



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 66 OF 2014

IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTION AND THE BILL OF RIGHTS ARTICLE 22, 23 AND 24

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 27, 29, 40, 47, 50 AND 157 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SENIOR RESIDENT MAGISTRATE'S COURT, MARIAKANI CRIMINAL CASE NO. 674 OF 2014 REPUBLIC VS. ABDUL KARIM SALEH

BETWEEN

ABDUL KARIM SALEH.....PETITIONER

VERSUS

1. DIRECTOR OF PUBLIC PROSECUTIONS

2. MOHAMED SHEIKH ABDULAHI.....RESPONDENTS

JUDGMENT

1. In his Petition dated and filed on 6th November, 2014, the Petitioner, Abdul Karim Saleh, seeks the following orders -
 - (a) A declaration that the Petitioner's constitutional rights have been breached;
 - (b) A declaration that the prosecution of the Petitioner in Mariakani PM Court Criminal Case No. 674 of 2014 is violating the Petitioner's constitutional rights;
 - (c) A declaration that the First Respondent has acted unlawfully and against the Constitution on prosecuting the Petitioner, and has breached its Constitutional mandate.

2. The Petitioner was represented by Mr. Magolo, while the First Respondent, the Director of Public Prosecutions was represented by Mr. Wamotsa, Senior Prosecution Counsel. It was common ground between the Petitioner's and Respondents counsel that the facts relating to the Petition are not in dispute.
3. The Petitioner and the Second Respondent both lay claim of ownership of the parcel of land known as KILIFI/KAWALA "A"/KADZONZO/13 ("the suit land"). To assert their respective rights, the Petitioner's company, (Regional Container Freight Station Limited) has sued the Second Respondent in Mombasa ELC Case No. 271 of 2014 Regional Freight Stations Limited vs. Mohamed Sheikh Abdullahi, and which suit is pending determination in this court.
4. It is also common ground that the Second Respondent was in the process of putting up a perimeter wall on 18h November, 2014, when a group of about thirty (30) men led by the Petitioner and armed with rungas, jembes, spades and pangas invaded the suit land, chased away the Second Respondent's three (3) workers, and destroyed their materials such as ballast, equipment such as wheelbarrows and brought down the fence.
5. Naturally alarmed the three workmen Ahmed Gorot Shaf Shaf, Ngoka Dzinga and Katana Kahindi Kadenge (the eye witnesses) made a report to Mariakani Police Station, and thereafter the Police carried out swift investigations and had the Petitioner arraigned in court on 31st November, 2014, charged with the offence Malicious Damage To Property contrary to section 339(1) of the Penal Code (Cap 63, Laws of Kenya).
6. The particulars of the offence include, willful and unlawful damage to a perimeter wall, four wheel barrows, a tank, 50 bags of cement all valued at Kshs. 900,000/= the property of the Second Respondent.
7. Alarmed with the prosecution, the Petitioner came to court on 6th November, 2014, and on 14th November, 2014 obtained conservatory orders halting his prosecution pending the determination of the Petition herein.
8. The Petitioner claims in paragraph 8 of the Petition that his prosecution is a clear breach of the Petitioner's constitutional right to liberty for detaining him for over six hours, and claims that he was charged on 3rd November, 2014 at Mariakani Law Courts for allegedly non-existent offence, and that in any event the dispute between him and the Second Respondent is a civil matter pending in court, and that the prosecution should be nullified by the court.
9. The First Respondent, through the Replying Affidavit of No. 65873, PC Johnstone Wekesa sworn and filed in court on 18th June, 2015 points to a totally different picture. A complaint was made by the Second Respondent's three workers who witnessed the destruction of the Second Respondent's perimeter wall to the suit property, and the threat of violence towards the Second Respondent's workers, while erecting the perimeter wall. Investigations were carried out and the Petitioner was charged for the offence of malicious damage to property, contrary to section 339(1) of the Penal Code.
10. The Petitioner claims that his rights to liberty were breached contrary to Article 29(a) and (b) (no deprivation of freedom arbitrarily or without just cause, or detention without trial), and Article 50(2)(b) to be informed of the charge with sufficient detail).
11. The issue which arises, is whether there was a just cause, and whether the offence of malicious damage to property is an offence known to the law. A third question is whether the Petitioner is liable to prosecution notwithstanding the existence of a dispute between him and the Second Respondent.
12. I will commence with third issue. A person may be subjected to criminal prosecution notwithstanding the existence of a civil dispute between him and a third party on the same subject matter. Authority for this statement may be found in section 193A of the Criminal Procedure Code (Cap 75, Laws of Kenya) which says –

“S.193A Notwithstanding the provisions of any 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.”

13. In other words the existence of Mombasa ELC Case No. 271 of 2014 is no bar against the prosecution of the Petitioner, unless it was shown that the prosecution is being conducted for an ulterior motive or out of malice. There was no evidence or submission that the prosecution was instituted for any of those grounds.

14. On whether there is an offence known in law as malicious damage to property, section 339(1) of the Penal Code clearly states –

“339(1) Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which unless otherwise stated, is a misdemeanor, and is liable of no other punishment is provided, to imprisonment for five years” (And depending on the property destroyed can earn the offender between ten years to life imprisonment).”

15. The answer to the first question is therefore that the offence of malicious damage to property exists in the Penal Code, and any person who willfully and unlawfully destroys or damages any property is guilty of that offence.

16. The third constitutional question is whether the deprivation of the Petitioner’s liberty was justified, or had a just cause. From the Replying Affidavit of PC Wekesa, and the Statements of would-be witnesses, that is a prima facie evidence of a just cause for the arrest and prosecution of the Petitioner.

17. In the premises therefore I find no merit in the Petitioner’s arguments, and the Petitioner’s Petition dated and filed on 6th November, 2014 is hereby dismissed with a direction that each party bears its own costs.

18. For avoidance of doubt, the conservatory orders herein before are discharged and vacated.

19. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 29th day of February, 2016.

M. J. ANYARA EMUKULE (MBS)

JUDGE

In the presence of:

Mr. Otwere holding brief Gikandi & Magolo for Petitioners

Mrs. Waswa holding brief Omotso for Respondent

Court Assistant Kaunda