



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

PETITION NO. 239 OF 2016

BETWEEN

AGNES WACERA MACHARIA.....1ST PETITIONER

PRIME TRANCITY SACCO LTD.....2ND PETITIONER

AND

RAILA AMOLO ODINGA

STEPHEN KALONZO MUSYOKA

MOSES WETANGULA (all jointly sued in their own capacity

and for and on behalf of

COALITION FOR REFORMS AND DEMOCRACY.....RESPONDENT

RULING

Introduction

1. The Petitioners are respectively a business-lady and an investor company in the transport sector within the City of Nairobi. They filed the instant petition against three leading opposition personalities and claimed that their constitutional rights to equal protection of the law under Article 27, as well as their right to be free and be protected from any form of violence were being violated by the Respondents' actions. Additionally, the petitioners contended that their right to property was also being violated by the Respondents' actions.

2. Alongside the Petition, the Petitioners also filed an interlocutory motion seeking conservatory orders as against the Respondents to restrain the Respondents whether by themselves or directors, officers, agents, servants or any person from violating the Petitioners' constitutional rights by calling for, organizing, scheduling or in any way participating in assemblies, demonstrations, picketing or protests pending the hearing and determination of the Petition. The Petitioners, in the alternative, sought that the Respondents do issue an unequivocal undertaking to the petitioners for the restitution of any loses the Petitioners would suffer arising out of any protests, demonstrations, assemblies or pickets organized by the Respondents including compensation for the loss of the 1st Petitioners motor vehicle registration number KCE 441E.

3. The Respondents opposed the interlocutory motion through the affidavit of Norman Magaya sworn and filed on 24 June 2016 as well as through the Grounds of Objection filed on 28 June 2016.

Background facts

4. The Petition was prompted by the demonstrations organized by the Coalition for Reform and Democracy and which demonstration were intended to express the said coalition's and any participant's distaste and dislike for the then Independent Elections and Boundaries Commission. The demonstrations admittedly were organized by the Coalition and were intended to take place throughout the country in from the months of April 2016. The demonstrations were first called out through a press release by the Coalition on mainly by a press release issued by the 5th Respondent on 26 April 2016 which urged members of the public 'to assemble at the Anniversary Towers with a date with the IEBC' on Tuesday May 2 2016 at 10:00a.m. and thereafter every Monday with similar assemblies also called for by the Coalition to be held at other IEBC offices all over the country.

5. The assemblies were indeed held. Members of the public picketed. Members of the public demonstrated. Members of the public marched. The picketing, marching and demonstrations somehow on occasion turned violent and indeed in some instances lives were lost.

6. There is no contest on the above narrative. Controversy however emerges when the Petitioners state that the Respondent has organized and continues to organize violent demonstrations which led to loss of property and life, while the Respondents heap blame on the National Police service for consistently and violently breaking up peaceful demonstrations.

The Petitioners' case

7. The Petitioners' case can be gathered from the Petition and the affidavit filed in support of the application. Additionally, the arguments by Mr. Lusi Ogot made the Petitioners' case clearer.

8. It is the Petitioners' case that the Respondent has violated the Petitioner s' constitutional rights through the unwarranted demonstrations which has seen the Respondent's supports turn violent and destroy private property and businesses. The 1st petitioner points to her motor vehicle which she claims was razed down by the supporters of the Respondents. The 2nd Petitioner on the other hand points to its membership which it states aggregates in terms of motor vehicles over seventy motor vehicles all involved in the transportation business within the city of Nairobi. The Petitioners are wary that their property and livelihood (business) is to be affected if the Respondents demonstrations continue. The Petitioners while appreciating that the Respondents are constitutionally allowed to assemble and demonstrate contend that such right is not absolute and that in the current circumstances there is need to impose conditions upon the Respondents if they are to continue demonstrating at least until the determination of the suit.

9. Through their counsel, the Petitioners contended that they had made out a case for conservatory orders as there was prima facie evidence that the demonstrations organized by the Respondent often turned violent leading to loss of property and even lives.

10. The Petitioners also pointed to the fact that the rights guaranteed by Article 37 of the Constitution are not absolute and are limited when there is a threat of breach of peace or where the demonstrators and picketers are armed. Additionally, submitted counsel, the rights under Article 37 are limited where the demonstrators violate the rights of others and when the object of the demonstration and picketing is unconstitutional. Mr Lusi urged the court to invoke the doctrine of proportionality and limit the Respondents' rights under Article 37 to ensure that the rights of other members of the public generally and those of the Petitioners specifically were protected. Counsel relied on this court's decision in **Ferdinand Ndung'u Waititu & Others v Attorney General & Others [2016]eKLR** for the proposition that the right to assemble picket and demonstrate is not absolute and that non peaceful demonstrations must not be allowed to subsist or take place in democratic societies. Additionally, counsel also relied on the South African cases of **Growth Point Properties Limited v South African Commercial Catering and allied Workers Union & Others(646/2010)** and **Fourways mall (Pty) Lt v**

South African Commercial Catering [1999] 3 SA 752 for the proposition that the Constitution as well as statute law does not protect demonstrations or picketers who proceed in a manner that interferes with the rights of other members of the public or assault others.

11. Mr Lusi finally , relied on the case of **South African Transport & Allied Workres Union v Garvis & Others (CCT 112 /2011) 2012** , for the proposition that where there is foreseeable damage in any demonstration, the organizers must reconcile themselves to the risk of limiting the right to assemble and picket with a view to avoiding a violation of the rights of other innocent bystanders and members of the public.

The Respondents' case

12. Ms. Anthony Oluoch argued the Respondents' case.

13. It is the Respondents' case that the right to picket, demonstrate and assemble is a constitutional right which should not be unnecessarily limited. The Respondents further contended that there was no evidence of any violent demonstrations by the Respondents but rather evidence of peaceful demonstrations which only turn violent when the police seek to unlawfully break the demonstrations up. The Respondents also contended that the Petitioners had not shown any evidence that the people who burned the petitioner's motor vehicle were the Respondents supporters or were under the instructions of the Respondents.

14. Mr Oluoch then relied on the case of **Ferdinand Ndung'u Waititu & Others v Attorney General & Others [2016]eKLR** for the proposition that it was up to the police to ensure that the demonstrations were peaceful and not for the court to cancel demonstrations. Counsel insisted that the Respondent had only been involved in organizing peaceful demonstrations and not otherwise. Then referring to the case of **Hon. Kanini Kega v Okoa Kenya Movement & 6 Others [2014]eKLR** counsel submitted that the Petitioners had not established a case for conservatory orders. Mwangi urged the 1st and 9th Respondents' case.

Discussion and determination

15. The only issue currently is whether the Petitioners are entitled to the conservatory orders sought in their Notice of Motion dated 8th June 2016?

16. It is important to point out that it is upon the Petitioners to meet the criteria for the grant of any conservatory orders sought. It is for the Petitioners, to establish that they have a prima facie case with a likelihood of success and that if the order is not granted then there is a real danger that they will suffer real prejudice and the petition rendered nugatory.

17. Besides, the court is also to consider, even in the absence of the respondent, whether granting the conservatory orders would promote constitutional values as well as principles and that, additionally, the public interest would be better served with either the issuance or denial of the conservatory orders. These principles were well summarized by this court in the case of **Kenya Small Scale Farmers Forum vs Cabinet Secretary, Ministry of Education & 5 Others HCCP No 399 of 2015 [2015]eKLR** where the Supreme Court case of **Gatirau Peter Munya vs Dickson Mwenda Githinji and 2 Others SCK Pet. No 2 of 2013** was cited with approval amongst other decided cases.

18. As well, at this stage of the proceedings, I need not make any definitive or substantive findings of fact or law unless for the very obvious. I must nonetheless consider the totality of the evidence and circumstances of the case.

19. The Petitioners' argument is that the Respondents are organizing and engaging in violent and illegal demonstration and that such demonstrations have caused the Petitioners loss and damage as the Petitioners property has been destroyed and the Petitioners whenever the Respondents are engaged in the demonstrations are not able to carry on with their business from where they earn their livelihood. According to the Petitioners, as the right to assemble, demonstrate and picket as guaranteed under Article

37 is not absolute , the circumstances dictate an intervention by the court on the Respondents' enjoyment of such rights.

20. It is not denied that the Respondents have organized or urged the demonstrations in question. The Respondents have freely admitted to this fact. The demonstrations have been attended by members of the public. The Respondents contend however that they are simply exercising their rights under Article 37 of the Constitution and that they have never urged violent or unruly demonstrations.

21. Article 37 of the Constitution stipulates as follows:

“37. Every person has the right peaceably and unarmed to assemble, to demonstrate, to picket, and to present petitions to public authorities”

22. The right to assemble, demonstrate, picket and petition as enshrined under Article 37 is not absolute. It may be limited by law. Even as the citizens are allowed to assemble and picket and thus associate and express themselves as well as their views, there are limitations. In **Ferdinand Ndung'u Waititu & Others v Attorney General & Others [2016]eKLR** this court expressed itself as follows, with regard to the limitations to Article 37 rights;

[32] Foremost, the Constitution itself has provided claw-backs. Demonstrators, picketers and petition-presenters must do so “peaceably and unarmed”. Assemblies, picketing and demonstrations which are not peaceful are excluded from the protection of the Article. If they consist of violence to or intimidation of the public then the assembly or the demonstration ought to be stopped. Likewise participants in assemblies, picketers and demonstrators must not be armed. Weapons as well as defensive or protective contraptions which breed or stimulate aggression ought not to be possessed by the demonstrators or picketers.

[33] The spirit of the constitutional claw-back is to ensure that the rights of others within the vicinity of the place of assembly or of the demonstrators or picketers are also not interfered with. Thus in the South African case of Fourways Mall(Pty) Ltd vs South African Commercial Catering [1999] 3 SA 752 , it was held that the Constitution as well as statute law does not protect picketers who proceed in a manner that interferes with the rights of the public or assault others. The court, in interpreting Section 17 of the South Africa’s Constitution which is pari materia with our Constitution at Article 37, was clear that the Constitution does not encourage a volatile environment in a protest march.

23. I would consequently agree with the Petitioners that while the Respondents may organize demonstrations as well as assemblies, the same cannot be unruly, violent or lead to interference with other non-participants rights. Persons going about their business must have the confidence that the Constitution also protects them as well as their properties, so demonstrators must also only operate within the confines of the Constitution.

24. The Respondents however contend that their protest marches as well as demonstrations have always been peaceful save that members of the Police Service often disrupt the same leading to violence and that when the police service do not intervene the protest marches are often peaceful from start to finish.

25. There is evidence that the protests have often turned unruly and violent. It is however not possible without further evidence and interrogation to state at this stage with elements of certainty that the unruly nature of the protest marches organized by the Respondents are always occasioned by the Respondents themselves or their supporters. The demonstrations are open to the public and not limited to the Respondents followers or supporters. It is also not possible on the affidavit evidence before me to conclude that the intervention of the members of the national police service is what causes the mayhem and unruly nature of the protest marches. I am not prepared to hold at this stage of the proceedings without further interrogation that the Respondents are always in a position to foresee that the demonstrations would turn violent after peaceful starts. I am also not prepared to hold that the violence is

always ignited by the Respondent's supporters.

26. My preliminary view as well is that on the affidavit evidence available, it is not possible to easily state that the loss fetched on the Petitioners following the burning of the motor vehicle owned by the 1st Petitioner may not be at this stage fetched on persons associated with the Respondents to make them culpable by association.

27. The Constitution allows every person to picket, demonstrate, assemble and present petitions. In the process members of the public may be inconvenienced but I would view it that it would be more appropriate and proportionate if the court at this stage of the proceedings refrained from interfering with a constitutionally guaranteed right. I am not convinced that the Petitioners have established a prima case against the Respondents to invite the court's intervention through a conservatory order.

28. Likewise, I am not also convinced that the lack of a conservatory order for now would render the Petition nugatory. It is evident that the Petitioners may seek damages for their loss from the Respondents and the damage sustained is the sort that can be ranked and placed in monetary terms.

29. With regard to the alternative prayer for an undertaking by the Respondents prior to organizing or participating in demonstrations, my view is that granting such a prayer would amount to the court superintending the exercise and enjoyment of constitutionally guaranteed rights and freedoms. I do not see how that should happen in the current constitutional dispensation.

30. There are already in place adequate safeguards for the exercise of the rights under Article 37. This is through the Public Order Act (Cap 56) which seeks to preserve and protect the precious right to public assembly and public protest marches or processions by regulating the same with a view to ensuring order. Part III of the Public Order Act regulates public meetings and processions by providing for the need to notify the police service and also the power of the police service to stop or prevent a public meeting where appropriate and where it is obvious it will not meet the constitutional objectives. Under the same Part III, the Public Order Act also prohibits the possession of "offensive weapons" at public meetings and processions. It is then the duty of the police service to ensure that there is no breach of the peace from the commencement till the end of the demonstrations or picketing.

31. To try and impose further limitations through conditions would not augur well with the constitutional spirit.

32. I conclude that the Petitioners have not made out a prima facie case with a likelihood of success and further that the absence of a conservatory order would not lead to the Petition being rendered nugatory. The Petitioners are perfectly well placed to press their claim for damages as against the Respondents or any other person the Petitioners may identify. The circumstances of the case would not warrant a conservatory order.

Disposition

33. I decline the application dated 8 June 2016 in its entirety and dismiss the same but with no order as to costs.

34. I must quickly add an apology to the parties for the delay in rendering this ruling. Circumstances beyond my control dictated the delay.

Dated, signed and delivered at Nairobi this 9th day June, 2017

J.L.ONGUTO

JUDGE