



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
PETITION NO.36 OF 2015
IN THE MATTER OF THE CONSTITUTION OF KENYA 2010
IN THE MATTER OF ARTICLES 40, 31,22,23 AND 165 OF THE CONSTITUTION
AND
IN THE MATTER OF THE MACHAKOS CHIEF MAGISTRATE'S
COURT CRIMINAL CASE NO 1395 OF 2014
BETWEEN
MORRIS MAKOVU.....PETITIONER
VERSUS
THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT
THE CHIEF MAGISTRATE COURT MACHAKOS.....2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT
AND
KENYA POWER AND LIGHTING COMPANY.....INTERESTED PARTY

JUDGMENT

Introduction

The Petitioner is an adult Kenyan Citizen residing and working in Nairobi within the Republic of Kenya ,and is a dependant of the estate of the late David Makovu Ndambo, who was the proprietor of land parcel No. MWALA/MANG0/179. The 1st and 2nd Respondents are the Director of Public Prosecutions and the in charge of the subordinate courts in Machakos Law Courts respectively, while the 3rd Respondent is sued in his capacity as the legal representative of the Government of Kenya. The Interested Party is a public limited liability company registered under the Companies Act (Cap 486 Laws of Kenya) whose key mandate is that of electricity generation and transmission.

The Petitioner has by way of a Petitioner filed in this Court on 27th November 2015 sought a prohibitory order against Criminal Case No. 1395 of 2014 at Machakos Chief Magistrates Court . The said Petition was supported by an affidavit sworn on 10th November 2015 by the Petitioner. The Petition is opposed by the 1st Respondent in a replying affidavit sworn on the 21st September, 2016 by C.I. Joseph Miguna, the D.C.I.O Mwala Divisional Headquarters. The 2nd and 3rd Respondents filed Grounds of Opposition to the Petition dated 14th September, 2016. The Petition is also opposed by the Interested Party in a Replying Affidavit of John Muriuki Nthiga sworn on the 1st August, 2016 and filed in court on the 3rd August, 2016.

The Parties' Respective Cases

The Petitioner's Case

The Petitioner claims that sometime in 2000, the Interested Party illegally and fraudulently erected a high voltage cable over land parcel No. MWALA/MANG0/179 without obtaining the requisite consent. Further, that he reported the matter to the police and after investigations, the 1st Respondent recommended the prosecution of the Interested Party's wayleaves officer for the offence of forgery.

However, that instead of acting on the said report, the DCIO Machakos incited the Petitioner's family members to testify against the Petitioner, and the officers of the 1st Respondent in collusion with the police, and without any reason, charged the Petitioner in the 2nd Respondent's court with 11 counts of forgery and making false documents. According to the Petitioner, the said charges in the 2nd Respondent's court were purely instigated by the Interested Party, and they were purely calculated to intimidate the Petitioner into abandoning his pursuit for the earlier claim. He annexed correspondence from the Prosecution state counsel advising that the Interested Party's wayleaves officer be charged with forging consent, and also various statements made to the police by his family members and other persons on the issue.

The Petitioner's Advocates, J.T. Nzioki Advocates, filed submissions on 30th November 2016, wherein reliance was placed on Articles 25, 50 and 51 of the Constitution on the right to a fair trial and Articles 23 (3) and 165 of the Constitution on this Court's powers to hear and determine issues of infringement of fundamental rights and freedom. Several judicial decisions were cited by the Petitioner in support of the argument that the decision to prosecute him leading to the proceedings in the lower court, were used purely to intimidate and oppress him to abandon the complaint which he had already launched against the officers of the Interested Party.

Reliance was placed in this respect on the decisions in **Justus Kathenge Mwendwa vs Director of Public Prosecutions, High Court Petition Number 372 of 2013** and **Gulom & Anor vs Chief Magistrate's Court & Anor (2006) eKLR**

The 1st Respondent's Case

The 1st Respondent gave a detailed account of the history of the charges brought against the Petitioner, and stated that sometime in the year 2013, the Petitioner lodged a complaint with them to the effect that the Interested Party had illegally and fraudulently erected a high voltage power line over their piece of land Plot No. MWALA/MANG0/179 that was still in the name of their deceased father, using a fake wayleave consent. After inquiry, it was recommended by the Prosecution state counsel that thorough investigations be done to ascertain how the way leave consent was obtained by the Interested Party.

The Petitioner and other members of his family were thereafter asked to record statements, and the 1st Respondent found that the deceased's eldest son, Edward Willy Makovu, had filed Machakos Succession Cause No.278 of 1998 which was yet to be determined. Further, that the Interested Party started implementing the rural electrification project in 2000 and erected power lines passing over the deceased's parcel of land, and that Edward Willy Makovu being the one who was left in charge of the day to day running of the family affairs, gave the way leave consent to erect the power line by endorsing his

signature on the same, and he was paid compensation by the Interested Party.

It was also found out by the 1st Respondent during the investigations that the Petitioner had filed a Succession Cause No. 291 of 2007 in Nairobi, and documents and proceedings relating to the said cause were requested by a letter dated 20th September, 2013. A response was given to the 1st Respondent by the Deputy Registrar of the High Court at Nairobi by a letter dated 25th September, 2013 enclosing copies of the documents. These documents are the ones that led to the charging of the Petitioner with the offences in criminal case No.1395 of 2014.

This was for reasons that the Assistant Chief Kyanganga sub-location and the Petitioner's family members denied writing and signing documents and consents that were filed in the said cause, and after a document examiner's examination of their specimen signatures, his report showed that their signatures were forged. The various correspondence and documents referred to were annexed by the 1st Respondent to support its account of events, as well as copies of the ruling in the trial Court on whether the Petitioner was found to have a case to answer.

The 1st Respondent's Prosecution Counsel, Adera Imelda, filed submissions dated 20th June 2017. It was contended therein that the Petitioner's rights under Article 40 of the Constitution were not infringed in any way, as he has not demonstrated how the same was infringed, and that when the Interested Party erected power through their father's land, the affected party was compensated and no complaint was ever lodged with them.

Further, that the Petitioner was accorded a fair trial and fair hearing as envisaged under Article 25 (c) and 50 of the Constitution, as he was represented by counsel throughout the trial; all the documents that were used by the prosecution during trial were supplied to the advocate in advance to enable them prepare for their defense; the Petitioner was conversant with the language that was used by court during trial; and he was given a chance to cross examine witnesses.

The 2nd and 3rd Respondents' Case

The 2nd and 3rd Respondents stated that the Petitioner has not demonstrated how the Respondents have violated his constitutional rights, and that the 2nd and 3rd Respondents have no prosecutorial powers under Article 156 of the Constitution of Kenya. Further, that the power to prosecute is vested upon the Office of the Director of Public Prosecutions under Article 157 of the Constitution of Kenya, and the police have the mandate to investigate a complaint under the National Police Act.

Therefore, that the 1st Respondent acted in accordance with the law, and there are no constitutional issues raised for the Court to determine as the Petition does not raise any violation of the Petitioner's fundamental rights and freedoms by the 2nd and 3rd Respondents.

The Interested Party's Case

The Interested Party on its part gave an account of its involvement with the Petitioner, and stated that this case revolves around land parcel No: Mwala/Mango/ 179 in which the Interested Party sought a wayleave in order to be able to supply Mwala Market in Machakos with electricity under the Rural Electrification program. The said land was registered under the name of Makovu Ndambo whom the Interested Party learnt was deceased. The Interested Party thereafter visited the said property and the wayleave was granted by Edward Willy Makovu who is the deceased's eldest son, and at the time of signing the consent had filed for letters of administration for the estate of the late Makovu Ndambo (Deceased) the owner of the property. The Interested Party thereafter assessed and paid all the damages payable to the estate of the late Makovu Ndambo.

The Interested Party stated that it thereafter received a letter dated 19th July and 20th July 2016 from Petitioner, wherein he was demanding compensation for a house which he alleged was destroyed by the Interested Party during the operation, to which it responded and notified the Petitioner that it only

compensates for property damaged during the construction of power lines and that land affected by distribution of power lines does not qualify for compensation. Copies of the damage assessment forms, the receipt confirming compensation to the estate of Makovu Ndambo, and the correspondence with the Petitioner were attached.

The Interested Party also denied taking part in, or controlling the way the investigations were carried out by the police, and averred that it is not answerable for the decision by the 1st Respondent to prosecute the Petitioner. Further, that it is the 1st Respondent who had the constitutional and statutory mandate to determine whether or not the Petitioner had committed an offence to warrant being charged in court, and that the Interested Party's role was limited to assisting the police in their investigations.

Prof. Albert Mumma & Company Advocates for the Interested Party filed submissions dated 4th April 2017, wherein it was contended that prosecutorial powers are vested in the Director of Public Prosecutions (DPP) under Article 157(6) of the Constitution, and that the decision to institute criminal proceedings by the DPP is discretionary and such exercise of power is not subject to the direction or control by any authority including the Interested Party as stipulated by Article 157(10) of the Constitution.

It was further submitted that the decision as to whether the Petitioner committed the offences he was charged with, and whether or not the wayleaves officer for the Interested Party ought instead to have been charged in the place of the Petitioner, is an issue which can only be determined by the trial court and that granting the prohibition orders sought by the Petitioner will amount to fettering with the mandate of the Director of Public Prosecution and the Chief Magistrates Court. Reliance was placed on the decision by Majanja J. in **Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR** in this respect.

Lastly, it was submitted that the failure by the Petitioner to provide particulars of breach of his rights under Article 25 and 50 of the Constitution was contrary to the well-established principle enumerated by the Court of Appeal in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** that the whole object of pleadings is to bring the parties to an issue. It was contended that no evidence of malice, unlawful actions, excess or want of authority, harassment, intimidation or manipulation of court process was brought by the Petitioner in support of his arguments that he might not get a fair trial as provided under Article 50 of the Constitution.

The Issues and Determination

I have considered the pleadings and submissions by the Petitioner, Respondents and Interested Party. At the outset I must clarify that the only relief sought in the Petition filed in this Court was that of an order of Prohibition. There was no prayer for a declaration, which was later introduced by the Petitioner in his submissions.

I am also alive to the relief that can be availed by this Court in a constitutional petition is provided for in Article 23(3) of the Constitution as follows:

“(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.”

Orders of judicial review, including those sought by the Petitioner of prohibition can therefore be granted by this Court if it is found that a Petitioner’s constitutional rights have been denied, infringed or violated.

I am in addition guided by the scope of the judicial review remedy of prohibition, as held in the Court of Appeal decision in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR in which the said Court held *inter alia* as follows:

“Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...”

The Petitioner’s main contention is that the Respondents and Interested Party have conspired to institute non-existent charges against him. The Petitioner in this respect alleges that his right to fair trial under Articles 25(c) and 50 of the Constitution has been thereby infringed. The Respondents’ and Interested Party’s submission on this point were that the Petitioner has not shown how his right has been violated.

Article 50 (1) of the Constitution 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. In addition, by Article 25 that right cannot be limited by law or otherwise. The Court of Appeal in Judicial Service Commission v Mbalu Mutava & another [2015] eKLR held that the right to a fair hearing as employed in Article 50(1) of the Constitution is a term of art, which exclusively applies to trial or inquiries in judicial proceedings, where a final decision is to be made through the application of law to facts.

The allegations of the Petitioner in this petition as to the infringement of his right to a fair hearing are however made in the context of the actions and decisions of the 1st Respondent and Interested Party prior to his being charged in the criminal Court, and not in relation to the actual conduct of the criminal proceedings against him. It is thus my finding that it was inappropriate for the Petitioner to invoke Article 50 of the Constitution which is inapplicable in the said circumstances.

The real issue therefore before the Court is whether the powers given to the Director of Public Prosecution were exercised lawfully and constitutionally in the prosecution of the Petitioner. Article 157(6) of the Constitution provides for the powers of the Director of Public Prosecution as follows:

“(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;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”

The above provisions must also be read with Article 157(10) of the Constitution which provides as

follows;

“ (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.”

In **Justus Mwenda Kathenge vs Director of Public Prosecutions and 2 Others**, High Court Petition No 372 of 2013 the Court stated as follows as to when the exercise of the DPP’s powers may be deemed to be unlawful:

“[8] It is now trite law that Courts cannot interfere with the exercise of the above mandate [exercise of prosecutorial powers] unless it can be shown that under Article 157(11);

(i) he has acted without due regard to public interest,

(ii) he has acted against the interests of the administration of justice,

(iii) he has not taken account of the need to prevent and avoid abuse of Court process.

The Petitioner’s grievance with the decision of the Director of Public Prosecution to prosecute him is that the said prosecution was mounted with the ulterior motive of preventing him from pursuing his complaint against the Interested Party’s wayleaves official. The Petitioner did provide evidence of his complaint against the said official, but did not place any material before the Court to show how the Interested Party thereafter influenced the prosecution to act. Furthermore, the 1st Respondent gave a detailed account of the investigations and grounds for charging the Petitioner, and provided the evidence that established a reasonable basis for its actions.

In addition, as the genesis of this dispute is the payment of compensation with respect to the wayleave over the Petitioner’s deceased’s father’s land, the law is in this respect clear that a civil matter arising from the same facts and circumstances that also point to the possible commission of a criminal offence, cannot of itself be an ulterior motive in the prosecution of the criminal offence. Section 193A of the Criminal Procedure Code provides as follows in this respect;

“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.”

I am therefore not persuaded, on the facts before me and for the foregoing reasons, that there is an ulterior or improper motive in the Petitioner’s prosecution, or that the Director of Public Prosecution has abused his constitutional mandate under Article 157 of the Constitution. It is also not the mandate of this Court in judicial review proceedings to determine who the proper person to be charged with the offences that may have been committed is, especially bearing in mind that the nature of the remedy that is sought of prohibition is that it only looks to the future, and is meant to stop an anticipated event that is likely to be in excess of jurisdiction.

I therefore find that no grounds have been established for the orders of prohibition sought by the Petitioner, and the Petition filed herein on 27th November 2015 is found not to have merit and is dismissed with no order as to costs. The orders of stay of proceedings in Criminal Case No. 1395 of 2014 at Machakos Chief Magistrates Court granted herein on 13th June 2017 are accordingly vacated.

Orders accordingly.

Dated and Signed at Machakos this 26th Day of July 2017

P. NYAMWEYA

JUDGE