



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC JUDICIAL REVIEW SUIT NO. 26 OF 2019

(FORMERLY H.C J.R. NO. 76 OF 2019)

**IN THE MATTER FOR AN APPLICATION FOR LEAVE BY LUCY
KAGAI & STEPHEN MUTHAURA TO APPLY FOR ORDERS OF
PROHIBITION AND DECLARATION**

AND

**IN THE MATTER OF ARTICLES 2(1) AND 2(2), 20, 22, 23, 25 (A) AND (C), 29 (D),
39, 47, 49, 157(10) AND (11) AND 159 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 4(1), (2) AND (3), 6, 7, AND 9(1)
OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE
LAW REFORM ACT CAP 26 LAWS OF KENYA**

AND

IN THE MATTER OF THE INTENDED KIBERA CRIMINAL CASE NO. 273 OF 2019

REPUBLIC V STEPHEN MUTHAURA & LUCY KAGAI

BETWEEN

LUCY KAGAI.....1ST APPLICANT

STEPHEN MUTHAURA.....2ND APPLICANT

AND

THE KIBERA CHIEF MAGISTRATE’S COURT.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....3RD RESPONDENT

INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....4TH RESPONDENT

JUDGEMENT

1. The Applicants seek an order to prohibit the Chief Magistrate's Court at Kibera from prosecuting them vide the application dated 20/03/2019. They seek an order of prohibition against the 1st, 2nd, 3rd and 4th Respondents stopping them from commencing, proceeding and conducting the trial of the Applicants through the intended charges in Criminal Case No. 273 of 2019- Republic v Stephen Muthaura & Lucy Kagai. Further, they seek an order to prohibit the 1st, 2nd, 3rd and 4th Respondents from engaging in any future abuse of their offices intended to harass and frustrate the 1st and 2nd Applicants in a manner that violates their constitutional rights including the right to property and its peaceful possession. They also seek a declaration that the commencement, maintenance and prosecution of **Kibera Chief Magistrates Criminal Case No. 273 of 2019- Republic v Stephen Muthaura & Lucy Kagai**, or any future arrest or prosecution relating to this matter is an abuse of the criminal justice system and is in contravention of the Applicants' constitutional rights and freedoms and security of the person, right to property and the right to secure the protection of the law. They also seek the costs of the suit.

2. The 1st Applicant brought **ELC Suit No. 139 of 2018- Lucy Ngugi Kagai v Joseph Njuguna Kariuki** concerning the ownership of the land known as Dagoretti/Riruta/3882. The 1st Applicant avers that she obtained a temporary injunction in this suit restraining the Defendant or any party from interfering with her peaceful possession of the suit property. It is the 1st Applicant's contention that her success in obtaining the interim orders in ELC Suit No. 139 of 2018 prompted the Area Chief of Riruta Location to harass her by violently arresting her on 27/2/2019 following which the 3rd and 4th Respondents charged her with the offence of constructing a house on a river without approval from the 3rd Respondent, claims which she maintains are trumped up charges against her.

3. The Applicants contended that the 3rd Respondent has not accorded the 1st Applicant well-grounded reasons or notice why she should be charged, which act the Applicants contend was a violation of Article 47(2) of the Constitution and Section 4(2) and (3) of the Fair Administration Action Act. The 2nd Applicant claims that he is a Pastor and was assisting the 1st Applicant during the confrontations with the Chief of Riruta Location but was unreasonably arrested and charged as a foreman of the 1st Applicant, which he has never been. The 1st Applicant claimed that the buildings referred to in the charge sheet dated 28/02/2018 were constructed in the 1990's and that in all that time the 4th Respondent had never summoned her to show cause and neither had it given her notice to rectify anything to do with the buildings, hence violating her constitutional right to be heard under Article 47(2).

4. It is the Applicants' contention that the Chief of Riruta Location acted in contempt of the orders made in ELC Case No. 139 of 2018 by issuing summons to the Applicants to attend the Chief for determination of questions of construction on the suit property despite the pendency of the case. The Applicants averred that the Defendant in the suit filed an application dated 18/01/2019 seeking a temporary injunction to halt construction on the suit property by the 1st Applicant but the application was dismissed with costs on 26/02/2019. The Applicants contend that the on following day, that is 27/02/2019, the 3rd and 4th Respondents collaborated with the Chief of Riruta area and violently arrested the 1st Applicant, injuring her and embarrassing her.

5. The Applicants averred that the 2nd, 3rd and 4th Respondents acted irrationally and maliciously in pursuing the charges against her since the survey map of the area indicates that the 1st Applicant's houses are not on the river bank or the riparian reserve. They stated that when they were arraigned in court on 28/02/2019, the 2nd and 3rd Respondent sought deferral of plea taking in order to confirm whether there was any construction next to the river as indicated in the charge sheet. To the Applicants, this confirmed that the 3rd Respondent acted illegally in arresting them without first carrying out a proper inspection.

6. The Applicants relied on the decisions in **Republic v National Environmental Management Authority & Another Ex Parte Philip Kisia & Council of Nairobi [2013] eKLR**; **Stanley Munga Githunguri v Republic [1986] eKLR** and **Republic v Chief Magistrates Courts at Mombasa ex parte Ganijee & Another [2002] eKLR** in their submissions.

7. The 3rd Respondent in its a reply averred that plea had not been taken in Kibera Criminal Case no. 273 of 2019 because the accused who is the 1st Applicant herein, had been unwell and the prosecutor agreed to defer the taking of the plea until the accused was medically fit to stand trial. It is the 3rd Respondent's contention that the Applicants are intent on frustrating the criminal proceedings. It further contended that it is not a party in ELC Case No. 139 of 2018 and that the orders made in that suit were not directed to it.

8. The 3rd Respondent averred that at the material time it was conducting an enforcement operation to clean up Nairobi River and its tributaries and many cases were instituted in court and mentioned Kibera Criminal Cases Numbers 273 of 2019, 170 of 2019, 171 of 2019, 172 of 2019, 173 of 2019, 264 of 2019 and 242 of 2019.

9. The 3rd Respondent denied that violence and brutality was meted by the area of Chief Riruta Location and produced a copy of the investigation diary while stating that the 1st Applicant resisted arrest. The 3rd Respondent prayed that the application be dismissed.

10. The Court has considered the Applicants' application together with the affidavits. The issues for determination are whether the actions of the Respondents constitute unfair administrative action against the Applicants, and whether the court should stay the criminal proceedings against the Applicants. The main contention by the Applicants is that they were not served any notice of the intended charges as required by Section 4(3) of the Fair Administrative Action Act and that they were not given good reasons for the charges contrary to Article 47(2) of the Constitution. Under Article 47(2) of the Constitution, if a right or fundamental freedom of a person has been or is likely to be affected by some administrative action, the person has a right to be given written reasons for the action. Section 4(3) of the Fair Administrative Action Act, 2015 provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision prior adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard.

11. The question is, did the 3rd Respondent infringe the Applicants' right to fair administrative action by instituting criminal proceedings against them for the alleged offence? The Court thinks not. The court notes that the 1st Applicant is the Plaintiff in ELC case no 139 of 2018 which is a dispute over the suit property and that that suit is ongoing. The 3rd Respondent stated that it was carrying out an operation to clean up Nairobi River and her tributaries, which led to it instituting criminal proceedings against several parties including the Applicants.

12. Under Section 118 of the Environmental Management and Co-ordination Act, and Section 29 of the Director of Public Prosecutions Act, an environmental inspector may, in any case in which he considers it desirable so to do, institute and undertake criminal proceedings against any person before a court of competent jurisdiction (other than a court martial), in respect of any offence alleged to have been committed by that person under the Act, or may discontinue at any stage before judgment is delivered, any such proceedings instituted or undertaken by himself with the approval of the Director of Public Prosecutions.

13. From the foregoing, it is apparent that the 3rd Respondent acted within its constitutional mandate in instituting proceedings against the Applicants. The court is not persuaded that the Applicants' right to fair administrative action has been infringed by the Respondents. In the court's view, the criminal proceedings will give the Applicants an opportunity to be heard on the charges brought against them.

14. In **Rodgers Muema Nzioka & others v Tiomin Kenya Limited (2006) 1 KLR (E&L) 423**, Hayanga J. was of the opinion that since environmental degradation affects the public at large, the balance of convenience test should be applied with a view to considering the convenience of the public as opposed to that of the parties in the suit. The proceedings in Kibera criminal cases 273 of 2019 and the other proceedings mentioned by the 3rd Respondent are important as the charges against the Applicants regarding encroachment on the riparian land affect the public at large and not just the 1st Applicant.

15. The Court declines to grant the orders sought by the Applicants because granting them would amount to this court unduly interfering with the criminal proceedings in the Kibera Magistrates' Court and further, would prevent the 2nd and 3rd Respondents from carrying out their legal mandate in the protection and conservation of the environment. Accordingly, the Court dismisses the Applicant's application dated 20/03/2019 with no orders as to costs.

Dated and delivered at Nairobi this 8th day of August 2019.

K. BOR

JUDGE

In the presence of:-

Mr. L. Munyiri for the Applicants

Mr. V. Owuor- Court Assistant

No appearance for the Respondents