



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION NO. 169 OF 2012

PETER NYAKI NJAGIPETITIONER

VERSUS

OFFICER COMMANDING STATION (OCS) KASARANI1ST RESPONDENT

THE PROVISIONAL POLICE OFFICER, NAIROBI..... 2ND RESPONDENT

THE COMMISSIONER OF POLICE 3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS4TH RESPONDENT

JANE NYAMBURA NJUGUNA5TH RESPONDENT

JUDGMENT

- 1.The petitioner has filed this petition to challenge the constitutionality of what he deems to be his imminent arrest and prosecution on a charge of malicious damage to property.
- 2.The genesis of the problem appears to be a dispute over a boundary between the petitioner's property, Nairobi Block 110/610, and land on which the 5th Respondent resides, Nairobi Block 110/611, situated at Thome Estate, Nairobi.
- 3.According to the petitioner, a complaint was made against him by the 5th respondent at the Kasarani Police Station on 6th February 2012, and he was summoned to the station. The complaint was that he had maliciously destroyed the 5th respondent's property comprising a live bougainvillea and Kei-apple fence, as well as fencing posts and a chain link fence, all valued at Kshs400,000.
- 4.The petitioner's case is that the intended arrest is in breach of his right to equal protection of the law. It is instigated by the 5th respondent with whom he has a boundary dispute, and who is not the owner of the property allegedly destroyed. He asserts, however, that he did not destroy any property, that all he did was remove a live fence that had encroached upon his property as he intended to build a permanent stone fence, that he had informed the 5th respondent and brought in a private surveyor and a government surveyor to identify the beacons between the two properties but the 5th respondent had been uncooperative. He therefore asks the court to grant the following orders.

(a) An order barring the 1st – 4th respondents from arresting and charging the petitioner with the offences of criminal trespass and malicious damage to property.

(b) A declaration that the 1st- 4th respondents and in particular the 2nd respondent are violating the petitioner's rights to equal protection and equal benefit of the law, freedom and security of the person and generally to enjoyment of the benefits of the rule of law by sanctioning the unwarranted and unjustifiable arrest and prosecution of the petitioner on malicious and unfounded charges of criminal trespass and malicious damage to property.

(c) Costs of these proceedings.

5. The 1st – 4th respondents take the position that their investigation of the alleged offence by the petitioner is lawful and does not breach any of the petitioner's constitutional rights. In the replying affidavit sworn by PC Musilli on 5th July 2012, the respondents' assert that they received a complaint and upon investigation, established that it disclosed an offence under the Penal Code. They therefore submit that what the petitioner is asking this court to do is the preserve of the trial court which will hear the evidence and determine if an offence has been committed.

6. The 5th respondent maintains that the petitioner maliciously destroyed her property comprising a live fence, chain link and posts valued at Kshs400,000. She states that she has purchased the property adjoining the petitioner's, namely Nairobi Block 110/611, on which she resides, from its original owner and she was entitled to make the complaint to the 1st respondent with regard to the damage to the property.

Determination

7. It is clear from the evidence before me that the issue giving rise to this petition is a dispute over a boundary between Nairobi Block 110/610 and Nairobi Block 110/611 belonging to the petitioner and one Stephen Nyoike respectively, according to the petitioner. The 5th respondent alleges that she has purchased Nairobi Block 110/611, though no evidence of purchase was placed before the court. The petitioner alleges that as a result of a complaint made by the 5th respondent, the 1st – 4th respondent have threatened to arrest and charge him in order to appease the 5th respondent. He therefore alleges violation of his right under Article 29(a) of the Constitution.

8. The petitioner submits that the police ought to be demonstrably convinced that there is prime facie evidence of criminal culpability of a suspect before they can arrest or charge him with a criminal offence. He then sets out facts which, in his view, demonstrate that there was no such evidence and that the 1st – 4th respondent were acting in breach of his rights. He states that there is malice on the part of the 1st – 4th respondents as the deponent of their replying affidavit failed to comment on whether or not his stone wall fence had been constructed inside his compound.

9. In my view, the duty of this court is not to enter into a boundary dispute between the petitioner and the 5th respondent. There is an appropriate forum for such matters established by law. It is also not the business of the court to inquire whether the 1st - 4th respondents had sufficient evidence to arrest and charge the petitioner. What it can do is inquire whether, from the facts before it, a violation of the petitioner's constitutional rights has been made out.

10. Article 157(4) of the Constitution vests in the Director of Public Prosecution, the 4th respondent herein, the power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct. Under Article 157(10), the 4th respondent is to exercise his function independently, and shall not require the consent of any person or authority for the commencement of criminal proceedings, nor shall he be under the direction or control of any person or authority.

11. The 1st, 2nd and 3rd respondents perform their functions under the direction of the 4th respondent, which is an independent office not subject to the direction or control of any party. It follows therefore

that, as this court has held in several decisions, the court has no basis for interfering with the exercise of the powers of the 4th respondent unless a clear breach of constitutional rights has been made out- see **Florence Dorothy Seyanoi Kibera Moschion & Another -v- DPP & 3 Others High Court Petition No 341 of 2012.**

12. In the present case, all that the petitioner has done is assert a violation of his rights under Article 29(a) without demonstrating how this right has been violated. He has a duty, as this court held in the case of **Trusted Society -v- Attorney General & Others High Court Petition No. 292 of 2012**, to demonstrate, a reasonable degree of precision, how his rights have been violated or threatened with violation. As the 1st – 4th respondents correctly point out in their submissions, an investigation into the alleged commission of an offence does not amount to violation of a constitutional right. Indeed, neither does arrest and prosecution, for these are all part of the criminal justice system which is sanctioned by the Constitution.

13. I can therefore find no basis for this petition. All that the respondents have done is summon the petitioner on the basis of a complaint by the 5th respondent, which they are constitutionally entitled to do. The petitioner has a duty to present himself to the police and give his side of the story, and should the 1st respondents find sufficient ground to charge him, they would be entitled, under the law, to do so.

14. The police had power under section 22 of the Police Act, Cap 84, and now under **Section 52** of the National Police Service Act to summon anyone to attend the Police Station in their investigation of alleged commission of a criminal offence. This case, in my view, aptly fits the words of Nyamu, J (as he then was) in **Francis Mburi Mungai -v- the Director of CID and Another High Court Misc App. No 615 of 2005** where he observed as follows:

“In this case it is alleged that the criminal process is being used in a manner that is Civil but it is clear to the court that investigations have not been finalised and any alleged abuse at this stage appears to the court to be speculative. Under our constitution pre-hearing investigations cannot be unconstitutional unless they purport to obtain evidence in an unlawful manner or they infringe on the rule against self-incrimination or violate the right of silence or because of the manner they have been conducted they seriously erode the presumption of innocence if and when the suspect is charged.”

15. The respondents, particularly the 1st- 3rd respondents, should not, however, allow themselves to be used by the 5th respondent, should that be the case, to give her an upper hand in the dispute with the petitioner. From the correspondence attached to the parties’ pleadings, there is clearly a problem involving the petitioner’s and 5th respondent’s common boundary, with accusations and counter-accusations made against each other. From the letters annexed to the petitioner’s affidavit as PNN-5, the receipt for beacon location dated 16th February 2012, the letter to the Provincial Surveyor dated 16th February 2012, and the letter from the Provincial Surveyor also dated 16th February 2012, it appears that the petitioner sought to re-establish the beacons after he build his stone fence. However, his letters (PNN-3 and PNN-4) indicate that some attempts had been made on 15th December 2011 to get the 5th respondent to remove the Kei-apple fence which allegedly encroached on the petitioner’s land, to no avail.

16. These, however, are matters that, should the 1st – 4th respondents decide to charge the petitioner, ought to be placed before the trial court in his defence, to be addressed and tested at the trial court. Whether the petitioner should be charged in court, however, should be determined on the basis of the evidence available to the respondents, not because they are compelled to act as a result of pressure exerted on all or any of them by any party.

17. I say this because, from the evidence before me, the 5th respondent does appear to be putting undue pressure on the 1st respondent to prosecute the petitioner. This can be gleaned from her letter dated 25th February 2012 (annexure **JNN6**) which is addressed to the 1st respondent and is copied to, among others, the OCPD, with the remarks **‘Kindly note the OCS defied your orders to take action’**; the PPO, with the remarks **‘Please intervene for justice to be done’**; the Chairman of the Ethics & Anti-Corruption

Commission with the remarks *'The OCS is believed to have been bribed in order not to take the suspect to court despite the Junior Officers investigating the case fairly'* and to the Director of Public Prosecutions with the remarks *'Kindly assist the OCS in prosecuting the offender.'*

18. Having made her complaint on 6th February 2012, it does seem strange that the 5th respondent wrote this letter which is couched in terms that can be deemed as intended to intimidate and compel the respondents, but particularly the 1st respondent, to act against the petitioner, regardless of his own professional assessment of the evidence presented to him.

19. However, I can see no basis for the petitioner to allege violation of his constitutional rights, and this petition must fail. It is hereby dismissed but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 11th day of April 2013.

**MUMBI NGUGI
JUDGE**

Mr. Njagi instructed by the firm of Njagi Wanjeru & Co. Advocates for the Petitioner

Ms Kahoro instructed by the State Law Office for 1st - 4th Respondent

Mr. Kibatia instructed by the firm of Kibatia & Co. Advocates for the 5th Respondent.