



**IN THE HIGH COURT**  
**AT NAIROBI MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 83 OF 2014**

**BETWEEN**

**GEORGE OTIENO MARENYA.....PETITIONER**

**AND**

**COUNTY COMMISSIONER NAIROBI**

**FORMERLY PROVINCIAL ADMINISTRATION.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**PHELIS NYOKABI NJOROGE.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner has filed this petition claiming that the 1st respondent's agent and his landlord, the 5<sup>th</sup> respondent illegally seized his household items. He alleges that despite his report of the unlawful conduct, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents failed and/or delayed to investigate and prosecute 1<sup>st</sup> respondent's agent and the 5<sup>th</sup> respondent.

2. In the petition dated 14<sup>th</sup> March 2014, he therefore seeks the following orders:

*a. A declaration that the illegal seizure of the petitioner's property and house hold goods by the 1<sup>st</sup> and 5<sup>th</sup> respondents is in contravention of fundamental rights and freedoms of the individual to wit, 27, 28, 31, 40 and 47 of the Constitution.*

*b. A declaration that the refusal and or delay in investigating and taking action on the petitioner's complaint by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to investigate.*

*d. An order of Mandamus to compel the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to investigate and report to the court on the investigation of the petitioner's complaint and or prosecute the 1<sup>st</sup> and 5<sup>th</sup>*

*respondent for theft.*

*d. A declaration that there be restitution of the petitioner's property and household items seized by the respondents.*

*e. An order for compensation of the petitioner for damages as a result of the infringement of his fundamental rights and freedoms.*

*f. Costs of the petition.*

*g. Any other or further orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the petitioner's fundamental rights and freedoms.*

3. The petitioner relied on the petition and his supporting sworn on 13<sup>th</sup> March 2014. He also gave oral testimony. The court also heard the evidence of Acting Inspector Arimi and the 5<sup>th</sup> respondent.

### **Petitioner's Case**

4. It is the petitioner's case that on 5<sup>th</sup> February 2014, the 5<sup>th</sup> respondent and the area chief, broke into his house in Rasta area, Kayole Estate within Nairobi County in his absence. On the same day he lodged a complaint at Kayole Police Station which was duly noted in the Occurrence Book. He recorded statements and gave an inventory of the stolen items.

5. He testified that on 13<sup>th</sup> February 2014, the Officer Commanding Kayole Police Station ("the OCS") summoned the area chief and the 5<sup>th</sup> respondent to the station to record statements on their alleged actions. He states that no further action other than the recording of the statements has been taken to investigate and prosecute the matter despite him making follow ups at Kayole Police Station and writing to the DPP and the Officer Commanding Police Division, Kayole Division.

6. The petitioner denies defaulting rent payments and receiving any notice of eviction from the 5<sup>th</sup> defendant. He contends the seizure of his property violated his fundamental rights and freedoms.

### **Respondents' Case**

7. The respondents opposed the petition. Police Inspector Denis Kaburu swore a replying affidavit on 2<sup>nd</sup> April 2014 and Police Inspector Patrick Arimi gave oral evidence in court and produced the investigation file in evidence.

8. In his deposition, Isp. Kaburu, the Investigating Officer, confirms that he investigated the complaint lodged by the petitioner. He confirmed that after the complaint was made, he sent two officers to the petitioner's premises. He also summoned the petitioner and the 5<sup>th</sup> respondent to record statements. He also recorded the statements from the area chief and the youth assistant. In light of the action taken on the petitioner's complaint, Isp. Kaburu denies that the police have failed to take any action on the petitioner's complaint.

9. Acting Isp. Arimi reiterated what Isp. Kaburu stated in his deposition. He produced the investigation file in court. He stated that the investigation concluded that the dispute between the petitioner and the 5<sup>th</sup> respondent was a landlord-tenant dispute and because the petitioner gave information gave false information regarding theft of his household items, the investigating officer recommended that the petitioner be charged with the offence of giving false information to a person employed in public service contrary to **section 129(a) of the Penal Code**.

10. The 5<sup>th</sup> respondent in her testimony stated that the petitioner was a good tenant until March 2012

when he started making late payment of rent. She stated that in November 2013, the petitioner defaulted in paying rent so she offset the rent from the deposit. In December 2013, the petitioner paid rent on 20<sup>th</sup> and as a result she sought the chief's intervention. She testified that the Chief then issued her with a notice to vacate to serve the petitioner but the petitioner declined to receive it. It is after declining to receive the notice that she took the step of requesting the area Chief and his assistant, a Mr Morara to help her remove the petitioner from the premises.

11. She testified that on the material day, the petitioner came at around 4 pm, while his items were being removed from the house, but he proceeded to the police to make a report. The 5<sup>th</sup> respondent stated that the petitioner's house was broken into by the area chief and Mr Morara. She asserts that the petitioner's goods have been stored safely but that the petitioner has refused to collect them despite several requests.

### **Determination**

12. The issues that fall for determination can be readily determined from the prayers in the petition as follows;

- a. Whether the seizure of the petitioner's property by the 1<sup>st</sup> and 5<sup>th</sup> respondent was in contravention of his fundamental rights and freedoms and if so, whether the petitioner is entitled to restitution and or damages.
- b. Whether the refusal and or delay investigating action by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent is a contravention of the petitioner's fundamental rights and if so, whether they should be compelled by way of an order of mandamus to prosecute the 1<sup>st</sup> and 5<sup>th</sup> respondents for theft.

### ***Seizure of the petitioner's property***

13. It is evident that at the heart of the petitioner's claim is a rent dispute between him and the 5<sup>th</sup> respondent. The 5<sup>th</sup> respondent tried to resolve it through the local chief's office. She issued a letter dated 1<sup>st</sup> January 2014 to the petitioner to vacate the room and in default she would take legal action. The petitioner denies receiving this notice.

14. The monthly rent for the petitioner's room was Kshs. 2,400/= per month which is below the Kshs. 2,500/= threshold for the jurisdiction of the Rent Restriction Tribunal ("the Tribunal") established under the ***Rent Restriction Act (Chapter 296 of the Laws of Kenya)*** ("the Act"). Under **section 6** of the Act, *"the tribunal may investigate any complaint relating to the tenancy of premises made to it by either a tenant or the landlord of those premises."* The matter therefore ought to have been referred to the Tribunal which is established by law to deal with issues which have been brought before this court.

15. Even if the matter was not one for the Rent Restriction Tribunal, the issue between the petitioner and the 5<sup>th</sup> respondent concerns whether the petitioner owed the landlord rent, whether the notice to vacate was actually issued and if so, whether the landlord was entitled to evict the petitioner from the house. These are matters which are properly dealt with in the civil courts. The fact that local chief was involved does not change the tenor of the case as he was acting at the behest of the 5<sup>th</sup> respondent to enforce her rights as a landlord.

16. In my view, the matter ought to have been taken to an appropriate forum for resolution. I am aware that this is a petition brought under **Article 22** to enforce fundamental rights and freedoms but I must emphasise that rights and fundamental freedoms are also realised through ordinary laws and procedures which are enacted pursuant to the State's responsibility to observe, promote, protect and fulfil these fundamental rights and freedoms. It follows therefore that the petitioner is entitled to sue the respondents for any wrong committed by the landlord. I also hold that the law provides an efficacious remedy to protect the petitioner hence there is no need for recourse to the Constitution.

17. The 5<sup>th</sup> respondent has testified that the petitioner's property is still at the premises and may be collected at any time. It is therefore not necessary to issue an order to that effect. If any items are missing, the petitioner may lodge a claim against the 5<sup>th</sup> respondent in ordinary court if he deems fit.

18. In light of my findings, I have exercised great circumspection in commenting on the myriad contested issues. I decline to find in favour of the petitioner on the first issue for determination.

### ***Investigation and prosecution of the 1<sup>st</sup> and 5<sup>th</sup> respondent***

19. The determination of the second issue calls for a consideration of the mandate and powers of the Director of Public Prosecutions ("the DPP") and the Inspector General of Police. Both offices are established under **Articles 157** and **245** of the Constitution respectively. The DPP has the power to prosecute criminal offences independently and without interference. The Inspector General of the National Police Service exercises independent command over the National Police Service. Under the **National Police Service Act, 2011** the police have the duty to detect and investigate complaints and offences. Under **Article 157(4)** of the Constitution, the DPP may instruct the Inspector General to investigate any criminal matter.

20. From the evidence of Isp. Kaburu and Ag Isp. Arimi, I find that the police dealt with the complaint laid by the petitioner. Police officers visited the scene of the crime, summoned potential witnesses and recorded their statements. The investigation resulted in a specific recommendation that the petitioner be charged. The Court is not concerned with the result of the investigation but the fact that the police carried out its mandate.

21. As the investigation is complete, the Office of the DPP will no doubt make a decision whether or not to prosecute the petitioner as recommended. This is a decision reposed in the DPP and this Court cannot intervene absent a violation of the Constitution. Since decision has not been made in that respect, the Court cannot intervene.

22. An order of mandamus can only be issued to compel a public office to perform a duty which has not been performed. In this case, I find and hold that the police have investigated the matter and the Director of Public Prosecution is yet to direct his mind to the recommendation of the police to prosecute the petitioner. The case against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is therefore dismissed.

23. During the hearing, the petitioner complained about the manner in which he was treated by the police. Such complaints can now be dealt with by the Independent Police Oversight Authority established under the **Independent Police Oversight Authority Act, 2011** and the petitioner is at liberty to lodge his complaint there.

### **Disposition**

24. The upshot of my findings is that the petition herein fails and is dismissed. I make no order as to costs.

**DATED and DELIVERED at NAIROBI this 16<sup>th</sup> day of April 2014.**

**D.S. MAJANJA**

**JUDGE**

Mr Ambani instructed by Mwangi Wahome and Company Advocates for the petitioners.

Ms Irari, Litigation Counsel, instructed by the State Law Office for the 1<sup>st</sup> and 4<sup>th</sup> respondent.

Ms Kiget, Prosecution Counsel, instructed by the Directorate of Public Prosecutions 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Ms Muchira instructed by L. N. Muchira and Company Advocates for the 5<sup>th</sup> respondent.