REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 474 OF 2015

IN THE MATTER OF ARTICLE 40 (2) (A) AND (B) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40 (2) (A), (B) AND ARTICLE 29 (A) OF THE CONSTITUTION OF KENYA

BETWEEN

KENYATTA NATIONAL HOSPITAL.....PETITIONER

VERSUS

NAIROBI CITY WATER & SEWERAGE COMPANY.....1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

JUDGEMENT

The petitioner avers that sometimes in 2014 it incurred huge water bills which it attributes to the fire Respondents acts of fetching water from its hydrants without its permission. Notwithstanding petitioners written protests, the first Respondent continued to draw water from the hydrants prompting the petitioner to issue a memo to its Safety and Security Services Manager instructing him not to allow the first Respondent to draw water from its hydrant.

Against the above background, on 2nd September 2014, the first Respondents fire engine was denied access to fetch water from the petitioners hydrants. A one Joseph Oginga, an officer of the fire brigade was notified the reasons for the refusal. However, the refusal triggered criminal proceedings against the petitioner being Criminal case number **13211** of **2015**, *County Government of Nairobi versus Chief Security Officer, Kenyatta National Hospital* by the second Respondent now the subject of this petition instituted under the provisions of Rules 11 and 14 of the City of Nairobi (Fire Brigade) (By-Laws 2007). The relevant provisions are reproduced below.

The charges against the petitioner are **(a)** willfully obstructing fire brigade from drawing water for firefighting from the fire hydrant within Kenyatta National Hospital, **(b)** interfering with members of Nairobi County Fire Brigade from executing their duty during fire emergencies at Kibera and Eastleigh and **(c)** causing Nairobi City Fire Brigade to delay in responding to fire emergencies at Kibera and Eastleigh.

The petitioner avers trespassing and drawing water from its premises without its consent infringed on its constitutional right to private property, that the prosecutor in the said case, a one Onguto Maoko was not gazetted by the DPP to prosecute as required under Article **157 (9)** of the constitution and asks this court to declare that the said criminal proceedings unconstitutional and quash or permanently stay the said

charges.

The first Respondent filed grounds of opposition and the affidavit of a one Samuel Maina, filed on 19th June 2017 in which he averred *inter alia* that fire hydrants are installed for public benefit.

The second Respondents Response is contained in the Replying affidavit of Walter Oditt filed on 29th February 2016. He states that on 2.9.2015 there was a fire out break at Kibera, in Nairobi County. The County Government dispatched a fire Engine with its fire officers to the scene. The crew requested for reinforcement and another fire engine and crew of fire officers was sent to aid them.

Also, on 3.9.2015, at about **5 am** a fire broke out in Eastleigh area, Nairobi and a fire engine was dispatched to the scene. The engine had to replenish its onboard water and Kenyatta National Hospital had the nearest working fire hydrant according to Fire Hydrant Map Location. Upon reaching Kenyatta National Hospital, the fire officer in charge, a Mr. Joseph Oginga was informed by the security officer that they had instructions not to allow any person to fetch water from the premises. He states that the denial was a breach of By-Laws **11** and **14** of the City of Nairobi (Fire By-Laws 2007), hence the charges complained of.

The third Respondent filed grounds of opposition stating *inter alia* that the reliefs sought seek to prevent it from exercising its constitutional mandate, and that there is no evidence to demonstrate that the criminal proceedings are mounted to achieve an ulterior motive nor has it been shown that the third Respondent exceeded his powers, nor has it been shown that substantial justice will result if the proceedings continue, and further that it is in public interest that the prosecution proceeds.

Petitioners counsel submitted that the actions in question violated the petitioners right to property. He challenged the constitutionality of the by-laws under which the charges are framed stating that it allows infringement of property rights and that a limitation to fundamental rights must be reasonable and justifiable in a democratic society[1]and that the measures adopted are based on irrational, unfair and impractical considerations. Counsel submitted that in addition to Rule 11 of the by-laws giving fire officers too much leeway to encroach on private property, the said provision is ambiguous and that a limitation to a constitutional right must be clear.[2] Counsel also questioned the authority of the officer prosecuting the case in the lower court in absence of evidence that he was gazetted as per the law.

Counsel for the first Respondent correctly submitted that there is no specific relief sought against the first Respondent in this petition.

Counsel for the second Respondent submitted that the petitioner has failed to demonstrate that its rights to property override public interest and that article **24** provides for limitation of constitutional rights while article **40 (3)** allows parliament to legislate for permissible deprivation of property and article **40 (3) (b)** allows for deprivation of property for public interest subject to just compensation. Further, article **185 (2)** allows county governments to legislate laws for their effective performance.

Counsel for the third Respondent submitted that the third Respondent has a constitutional mandate to institute criminal proceedings and that the act complained of was for public good. On the Gazettement of the prosecutor, counsel stated that it was not fatal to the case and steps have been taken to correct the position. Also, the water drawn from the hydrant for public good.

Analysis of the issues and the law

It is commonplace to observe that few rights are absolute, a commonplace which is expressly recognised in most Bills of Rights. The only fundamental rights and freedoms that cannot be limited are contained in Article 25 of the constitution.

Article 24 provides "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, including

— A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including — **(a)** the nature of the right or fundamental freedom; **(b)** the importance of the purpose of the limitation; and **(c)** the nature and extent of the limitation; and **(d)** the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and **(e)** the relationship between the limitation and its purpose; and **(f)** any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Under article 24 of the constitution, fundamental rights may be limited only to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom and in deciding whether any limitation meets this criterion a number of relevant factors must be taken into account.

What is reasonably justifiable in a democratic society is an elusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the decision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right.[3]

In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:- **(a)** the objective is sufficiently important to justify limiting a fundamental right; **(b)** the measures designed to meet the legislative object are rationally connected to it; and **(c)** the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[4]

According to the *Oxford English Dictionary* "limit" means "confining within limits, set bounds to, restrict." It is clear, therefore, that article **24** does not authorize the state to "eliminate" rights contained in the Declaration of Rights or to "hollow out such rights, so that they no longer have any meaningful content." Thus, the power to limit rights does not go beyond the power to restrict rights. Writing about the limitation provision in the *Canadian Charter of Rights*, Peter Hogg, says that "… not every Charter infringement is a 'limit,' and any infringement that is more severe than a limit cannot be justified."[5]

The Canadian Supreme Court[6] drew a distinction between "the negation of a right or freedom and a limit on it."[7] Thus, the courts must uphold the fundamental right to property and any limitations upon this right must be reasonable and must not take away completely or eliminate the right or remove the essential core of the right.

At this juncture it is appropriate to reproduce the relevant provisions of The City of Nairobi (Fire By-Laws 2007) under which the charges are brought.[8] Rule **11** provides follows:-

> *"A senior fire officer present shall have power to use for firefighting any convenient supply or body of water and shall have free right of access to and liberty to draw or take water from any hydrant, pipe, tank cistern, well or other place, whether on public or private property, subject only to the liability of the council to pay reasonable compensation for any water so taken and to make good any damage occasioned thereby."*

Rule **14** provides follows:-

> *"Any person who willfully obstructs, molests or interferes with any member of the fire brigade in the execution of his duty, or who willfully interferes with or damages any vehicle, appliance or equipment being used or brought into use by the fire brigade for firefighting shall be guilty of an offence."*

In view of the clear provisions cited above rules, the question that follows is whether the fire brigade officers acted within the rules by accessing the petitioners hydrant to draw water for purposes of fire fighting. The uncontested facts of this case are that fire fighting engines of the second Respondent drove

into the petitioners premises to draw water for the purposes of fire fighting which calls for a rapid/emergency response.

The petitioner denied them access on the grounds stated earlier, that their consent had not been sought and obtained. My reading of the above provisions is that the act is question is perfectly lawful, that the By-laws grant a senior fire officer power to use for firefighting any convenient supply or body of water and shall have free right of access to and liberty to draw or take water from any hydrant, pipe, tank cistern, well or other place, whether on public or private property. The only liability of the Respondent is to pay reasonable compensation for any water so taken and to make good any damage occasioned thereby. It has not been alleged that compensation was sought and denied not any damage been alleged.

I find that the above By-laws are **not** *ultra vires* the Constitution because they satisfy the requirements set out under article 24 of the Constitution in that the alleged limitation is "fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. It was undertaken for public interest. This is a clear case where private interests must give way to public interests.

In upholding the constitutionality of the above by-laws, I have considered that they are aimed at protecting public safety and thus the safety of the public is of paramount importance. In my view, actions complained clearly fall within exceptions under article 24 of the constitution are out rightly constitutional.

In other words, the court has to examine the acts complained of viewed against the background of the Constitution, and, in particular, the constitutional rights of the petitioner and the constitutional and statutory obligations of the Respondents, and satisfy itself whether or not the actions complained of sufficiently renders the respondents liable.[9] I find that the act of drawing water from the petitioners premises to respond to a fire emergency is not unconstitutional and cannot amount to an infringement of the petitioners rights to property under the constitution.

The next question is whether or not the prosecution was mounted without any factual basis. The law enjoins the DPP to be scrupulously fair to an alleged offender and to ensure fair investigation and fair trial and also to ensure that the citizens constitutional and fundamental rights are not violated. It is the duty of the courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments into these rights.[10] A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose.[11] Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case.

A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable. [12] From the material before me, I am persuaded that there is nothing to show that the prosecution was commenced with ulterior motives or without any factual basis. In the end it may come back to the words of Christmas Humphreys QC:- "It is the duty of prosecuting counsel to prosecute, and he need not rise to his feet and apologize for so doing. It is not unfair to prosecute."[13]

It is settled law 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.[14] A stay (by an order of prohibition) should be granted only 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 cannot to be allowed to become a tool for the police violate constitutional rights of citizens[15] The invocation of the criminal law, in unsuitable circumstances or for the wrong ends must be stopped and this court has the mandate to stop such proceedings. In the instant case, the criminal prosecution is in my view **not tainted**

with ulterior motives, nor is it aimed curtailing the rights of the petitioner.

This court has an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of citizens fundamental rights.

Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case. [16] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. From the material before this court, there is nothing to demonstrate that the prosecution is unfair, wrong, baseless or an abuse of police powers or judicial process.

The essential focus of staying a prosecution is to prevent unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights. As observed above, the Respondents acted within the law and the prosecution in question cannot be said to be a violation of the petitioners rights.

In *Joram Mwenda Guantai vs. The Chief Magistrate*,[17] the Court of Appeal held *inter alia* that the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court if he is a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.[18] The circumstances under which the charges complained of arose leave this court with no doubt that the Respondents did not act in an oppressive manner or in total violation of the constitution nor is there an element of abuse of criminal process.

On the allegation that the prosecutor is not gazetted, it is not clear whether the trial had commenced, and if so, how far it had proceeded. Even if the trial had commenced, I would be hesitant to find that it is a nullity on account of failure to gazette the prosecutor. In this regard, the following observation by **Emukule, J** in ***Republic vs. David Geoffrey Gitonga,[19]*** is relevant. The learned Judge expressed himself as follows:-

> ***"I am aware that contrary opinions have been expressed by others in this court. I do not share those views. I hold the considered view that such trial is not a nullity at all. These are my reasons. Firstly, the principle of nullity presupposes that the process of trial is void either because it is against public policy, law, order, and indeed, nullity is non-curable. Secondly, for a trial to be void in law it must be shown either that the offence for which the accused is being tried is non-existent, or that the authority or court seized of the matter has no authority to do so. It is a public policy of all civilized States that offenders be subjected to due process in respect of defined offences, and by duly competent courts or tribunal…A trial will be a nullity where the offence is non-existent or there is lack of jurisdiction. To say otherwise would be against both public policy and the law. The court will not act against the law nor will it go against public policy".***

In my view, it would not be late for the DPP to remedy the situation by appointing a competent prosecutor. Even where trials have proceeded under similar circumstances', our court have ordered a re-trial where the justice of the case demands as opposed to terminating the proceedings. Each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person. So far, no prejudice has been shown to have been occasioned upon the petitioner.

In any event, most of the cases determined on the issue of failure to gazette a prosecutor were decided before the promulgation of the 2010 constitution. Now we have a transformative constitution which

clearly provides for the manner in which courts have to exercise judicial authority. Article 159 (2) on Judicial authority provides that in exercising judicial authority, the courts and tribunals shall be guided by the principles stated therein among them justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution shall be protected and promoted.

Rule (3) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[20] provides that the rules shall be interpreted in accordance with Article **259 (1)** of the constitution and shall be applied with a view to advancing and realizing the- **(a)** rights and fundamental freedoms enshrined in the Bill of Rights; and **(b)** values and principles in the constitution.

A key value in the architecture of the constitution is to dispense justice without undue regard to procedural technicalities. My strong view is that conduct of judicial proceedings and exercise of judicial authority is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making process that does not adhere to the constitutional test on procedural fairness, the right to a fair trial, the right to legal representation and access to justice cannot stand court scrutiny.

It is my view that the question of the prosecutor not having been gazetted is not fatal especially considering that the trial had not even began. No prejudice can be said to have been occasioned to the petitioner at this point.

Determination

In view of my analysis above, I find that this petition has no merits. The prosecution was commenced with proper factual basis, it is not an abuse of court process nor has it been shown to be malicious. The provisions of the by-laws are in my view constitutional and do not offend the constitution in any manner. The petitioner has failed to demonstrate to the court that his rights have been or will be violated. This is a clear case where public interest must prevail over private rights.

In conclusion, I find that this petition fails. Consequently, I dismiss this petition with costs to the Respondents and order that criminal case number **13211** of **2015**, *County Government of Nairobi versus Chief Security Officer, Kenyatta National Hospital* to proceeds for hearing and determination.

Signed, Dated, Delivered at Nairobi this 28th day of June 2017

John M. Mativo

Judge

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[1] Counsel cited R vs Oaks {1986} 1 R.C.S

[2] Mtana Lewa vs Kahindi Ngala Mwagandi {2015}eKLR cited

[3] See re Munhumeso & Others 1994 (1) ZLR 49 (S) at 64B-C

[4] See Nyambirai v National Social Security Authority & Another 1995 (2) ZLR 1 (S) at 13C-F, GUBBAY CJ

[5] Hogg, Peter, Constitutional Law of Canada (2003) Loose-leaf edition. Toronto: Carswell, pages 35-10

[6] See Ford vs Attorney-General Quebec {1988} 2 SCR 712 at 772

[7] A similar approach was put forward in an earlier Canadian case, Attorney General Quebec v Quebec Protestant School Boards [1984] 2 SCR 66 at 88

[8] The City of Nairobi (Fire By-Laws 2007)

[9] 1986 (1) SA 117 (A)

[10]Bradley J. in Edward A. Boyd and George H. Boyd v. Unites States (1884) 116 U.S. 616

[11] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[12] Ibid

[13] {1955} Crim LR 739 at 741

[14] Kuria & 3 Others vs. Attorney General{[2002} 2 KLR 69

[15] Ibid

[16] *Hui Chi-Ming v R [1992] 1 A.C. 34, PC*

[17] Nairobi Civil Appeal No. 228 of 2003 {2007} 2 EA 170

[18] Ibid

[19] **Criminal Case No. 79 of 2006 (Meru) (unreported)**

[20] Legal Notice No. 117 of 28 June 2013