



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Petition 457 of 2012

DAVID NG'ANG'A MBURU
PETITIONER
AND

THOMAS K. NG'ANG'A 1ST RESPONDENT

ATTORNEY GENERAL
..... 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

CITY COUNCIL OF NAIROBI MEDICAL OFFICER OF HEALTH 4TH
RESPONDENT

CITY COUNCIL OF NAIROBI 5TH RESPONDENT

JUDGMENT

1.This matter came up for hearing today, 8th April 2013 and although the hearing date was taken in the presence of the petitioner's counsel, he did not attend court and neither did the petitioner. I ordered the matter to proceed for hearing.

2.The petitioner's case is contained in the petition dated 5th October 2012 and the supporting affidavit sworn by the petitioner dated 5th October 2012. The petitioner is the proprietor of the land parcel known as DAGORETTI/UTHIRU/1011 which comprises four (4) units of two bedroom houses.

3.The 1st respondent, who owns DAGORETTI/UTHIRU/1012, is a nominated councillor and is the petitioner's neighbour. It is apparent that the petitioner and the 1st respondent have a dispute regarding the perimeter wall. On or about 17th October 2010, the petitioner alleges that the 1st respondent brought a bulldozer to destroy the perimeter wall and septic tank. On 19th October 2012, the petitioner lodged a complaint against the 1st respondent relating to malicious damage to property at Kabete Police Station.

4.The petitioner complains that the police have failed to take steps to charge the 1st respondent upon the recommendation of the investigating officer. However, in a turn of events he was charged with the

offence of failing to comply with a notice issued under **section 115** as read with **sections 118 and 119** of the **Public Health Act (Chapter 242 of the Laws of Kenya)** in so far as he failed to stop discharge of waste water/raw sewage into the adjacent plot and for failing to construct septic tank that is water tight. It is alleged that he failed to abate the nuisance after being served with a notice to do so under the Act. He was thereafter charged at the **City Court Criminal Case No. M. 658 of 2012**.

5. Although the petitioner did not file written submissions, its case is that the charges against him smirk of administrative and prosecutorial misconduct and permitting the matter to proceed will result in violation of his fundamental rights. He alleges that the prosecution is instigated by the 1st respondent, as a nominated councillor, and is based upon a complaint he himself lodged and which has been ignored by the 3rd respondent. He avers that the prosecution is motivated by malice, bad faith and is unreasonable. He also states that he was not informed of the charges and only learnt of the criminal case when his caretaker was arrested.

6. He therefore seeks the following reliefs;

a) *Leave be granted for the applicant to remove Nairobi Chief Magistrates' Court at City Hall Public Health Criminal case Number M. 658 of 2012 being Republic v David Ng'ang'a Mburu (Landlord/Proprietor/Caretaker of Plot Number Dagoretti/Uthiru/1011) into this Honourable court for orders of Prohibition.*

b) *Orders of Prohibition to issue against the Chief Magistrates' Court at City Hall prohibiting him by himself and/or other magistrate thereof from presiding over mentioning, making a finding, hearing and/or determination of public Health Case Number M. 658 of 2012 being Republic v David Ng'ang'a Mburu (Landlord /Proprietor /Caretaker of Plot Number) Dagoretti/Uthiru/1011.*

c) *Compensation be quantified by this Honourable court by way of damages for breach of constitutional rights of the petitioner.*

d) *Costs.*

e) *Any other form of relief that this Honourable Court shall deem to be just and expedient to award.*

7. The petition is opposed by the 4th and 5th respondents who have filed an answer to petition, which is in the form of an affidavit, sworn on 20th January 2012 by Karisa Iha, the Director of Legal Service of the 5th respondent. The thrust of the deposition is that the complaint that led to the charges was from a member of the public regarding a specific nuisance emanating from the petitioner's property. He depones that the complaint concerned the issue of raw sewage, which present high risk to general public health, and as such it was duly investigated and a notice served on the petitioner to abate the nuisance. That the petitioner failed to comply with the notice and the matter was referred to the appropriate authority for prosecution.

8. Mr Oonge, counsel for the 4th and 5th respondents submitted that the Nairobi City Council acted within its mandate under the **Public Health Act** and that there was no basis to stop the prosecution. He submitted that the prosecution was not influenced by the 1st respondent and that the matters between the petitioner and the 1st respondent were not of concern to the 5th respondent as it was only concerned with the enforcement of public health laws. Ms Irari, counsel for the 2nd and 3rd respondents, concurred with the position taken by the 4th and 5th respondents.

9. I have considered the pleadings, depositions and submissions. I have come to the conclusion that the charges against the petitioner are founded on a reasonable basis, that is, that of failure to comply with a notice issued by a competent authority mandated to enforce public health laws. To grant the orders sought would be to grant the petitioner judicial immunity from public health legislation. There is no basis, constitutional, legal or otherwise to do so.

10. I note there seems to be a dispute between the petitioner and the 1st respondent, but this is a matter that can be resolved in another forum particularly where it is alleged that the 1st respondent did, by some deliberate act cause the petitioner loss and damage. As regard the current charges facing the petitioner, there is no allegation that the petitioner will not receive a fair trial in the subordinate court.

11. The petitioner has also raised the issue of interpretation of the **Public Health Act** and in particular whether the prosecutor in the subordinate court has *locus standi* to present the complaint and prosecute the case. I think these are matters to be dealt with by the court hearing the matter.

12. I therefore conclude that the petition lacks merit. It is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 8th day of April 2013.

D.S. MAJANJA
JUDGE

Mr Okindo instructed by Wangechi Munene and Company Advocates for the petitioner.

Ms Irari, State Counsel, instructed by the State Law Office for the 2nd and 3rd respondents.

Mr Oonge instructed by Were and Oonge Advocates for the 4th and 5th respondents.