



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 1230 OF 2015

**IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA, 2010**

AND

**IN THE MATTER OF RULES 11, 12 AND 13 OF THE CONSTITUTION OF KENYA
(SUPERVISORY JURISDICTION & PROTECTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES,
2006**

AND

**IN THE MATTER OF THE CONTRAVENTION AND/OR ALLEGED CONTRAVENTION OF
THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF THE LAND ACT, NO. 6 OF 2012 AND THE LAND REGISTRATION
ACT NO. 3 OF 2012, LAWS OF KENYA**

BETWEEN

RED KAKA LIMITED.....PETITIONER

-VERSUS-

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

VIVO ENERGY KENYA LIMITED

(formerly known as KENYA SHELL LIMITED).....2ND RESPONDENT

JUDGMENT

The Petitioner brought this petition in the High Court on 30th July 2015 seeking the following reliefs:-

1. A declaration that the actions of the 1st Respondent's officers at CID Headquarters are a gross violation of the Petitioner's constitutional rights protected under the Kenya Constitution, 2010.

2. A declaration that the Petitioner's fundamental rights to property and fair administrative action under Articles 40 and 47 of the Constitution of Kenya 2010 have been and continue to be infringed and that the Petitioner deserves protection under the Constitution of Kenya, 2010.

3. An order for compensation to be made to the Petitioner by the Respondents for harassment, intimidation and embarrassment caused to the Petitioner as a result of the unlawful acts by the 1st Respondent of laying unfounded claims over acquisition of land in order to aid the 2nd Respondent satisfy its malicious intent of depriving the Petitioner of its property.

4. The costs of the petition.

The petition was transferred to this court on 25th November 2015. The Petitioner's case as set out in the petition is that the Petitioner was at all material times registered as the proprietor of all that parcel of land known as L.R No. 209/405/8 (I.R No. 161133 (hereinafter referred to as "the suit property"). The Petitioner acquired the suit property through a lease which was granted to it by the then City Council of Nairobi on 20th August 2007. The lease was registered on 21st May 2008. The Petitioner has at all material times in occupation of the suit property. In the year 2011, the 2nd Respondent started laying baseless claims over the suit property. The Petitioner resisted attempts by the 2nd Respondent to forcefully take over the suit property from the Petitioner. The 2nd Respondent did not give up. The 2nd Respondent after failing to have its way with the Petitioner turned its energy to the Registrar of Titles Nairobi. Without any material to back up its claim, the 2nd Respondent persistently demanded that the Registrar of Titles cancels the Petitioner's title to the suit property. The demand was aimed at defeating the Petitioner's lawful claim over the suit property and asserting the 2nd Respondents unlawful one. The Registrar of Titles refused to give in to the 2nd Respondent's demands. The 2nd Respondent then decided to move to court. The 2nd Respondent filed Judicial Review Application No. 32 of 2011 seeking an order to compel the Registrar of titles to cancel the Petitioner's title number I.R 1995/1 in respect of the suit property together with any certificate of title issued in respect thereof. The 2nd Respondent also sought an order of prohibition to prohibit the Registrar of titles from registering any dealings or transactions against the title for the suit property contrary to the 2nd Respondent's alleged interests and rights in the suit property. The 2nd Respondent's judicial Review application was dismissed by Odunga J. on 8th April, 2013.

After the dismissal of the Judicial Review application, the 2nd Respondent lodged a malicious complaint at the CID Headquarters seeking the arrest of the Petitioner's officials over the manner in which they acquired the suit property. Acting on this complaint, the police without carrying out independent investigations resorted to acts of intimidation and harassment of officials of the Petitioner. The harassment and intimidation was extended to the officers at the City Hall Nairobi who were also threatened with arrest. All these activities were aimed at putting pressure upon the Petitioner to relinquish ownership of the suit property. The police officers have made attempts to arrest the Petitioner's directors an exercise which has subjected the Petitioner to ridicule and reduced its standing in the eyes of its customers. The attempts by the 2nd Respondent to have the petitioner's directors arrested and arraigned in court on trumped up charges was aimed at laying a basis for challenging the Petitioner's title over the suit property.

The intended arrest and arraignment in court of the Petitioner's directors in the circumstances amount to abuse of criminal justice. It is also an attempt to deprive the Petitioner of its property. The Petitioner contended that the 2nd Respondent is using the criminal process to settle disputes of a civil nature. The Petitioner contended that it has a constitutional right to acquire and own property which right cannot be taken away capriciously. The Petitioner contended further that it has a right to fair administrative action. The Petitioner contended further that the 1st Respondent has a duty while considering criminal complaints to have regard to public interest in the administration of justice and the need to prevent and avoid abuse of legal process.

The Petition was supported by the affidavit of the Petitioner's Managing Director, Peter Kamau Nyutu sworn on 28th July 2015 in which he reiterated the contents of the Petition which I have highlighted above. He annexed to the said affidavit among others, copies of, a provisional certificate of title for the suit property, a lease dated 20th August 2007 between the Petitioner and the City Council of Nairobi, judgment by Odunga J. delivered on 8th April 2013 and a letter dated 30th June 2015 addressed to the Principal Secretary Ministry of Lands by the Ethics and Anti-corruption Commission.

The petition was opposed by the Respondents. The 1st Respondent filed grounds of opposition dated 9th November 2015 in which it contented among others that the Petition has no merit, speculative in nature and an abuse of the process of the court. The 1st Respondent stated that the Petitioner had not demonstrated the violation or threatened violation of its fundamental rights and the manner in which the said rights were violated or threatened by the 1st Respondent. The 1st Respondent stated that its investigating officers have a legal duty to investigate any complaint made by any person. The 2nd Respondent on their part opposed the application through a replying affidavit and further affidavit both sworn by Naomi Assumani on 7th October 2015 and 16th March 2016 respectively. In the replying affidavit, the 2nd Respondent denied that the Petitioner is the registered proprietor of the suit property. The 2nd Respondent contended that it is the registered owner of the suit property and that it had instituted a suit against the Petitioner to enforce its rights over the suit property. The 2nd Respondent contented that the lease which the Petitioner purportedly obtained from the City council of Nairobi on its face warranted a complaint to the 1st Respondent for investigation. The 2nd Respondent contended that it was entitled to lodge a complaint with the 1st Respondent when it's rights of user, ownership and enjoyment of the suit property was threatened by fraudulent acts. The 2nd Respondent stated that the complaint against the Petitioner was lodged in good faith and was not limited to the Petitioner. The 2nd Respondent stated that the Petitioner had not demonstrated in what manner it was being harassed or intimidated by the Respondents or how its rights were infringed or threatened. The 2nd Respondent stated that the mere fact that there were civil proceedings pending before court did not bar the 1st Respondent from discharging its mandate under the Constitution. The 2nd Respondent denied that it had influenced the 1st Respondent to arrest and arraign the Petitioner's directors or any other person in court. In the further affidavit, the 2nd Respondent stated that the Land Registrar had admitted in the pleadings filed in the civil suit filed by the 2nd Respondent against among others, the Petitioner, that there were fraudulent dealings in relation to the lease which is the foundation of the Petitioner's alleged title to the suit property.

The petition was heard by way of written submissions. I have considered the petition and the response thereto by the Respondents. I have also considered the submissions by the parties and the case law cited in support thereof. The following is my view on the matter. The dispute between the Petitioner and the 2nd Respondent is over the ownership of the suit property in respect of which both civil and criminal proceedings have been initiated against the Petitioner. The Petitioner has contended that the said criminal proceedings have been initiated for collateral purposes with the aim of aiding the civil proceedings instituted by the 2nd Respondent and as such is an abuse of the legal process. The Petitioner has contended that following a complaint that was made by the 2nd Respondent to the 1st Respondent, the 1st Respondent under the influence of the 2nd Respondent has engaged in acts of intimidation, harassment and threats towards the officials of the petitioner to force the Petitioner to relinquish its ownership of the suit property. The Petitioner has contended that its constitutional right to acquire and own property has been infringed together with its rights to fair administrative action. The Petitioner has contended that the 2nd Respondent is using the criminal process to settle civil disputes.

Under section 13 of the Environment and Land Court Act 2011, this court has jurisdiction to hear and determine all disputes relating to the use, occupation and title to land in accordance with Article 162 (2) (b) of the Constitution of Kenya. Under Section 13 (7) of the said Act, the court has power to make any order and grant any relief as deemed fit including prerogative orders, award of damages and declarations. The court has power to hear and determine applications for redress of a denial, violation, infringement or threats to rights or fundamental freedoms relating to matters falling within its jurisdiction.

What I need to determine in this petition is whether the Petitioner's rights under Articles 40 and 47 of the Constitution have been violated or threatened with violation. The onus was upon the Petitioner to prove the alleged violation or threatened violation of its rights. In its submissions, the Petitioner contended that the 2nd Respondent had set in motion the criminal process with a view to assist the 2nd Respondent make out a case in ELC No. 766 of 2015. The Petitioner submitted that a criminal process initiated for the purposes of gathering evidence to bolster a civil case cannot be allowed by the court to stand. The Petitioner submitted that it is a travesty of justice and against public interest and the interest of administration of justice for criminal process to be used to settle civil disputes. In support of this submission the Petitioner cited the cases of, Republic vs Inspector General, National Police Service & 3 Others, Ex-parte Stephen Samba Kathima (2014) eKLR and Musyoki Kimanathi vs- Inspector General of Police & 3 Others (2014) eKLR. The Petitioner submitted that where the court reaches a finding that the discretion to prosecute criminal offences is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the court should not hesitate to halt such prosecution.

It is now settled law that a person alleging contravention of a constitutional right must set out the right infringed and the particulars of such infringement. See, the cases of Annarita Karimi Njeru vs. Attorney General (1979) KLR 154, Republic Vs. Commissioner of Police, Ex-parte Nicholus Gitutu Karia, Misc. Civil Application No. 534 of 2003 (unreported) and Rashid Odhiambo Aloggoh and 245 Others vs. Hacco Industries (2007) Eklr which were cited by the 1st Respondent. In the case of Republic vs. Commissioner of Police Exparte Nicholus Gitutu Karia (supra), the court stated that:

“.....any applicant who alleges that his/her rights have been infringed must not only make allegation but must also state clearly with supporting facts instances where such rights have been infringed.”

In the case of Republic vs. Director or Public Prosecution & 2 Others Ex-parte Francis Njakwe Maina & another (2015) EKLR which was also cited by the 1st Respondent, the court stated that:

“The burden was therefore upon the applicants to place before the court, not by mere allegations, but also by available evidence that the Respondent's conduct in preferring criminal charges in the face of existing civil proceedings is reprehensible and an abuse of the court and legal process and right to be arrested.”

It is common ground that the existence of civil proceedings is not a bar to criminal prosecution. The Criminal Procedure Code allows concurrent prosecution of civil and criminal proceedings arising from the same facts. In this particular case, the Petitioner's grievance is that the 2nd Respondent's complaint to the 1st Respondent which the 1st Respondent is pursuing through investigations has been made in bad faith and that the complaint and investigations are aimed at achieving collateral purposes namely, to assist the 2nd Respondent in collecting evidence for its civil case. The Petitioner has also contended that the purported investigations are being carried out in a manner which infringes on its fundamental rights. The Petitioner has accused the Respondents of intimidation and harassment.

The Petitioner had a duty to demonstrate that the complaint which was made by the 2nd Respondent to the 1st Respondent was made in bad faith and that the investigations by the 1st Respondent on the said complaint were not being conducted in accordance with the law. The Petitioner placed no evidence before the court showing that the complaint which was made by the 2nd Respondent to the 1st Respondent was activated by malice and that the 2nd Respondent's intention was to gather evidence for use in civil case filed against the Petitioner among others. There is also no evidence that in carrying out investigations following the said complaint, the 1st Respondent engaged in acts of intimidation and harassment of the Petitioner's officials. No evidence has also been placed before the court showing that attempts have been made by the Respondents to arrest the Petitioner's directors and that the charges likely to be preferred against them if at all they would be charged, would be malicious and without merit.

In the case of Kuria & 3 Others vs. Attorney General (2002) 2 KLR 69, the court stated that:

“It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution.”

It is admitted that there is a dispute between the Petitioner and the 2nd Respondent over the ownership of the suit property. The Petitioner has contended that the dispute is the subject of ELC No. 766 of 2015 in which the 2nd Respondent has sued among others the Petitioner. The Petitioner’s contention is that since the dispute is already the subject of a civil suit, the 1st Respondent cannot institute parallel criminal proceedings on the same facts. Based on the cases which I have cited above, this argument is not based on law and must fail.

The issue is not whether criminal proceedings can be instituted while there are civil proceedings pending. The issue is whether the criminal proceedings have been instituted in bad faith and for collateral purposes other than to vindicate the commission of an offence. The 2nd Respondent has contended that the manner in which the suit property was transferred to the Petitioner had some criminal element which necessitated a formal complaint being made to the police. Whether or not there is sufficient evidence to sustain a criminal charge is for the police to decide after carrying out investigations. So far, no charge has been preferred against the Petitioner’s directors. A decision has not been made one way or the other on the complaint by the 2nd Respondent. The 2nd Respondent has a right to lodge a complaint with the 1st Respondent it forms the view that a criminal offence has been committed against it. Once a complaint has been made to the 1st Respondent the 1st Respondent similarly has a duty to consider the complaint and make an informed decision on it. In considering the complaint, the 1st Respondent has to act in good faith and in accordance with the law. As I have stated above, there is no evidence that the complaint that was lodged against the Petitioner was malicious and made in bad faith. There is also no evidence that in investigating the complaint the 1st Respondent acted illegally or violated the Petitioner rights.

In my view, the Petitioner has made allegations without any material evidence to back up the same. The Petitioner has not even produced before this court the pleadings in ELC No. 799 of 2015 to demonstrate the connection between that case and the criminal complaint made against it by the 2nd Respondent. The Petitioner has also made allegations of harassment and intimidation without furnishing any particulars of the same. The Petitioner has not stated when and how its officials were intimidated or harassed and by who. The Petitioner has alleged that its right to own property has been violated. The Petitioner has not stated in what manner the right has been violated. I am of the view that a complaint that a property has been acquired through criminal activities cannot be termed a threat or a violation of a right to acquire or own property. The same applies to the allegation that the Petitioner’s right to a fair administrative action has been infringed. No evidence has been placed before the court to support that allegation.

In the final analysis, I find no merit in the petition filed herein by the Petitioner. The petition fails and is accordingly dismissed with costs to the Respondents.

Delivered and Signed at Nairobi this 26th day of July, 2017

S. OKONG’O

JUDGE

Judgment delivered in open court in the presence of

Mr. Kiprono h/b for Gachue for the Petitioner

Mr. Terrel h/b for Morari for the 1st Respondent

Mr. Luseno for the 2nd Respondent

Catherine Court Assistant