



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO 400 OF 2017

PETER MANYURU.....1ST PETITIONER

STEPHEN ONSEMBE MACHOKA.....2ND PETITIONER

Versus

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE OCS EMBAKASI POLICE STATION.....2ND RESPONDENT

And

VICTOR MOSE BIRUNDU.....INTERESTED PARTY

JUDGMENT

1. In a Petition dated 16th August 2017 and filed in court on the same day, **Peter Manyuru** and **Stephen Onsembe Machoka**, the Petitioners sued the **Director of Public Prosecutions** and the **Officer Commanding Police Station, Embakasi Police Station**, the first and 2nd respondents respectively, challenging their decision to initial criminal proceedings against them at the Chief Magistrate's Court at Makadara, in Criminal Case No 1667 of 2017. They enjoined **Victor Mose Birundu** as an interested party.

2. The petitioners averred that 1st petitioner is the registered proprietor of parcel of land known as **LR No 21190/00/239/1** which he purchased from the National Social Security Fund and the 2nd petitioner is his employee. They stated that the parcel of land is the subject of litigation in **NBI ELC No 514 of 2012** and that the court had declined to issue an injunction in favour of the interested party in that case against the petitioners to restrain them from interfering with his (interested party's) possession.

3. They further stated that they had discovered that the interested party was constructing a wall on the disputed parcel of land and proceeded to stop him and that was when, they contend, the interested party and respondents colluded to institute the impugned criminal proceedings for the offence of malicious damage to property so as to give the interested party an unfair advantage in the ELC Case.

4. The petitioners contended, therefore that the respondents' actions amounted to abuse of power and that the decision to charge them was tainted with ulterior motive. They also contended that the decision to prosecute them is an abuse of the legal process. They argue that the selective prosecution violates their right under Articles 27(1)(2) and (4) and 50 of the constitution. They sought the following reliefs:-

i. That a declaration do issue that the respondent's decision to charge the petitioners with criminal offences in NAIROBI MAKADARA CHIEF MAGISTRATES CRIMINAL CASE NO 1667 OF 2017 amounts to a violation of the petitioner's rights under Articles 27, 47 and 50 of the Constitution of Kenya.

ii. That an order of certiorari quashing the respondents decision to charge the petitioners with various criminal offences in Nairobi Makadara Chief Magistrates Criminal Case No 1667 of 2017.

iii. Costs of the petition

iv. Any other orders that this Honourable Court may deem fit to issue in the circumstances.

Respondent's response

5. The respondents filed a replying affidavit by **Sergeant Albert Mwaniki**, a police officer attached to Embakasi Police Station and the

investigating officer in the criminal case.

6. He deposed that on 29th June 2017, a report was made by Mrs **Margaret Mose Birundu** that she had received a call from her nephew, **George Gachihi**, that a group of about 15 men were demolishing a perimeter wall on the disputed parcel of land. Subsequently the complainant and other witnesses recorded statements and investigations commenced.

7. **Sergeant Mwaniki** stated that he established that the parcel of land had a long standing dispute regarding ownership and that the 1st petitioner and interested party have a civil case in court. He also established that the perimeter wall was demolished by a group of about 15 men armed with crude weapons. According to **Sgt Mwaniki**, they managed to arrest the 2nd petitioner after he was positively identified as one of those who were involved in the demolition of the perimeter wall. They also arrested the 1st petitioner later on.

8. It is his deposition that after completion of investigations, he forwarded the investigation file to the 1st respondent as required by law who made a decision that the petitioners be charged with the offence. He denied any wrong doing.

Petitioner's submissions

9. **Mrs Chege**, learned counsel for the petitioner, submitted relying on their written submissions dated 8th May 2018 and filed in court on 11th May 2018, that the petition is meritorious and should be allowed. In the written submissions, it was contended that the 1st respondent's power to initiate and maintain prosecution should not be abused. It was argued that although the 1st respondent has discretionary power, that power is not absolute and the DPP should be guided by constitutional and statutory provisions to assist him avoid incidences of abuse of power or excess of power in the exercise of such discretion.

10. They relied on the decision of **Vincent Kibiego v Attorney General** (Misc. Application No 839/1998), **Kenya Commercial Bank Ltd & 2 Others v Commissioner of Police & another** (Petition No 218 of 2011) and **Republic v Attorney General Ex Parte Kipngento Arap Ngeny** (CA No 406 of 2001).

11. They contended with respect to this petition, that there was abuse of power and oppression and relied on the case of **Joram Mwenda Guantai v Chief Magistrates Court Nairobi** (Civil Appeal No 298 of 2009[2007]2'EA 170.)

Respondents' submissions

12. **Mr Makori**, learned counsel for the respondents, submitting orally, opposing the petition, that the petitioners had not given good reasons that show violation of their rights as far as Articles 27, 47 and 50 of the Constitution are concerned. He argued that the petitioners had not demonstrated how their rights had been violated or that the prosecution was initiated otherwise than in compliance with the constitution and the law.

Determination

13. I have considered the pleadings herein and submissions by counsel for the parties. I have also perused the records as well as the authorities relied on, the question that arises for determination is whether the petitioners have made a case for grants of the reliefs sought.

14. The facts of this petition are not in dispute. There is a dispute over parcel of land **No 21190/00/239/1** where both the 1st petitioner and interested party claim to be the lawful owners. The dispute had ended up in the Environment and Land Court where it is pending as **ELC No 514/2012**.

15. There is clear admission from the petitioners that the interested party was trespassing onto the land and that they stopped him. They did not say how they did this. The Investigating officer in the criminal case deposed that the petitioners and others were demolishing a perimeter wall which led to making of a report at the Police Station. He deposed that after investigations, he established that a gang of about 15 people was involved in the demolition. The petitioners were identified arrested and charged after the 1st respondent approved their prosecution. The fact of demolition of a perimeter wall has not been denied by the petitioners.

16. The petitioners' contention in this petition is that the DPP has abused his powers in prosecuting them; that he has instituted the proceedings with malice and with a view to giving the interested party an advantage in the land case.

17. The DPP exercises constitutional mandate under Article 157 of the constitution and does not require consent from anyone in the discharge of his mandate. He is only subject to the constitution and the law. The only caveat is in Article 157(11) which he must observe. That is, **"in exercising the powers conferred by Article 157, 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."**

18. Although DPP exercises constitutional discretion, his actions are subject to the supervision of the courts if they do not comply with the constitution and the law. There are many decisions on this. However, a party who seeks to challenge or impugn the decision of the DPP to prosecute him/her must show that the DPP is violating the constitution or the law in undertaking such prosecution. The issue of violation must be clear and not speculative.

19. I have gone through this petition, the supporting affidavit as well as the replying affidavit by the investigating officer. I have also perused a copy of the charge sheet attached to the petitioners' affidavit sworn in support of the petition. The charge the petitioners face is that of malicious damage to property and noting more. The affidavit by the Investigating Officer states that they were demolishing a perimeter wall

on the disputed property. The petitioners have not denied this and they have themselves stated that they stopped the interested party from trespassing onto the land, without elaborating.

20. That, in my view, cannot be selective prosecution to warrant this court interfering with the criminal prosecution. The petitioners were also duty bound to show that their prosecution was malicious or was initiated in bad faith or even that it was not being done in pursuit of the course of justice as required by Article 157(11) of the constitution.

21. Upon a careful consideration of this petition, I am unable to decipher any slight violation of the constitution or the law. There is also no evidence that the petitioners' prosecution is intended to give advantage to the interested party in the ELC case. The charge the petitioners face is that of malicious damage to property, a charge they can adequately defend before the trial court and disprove. It does not warrant this court's exercise of its constitutional discretion to stop.

22. For the above reasons, this petition is declined and dismissed with no order as to costs.

Dated Signed and Delivered at Nairobi this 18th Day of December, 2018

E C MWITA

JUDGE