



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

PETITION NO 197 OF 2014

WILFRED MASINDE WANYONYIPETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE CHIEF MAGISTRATES COURT- KIBERA2ND RESPONDENT

RULING

Introduction

1. The petitioner filed this application dated 24th April 2014 in which he seeks orders to stop his prosecution in Kibera Criminal Case No 2450 of 2013 scheduled to come up for hearing on 13th May 2014. The petitioner has been charged on four counts of manslaughter contrary to section 202 as read with section 205 of the Penal Code and three counts of negligent acts causing harm contrary to the provisions of section 244 of the Penal Code. He contends that the charges violate his rights under Article 236 of the Constitution and section 6 of the Physical Planning Act.
2. The events leading to the incident giving rise to the criminal prosecution commenced in 2009. According to the petitioner, officers of the then City Council of Nairobi inspected a building being erected on L.R. 7102/2 off Airport North Road, Nairobi and found that they had been illegally erected as the developer had not sought development permission as required under section 33 of the Physical Planning Act. It then issued an enforcement notice dated 27th March 2009 requiring the developer to cease construction. The petitioner avers that after the issue of the enforcement notice, the developer moved to Court in High Court Misc. Application No. 155 of 2009 and obtained an injunction issued on 8th April 2009 restraining enforcement of the notice.
3. Subsequently, the developer sought orders of contempt against the Town Clerk and four of the Council officers for alleged disobedience of the Court order of 8th April 2009 and orders of committal were issued on 25th November 2009. The City Council officers then obtained orders staying the committal orders. Both the orders restraining enforcement of the enforcement notice and the order staying the committal to civil jail of the Council officers are still in force.
4. On 14th June 2011, the building under construction on L.R. 7102/2 collapsed, resulting in the deaths and injuries forming the substance of the charge now facing the petitioner and two others. The petitioner's co-accused included one Justus Mwendwa Kathenge. The said Kathenge who,

according to the petitioner, was his superior officer at the City Council, moved the High Court in High Court Petition No. 372 of 2013 and the Court (Lenaola J) issued orders declaring the prosecution of the petitioner, Mr. Kathenge, null and void and prohibiting the Magistrate's Court from proceeding with the prosecution on the basis that it violated his indemnity under Article 236 of the Constitution and section 6 of the Physical Planning Act.

5. The Court also directed that its decision be transmitted to the Chief Magistrate's Court and placed in the Court file on CMCC No, 2450 of 2013. It is on the basis of this decision that the petitioner now approaches this Court.

The Application

6. In his application brought by way of Notice of Motion dated 24th April 2014, the petitioner seeks the following orders:
 1. *That this application be certified as urgent, service thereof be dispensed with and the same be heard ex parte at the first instance.*
 2. *That the Honourable Court do issue an order stopping the prosecution of the petitioner in Kibera Chief Magistrate Criminal Case No. 2450/13 pending the hearing and determination of this application.*
 3. *That the Honourable Court do issue an order stopping the prosecution of the petitioner in Kibera Chief Magistrate Criminal Case No. 2450/13 pending the hearing and determination of this petition.*
 4. *That the Honourable Court be pleased to give any such other directions as it shall deem necessary for the ends of justice.*
 5. *That costs of this application be in the cause.*
7. The petitioner bases his application on, inter alia, the ground that the matter is coming up for mention on 13th of May at the Kibera Chief Magistrates Court; that his fundamental rights to equal protection of the law and the right to a fair trial is being violated by the capricious conduct of the 1st and 2nd respondents; and that the intended charges against him are discriminatory, ill-conceived and have no foundation in law and have been brought in contravention of **Article 236** of the Constitution.
8. The application came up before the Court on 28th April 2014 with Counsel for the petitioner seeking ex parte conservatory orders to stop the proceedings against him on 13th of May 2014. I directed that the application and petition be served for inter partes hearing on 7th May 2014. At the hearing, Mr. Omogeni appeared for the petitioner while Ms. Kithiki represented the Director of Public Prosecutions.

The Submissions

9. Mr. Omogeni submitted that the petitioner is a member of staff of the County Government. He had been charged with his superior who was the petitioner in **Petition No 372 of 2013 Justus Mwendwa Kathenge vs Director of Public Prosecution & Others** in which the Court issued prohibitory orders restraining his prosecution in Kibera Criminal Case No. 2450 of 2013, the same criminal case now facing the petitioner.
10. Mr. Omogeni argued that if the petitioner's superior at the City Council is not criminally liable for the events forming the factual basis of Criminal Case No. 2450 of 2013, then the petitioner can also not be held criminally liable. It was his contention that Article 27 gives equal benefit of the

law to all citizens, and if the senior officer has been given protection by the Court against the said criminal charges, such protection should extend to the petitioner.

11. Mr. Omogeni submitted that the petitioner has an arguable case with high chances of succeeding, and that if conservatory orders are not given and the trial commences, the petition would be rendered nugatory. He relied on the decision of the Supreme Court in **Petition No 5 of 2014 Gatirau Peter Munya vs Dickson Kithinji** and High Court **Petition No 30 of 2013 – Nation Media Group v Attorney General** for the principles on which conservatory orders should be issued and asked the Court to grant the conservatory orders pending the hearing of the main petition.
12. In her response in opposition to the application, Ms. Kithiki submitted that the petitioner had an obligation under the Constitution to show what prejudice he is likely to suffer if the trial is not stopped.
13. According to the respondent, the petitioner bases his case on the fact that his superior at the City Council had been granted orders stopping his prosecution. It was, however, Ms. Kithiki's submission that the decision of the Court was individual to the petitioner in that case and the orders do not extend to the petitioner. She contended that the petitioner had a right to make a similar application but chose to wait; and that granting the orders sought would work an injustice against the victims.
14. Ms. Kithiki distinguished the cases relied on by the petitioner on the basis that the facts were different from the present case. She argued, further, that the decision in favour of the petitioner in Petition No. 372 of 2013 is pending appeal. She asked the Court not to grant the orders sought but to allow the prosecution to proceed.

Determination

15. I appreciate that the respondent had not filed a replying affidavit in respect of the application at the time it came up for inter partes hearing. However, given that the matter comes up before the Magistrate's Court on 13th May 2014, I deemed it necessary to deal with and dispose of the application for conservatory orders.
16. Nonetheless, Ms. Kithiki did not materially dispute the factual basis of the application and the petition. The crux of the respondent's opposition to the application centres on the fact that the respondent intends to appeal the decision of the Court in Petition No. 372 of 2013, and that issuing the orders sought will work an injustice in relation to the rights of the victims who have been waiting for justice.
17. It is undisputed that the petitioner in this matter was, like the petitioner in Petition No. 372 of 2013, an enforcement officer with the City Council. Both were charged on 18th July 2013 with the offences said to have arisen as a result of the collapse of the building being erected on No. L.R. 7102/2.
18. In determining this application, I take into account several matters. First, it appears that at the time of the collapse of the building, orders were in force restraining the City Council from effecting the enforcement notice it had issued against the developer of the property. On the application of the developers, orders had also been issued against officers of the City Council for alleged disobedience of the Court orders. In the circumstances therefore, the question must arise whether the enforcement officers could have proceeded with the enforcement against the developer, and thereby prevented the eventual collapse of the building on the 14th of June 2011.

19. Secondly, Article 236(a) provides that

“A public officer shall not be—

(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law;“.

20. Finally, in granting the petitioner prohibitory orders in Petition No. 372 of 2013, the Court found that in the circumstances under which the charges against the petitioner arose, it would be a violation of the Constitution to proceed with the charges against him.

21. Given the above matters, I take the view that the petitioner is entitled to orders restraining his further prosecution pending the hearing and determination of this petition. Article 27 grants to all persons equal protection of the law. To continue with the prosecution of the petitioner while the prosecution of his superior in the enforcement section of the City Council has been prohibited, without affording him a hearing to enable the Court determine whether the prosecution against him should proceed, would likely result in an injustice to him.

22. I therefore agree fully with the submissions of Counsel for the petitioner, and rely on the case of **Muslims For Human Rights (MUHURI) & 2 Others -vs- Attorney General & 2 Others High Court Petition No. 7 of 2011**, which was cited with approval in **Nation Media Group & Others v Attorney General** (supra), that in the circumstances of this case, it is necessary to issue temporary restraining orders pending determination of this petition so that the petition is not rendered nugatory. In the **Muhuri** case, Ibrahim J (as he then was) expressed himself as follows:

A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise.

23. I accept the submissions of Counsel for the respondent that the rights of the victims of the collapsed building must also be considered, and they should not be kept waiting for an unduly long time for justice. From the charge sheet annexed to the petitioner's affidavit in support of the petition, I note that the charges were brought against the petitioner and his co-accused on 18th July 2013, two years after the incident on 14th June 2011. Such delay as there has been cannot therefore be blamed on the petitioner.

24. I agree also that ideally, the petitioner's claim should have been litigated together with that of the petitioner in Petition No. 372 of 2013 as their circumstances are really the same. I note also that the Court directed that the orders granted in favour of the petitioner in 372 of 2013 be placed in the Court file in respect of the criminal prosecution. That ought perhaps have led the respondent to reconsider the prosecution of the petitioner in this matter.

25. However, according to Ms. Kithiki, the respondent has lodged an appeal in that matter. In the circumstances, I believe the best course of action is to grant interim orders in the matter now before me and permit the parties to present their respective cases on the matters at issue for determination.

26. I therefore grant an order restraining the Kibera Chief Magistrate's Court from proceeding with the prosecution of the petitioner in Criminal Case No. 2450 of 2013 pending the hearing and determination of this petition.

27. Costs of this application shall be in the cause.

Dated, signed and delivered at Nairobi this 12th day of May 2014

Mumbi Ngugi

Judge

Mr. Okong'o Omogeni instructed by the firm of Okongo Omogeni & Co. Advocates for the petitioner.

Ms. Kithiki instructed by the Director of Public Prosecutions for the respondent.