



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 13 OF 2018

STEPHEN MBUGUA NJOROGE.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE.....2ND RESPONDENT

AND

THE COUNTY CRIMINAL INVESTIGATION OFFICER, NAIROBI COUNTY

AND

JOSEPH GITAU KIBUCI.....INTERESTED PARTY

JUDGMENT

1. Through the petition dated 16th January, 2018, the Petitioner, Stephen Mbugua Njoroge, seeks orders as follows:-

- a) THAT this Court be pleased to declare that the rights as protected under the provisions of Article 22, 23, 27, 28, 29 and 47 of the Constitution were and/ or are being infringed by the CCIO, Nairobi County.
- b) THAT this Honourable Court be pleased to declare that the CCIO, Nairobi County has acted contrary to the due process of the law and that their actions are unlawful and the same should cease forthwith.
- c) THAT this Honourable Court be pleased to declare that any intended arraignment of the Petitioner in any criminal court in relation to the matter raised in this Petition is unconstitutional, illegal and a breach of lawful due process.
- d) THAT this Honourable Court be pleased to issue an order prohibiting the CCIO, Nairobi or any department of the police from harassing the Petitioner on matter raised herein and/or infringing on their fundamental rights.
- e) THAT this Honourable Court be pleased to grant the Petitioner cost of this petition.
- f) THAT this Honourable Court be pleased to make any other such orders as it deems just and expedient in the attainment of justice.”

2. In the petition, the Director of Public Prosecutions is named as the 1st Respondent and the Inspector General of Police is named as the 2nd Respondent. The petition is also said to be between the Petitioner and Ex-parte The County Criminal Investigating Officer, Nairobi County, (CCCO, Nairobi County) Joseph Gitau Kibuci is named as an Interested Party.

3. The Petitioner’s case is straight forward. His averment is that he is the sole director of Realcom Company Limited and on 10th October, 2017 his company entered into a land sale agreement with the Interested Party through which his company was to sell land parcel number Lamu/Tchundwa/786 to the Interested Party at a consideration of Kshs.20,000,000/-. A deposit of 162,970 USD equivalent to

Kshs.16,000,000/- was made and the balance was to be paid within 90 days.

4. According to the Petitioner, the deposit was received from United Nations Federal Credit Union (UNFCU) being the financier of the Interested Party. It is the Petitioner's case that the Interested Party failed to perform his contractual obligation and instead reported the matter to the CCIO, Nairobi County alleging that he had conned him of Ksh.16,000,000/- on the pretext that he would sell him land in Karen, Nairobi.

5. According to the Petitioner, he had a good business relationship with the interested Party. Further, that instead of responding to his demand for the balance of the sale price, the Petitioner reported the matter to the CCIO, Nairobi County who had summoned him to record a statement.

6. It is the Petitioner's case that this is a purely civil matter and allowing the investigations to proceed would violate his constitutional rights under Articles 28, 29 and 47 of the Constitution.

7. The 1st Respondent opposed the petition through the replying affidavit sworn on 6th March, 2018 by the Investigating Officer Police Constable David Riungu. His averment is that on 22nd December, 2017 the CCIO, Nairobi County received a complaint from the Interested Party alleging that in October, 2017 the Petitioner who is the director of Realcom Company Limited had falsely obtained Kshs.16 million from him on the pretext that he was in a position to sell him half an acre of land situated in Karen, Nairobi. The Interested Party further reported that the Petitioner had advertised the sale of half acre plots in Karen and they had indeed visited the site.

8. The Investigating Officer averred that the Petitioner had informed the Interested Party that he was in the process of sub-dividing the plots and the titles were thus not ready. As the parties were known to each other and had even worked together for the United Nations Organization, the parties reached a gentleman's agreement wherein the Petitioner offered the title for a parcel he owns in Lamu to assist the Interested Party secure a loan with his bank. Further, that the parties agreed to execute a sale agreement for the Lamu property owned by the Petitioner as the Karen plot was under sub-division and a sale agreement was necessary in order for the Interested Party to secure bank financing. The parties therefore entered a sale agreement dated 10th October, 2017 for L.R. No. Lamu/Tchundwa/786 which the Interested Party used to obtain a loan of 162,000 USD equivalent to Kshs.16 million from UNFCU. That the sum of 162,000 USD was indeed disbursed by UNFCU to Realcom Company Limited's bank account with Equity Bank on 8th November, 2017.

9. The Investigating Officer further averred that the Petitioner had declined to honour summons for investigations and had instead written a letter explaining the events and circumstances of the alleged complaint. Further, that the advocate who had witnessed the execution of the sale agreement indicated that he indeed witnessed the agreement concerning the Lamu property and at no point did the Interested Party instruct him on a Karen property.

10. It is the Investigating Officer's averment that it is in the public interest that all complaints made to the police are investigated and the perpetrators of crimes are arrested, charged and prosecuted in court. Further, that Section 52 of the National Police Service Act grants a police officer power to summon any person believed to have information which may assist in investigations to appear before the police. He stated that such summons does not indicate intention to charge or prosecute the person summoned as this is among the tools used by the police in conducting investigations.

11. The Interested Party opposed the application through a replying affidavit sworn on 7th February, 2018. His story is that he entered into a sale agreement with the Petitioner for the Lamu property for the purposes of securing a loan from his bankers. He averred that the actual property he was purchasing from the Petitioner was half an acre of land in Karen, Nairobi but since the land was still undergoing sub-division they reached a gentleman's agreement to enter into an agreement using the Lamu property so that he could secure the bank loan. He stated that the bank loan was indeed processed and as per the protocol of the bank the money was disbursed to the Petitioner who was the vendor as per the agreement. His averment was that upon the transfer of the money to the Petitioner's account, he requested the Petitioner to transfer the money to his account but the Petitioner deployed all sorts of delaying tactics and excuses for failing to transfer the money to his account as agreed.

12. The Interested Party attached the advertisement by the Petitioner's company for the sale of half-acre plots in Karen, Nairobi. He accused the Petitioner of belatedly writing a demand for the balance of the sale price in an attempt to falsify the actual facts of the matter. The Interested Party therefore asked the court to dismiss the petition.

13. A perusal of the pleadings discloses that the only issue for the determination of the court is whether the Petitioner has established grounds warranting this court's interference with the investigative powers donated to the 2nd Respondent by the Constitution and the law.

14. I have perused the submissions filed by the advocates for the parties and I will take the submissions into account in reaching my decision. In order to get a clear perspective of the law, it is imported to reproduce Article 245 (4) of the constitution which provides that:-

“4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to--

(a) the investigation of any particular offence or offences;

(b) the enforcement of the law against any particular person or persons; or

(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.”

15. A reading of the said provision confirms that the independence of the National Police Service in the execution of its functions is secured by the Constitution. Section 24 of the National Police Service Act gives the police the mandate to investigate crime, prevent and detect crime, apprehend offenders and enforce the laws of the land.

16. A perusal of the affidavits filed in this petition shows that the facts are generally not disputed. The Petitioner has over Kshs.16 million belonging to the Interested Party. The Petitioner claims that the money was paid to him after he sold land in Lamu to the Interested Party. The Interested Party alleges that the money was meant for a parcel of land in Karen, Nairobi.

17. The Interested Party has produced an advertisement by the Petitioner's company for sale of plots in Karen. He has explained why the agreement for the sale of the Lamu parcel of land was signed between him and the Petitioner. The facts disclose that there could be some element of trickery and criminal offences may have been committed by the Petitioner. The only body that has the mandate and capacity to unravel the issues is the 2nd Respondent through the CCIO, Nairobi County.

18. In order for the Petitioner to succeed in his petition, he needed to demonstrate that there was unlawful application of the 2nd Respondent's authority. He has not succeeded in doing so. He has also not shown how the exercise of the 2nd Respondent's powers has infringed on his constitutional rights.

19. In short the instant petition is one for dismissal and it is so dismissed. Parties shall bear own costs of the proceedings.

Dated, signed and delivered at Nairobi this 20th day of February, 2020

W. Korir

Judge of the High Court