's trial in criminal case No. 1611 of 2017. Learned counsel contended that the respondent had wrongly exercised his discretion under Article 157 of the Constitution; that there were several civil suits pending in various Courts including the ELC and that it would be improper to allow the criminal case to proceed while the civil cases are pending in Court.

12. Learned counsel submitted that according to the responses to the petition, the respondents and interested party admit the existence of civil cases; that the interested party is the main complainant in the criminal case and that as a result, it is clear that the respondent violated Article 157(11) of the Constitution. Counsel relied on the case of **Ronald Leposo Musengi v Director of Public Prosecutions & 3 others** [2015] eKLR for the submission that criminal proceedings cannot be commenced to coerce a person to concede a civil claim.

Respondent's submissions

13. **Mr. Mule**, learned counsel for the respondent, submitted relying on their replying affidavit, that a complaint was made; investigations carried out and thereafter, recommendations were made and action taken to have the petitioner charged and prosecuted. Learned counsel submitted that there was no delay in charging the petitioner and referred to witness' statements annexed to the replying affidavit to show when investigations were completed.

14. **Mr. Mule** contended that the existence of civil suits does not exonerate the petitioner from criminal liability. He submitted that there was no violation of the petitioner's constitutional rights and fundamental freedoms as alleged and asked that the petition be dismissed.

Interested party's submissions

15. **Mr. Etole**, learned counsel for the interested party, submitted relying on the interested party's replying affidavit sworn on 15th May 2018, that the interested party was wrongly enjoined in the proceedings; that the interested party does not control activities of the respondent and

that the petition seeks no reliefs against the interested party. Learned counsel urged the Court to dismiss the petition

Determination

16. I have considered the petition; the responses and submissions by counsel for the parties, I have also considered the authorities relied on. This petition challenges the petitioner's arrest, arraignment in Court and prosecution for fraud in criminal case No 1611 of 2017 now pending before the Chief magistrates Court at Thika. The reasons advanced by the petitioner in opposing his prosecution are that there are currently on going civil proceedings in **ELC No 14 of 2017** over the ownership of parcel No 4953/34/14 situate in Thika town within Kiambu County.

17. The petitioner contends that the decision to charge him with the criminal case is a violation of his fundamental rights under Article 47(1) and 50(1) of the Constitution. He further contends that the criminal case is intended to achieve a collateral purpose and the decision to prosecute him was made in violation of Article 157(11) of the Constitution, given that there is a civil suit pending before the ELC over the ownership of the parcel of land.

18. Article 244 of the Constitution provides for the objects and functions of the National Police Service, including; to prevent corruption and promote and practice transparency and accountability; and to comply with constitutional standards of human rights and fundamental freedoms among others. The National Police Service Act confers on the Police the function of preserving law and order; protecting property and preventing commission of crime. Section 49 gives the police powers to investigate crime. However, the power to decide whether or not to persecute is conferred on the respondent by Article 157 of the Constitution.

19. In the discharge of that mandate, the respondent does not take directions from any person or authority. In that regard, Article 157(6) provides that the respondent **has power to undertake criminal proceedings against any person before any court except the court martial and in respect of any criminal offence**. The respondent can also take over proceedings or discontinue any proceedings at his discretion subject to conditions in Article 157(7) and 157 (8). Article 157(10) is clear that the respondent **"shall not require consent of any person or authority to commence criminal proceedings and shall not while performing his duties and discharging his functions be under the direction or control of any person"**.

20. It is therefore clear from the constitutional text that the respondent exercises constitutional mandate and that he is subject only to the Constitution and the law in the performance of his duties. The only caveat is in Article 157(11) which states that in exercising his powers the respondent should 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 Constitution, therefore, bars the respondent from instituting criminal prosecution for any other purposes than pursuing the cause of justice.

21. The petitioner's contention in this petition is that the respondent has violated his fundamental rights under Articles 47(1) and 50(1) of the Constitution. Article 47(1) provides for expeditious, efficient, lawful, reasonable and procedurally fair administrative actions while Article 50(1) provides that every person has the right to have any dispute that can be resolved by the application of law, decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

22. Article 47(1) embodies the constitutional right to have administrative actions taken against any person done in an expeditious manner, be lawful, reasonable and to accord the person involved a procedurally fair decision making process. Article 47(1) is intended to check and ensure the efficacy of administrative actions and guarantee that they are not only in line with the constitutional standards of procedural but also substantive fairness. Article 50(1) on the other hand accords every person the right to have their disputes decided by courts or tribunals in an open and fair manner. These are constitutional standards that accord persons rights and fundamental freedoms in administrative actions and dispute resolutions.

23. In that regard, therefore, a person relying on Article 47(1) and or 50(1) of the Constitution has a duty to show to the satisfaction of the court how a respondent failed to comply with the commands in either of the Articles or both. In the present petition, the petitioner has merely pleaded, deposed and submitted that the respondent violated his fundamental rights and freedoms provided for in the two Articles. He did not however, attempt to demonstrate how, if at all, the respondent failed to comply with requirements in the two Articles of the Constitution.

24. It is now settled law that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out with precision the right infringed or threatened, the particulars of such infringement or threat, the constitutional provisions alleged to be infringed and the jurisdictional basis for it. (*See Anarita Karimi Njeru v Republic* [1979] KLR 154, *Meme v Republic 2004 eKLR*). It is a fundamental principle of constitutional litigation to require accuracy in the identification of the provisions of the constitution that is said to be infringed on the basis that the breach is inconsistent with the Constitution. That constitutional challenge should be explicit, with due notice to all affected is necessary as this ensures that all interested parties have an opportunity to make representation(s) and that the relevant evidence, if necessary will be led. (*see Saili v National Commissioner of South African Police Service & others* [2014] ZACC19), *Phillips & others v National Director of Public Prosecutions* [2005] ZACC 15; 2006(1) SA 505(CC),

25. The Supreme Court further stated in *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR at paragraph 349, that **"...the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement... plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement..."**

26. In the present petition, I do not see such precise pleading or any evidence on the violation of either Article 47(1) or 50(1) of the Constitution. For instance, the petitioner did not show that the respondent's decision to prosecute him was not expeditious, efficient, lawful, and reasonable or procedurally fair. Regarding the complaint that the respondent violated article 50(1), it is clear to me that apart from merely pleading this Article, the petitioner never attempted to show how the Article was violated leaving the complaint without any substance.

27. The petitioner has however complained that the respondent's decision to prosecute him was meant to achieve purposes other than pursuit of the course of justice. This, he contends, is because there are multiple civil suits over the same property pending in various Courts. The petitioner mentioned ELC case No.14 of 2014, a case before the Business Premises Rent Tribunal and another civil suit in Thika to fortify his case.

28. I have peruse the pleadings in the said suits and, to my minds, the case at the Business Rent Tribunal and the civil suit in Thika do not have relevance to the criminal case in which the petition has been charged and is the subject of this petition. On the other hand, the ELC case though between the petitioner and persons who claim to be beneficiaries of the estate of a deceased who was the proprietor of the suit land is relevant as it touches on the suit land and the interested party herein though not a party in the ELC case, claims ownership of that parcel of land and is the complainant in the criminal case.

29. The respondent filed a replying affidavit sworn by the investigating officer explaining that investigations they conducted ascertained that there may have been fraud involving the petitioner. He also attached witness statements to demonstrate that there was good reason to prosecute the petitioner.

30. The Constitution and the law are clear on the mandate of the respondent. The Court would only interfere where there is clear demonstration that the respondent has misused his discretion or that the power has been used for purposes other than pursuit of the course of justice. A number of decisions also inform of this position.

31. In the case of Meixner & Another vs. Attorney General [2005] 2 KLR 189, the Court of Appeal though dealing with the retired constitution, was emphatic that;

“The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution.”(emphasis)

32. In Republic v Director of Public Prosecution & 2 others Exparte Francis Njakwe Maina & another [2015] eKLR it was stated that;

“The Court ought not to usurp the Constitutional mandate of the Director of prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings...However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim.”(emphasis)

33. And in the case of Kuria & 3 Others vs. Attorney General [2002] 2 KLR 6 it was held that;

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta.” (emphasis)

34. I have considered this petition, the responses and submissions. I have also considered the applicable law; the authorities relied on by the parties and weighed them against the constitutional mandate of the respondent. I am persuaded that the petitioner's arraignment and prosecution is intended to achieve other purpose than the course of justice thus is contrary Article 157(11) of the Constitution.

35. In the present case, the petitioner and the interested party are fighting over ownership of the parcel of land relying on sale agreements allegedly signed by the proprietor of the land. The petitioner says that he purchased the property from **Peter Kabaru Muiruri**, (late) in 2009. However, the vendor passed on shortly thereafter before the transaction was completed and that the deceased's family was aware. In their defence, the defendants in the ELC Case are not categorical that they do not know the petitioner. That means they will have to tender evidence before the ELC and thereafter that Court will make a determination on who the true owner is. Allowing the criminal case to proceed before conclusion of the civil suit before the ELC will, in my view, give an advantage to the other party in that case. The respondent will not suffer any prejudice if the criminal case awaits the determination of the parties rights through the civil suit pending before the ELC.

36. Although section 193A of the Criminal Procedure Code allows concurrent civil and criminal proceedings, that does not take away the powers of the Court to ensure that any criminal process is intended to achieve the course of justice but not to aid a party in a civil litigation. That is why the section states that ***“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 proceeding.”*** The Court will, however intervene when it is demonstrated to its satisfaction, that the criminal proceedings have been instituted with some element of ulterior motive which I find to be the case in the present petition. The respondent will still have a chance to pursue the charge against the petitioner and lead evidence to prove fraud, if any, once the ELC case is

determined.

37. In that regard, I agree with the petitioner's counsel that it would further the course of justice to allow conclusion of the ELC case first before the criminal case can proceed to give parties an equal opportunity to prove their case before the ELC. For the above reasons, I find the petition dated 28th May 2017 meritorious and is hereby allowed and I make the following orders;

i. An order of prohibition is hereby issued prohibiting the respondent and or any officer acting on his instructions from proceeding with Thika Criminal Case No 1611 of 2017, Republic v David Mwaura Nduruhi until final determination of the ELC case No. 17 of 2014 pending before the Environment and Land Court at Milimani, Nairobi.

ii. Each party do bear their own costs

Dated, Signed and Delivered at Nairobi this 31st Day of August 2018

E C MWITA

JUDGE