



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 590 OF 2013

JULIUS MUNGAIPETITIONER

VERSUS

THE HON. ATTORNEY GENERALRESPONDENTS

THE PRINCIPAL MAGISTRATE'S COURT

AT KAJIADO2ND RESPONDENT

ANNE WANJIKU WAINAINA3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioner was charged in Kajiado Criminal Case No 175 of 2011 with the offence of discharging raw sewage into the 3rd respondent's plot no 49 situate in Ongata Rongai contrary to section 115 and section 118(1)(b),(c) and (e) as read with section 119 and 121 of the Public Health Act (Cap 242) Laws of Kenya. A second count charged that he failed to comply with a legal public health statutory notice contrary to section 120 of the Public Health Act (Cap 242) Laws of Kenya. The petitioner is the caretaker of plot no 45 adjoining the 3rd respondent's plot.
2. He was tried and acquitted under section 215 of the Penal Code. He is aggrieved, however, that in its judgment, while finding that the raw sewage was not emanating from plot. no. 45, it ruled that he should participate in and continue to attend court as certain excavations are undertaken in the 3rd respondent's property to ascertain the source of the raw sewage.
3. He alleges that the acts of the 2nd respondent are a violation of his constitutional rights to, among others, a fair hearing under Article 50 of the Constitution. In his Amended Petition dated 18th February 2014 he seeks various orders and declarations set out in the petition.
4. The petition is opposed by the 2nd and 3rd respondents. The Attorney General filed grounds of opposition dated 17th March 2014 in which he contends that the petitioner has not shown how his rights under Article 50 have been violated; that his interpretation of the Constitution and the judgment of the Court is misleading and self-serving; and that the petitioner raises no constitutional issues, is an abuse of the court process and should be dismissed with costs.
5. The Director of Public Prosecutions, who was enjoined in this matter in light of his constitutional

mandate, did not oppose the petition.

The Petitioner's Case

6. Learned Counsel, Mr. Chege, relied on the Amended Petition and the affidavit in support sworn by the petitioner on 18th February 2014 as well as written submissions dated 6th May 2014.
7. In his affidavit, the petitioner avers that he was the caretaker of a building situate on plot No. 45 situated in Ongata Rongai owned by one Hiram K. Mungai who resides in California in the United States of America.
8. He alleges that in March 2011, he was arrested at the instigation of the 3rd respondent on the allegation that he was discharging raw sewage from plot No 45 on to her plot no 49. He was charged and tried in Kajiado Criminal Case No 175 of 2011. In the course of the hearing, the Court visited the site of the alleged offence and established that plot No. 45 was not the source of the sewage.
9. He further states that the court directed the Kajiado Public Health Officer, NEMA officials and the Public Works engineer to visit the site, find the source of the effluence and file a report in court. At the end of the prosecution, the court found that the prosecution had failed to prove its case beyond reasonable doubt and acquitted him under section 215 of the Criminal Procedure Code in its judgment dated 16th July 2013.
10. He is, however, aggrieved that despite his acquittal, the court required him to accompany the court on site visits in the company of NEMA officials, public health officers, county surveyors, and the 3rd respondent for the purpose of excavating the boundary between the two plots from within the 3rd respondent's plot to ascertain the source of the sewage. His objection to this order of the Court was overruled in the ruling dated 17th October 2013. It was as a result of this ruling that he filed the present petition.

The Position of the DPP

11. The Director of Public Prosecution conceded at the outset that for the petitioner to be subjected to further proceedings after acquittal was unlawful. At the hearing of the petition, Mr. Ashimosi reiterated this position and agreed with the petitioner that submitting him to further proceedings was a violation of his rights and that the 2nd respondent became *functus officio* after it acquitted the petitioner, while the prosecution had no further role in the matter.

The 2nd Respondent's Case

12. Mr. Sekwe, Counsel for the 2nd respondent opposed the petition and relied on the grounds of opposition and submissions filed on behalf of the 2nd respondent. Mr. Sekwe argued that the public good as opposed to an individual's right should be the main consideration; that Article 69(2) imposes a constitutional duty on every person to protect the environment; that though the petitioner was acquitted of charges under the Public Health Act, the hazard that he was charged in respect of is still ongoing and has not been resolved. Counsel argued that the hazard poses a health risk to the public at large and the petitioner has a duty to cooperate while the court has a duty under Article 69(2) to supervise the excavation.
13. Mr. Sekwe further contended that the petitioner has an alternative remedy in that he should have appealed against the judgment of the trial court and the recommendations made in the judgment.

The 3rd Respondent's Case

14. Through her Counsel, Mr. Githuka, the 3rd respondent also opposed the petition and relied on

submissions dated 7th May 2014 as well as the judgment of the trial court. Her contention was that in the exercise of judicial authority under Article 159(2)(a), justice must be done to all; that this was a public health issue and it was imperative that justice be done to all; and that raw sewage was still continuing in the subject premises unabated. According to the 3rd respondent, Article 42 guaranteed to all the right to a clean environment while Article 69 casts an obligation on the state, including the court, to eliminate processes likely to endanger the environment. She contended further that Article 69(2) imposes a duty on parties to cooperate with state organs, including the courts, to conserve the environment.

15. It was her case that at the end of the petitioner's trial, there was no doubt that there was effluence in the subject premises; what was in doubt was the source, and the petitioner, who in his evidence had stated that he should be allowed to go into the 3rd respondent's premises to establish the source of the effluence, could not now complain.
16. The 3rd respondent contended that the court has a duty to safeguard the environment; that the recommendation of the court does not cast a duty on the petitioner to appear in court but that it assists the public health officer to resolve the source of the effluence.
17. She submitted that the court did not make a recommendation that infringed the rights of the petitioner; that she had no problem with the petitioner not attending court, but that a resolution of the matter was necessary. What was required of the petitioner was his presence during the excavation which required to be done where the walls of the 3rd respondent and the property of which the petitioner is caretaker abut.

Determination

18. I have read the pleadings of the parties, as well as their submissions in this matter. I have also read the judgment of the court (Hon. S.O. Temu, PM) and the ruling of Hon. M. A Ochieng (SRM) dated 11th October 2013. What emerges from these decisions is the concern of the court to assist in establishing the source of raw sewage that was clearly a nuisance, and doubtless still is a nuisance, to both the petitioner, the 3rd respondent, and indeed the neighbourhood in the Ongata Rongai area where the two properties are located.
19. What is clear also, however, is that the court had found no culpability on the part of the petitioner. While it expressed quite some frustration with public officers such as engineers in the Ministry of Works whom it had requested for assistance, it found that the prosecution had failed to prove its case against the petitioner. The court also observed that the 3rd respondent had been adamant that she would not allow any excavation to be carried out within her property.
20. Having found that the prosecution had not established its case against the petitioner, even though the nuisance continued, could the court properly continue to require attendance before it by the petitioner?
21. Unless there are provisions in the Public Health Act that empower it to continue dealing with the matter and to oversee the excavation with a view to abating the nuisance, and unless it can be shown that the petitioner is responsible for the nuisance, it appears to me that the petitioner is correct in asserting that the court became *functus officio* upon his acquittal. Indeed, this was conceded directly at the outset by the Director of Public Prosecutions, and somewhat reluctantly by the 2nd and 3rd respondents.
22. None of the parties referred me to any provisions of the **Public Health Act** that would allow the 2nd respondent to remain seized of the dispute, or to require attendance by the petitioner in court in the process of excavation of the premises where the raw sewage is suspected to be emanating from.
23. I have considered the provisions of the Act, particularly those under which the petitioner was

charged, section 115, 118(1)(b),(c) and (e) as read with section 119 and 121 of the Act. These sections are contained in Part IX of the Act titled “**Sanitation and Housing**”. Section 115 provides as follows:

“No person shall cause a nuisance or shall suffer to exist on any land or premises owned or occupied by him or of which he is in charge any nuisance or other condition liable to be injurious or dangerous to health.

24. At section 116, the Act requires local authorities to maintain cleanliness and prevent nuisances. It states as follows:

“It shall be the duty of every local authority to take all lawful, necessary and reasonably practicable measures for maintaining its district at all times in clean and sanitary condition, and for preventing the occurrence therein of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health, and to take proceedings at law against any person causing or responsible for the continuance of any such nuisance or condition.

25. Section 118 defines what constitutes a nuisance under the Act, with section 118 (b) and (c) defining a nuisance to include

“any dwelling or premises or part thereof which is or are of such construction or in such a state or so situated or so dirty or so verminous as to be, in the opinion of the medical officer of health, injurious or dangerous to health, or which is or are liable to favour the spread of any infectious disease; and “any street, road or any part thereof, any stream, pool, ditch, gutter, watercourse, sink, water-tank, cistern, water-closet, earth-closet, privy, urinal, cesspool, soak-away pit, septic tank, cesspit, soil-pipe, waste-pipe, drain, sewer, garbage receptacle, dust-bin, dung-pit, refuse-pit, slop-tank, ash-pit or manure heap so foul or in such a state or so situated or constructed as in the opinion of the medical officer of health to be offensive or to be injurious or dangerous to health;”

26. Section 119 deals with the issuance of notices to remove nuisance by the medical officer of health. The notice is to be served on the author of the nuisance, and if he cannot be found, the occupier or owner of the dwelling or premises on which the nuisance arises or continues, requiring him to remove it within the time specified in the notice.

27. Proviso (ii) to section 119 is instructive. It provides as follows:

“where the author of the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act or default or sufferance of the occupier or owner of the dwelling or premises, the medical officer of health shall remove the same and may do what is necessary to prevent the recurrence thereof.

28. Section 120 of the Act contains the procedure to be followed if an owner of premises fails to comply with notice. It is the provision under which the petitioner in the present case was charged and acquitted. The Court seized of the matter is empowered, under section 120(8), to require that an inspection of the premises where the nuisance is occurring to be carried:

(8) Before making any order, the court may, if it thinks fit, adjourn the hearing or further hearing of the summons until an inspection, investigation or analysis in respect of the nuisance alleged has been made by some competent person.

29. As noted above, the trial magistrate did make an order for competent persons to assist with determining where the effluence in the subject premises was coming from, an order that was not complied with. He also considered the evidence before him, and came to the conclusion that the nuisance was not being caused by the petitioner. Consequently, given the above provisions of the

Act, it seems to me that there is no longer any basis to require the continued appearance of the petitioner in court.

30. The petitioner has alleged violation of various of his rights under the Constitution, specifically under Article 50. My reading of the judgment and ruling of the Court do not disclose a violation of any rights of the petitioner. The trial court may have been mistaken in requiring that he continues to attend court, but not, in my view, in requiring that he participate in the excavation of the premises to establish the source of the nuisance. It is in the interest of both the petitioner and the 3rd respondent, whose premises are adjoining, to cooperate in any attempt to ensure that the source of the waste in the subject premises is established and removed.

31. In the circumstances, I find no violation of the petitioner's rights as alleged. The petitioner need not appear before the court seized of the matter and under whose supervision the excavation, with the assistance of various state officers, including NEMA and Public Health, is continuing. He has, however, an obligation, as does the 3rd respondent, should this be required, to co-operate with Public Health and the National Environment Management Authority officers in the process of establishing the source of the effluence giving rise to the criminal prosecution and the present petition.

32. Should any of the parties fail to co-operate, then the medical officer of health can invoke once again the powers vested in him or her under the Public Health Act. In particular, as noted above, the medical officer of health has power under Section 119, proviso (ii), to ***“remove the (nuisance) and may do what is necessary to prevent the recurrence thereof.”***

33. Each party shall bear its own costs of this petition.

Dated, Delivered and Signed at Nairobi this 31st day of July 2014

MUMBI NGUGI

JUDGE

Mr. Chege instructed by the firm of Mwangi Chege & Co. Advocates for the Petitioner

Mr. Ashimosi instructed by the Director of Public Prosecutions

Mr. Sekwe instructed by the State Law Office

Mr. Gikunda instructed by the firm of Ndung'u Githuka & Co. Advocates for the 3rd Respondent