



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.114 OF 2019

IN THE MATTER OF ARTICLES 22(1), 23, 25,26,27,28 & 29

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER THE BILL OF RIGHTS (CHAPTER 4 OF THE CONSTITUTION OF KENYA, ARTICLE 29) & ARTICLE 9 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

BETWEEN

JOHN MAINA MWANGI.....PETITIONER

AND

CHARLES MWITI ALEXANDER.....1^S RESPONDENT

OFFICE OF THE INSPECTOR GENERAL.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The petitioner herein filed petition on 22nd March 2019 simultaneously with Notice of Motion dated 11th March 2019 seeking the following orders:-

- a) **THAT** this application be certified as urgent and be placed before the Duty Judge for hearing ex parte in the first instance.
- b) **THAT** conservatory orders be issued restraining the 2nd Respondent, his servants, agents, assignees, or anyone acting under his authority, and in particular officers from the National Police Service from arresting, charging and arraigning the petitioner herein in court on any charges.
- c) **THAT** conservatory orders be issued staying the proceedings and continued prosecution of the petitioner in Makadara Law Courts Criminal Case Number 544 of 2019 Republic versus John Maina Mwangi.
- d) **THAT** the 2nd Respondent, his servants, agents, assignees, or anyone acting under his authority, and in particular officers from the National Police Service, be permanently restrained and enjoined against arresting, charging and arraigning the petitioner in court on criminal charges related to any complaint by the 1st respondent, his servants, agents or assignees.
- e) **THAT** there be a stay of proceedings in Makadara Law Courts Criminal Case Number 544 of 2019, Republic versus John Maina Mwangi, or in any other court or tribunal, pending the hearing and determination of this petition.
- f) **THAT** a declaration be and is hereby made that the continued prosecution of the petitioner in Makadara Law Court Criminal Case No. 544 of 2019, Republic versus John Maina Mwangi, is malicious, illegal, null and void, and must be terminated forthwith.
- g) **THAT** appropriate sanctions/disciplinary orders be issued against any officer of the National Police Service deemed to have abused his office in the handling of the dispute between the petitioner and the 1st respondent.
- h) **THAT** such further or other orders as are appropriate for the effective administration of justice be issued.

i) **THAT** such further or other orders as are appropriate for the effective administration of justice be issued.

2. The Petitioner's Notice of Motion is premised on the grounds on the face of the application being Nos. 1 – 9 in which can be summarized as follows:-

That the petitioner is the secretary of Naridai Muoroto self-help group, the lawful and *bonafide* proprietor of Plot Number 225 on L.R. No. 5809/10; that the 1st Respondent has trespassed upon the said property and proceeded to erect a perimeter wall and gate thereon, without the consent of either the petitioner or the self-help group; that upon the self-help group taking a lawful steps to evict the 1st Respondent from their lawful property, the 1st Respondent colluded and connived with a rogue police officers from Kayole police station to intimidate and harass the petitioner through threats of arbitrary arrest, prosecution and incarceration, into acceding to the 1st Respondent's illegal acts of trespass.

3. It is petitioner's contention that the threats are real and actual, and have culminated in the malicious arraignment of the petitioner in Makadara Law Courts on charges of malicious damage to property contrary to section 339(1) of the Penal Code in **CR.C. No.544 of 2019 Republic vs John Maina Mwangi**. It is further petitioner's contention the arraignment in court is driven by extraneous and malicious considerations unrelated to the joint enforcement of the rule of law.

4. The petitioner aver that the prosecution has not supplied the petitioner with witness statements and ownership documents upon which the 1st Respondent lays his claim against the property of Naridai Muoroto self-help group contending the 1st Respondent have no such documents to produce. The petitioner contends that the prosecution is malicious and fraudulent and calculated purely at dispossessing the self-help group.

5. The petitioner urges, that the police actions are a wanton and reckless infringement on the constitutional rights of the petitioner as spelt out under the Bill of Rights and the petitioner further contend that he has not committed any known crime under the law. He further contends the nature of the dispute between the petitioner and the 1st Respondent falls squarely within the province of civil law and there is no place for the application of criminal law sanctions, over a dispute of ownership of land.

6. The petitioner in his supporting affidavit sworn on 20th March, has reiterated the grounds on the face of the application and attached "JMM-1" and "JMM-2" being his national identification and certificate of Registration of Naridai Muoroto self-help group; "JMM-3" a letter confirming Naridai Muoroto self-help group members are the owners of plot No.225 within **L.R. No. 5908/10; 'JMM-4'**, confirming Naridai Muoroto self-help group members are beneficial owners of 39 acres comprising **L.R No.5908/10** subdivided to 239 plots shared amongst its members; "JMM-5" a copy of the charge sheet.

7. The 1st Respondent filed a Replying affidavit dated 24th April 2019 claiming, that he purchased Plot No.226 at Naridai Muoroto Scheme **L.R. No. 5908/10** from one Hon. John Ndirangu Kariuki ("CMA-1") copy of the transfer document. The 1st Respondent claim he was taken to the site by the seller and groups committee members and shown all beacons in the year 2014 and proceeded to build a perimeter wall and affixed a gate with specifications and has since 2014 been in physical possession with all his neighbours who own Plot No. 225, that is Kados Paul Muiruri Kiguatha and 227 and 228 owned by Noor Hassan Sheikh (**CMA2**) copies of certificates.

8. The 1st Respondent aver, that sometimes on 2nd February 2019, the Applicant and John Nyamohanga led a group to 1st Respondent's property, who destroyed the wall and the gate forcing 1st Respondent to report the matter to Kayole police station. The two were subsequently arrested and charged with malicious damage to property.

9. I have considered the petitioner's application, and affidavit in support, counsel written submissions as well as the 1st Respondents Replying affidavit, and rival submissions on behalf of the Respondents. The issues arising for consideration can be summed up as follows:-

a) **Whether the petitioner has met the threshold justifying the granting of the orders sought in the notice of motion dated 11th March 2019?**

b) **Whether the court should grant conservatory orders stopping the ongoing criminal case No. 544 of 2019 at Makandara Law Courts?**

A) **Whether the petitioner has met the threshold justifying the granting of the orders sought in the notice of motion dated 11th March 2019?**

10. The petitioner seeks several prayers in the notice of motion dated 11th March 2019. Amongst the several prayers are order to restrain the 2nd Respondent through its agents, assignee or anyone acting under his authority from arresting, charging and arraigning the petitioner in court on any charges; an order staying the proceeding and continued prosecution of the petitioner in Makandara Law Courts **CR.C. No.544 of 2019 Republic vs John Maina Mwangi**, a permanent order restraining the 2nd Respondent from arresting, charging and arraigning the petitioner in court on criminal charges related to any complaint by the 1st Respondent, his servants or assignees; a declaration that Makadara Law Courts Criminal Case No. 544 of 2019 is illegal, null and void and must be terminated; an order be issued that the National Police Service have abused its office in handling of the dispute between the petitioner and the 1st Respondent.

11. In a claim of malicious prosecution the petitioner is bound to plead particulars of malice in support of the allegation. It is not sufficient to only allege and failure to plead the particulars. The petitioner has alluded to the fact, that the 1st Respondent colluded and connived with a rogue police officers from Kayole Police Station to intimidate and harass the petitioner through the threats of arbitrary arrest; prosecution and incarceration, or to acceding to the 1st Respondents' illegal acts of trespass. The particulars on how, where and when the 1st Respondent and

the vogue police officers have not been pleaded. The alleged extraneous and malicious consideration unrelated to just enforcement of the rule of law alleged in the petitioner's grounds on the face of the application are not pleaded. However upon perusal of the petitioner's supporting affidavit and the 1st Respondent affidavit, I have no doubt in my mind that there is a dispute of ownership of land between the petitioner and the 1st Respondent. There is further no denial, that the 1st Respondent's property being perimeter wall and gate was destroyed, giving rise to criminal liability. The report was made to police by the 1st Respondent and police acted within their mandate, thus to investigate, arrest and arraigning the culprit before court. I find no malice in police having done what is expected of them.

12. The petitioner in the instant application has not adduced evidence to establish that his arrest, and arraignment before court by 2nd Respondent was without reasonable and probable cause. There is further no material evidence to support petitioner's allegation, that the prosecution was actuated by malice. In the instant case pending before magistrate court, the petitioner is charged with a known offence in law, that is malicious damage to property, before a competent court with a competent judicial officer and as such, I find that his rights would not be deemed to be violated by undergoing through full trial before a qualified judicial officer, before whom he shall be at liberty to raise his defence and which defence will be considered and if the court finds the defence to exonerate the petitioner, he can be acquitted; and if not he will still have the right of appeal against the magistrate's decision.

b) Whether the court should grant conservatory orders stopping the ongoing criminal case No. 544 of 2019 at Makandara Law Courts?

13. The petitioner contention is, that proper forum to settle the dispute between the petitioner and the 1st respondent is ELC Division as the dispute is that of ownership of land.

14. The petitioner has established that he is the proprietor of Plot No.225 within **L.R. No.5908/10 (see "JMM-3")** and the 1st Respondent claims Plot No. 226 within the same land Reference **No.5908/10**. It is claimed the 1st Respondent trespassed into petitioner's land Plot No.225 and purported to alienate the same. Efforts to have him peacefully vacate could not yield any positive results. The petitioner reported the matter to Mihango Police Post on behalf of the group and report booked as **OB05/4/2019** but no action was taken. The petitioner issued a demand note. That when 1st Respondent failed to comply with demand by the group, some members of the self-help group, led by the Applicant proceeded to plot Number 225 and destroyed the perimeter fence and the gate that had illegally and unlawfully been constructed in and around the plot by the trespasser and gate delivered to the office of the Chief for safe keeping. The petitioner urges the action taken by the group members was both lawful and reasonable.

15. In the instant matter the petitioner has already been charged and the trial is ongoing. The conservatory orders sought have been overtaken by event and will serve no useful purpose. I find, that the prosecution should be allowed to proceed before the magistrate who is competent to try the petitioner. In the **case of Board of Management of Uhuru Secondary School, City County Director of Education & 2 Others [2015] eKLR**, the High Court held that:-

"In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order."

16. Further in the case **Attorney General vs Attorney General for and on Behalf of Inspector General of Police & 3 others ex-parte Thomas Ng'ang'a Munene [2014] eKLR** it was stated:-

"Similarly, it is not for this Court to stop the DPP in his tracks simply because the Court believes that the DPP ought to have done better. The constitutional discretion given to the DPP ought not to be lightly interfered with especially if on the evidence in his possession if true may well sustain a prosecution. Trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on his defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words I am not satisfied based on the material before me that the applicant will not receive a fair trial before the trial court more so as no allegation are made against the 5th respondent towards that direction. Therefore the mere insufficiency of evidence does not in my considered view justify the halting of a criminal trial."

17. In the instant application, the petitioner seeks conservatory orders to stop 2nd Respondent from arresting, charging and arraigning him in court on any charges. Under National Police Service Act, the 2nd Respondent has mandate to investigate, arrest and charge anyone who is accused of committing an offence. It would be contrary to law to seek orders to stop the 2nd Respondent from exercising its lawful function. Such orders will not only amount to curtail the 2nd Respondent in discharge of its function but will be unconstitutional. The functions of the 2nd Respondent can however be interfered with if it acts illegally or with malice or contrary to the constitution.

18. The petitioner has failed to demonstrate how he will be prejudiced if the trial proceeds on, neither has he demonstrated that the criminal trial is an abuse of the court process. Secondly it is noted that the Notice of Motion was not initiated till after the petitioner was arrested, arraigned in court and charge read to him. I find that there is nothing to stay following the charging of the petitioner. What is sought to be stopped has occurred and there is nothing to stay.

19. I find that the petitioner has not met the threshold to warrant granting the prayers sought in the Notice of Motion.

20. The upshot is that the Notice of Motion dated 11th March 2019 is without merit and is accordingly dismissed.

No orders as to costs.

Dated, signed and delivered at Nairobi this 19th day of September, 2019.

J .A. MAKAU

JUDGE