



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

CONSTITUTIONAL PETITION NO. 5B OF 2015

MONICA CYOMBUA GITARI.....PETITIONER

VERSUS

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

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

A N D

CHARLES MURIUKI NJAGAGUA.....1ST INTERESTED PARTY

ROSALINE DAISY KARIMI2ND INTERESTED PARTY

ALBERT NGONDI3RD INTERESTED PARTY

J U D G E M E N T

1. By a Petition dated 23 October 2015 and filed on 30 October 2015, the petitioner sought the following reliefs;

a) That a declaration be issued that the intended prosecution of the petitioner is in violation of her right to protection of law and equality before the law as enshrined in Articles 27 and 50 of the Constitution.

b) That a declaration be issued that under Article 157 of the Constitution the 1st Respondent has no power to institute Criminal proceedings relating to a civil dispute between the Petitioner and the Interested Parties in respect of the location of a public road and encroachment of the same.

c) That a declaration be issued to declare that the intended institution, prosecution and maintenance of Criminal proceedings against the petitioner amount to abuse of the Court process.

d) That a declaration be issued that the failure of the police to investigate the complaint lodged by the petitioner on the 23rd day of April, 2015 is in violation of her right to protection of law and human dignity enshrined in Articles 27 and 28 of the Constitution.

e) That an order of mandamus be issued to compel the Inspector General of Police to

investigate and act on the complaint lodged by the petitioner on 23rd April, 2015.

f) That the Honourable Court be pleased to issue an order of prohibition to prohibit the Respondents from prosecuting the Petitioner in relation to the current dispute surrounding the location of the Public Road between the Petitioner and the Interested parties herein.

g) That the costs of this suit be borne by the Respondents in any event.

2. The Petitioner stated in her petition that she was the wife of the registered owner of Title No. NTHAWA/RIANDU/1293 whereas the 1st and 2nd interested parties were said to be the owners of Title No. NTHAWA/RIANDU/1292 which is adjacent to her property. The 3rd interested party was described as the owner of Title No. NTHAWA/RIANDU/1125. It was averred that there was a dispute on the actual location of a public access road for accessing the said 3 properties and that the petitioner had already commenced a process of resolving it through the Land Registrar.

3. The Petitioner further stated that the 3rd interested party had encroached on the said public access road with the consequence that she was constrained to excise part of her property for use as a private access road. It was her case that owing to continued trespass by the interested parties, she decided to fence off the private access road which was part of her property in consequence of which the Respondents decided to charge her with a criminal offence of blocking a public road under the Penal Code.

4. The Petitioner complained that the police officers conducted a shoddy and biased investigation and that the Director of Public Prosecutions decided to charge her on the basis of improper influence from the 1st interested party who was a member of parliament. She also averred that the Respondents were trying to abuse the Criminal Justice Process in order to advance the interests of one party to a civil dispute. The Petitioner further complained that the 2nd Respondent had failed to investigate her report of malicious damage to property in that her fence and fencing materials were destroyed by hooligans at the instance of the 1st interested party.

5. The Petitioner, therefore, considered and contended that her fundamental rights under Articles 27,28,40,48 and 50 of the Constitution of Kenya 2010 had been violated or threatened with violation in consequence whereof she sought the various declarations and the prerogative orders of mandamus and prohibition. She faulted the Director of Public Prosecutions for failing to recommend or direct the police to undertake further investigations in the matter and for failing to recommend that the existing civil boundary dispute be resolved first before commencing any criminal proceedings.

6. The 1st Respondent filed a replying affidavit in this matter through the investigating officer one Eliakim K. Silgich (F.No. 232446) who undertook inquiry No. 2 of 2015 relating to the alleged blockage of a public road. He deposed in his affidavit of 12 October 2015 that upon relevant report being received on 14.4.15 he together with two other police officers visited the scene and observed a blockage on the road made up of posts and iron sheets. He further stated that when they visited the place again on 15.4.15 in the company of the scenes of crime officers, they observed that another section of the road had been blocked using posts and barbed wire. He further stated that in the course of investigations they contacted the workers of the 1st interested party, the Sub-County Surveyor, and the County Land Registry. He had in his possession a statement of the petitioner and upon conclusion of investigations, the inquiry file was forwarded to the Director of Public Prosecutions for advice. The Director of Public Prosecutions appears to have given a direction to prosecute the Petitioner with obstruction of a public way contrary to Section 249 of the Penal Code vide a letter dated 18 June 2015.

7. The 1st Interested party also filed a replying affidavit sworn on 27 November 2015 on his behalf and on behalf of the 2nd interested party who was his wife. They stated that the Petitioner was merely attempting to scuttle the legal process against her without just cause. They further stated that the Petitioner shall be accorded a chance to defend herself under the Criminal Justice system and that the court should be slow to intervene in criminal proceedings simply because of the availability of civil remedies. They denied

that any of the Petitioner's rights had been violated as alleged and urged the court to dismiss the petition with costs.

8. The 3rd interested party did not file any replying affidavit but only grounds of opposition. He stated that the petitioner had failed to satisfy the threshold for proving violation of constitutional rights; that the cited articles of the Constitution had no relevance to the matter at hand; and that he was not a prosecutor and could not influence a criminal prosecution. He considered that he had been wrongly joined in the petition.

9. The parties herein agreed to dispose of the petition through written submissions. In her submissions, the petitioner maintained that the intended criminal prosecution was as a direct result of a boundary dispute she had with the interested parties which was intended to unfairly influence the outcome of a civil dispute. She faulted the police for failing to investigate her complaint on damage to her property and for conducting speedy and shoddy investigations into the alleged blockage of a public road. She submitted that the criminal prosecution was intended to harass or intimidate her to stop pursuing the boundary dispute to its logical conclusion.

10. The petitioner faulted the Director of Public Prosecutions for accepting and acting upon a partisan investigation report which was prepared in bad faith. It was submitted that the Director Of Public Prosecutions had failed to act properly and within his powers as required under Article 157 (10) of the Constitution and Section 4 of the Office of the Director of Public Prosecutions Act 2013 with the consequence that he failed to ensure that he served the ends of justice and prevent abuse of the legal process. The petitioner relied upon the case of **Republic vs Director of Public Prosecutions & 4 others Ex parte Shamilla Kiptoo** 2006 (e KLR) and the case of **Joram Mwenda Guantai vs The Chief Magistrate Nairobi Civil Appeal No. 228 of 2003**. In the latter case, the Court of Appeal observed, *inter alia*, that;

“ ...Equally so, the High court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers him to be a victim of oppression. If the prosecution amounts to an abuse of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment of all persons who are brought before the court or a subordinate court and to prevent an abuse of the process of court”.

11. The Petitioner submitted that the intended prosecution was instigated or influenced by the 1st interested party in order to settle personal scores. The court was urged to find and hold that the intended prosecution was tainted with malice and was the product of vendetta by the 1st interested party.

12. The Petitioner, finally, submitted that it was an abuse of power for the respondents to institute and prosecute criminal proceedings solely for the purposes of settling a purely civil dispute. The petitioner cited the case of **Francis Kirima M'Ikunyua & Others vs Director of Public Prosecutions Petition No. 461 of 2012** where it was held, *inter alia*,

“It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise a civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the Criminal Process to score points against each side in order to assert the rights of ownership...”

13. The Director of Public Prosecutions who is the 1st Respondent submitted on the question of jurisdiction only. It was submitted that this court had no jurisdiction to entertain a Constitutional petition which was the preserve of the High Court. The Director of Public Prosecutions relied upon the provisions of Article 165 of the Constitution and upon the case of the owners of ***Motor Vessel 'Lilian S' vs Caltex Oil Kenya Ltd (1989) KLR1*** where it was held, *inter alia*,

“Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there will be no basis for a continuation of proceedings pending

evidence. A court of law downs tools in respect of the matter before it when it holds the opinion that it is without jurisdiction”.

14. It is very strange that the 1st respondent did not raise the question of the court’s jurisdiction at the earliest opportunity so that the court could deal with it right away. In the above cited case of the owners of Motor Vessel ‘Lilian S’ (supra) the opening words of the paragraph of Hon. Justice Masime J.A. quoted begins as follows;

“With that I return to the issue of jurisdiction and to the words of section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step ……….”

15. It is intriguing that the 1st respondent waited until the filing of submissions to finally dispose of the petition in order to raise the issue of jurisdiction. It was not raised in the replying affidavit even though one was filed. It was not raised by way of a preliminary objection even though he had an opportunity to do so since 2015. To make the matter worse, the 1st respondent then selectively cited the paragraph in the above quoted judgment mischievously excluding the parts which related to the timing of such objections. The 1st respondent’s conduct has not doubt deprived the petitioner and the interested parties an opportunity to comment or submit on the issue of jurisdiction. This court frowns upon such sharp practice.

16. So, what are the consequences for failure by a party to object to the court’s jurisdiction at the earliest opportunity? What if a party waits until a matter is due for judgment and then surreptitiously sneaks it into his final submissions? The following passage in the said judgment may be of some help;

“It is for this reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court... A party who fails to question the jurisdiction of the court may not be heard to raise the issue once the matter is heard and determined”.

17. The 1st and 2nd interested parties submitted on three points only. First, that there was no evidence of pending civil proceedings before this or any other court. Second, it was submitted that the mere existence of civil proceedings is not a bar to the institution of criminal proceedings in appropriate cases. Third, that even if the petitioner is charged she would still have an opportunity to defend herself and she would be presumed innocent until proved guilty. They relied upon the cases of **Christopher Mbugua Kiiru vs Inspector General of Police & 3 Others Mombasa Constitutional Petition No. 38 of 2013 and Republic vs The Attorney General & 5 Others Nairobi Misc. Application No. 153 of 2012.**

18. The 3rd interested party reiterated his grounds of objection in the submissions. He submitted that he was not a prosecutor and could not undertake a criminal prosecution. He submitted that it had not been demonstrated that he had breached any of the Petitioner’s Constitutional rights and that no remedy was being sought against him in the petition. In his view, he was wrongly joined in the petition.

19. This being a petition alleging various violations of Constitutional rights including property rights under Act 40 of the Constitution, the main issue for consideration is whether the petitioner has proved her case to the required standard. The court has considered the petition, the affidavit in support thereof, the replying affidavits thereto and the various submissions filed herein by and on behalf of the parties.

20. On the basis of the material on record, it is clear that there is some sort of dispute amongst the petitioner on one hand and the interested parties on the other. It is also clear on the material on record that a dispute styled as a ‘boundary’ dispute was submitted by the Petitioner to the Land Registrar, Mbeere District for resolution and summons were issued to the concerned parties in January 2015. The existence of that dispute did not attract any criminal investigations or prosecution.

21. So what triggered the criminal investigations and intended prosecution of the Petitioner later in the year? The Petitioner filed the petition on 30 October 2015 together with an application for conservatory orders under certificate of urgency. The factors which led to such a state of affairs are articulated in the replying affidavit of the investigating officer and partly in the affidavit in support of the petition. The Petitioner apparently decided to fence off and block the road of access linking the 3 properties mentioned in paragraph 2 of the judgment without waiting for resolution of the “boundary dispute”. She did so in the belief that she was securing her own **private** road of access whereas the interested parties contended that it was a **public** access road. A complaint alleging blockage of a public road was apparently lodged by an employee of the 1st interested party at Siakago police station. An investigation ensued which later on culminated in the Director of Public Prosecution’s decision to charge the petitioner with a criminal offence of obstructing a public road contrary to section 249 of the Penal Code. One wonders why the Petitioner could not wait for resolution of the boundary or access road dispute through a mechanism she had initiated herself.

22. It is, therefore, clear to me that it is not the mere existence of a boundary dispute, or its resolution by the District Land Registrar, Mbeere, which directly resulted into the criminal investigation of the Petitioner. There were other intervening actions on the part of the Petitioner which triggered a report to the police who in turn conducted an investigation. There is absolutely no evidence before court to demonstrate that the 1st interested party improperly influenced either the 1st respondent or the 2nd respondent in the actions and decisions they took. There was no evidence that the 1st interested party used the respondents, or any one of them, to abuse the criminal justice system. There is no evidence on record or material upon which it may be reasonably inferred that the Petitioner was a victim of oppression, malice or personal vendetta.

23. In my view, the mere existence of a civil dispute or a civil case between parties would not automatically insulate a party who is suspected of commission of a criminal offence from criminal investigation unless, there is material upon which it may be inferred that the criminal justice system is being employed to achieve ulterior motives. The court was, therefore, right in the case of ***Francis Kirima M’Ikunya & others vs Director of Public Prosecutions*** (supra) in stopping a criminal prosecution when it found that there were several decided and pending civil suits concerning the disputants but the criminal justice regime had been maliciously employed to give undue advantage to one disputant. It was really a case of the criminal process being employed to ‘score points’ in a bid to assert ownership rights over disputed property. That scenario was not demonstrated in this petition.

24. The court is alive to the fact the real nature of the dispute herein is whether the access road which the Petitioner is alleged to have obstructed was a private or public road. The petitioner contends it was a private road and part of her husband’s property whereas the interested parties contended that it was a public road. So the investigating agency conducted some investigations which made them conclude it was a public road and that an offence had probably been committed. The Director of Public Prosecutions in exercise of his Constitutional power under Article 157 of the Constitution considered the inquiry file and accepted that there was sufficient evidence to sustain the charge. In those circumstances, this court should not short circuit the criminal justice system by making an assessment of the strength or weakness of the prosecution case vide a petition. That is the sole function of the trial court.

25. In the case of ***Christopher Mbugua Kiiru vs Inspector General of Police & 3 Others*** (supra) the court quoted from another decided case of ***Republic vs Inspector General of Police & 2 Others ex parte Zelea Jakaa Akiru*** as follows;

“The Director of Public Prosecutions (DPP) has constitutional duty to prosecute offences under Article 157 of the Constitution and in the exercise of such mandate, the DPP may use the police investigators and prosecutors as may have happened in this case, and I would therefore, find that the 2nd respondent acted within his powers to file criminal prosecution. The prosecution would, of course be expected to bring charges only where the investigations reveal an offence. However, whether the investigations leading to the arrest and charge of the applicant were properly done, if at all, will be established before the trial court in its decision whether the applicant has a case to answer or whether the prosecution proves the case beyond reasonable

doubt upon full hearing in accordance with section 215 of the Criminal Procedure Code. The court cannot, in exercise of its Judicial Review jurisdiction of Order 53 of the Civil Procedure Rules, consider the merits of the criminal charges facing the applicant and determine whether proper investigations were conducted into the alleged offence, and consequently whether the applicant is guilty or not guilty.

26. The court does not agree with the position taken by the 1st and 2nd interested parties that the Petitioner should be subjected to a criminal prosecution regardless of the merits for her petition so that she pleads and proves her defence of innocence there. The court takes the view that in appropriate cases where it has been demonstrated that an intended prosecution is flawed, oppressive, malicious or otherwise an abuse of the criminal process the court has jurisdiction to stop such a prosecution. The various authorities cited by the Petitioner support this view. The only difference here is that the court is not satisfied that the Petitioner has demonstrated that the intended prosecution is tainted as contemplated in law.

27. In view of the above, the court is not satisfied that the Petitioner is entitled to the declarations (a), (b), (c) and (f) of the petition dated 23 October 2015.

28. There is a second aspect which relates to the alleged failure by the police to investigate the complaint the Petitioner lodged on 23 April 2015. There is sufficient material on record to demonstrate that such a report was made. A replying affidavit was filed on behalf of the 2nd respondent but nothing was said on the said report. This complaint was not addressed and the court was not informed if it was ever investigated and, if so, with what result, or it was not investigated, for what reasons. If the Petitioner's complaint was investigated or pending investigations, there would have been nothing easier than informing the court as much. The only reasonable conclusion to be drawn from the 2nd respondent's silence is that it defaulted in undertaking the investigation as required by law. In that case, such failure would constitute an abdication of its statutory obligation under Section 42 of the National Police Service Act of 2011. In my view, such dereliction of duty would be a violation of Article 27 (1) of the Constitution of Kenya which guarantees every person the right to equal protection and equal benefit of the law. However, there is no material on record which would demonstrate a violation of Article 28 of the Constitution.

29. In view of my finding in paragraph 28 hereof the court holds that the Petitioner is entitled to the reliefs sought in paragraph (d) and (e) of the petition dated 23 October 2015.

30. The upshot of the foregoing is that the petition dated 23 October 2015 partly fails and partly succeeds in the following manner;

a) The declarations sought in paragraphs (a) (b) (c) and (f) are hereby declined.

b) The declaration sought in paragraph (d) and the order of mandamus sought in paragraph (e) are hereby granted.

c) Each of the parties to the petition to bear own costs.

31. It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 5TH DAY OF OCTOBER 2017.

In the presence of Mr. Mwathe for the Petitioner, Ms. Nandwa for the 1st Defendant, and Ms. Muriuki holding brief for Mr. Okwaro for the 3rd interested party but in the absence of the 2nd Respondent and the 1st and 2nd interested parties. The petition dated 23 October 2015 was allowed partially in terms of prayers (d) and (e) only.

Court Clerk Njue/Leadys

Y.M. ANGIMA

JUDGE. - 5.10.17.