Theuri v DCIO Nanyuki Police Station & 2 others; Kimuri (Interested Party) (Miscellaneous Application E014 of 2022) [2023] KEHC 20910 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20910 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

MISCELLANEOUS APPLICATION E014 OF 2022

AK NDUNG'U, J

JULY 27, 2023

BETWEEN

GEORGE KIMURI THEURI .... APPLICANT

AND

THE DCIO NANYUKI POLICE STATION .... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS .... 2ND RESPONDENT

EZEKIEL LETEPES LEKARAM .... 3RD RESPONDENT

AND

WILSON THEURI KIMURI .... INTERESTED PARTY

RULING

1. This ruling concerns the notice of motion application dated October 12, 2022 seeking for the following orders;

   i. Spent

   ii. Pending the hearing and determination of this application, this honourable court be pleased to issue a conservatory order barring the Respondents by themselves, their agents, their servants, CID officers and/or police officers from arresting, detaining, harassing, charging and/ or intimidating the interested party over the subject matter obtaining.

   iii. Spent.

   iv. That costs for this application be provided for.

2. The application is supported by a supporting affidavit sworn by the Applicant herein. It is deponed that the Applicant is the legal guardian of the estate of the Interested Party herein who was declared

incapable of handling any matter due to his age and mental incapacitation and who is the registered proprietor of land known as LR No 2787/421 (the suit property). That the Interested Party and the 3rd Respondent entered into an agreement for sale of a quarter acre to be hived from the suit property in July 2010 and the Interested Party surrendered the title to the 3rd Respondent through their advocate.

3. On September 22, 2022, the 3rd Respondent entered into the Interested Party property accompanied by young men and on the same day, DCI officers sent by the 1st Respondent stormed the Interested Party's home threatening to arrest him since the 3rd Respondent was claiming to have paid the Interested Party Kshs 2,300,000/- as purchase price for the suit property. Since then, the 1st Respondent has been threatening to arrest and charge the Interested Party and have summoned him to record a statement but the Applicant is apprehensive that the 1st Respondent intention is to harass and intimidate the Interested Party.

4. That the Interested Party is being harassed and intimidated by 1st Respondent to admit the allegations or risk being charged with a criminal case but the Interested Party has refused to yield to the demand hence, 1st Respondent might send his officers to arrest him. That the Interested Party is not guilty of obtaining money since the 3rd Respondent is in custody of the title deed and the allegations are civil in nature and not criminal. That the Applicant is apprehensive that the Interested Party may be arrested and detained and it is therefore fair and just this court bar the Respondents from arresting, detaining and charging the Interested Party in relation to obtaining money by false pretence over the suit property.

5. The 1st and 2nd Respondents filed separate replying affidavits opposing the application. The 3rd Respondent did not respond to the application. There is no indication from the record that he was served.

6. The 1st Respondent, an investigating officer working at DCI Nanyuki deponed that prayer 2 and 3 cannot be granted for reasons that the 1st Respondent is empowered to investigate the alleged offence and upon conclusion of the investigations, to forward the file to 2nd Respondent to decide on the next course. That this power is derived from Article 245(4)(a) of *the Constitution* which states that no person can direct the Inspector General to the investigations of any offence or crime.

7. That the Applicant has not proved that the 1st Respondent has been harassing the Interested Party as no summons have been attached and therefore, the alleged harassment and intimidation is unsubstantiated and that whether the case is civil or criminal in nature cannot bar the 1st Respondent to conduct investigations. That the prayers sought invite the court to impede statutory and constitutional functions of the 1st and 2nd Respondents to investigate and to undertake prosecutions without interference. That injuncting the 1st Respondent from completing investigations will leave matters unresolved and this will undermine the criminal justice and after all, the Interested Party if charged will have his day in court and the court will render itself in accordance with the dictates of fair hearing.

8. The 2nd Respondent in response to the Applicant's application averred that the application is incompetent for it is unsupported by any provisions of law for reasons that the same is based on the wrong provisions of the law being section 39 of the *CPC* that deals with arrest by the magistrate, section 261 *CPC* which was repealed by Act No 5 of 2003, and section 121(1) (3) anticipate admission to bail when a person has already being arrested and that all other provisions cited are foundational and do not specifically support the Applicant's application.

9. That the prayers sought cannot be granted for reasons that *the Constitution* empowers the 2nd Respondent to undertake prosecutions without directions from anyone. That the 2nd Respondent has clear guidelines on how to exercise decision to charge and the Applicant cannot purport to pre-empt

how the 2nd Respondent will exercise the decision to charge when the investigations are incomplete. Hence the application for conservatory orders as to decision to charge is premature and not ripe for consideration. That conservatory orders are only granted where there is evidence of imminent or actual violation of citizen's rights bearing in mind the public interest and constitutional values.

10. The 2nd Respondent further deponed that whether the issue is civil or criminal in nature is not a ground for the court to trespass into the role of investigations or the role of 2nd Respondent to charge; that if this court decided that the matter is civil in nature, the court will have conclusively made up its mind regarding the facts and evidence which are yet to be concluded.

11. That the application fails the test for anticipatory bail since the Applicant has not demonstrated that there will be serious breach of his rights. That the prayers sought seeks to impede the 1st and 2nd Respondent to investigate and to undertake prosecutions which will leave matters unresolved and which will undermine the criminal justice. That the Applicant will not suffer prejudice if the prayers sought are declined since he will have the day in court and the court will render itself in accordance with the dictates of fair hearing.

12. The application was canvassed by way of written submissions. The Applicant's counsel submitted that a report was made on September 23, 2022 and the Applicant recorded his statement with respect to the allegations and since then, no charges have been preferred against the Interested Party and despite the nature of the dispute being a land dispute, the DCI has continued summoning, harassing and intimidating the Applicant to agree to the allegations.

13. It is submitted that Article 29 of *the Constitution* provides for the right to liberty and security of a person which is a fundamental human right. That the Applicant is aware of the rights of an arrested person as provided under Article 49 of *the Constitution* but fears that the police may take an approach that is incompatible with Article 49. That even though there are no express provisions for anticipatory bail in our laws, anticipatory bail has been granted as an appropriate relief by our courts under Article 23(3) of *the Constitution*. That India, a common law jurisdiction upon which our *CPC* is premised has a specific section 438 on anticipatory bail.

14. The 1st and 2nd Respondent filed joint written submissions. Counsel submitted that the Applicant only submitted on the issue of anticipatory bail and abandoned the prayer for conservatory orders. The Respondents submitted that the Applicant has not met the threshold for grant of conservatory orders since the prayers sought seeks conservatory orders against individuals which is the preserve of injunctive orders; that conservatory orders are orders in rem and not in personam; that conservatory order according to Rule 23 of *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practise and Procedure Rules* only envisions issuance of conservatory orders where there is a petition alleging violation or threatened violation of the constitutional rights which is not the case in the instant application which was filed under a miscellaneous application; that conservatory orders do not apply in private issues since the dispute emanates from contract for sale of land which is a private treaty.

15. As to the prayer for anticipatory bail, the Respondents submitted that the Applicant has not disclosed sufficient grounds for grant of anticipatory bail since the right to liberty which the anticipatory bail is meant to safeguard is not an absolute right. Furthermore, the Applicant did not plead any instance of his alleged harassment by the 1st Respondent and did not name any officer who allegedly intimidated him and he has not been arrested or detained.

16. That the procedure is that after recording a statement, investigations kicks in and upon completion of the investigations and it appears that someone need to be charged, what follows is the arrest by the 1st Respondent. Before arraignment, the file is forwarded to the 2nd Respondent who will decide whether

there is sufficient evidence to charge. That the decision to charge by the 2nd Respondent is subjected to exhaustive decision to Charge Guidelines, 2019 that ensure that before charging, evidentiary burden has been met. Therefore, the Applicant is arguing his case upon speculations since investigations are not complete and on whether the dispute is civil or criminal in nature is an open question since investigations are not complete.

17. Further, if the orders are granted, it would mean that the 1st Respondent will not be able to arrest the Interested Party whereas the criminal justice does not dictate instances where matters should be left in abeyance. That the 1st Respondent is empowered through section 35(b) of the *National Police Service Act* to conduct investigations hence, the 1st Respondent acted within his mandate in summoning the Interested Party. That the interested party has a second safeguard since the 2nd Respondent may approve or reject the charges in accordance with Article 157(6) of *the Constitution*.

18. The Respondents submitted that the Interested Party should not be aided in arresting the course of investigations and criminal justice not unless he shows a special reason why he should not be subjected to the normal procedure in criminal justice. That the Applicant has not demonstrated that there is arbitrariness in the actions that has so far been undertaken and neither violation or threatened violation of his rights has been demonstrated. Furthermore, the Interested Party cannot allege that his rights have been violated or will be violated if he is summoned or arrested since the law bestows him with rights that provides for the procedure he is now trying to circumvent. Reliance was placed on the case of *Mandiki Luyeye v R* (2015) eKLR and *Richard Makhanu v R* (2014) eKLR.

19. Finally, there is no grounds for the Interested Party to benefit from conservatory orders nor for his exemption from the usual procedures; that anticipatory bail and conservatory orders were not meant to curtail the independent functions of the 1st and 2nd Respondent and that the Interested Party has been enjoying Prayer No4 which curtailed his arrest and charging. The counsel urged this court to vacate those orders.

20. I have considered the rival arguments made by the parties herein. The Respondents in their submissions raised a preliminary point and argued that the Applicant's application was brought under the wrong provisions of the law being section 39 of the *CPC* that deals with arrest by the magistrate, section 261 *CPC* which was repealed by Act No 5 of 2003, and section 121(1) (3) which anticipate admission to bail when a person has already being arrested and that all other provisions cited are foundational and do not specifically support the Applicant's application. It is noteworthy that section 123 (1) (3) is the one that talks about bail and not section 121 of the *CPC* as was quoted by the Respondents.

21. It is now trite that invoking the wrong provision of law does not necessarily spell doom to an otherwise meritorious application. The court will not dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded.

22. In *Thomas Ratemo Ongeri& 2 Others v Zachariah Isaboke Nyaata& Another* [2014] eKLR, court stated as follows:

> "On the Defendants' argument that the application has been brought under the wrong provisions of the law, I am fully in agreement. That however is a procedural technicality that this court would overlook for the sake of substantive justice pursuant to Article 159 (2) (d) of *the Constitution* of Kenya."

23. In the case of *Gitau v Muriuki* [1986] KLR 211 the Court held that:

> "...as long as a party's invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the court will not dismiss an application solely on account of a provision of the law on which the application is grounded."

24. It therefore follows those errors do not render the application incompetent. Guided by the above authorities it is only proper that the application be considered on its merits and I proceed so to do.

25. The Applicant is seeking conservatory orders geared towards restraining the 1st and 2nd Respondents from arresting, charging and, prosecuting the Interested Party pending hearing and determination of the application herein. The Respondents' case is that the petitioner is asking this court to suspend the constituted authority of the police and the ODPP from doing their constitutional duties and it is wrong to stop investigations unless it is demonstrated that it is being done for ulterior purpose.

26. The conservatory orders sought seek to stop the arrest and prosecution of the Interested Party for the offence of obtaining money by false pretences. In order to do this, the court must be satisfied that the Applicant has met the criteria for grant of conservatory orders, a jurisdiction the court has under Article 23(3) of *the Constitution*. This Article provides that in petitions brought under Article 22 of *the Constitution* alleging violation or threat of violation of constitutional rights, the Court has the jurisdiction to grant various orders. It is in the following terms:

> "In any proceedings brought under Article 22, a court may grant appropriate relief, including —
>
> (a) a declaration of rights;
>
> (b) an injunction;
>
> (c) a conservatory order;
>
> (d) ...."

27. The principles for granting conservatory orders have been discussed in various cases for example in The Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* Petition No 2 of 2014 the court held that;

> "Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes".

28. Musinga J (as he then was) observed in the case of *Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General* Petition No 16 of 2011 that:

> "At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*."

29. As to what real danger entails, the court in *Martin Nyaga Wambora v Speaker of The County Assembly of Embu & 3 Others* Petition No 7 of 2014 was of the view that;

> " To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention".

30. The question is whether, in the present case, the Applicant has met the criteria enunciated in the above decisions. Has he established a prima facie case with a probability or likelihood of success; that if the conservatory orders are not granted, he will suffer prejudice; that the balance of convenience lies in his favour, and has he demonstrated that the public interest in this case would be served by the grant of the orders in his favour?

31. Applicant's allegation is that on September 22, 2022, the 1st Respondent under instructions of the 3rd respondent went to the Interested Party home harassed and threatened to arrest him. That the Interested Party is yet to record his statement but is being continuously threatened to be arrested by the 1st Respondent who is acting in cahoots with the 3rd Respondent. That the Interested Party is being harassed to admit the allegations of obtaining money by false pretences which offence he did not commit. That the dispute is purely civil and not criminal and that the Applicant is apprehensive that the Interested Party if arrested may be frustrated while in the 1st Respondent's custody.

32. The Respondents did not state whether they entered into the Interested Party property and threatened to arrest and charge him with the alleged offence of obtaining money by false pretences. The Respondents stated that the Applicant's claim is unsubstantiated with any proof since the Applicant did not mention any officer from the 1st Respondent's office who has been threatening him or harassing him. That the Applicant did not attach a summon to show that indeed he was summoned by the 1st Respondent.

33. Section 52 of the *National Police Service Act* empowers the police to summon anybody to assist in investigations and to record a statement. Article 157(6) of *the Constitution* gives the ODPP power to conduct criminal prosecution. It states that;

> " The Director of Public Prosecution shall exercise State powers of prosecution and may-

(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed."

34. It is apparent that the Interested Party is yet to record a statement and no charges have been proffered yet. It is my view therefore that to submit that one's rights will be violated through employment of a fairly predictable procedure that he has not yet even been subject to is indeed merely speculative and premature.

35. As submitted by the Respondents, if this Court is to grant the conservatory orders sought by the Applicant, the Court would be imposing a restriction on the constitutional powers of the independent

offices to investigate, arrest, and prosecute. This power can only be exercised in clear cases backed with evidence.

36. In *Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others* [2016] eKLR the court held that;

> "Is threat of arrest or arrest with reasons given a violation or threatened violation of fundamental rights and freedoms? We think not. What the law seeks to prevent is arbitrary arrest without probable cause. An objective justification must be shown to validate arrest of any individual. The Kenya Constitution recognizes that if a criminal offence is committed, investigation arrest and prosecution might ensue. In this context, *the Constitution* anticipates arrest of individuals and that is why Articles 49 and 50 (2) make provision for the rights of arrested persons. In our view, a threat of arrest or any arrest per se is not unconstitutional so long as due process of law is followed and the rights of the arrested person are observed."

37. If follows therefore that this court can only intervene if there are cogent allegations of violation of constitutional rights; or threat to violation of the Rights; or in clear circumstances where it is evident that the accused will not be afforded a fair trial; or where the prosecution is commenced without a factual basis. The allegations cited by the Applicant do not pass this threshold.

38. Guided by the above, I find that the Applicant has failed to satisfy the tests for granting the conservatory orders sought. The upshot is that the Applicant's application dated October 12, 2022 is unmerited and is dismissed. The order issued by this court on December 8, 2022 curtailing the Interested Party's arrest is accordingly hereby vacated.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 27TH DAY OF JULY 2023

A.K.NDUNG'U

JUDGE