



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 63 OF 2018

JOSEPHAT GACHERU RUGIRI.....PETITIONER

VERSUS

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

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

JUDGMENT

1. In the petition filed on 21st February 2018 the petitioner seeks a declaration that the respondents have violated and/or threatened to violate his rights. He also seeks an order of prohibition to issue restraining the 1st and 2nd respondents from arresting, detaining, charging, questioning, investigating and/or prosecuting him in relation to execution of the order issued in Milimani CM CC No. 6798 of 2016. The petitioner also prays for the costs of the petition. The petitioner's case is that he was the complainant in Milimani CMCC 6798 of 2016 (hereinafter "the Milimani Case") wherein he sued one Amos Kibata Githeko and obtained an eviction order which he executed with the assistance of a licenced auctioneer and the police and that the police now want to arrest, detain and charge him with a criminal offence arising out of the execution of the said Milimani case court order, an action, which he states, will violate the provisions of Articles 29, 31, 40, 47 and 50 of the Constitution.

2. The petition is supported by the petitioner's affidavit sworn on 21st February 2018 wherein he avers that he is the proprietor of LR Nos. Kabete/L. Kabete/3162, 3163 and 3164 (herein- after the suit property) having purchased the same from one **Amos Kibata Githeko** who did not give him vacant possession thereby prompting him to file the Milimani case where he obtained eviction orders as shown in annexure "**JGR1**" attached to his said affidavit.

3. He further states that in a strange turn of events, one Rose Gachuki Kinuthia filed a complaint with the police who now want to arrest him over the said eviction. He attached the letter of complaint to his affidavit as annexure "**JGR 3**". He further states that there is a land case before the Environment and Land Court at Thika over the same subject matter in which the court had issued an order to maintain the status quo.

4. In the supplementary affidavit filed on 25th April, 2018, the petitioner faults the 2nd respondent for failing to act in an impartial manner and for relying entirely on the documents availed to them by the 1st respondent. The petitioner also attached copies of the title deeds in respect to the suit land to his supplementary as annexure "**JGR- SA1**".

The respondents' case

5. The respondents opposed the petition through the replying affidavit of **James Mungai Warui**, the Senior Assistant Director of Public prosecutions dated 26th February 2018 wherein he avers that the Director of Public Prosecutions (DPP) received a letter of complaint from one Rose Gachiku Kinuthia who complained of having been unlawfully evicted from her parcel of land No. Kabete/L. Kabete/47 which complaint prompted the DPP to write to the office Director of Criminal Investigations (DCI) to investigate the complaint and forward the investigations file to him within 21 days. A copy of the letter of complaint was attached to the replying affidavit as annexure "**JM1**" and the Director of Public Prosecutions letter as annexure "**JM2**".

6. He further states that the investigations file is yet to be forwarded to the Director of Public Prosecutions and that it was therefore not true that the police intend to arrest and charge the petitioner. He further avers that the documents availed to the DPP show that the petitioner is not the owner of the suit property from which the complainant was evicted.

7. He also avers that the documents that the complainant attached to her complaint letter showed that the petitioner had obtained the eviction

through material non-disclosure and that the eviction was executed by an auctioneer notwithstanding the fact that the eviction order did not specify the parcel of land on which the said eviction was to be carried out. He states that there were glaring anomalies in the eviction process which the DPP intends to address through an investigation in order to establish if a criminal offence was committed so that the perpetrators can be brought to book.

8. It is the respondents' contention that the Director of Public Prosecutions has a constitutional responsibility to direct the police to commence investigations against any person reasonably suspected of having committed an offence and thereafter decide whether or not to prefer charges. The respondents state that investigations do not in any way violate or threaten to violate any of the petitioner's constitutional rights or freedoms as alleged or at all and that the petitioner has not demonstrated any such violation or likelihood of a violation so as to warrant the granting of the orders sought in the petition.

Petitioners submissions

9. **Miss Motabori**, learned counsel for the petitioner, submitted that the petitioner is the bona fide purchaser of the suit land on which he obtained an eviction order in the Milimani case which orders he duly executed only for the complainant to lodge a complaint with the police over the said eviction.

10. Counsel stated that as a result of the complaint, the petitioner had been summoned to avail himself to the police which summons she contended, amounted to an infringement of the petitioners rights as the eviction order was issued by a court of competent jurisdiction and that the attempts to charge him with an offence stemming from the eviction order would be unlawful and unconstitutional. Counsel took issue with the slow manner in which the respondents were handling the complaint and noted that even though the investigations commenced in the year 2016, to-date, the investigations file had not been forwarded to the Director of Public Prosecutions thereby creating the impression that the petitioner will not be accorded his right to fair administrative action as envisaged under Article 47 of the Constitution. For this argument the relied on the case of **Republic –vs Inspector General of Police Exparte Patrick Macharia Nderitu [2015] eKLR** where the court stated that the discretion to investigate criminal offences is not to be interfered with but must be properly exercised. Counsel also relied on the decision in the case of **Republic –vs- Director of Public Prosecutions exparte Francis Njakwe Maina [2015] eKLR** where the court stated that where the discretion is being abused or used for ulterior motive, the court will not hesitate to bring the investigation to a halt.

11. The petitioner also cited the case of **Zacharia Barasa vs Director of Public Prosecutions [2017] eKLR** wherein Mativo J. expounded on Article 47 and held that the Director of Public Prosecutions should have regard to Article 47 of the Constitution and avoid abuse of the legal process when pursuing claims against an accused person. Counsel added that the averments contained in the replying affidavit showed that respondents had already made up their minds to charge the petitioner and that an order of prohibition should therefore be issued to prevent the DPP from acting in a flawed process.

Respondent's submissions.

12. **Mr. Warui**, learned counsel for the respondents submitted that the genesis of the complainant's complaint was her unlawful eviction from the parcel of land that she has occupied all her life following an alleged eviction order issued in a case in which she was not a party.

13. Counsel argued that following her unlawful eviction, the complainant lodged a complaint within the police and under Article 157 the police are instructed to conduct investigations and charge suspects but that the investigations were yet to be finalized.

14. Counsel explained that the delay in concluding the investigations was caused by the petitioner and the Auctioneer who filed Judicial Review applications also challenging the on-going investigations. Counsel submitted that the petitioner should allow the respondent to discharge their constitutional mandate which he will be free to challenge upon its completion depending on the outcome of the investigations.

Determination

15. I have considered the pleadings herein and the parties' respective submissions together with the authorities that they cited. I note that the main issue for determination is whether the petitioner has established that his constitutional rights have been violated or threatened with violation.

16. From the outset, I wish to state that even though the instant case revolves around ownership of the suit land and the eviction of the complainant, this courts mandate is not to decide who between the petitioner and the complainant actually owns the suit land or whether or not the alleged eviction of the complainant was lawful as those are issues that can only be determined before the Environment and Land Court or before the Magistrates court should criminal charges be preferred against any party upon the conclusion of the investigations.

17. The mandate of this court is to determine whether the petitioner has established, to the required standards, that in carrying out the investigations, the respondents have infringed or threatened to infringe on the petitioners constitutional rights.

18. It was not disputed that the complainant lodged a complaint with police following her eviction from land that she alleges belongs to her. The complainant's letter of complaint was attached to both the petitioner's affidavit and respondents' replying affidavit as annexures.

19. It was further not disputed that the respondents commenced investigations into the complainant's complaint as shown in their various correspondence which were also attached to the replying affidavit as annexures.

20. My task in this case is to address myself to the issue of fundamental rights and freedoms. **Article 22** of the Constitution grants every person the right to move the High Court to enforce fundamental rights and freedoms contained in the Bill of Rights. These rights are very

specific and a petitioner who comes before the court must set out with some level of particularity the specific right and how it is violated. This principle was established in the case of **Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154** and augmented by the Court of Appeal recently in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 [2013] eKLR**.

21. In the instant case, I find that apart from merely claiming that his constitutional rights under Articles 29, 32, 40, 47, and 50 of the Constitution were violated or are threatened with violations, the petitioner did not present any tangible proof of the alleged violations so as to meet the threshold of proof as envisaged in the **Anarita Karimi Njeru** case (supra). In fact, all that the petitioner states is that the police have summoned him to appear before them and that they want to charge him in court.

22. My take is that the respondents are well within their mandate to summon any person and to charge that person in court if they have evidence linking him to an offence and that such exercise of duty cannot in the circumstances of this case be construed to mean harassment or violation of rights as the accused person will then be accorded a hearing where he will present his side of the story. Article 157 of the Constitution stipulates as follows :

1. There is established the office of Director of Public Prosecutions.

2. The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.

3. The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.

4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such direction.

5. The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.

6. The Director of Public Prosecutions shall exercise State powers of prosecution and may--

a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

7. If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

8. The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

9. The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

10. The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

11. In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

12. Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.

23. In the instant case, I find that the petitioners claim that he is constantly being summoned by the police who want to charge him in court was not only speculative but was also not proved and even if it was true that the police intend to prefer charges against him such an action will not be unconstitutional as the respondents will then be exercising their constitutional mandate as provided for under the law. It was the respondents' case that the investigations report is yet to be sent to the DPP at the close of the investigations who may as well recommend that the file be closed for want of sufficient evidence in which case, I find that the present claim is premature and speculative if not pre-emptive.

24. Needless to say, it is expected that should the petitioner be taken before the trial court to face criminal charges upon conclusion of the investigations, he will be subjected to a fair trial before a court of competent jurisdiction where he will be able to raise any objections that they may have to the validity of the charges or the weight of the prosecution's case. The petitioner did not state that he will not be able to receive a fair hearing before the trial Court. The criminal justice system in Kenya is structured such that every accused person has a right to

a fair trial and this is a guaranteed right enshrined in the Constitution. I therefore do not find that there is no reason to doubt that the trial court will not adhere to the provisions of Article 50 of the Constitution with respect to a fair trial should the matter be escalated to that stage. In the case of **Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** it was held:

“Our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the 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 their 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 unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant’s chances of being acquitted are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.”

25. In his submissions the petitioner raised the issue of delay in the finalization of the investigations as one of the indicators that the respondents had an ulterior motive against him. I however find that the aspect of delay was neither pleaded in the petition nor in the supporting affidavit and even though the respondents attempted to explain the reasons for the delay in their rejoinder to the oral submissions before the court, I find that the alleged delay *per se* does not translate into a violation of a right as there could be many factors that may impede the conclusion of investigation including the lack of cooperation from the petitioner and the pendency of other related cases before other courts.

26. Turning to the claim that his rights to fair administrative action has been violated, I note that this is a right that now forms an integral part of the Bill of Rights and is an essential feature of our Constitution as it is at the heart of a democratic society without which democracy and the rule of law cannot be said to exist. The right to fair administrative action is now firmly embedded in our Constitution as a way of ensuring that administrative actions meet the standards set by the Constitution. In this regard, Article 47 of the Constitution of Kenya provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

27. It is now trite law that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, Civil Appeal 52 of 2014 in which the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

28. In the instant case, I find that the petitioner did not demonstrate that the respondents have taken any adverse against him without according him a hearing so as to justify the claim that his right to fair administrative action has been violated. In fact, the petitioner’s case is that the respondents should be restrained from questioning him over the complaint filed by the complainant. My finding is that such an order will not only hamper the respondents from carrying out their constitutional mandate, but will also counter the petitioner’s right to fair administrative action as he will then be denied the opportunity to present his side of the story to the police before a decision is made on whether or not to charge him in court.

29. In conclusion, I find that no material has been placed before me to show that any of the petitioner’s rights have been violated or are threatened with violation by the ongoing investigations. Even assuming, for argument’s sake, that the respondents had made up their minds to charge the petitioner in court, that would not be a violation of a right as the making of a decision to charge a suspect in court is one of the duties of the DPP. No evidence was presented before me to show that the respondents acted maliciously or outside their powers in carrying out their duties. The petitioner has not presented any evidence to show that the investigations were commenced without a proper foundation.

30. In a nutshell, I find that this petition has no merits and I dismiss it with no orders as to costs.

Dated, delivered and signed in open court at Nairobi this 19th day of November 2018.

W. A. OKWANY

JUDGE

In the presence of:

Miss Khala for Nyangau for the petitioner

No appearance for Director of Public Prosecution

Court Assistant – Kombo