



**Churi v Inspector General of Police & 3 others; Mugambi & another (Interested Parties)
(Constitutional Petition E001 of 2021) [2023] KEHC 21862 (KLR) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CONSTITUTIONAL PETITION E001 OF 2021**

MS SHARIFF, J

AUGUST 10, 2023

**IN THE MATTER OF ARTICLES 2,3(1),10, 20, 21, 22(1), 23(1)&
(3), 165(3), 258(1) AND 259I(B) OF THE CONSTITUTION**

AND

**IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS PRACTICE AND PROCEDURE RULES).**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION
AND THREATENED VIOLATION OF ARTICLES 29(A), 47(1) &
(2), 48,49, 50 & 157(11) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

DORIS CHURI PETITIONER

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

DIRECTOR, CRIMINAL INVESTIGATION 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

PATRICK MURITHI MUGAMBI INTERESTED PARTY

MARY MUTHONI M'NABEA INTERESTED PARTY



JUDGMENT

1. By a petition dated June 2, 2021, the petitioner sought the following reliefs;
 - a. A declaration that the intended arrest and prosecution of the petitioner in relation to the agreement dated June 23, 2020 between the 1st and 2nd interested parties is unlawful, unconstitutional, null and void *ab initio* and the same contravenes the petitioner's rights to a fair trial under article 50 of the Constitution.
 - b. A declaration that the intended arrest and prosecution of the petitioner in relation to the agreement dated June 23, 2020 between the 1st and 2nd interested parties is unlawful, unconstitutional and will negatively affect the right to fair trial in the pending civil suit and that the matter cannot be litigated in a criminal court and any attempt to do so violates her fundamental rights and freedoms particularly because the petitioner was not a party to the agreement but only acted as a witness.
 - c. A declaration that the intended arrest and prosecution of the petitioner in relation to the agreement dated June 23, 2020 between the 1st and 2nd interested parties is unlawful, unconstitutional and violates the petitioner's right not to be deprived of freedom arbitrarily or without just cause under article 29 of the Constitution.
 - d. A permanent injunction do issue restraining the 1st, 2nd and 3rd respondents whether by themselves and or their agents, servants, employees from arresting and prosecuting the petitioner based on the agreement dated June 23, 2020 between the 1st and 2nd interested parties.
 - e. Costs of the petition.
2. The petitioner, averred that vide a loan agreement dated June 23, 2020, drawn and witnessed by Kiogora Mugambi Advocate, the 2nd interested party advanced the 1st interested party a sum of Kenya Shillings six million and seven hundred thousand (Ksh 6,700,000) that was to be repaid on or before August 23, 2020. However as at February 11, 2021, the money remained unpaid and the 2nd interested party sued the 1st interested party in Chuka Chief Magistrate's Court Civil Suit No E011 of 2021. In the entire transaction, the petitioner was a witness to the agreement and duly signed the said loan agreement in that capacity.
3. The petitioner averred that in May, 2021, the Directorate of Criminal Investigations Officers from Meru arrested the 1st interested party allegedly for non-payment of the loan subject of the agreement. On May 17, 2021, the 1st interested party was charged in Meru Chief Magistrate's Court Criminal Case No E694 of 2021 with the offence of cheating. She stated that thereafter, the 1st and 2nd respondent's officers have been threatening to arrest her if the 1st interested party does not pay up the amount due and has been forced to flee her home as the said officers have always frequented her home inquiring of her whereabouts.
4. She stated that the fact that the 1st interested party has already instituted suit against the 1st defendant goes to show that the dispute is purely civil in nature. The petitioner averred that the intended institution of the criminal proceedings will violate her rights guaranteed under Articles 29 and 50 of the Constitution.



5. Jamlick Githinji, the Sub-County Criminal Investigations Officer swore a replying affidavit to the petition. In his affidavit, he gave a background of the events leading to the charges against the 1st interested party. According to his affidavit, the 2nd interested party approached the 1st interested party for some money so he could secure the release of his 2 title deeds held as security by a bank. The 2nd interested party agreed and advanced him the sum of Kshs 6.700,000/- and she was handed over title deeds of the 2 parcels of land as security to hold until her money was repaid.
6. Subsequently the borrower handed over two title deeds to the 2nd Interested Party but to her astonishment, one of the title deed was registered in the petitioner's name and the other in another person's name. The 2nd interested party therefore approached the advocate who drew and agreement for advice. When called by the advocate, the 1st interested party failed to pick the advocates' calls. The 2nd interested party frantically attempted to contact the 1st interested party to no avail. The latter had become elusive and noncommittal. Thereafter the 2nd interested party duly lodged a report with the 2nd respondent, who in turn commenced investigations, apprehended and charged the 1st interested party with the offence of conspiracy to defraud contrary to section 317 of the *Penal Code*.
7. According to him, upon further investigations, the 2nd respondent formed the opinion that the petitioner is a necessary party in the criminal proceedings and there was need to enjoin her as a co-accused to the 1st interested party, her husband, for the offence of conspiracy to defraud.
8. The 2nd interested party duly entered appearance in this petition and filed a replying affidavit denying any wrong doing on her part. She insisted that the petitioner must face the consequences of her actions. Her position is that the intended prosecution does not in any way violate the rights of the petitioner but is intended to enforce her economic rights that were being infringed upon by the 1st interested party and the petitioner.

Submissions

9. The petition was disposed of by way of written submissions. All parties complied and their respective submissions have been considered.

Analysis and Determination

10. In an action of this nature, the primary consideration that the court ought to take into account is whether the factual evidence presented by the petitioner establishes flagrant violations of her constitutionally enshrined rights by the respondent to justify the issuance by this court of prohibitory orders barring the arrest and prosecution of the petitioner by the respondents.
11. The genesis of the investigations by the respondents and the intended prosecution of the petitioner stems from a transaction allegedly entered into by the interested parties where the 2nd interested party advanced the 1st interested party some amount of money with the undertaking that he will refund the money. As a show of commitment, the 1st interested party surrendered 2 title deeds to secure the repayment. It later emerged that one of the title deeds is registered in the name of the petitioner.
12. It should be appreciated from the onset that the office of the Inspector General is an independent office with the power to investigate any offence. The *Constitution of Kenya 2010* at article 243 establishes the National Police Service and at article 245(1) the office of the Inspector- General of the National Police Service is created. Article 245(4) and (5) as far as is relevant to this petition provides as follows: -

“(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector- General with respect to any matter of policy for the



National Police Service, but no person may give a direction to the Inspector-General with respect to—

- (a) the investigation of any particular offence or offences;
- (b) the enforcement of the law against any particular person or persons; or
- (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.

(5) Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.”

13. The specific roles and duties are further provided for under section 24 of the *National Police Service Act*.

14. The Directorate of Criminal Investigations being a branch of the National Police Service has its roles spelt out in section 35 of the *National Police Service Act* which provides;

- “(a) collect and provide criminal intelligence;
- (b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber-crime among others;
- (c) maintain law and order;
- (d) detect and prevent crime;
- (e) apprehend offenders;
- (f) maintain criminal records;
- (g) conduct forensic analysis;
- (h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;
- (i) co-ordinate country Interpol Affairs;
- (j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
- (k) perform any other function conferred on it by any other written law.”

15. On the other hand, the office of the Director of the Public Prosecution is provided for under article 157 (4) which provides;

“(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.”



16. The specific powers granted to the office of the Director of Public Prosecution is contained in Article 157(6) of the Constitution and Section 5 of the Office of the Director of Public Prosecutions Act. Article 157(6) provides;
- "(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;
 - (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)."
17. Premised on the above constitutional provisions, it is clear that the respondents are performing both constitutional and statutory roles.
18. The instances under which a court can interfere with the functions of such offices has been the subject of several judicial pronouncements, for instance; in Republic v Commissioner of Police & another Ex parte Michael Monari & another [2012] eKLR.

“Under Article 157(4) of the Constitution, the Director shall have power to direct police to investigate any information or allegation of a criminal conduct and it is mandatory for the police to comply with any directions or instructions given by the Director of Public Prosecution. Under article 157(10) the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person. It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct, which amounts to an offence and on that account is deserving punishment.”



19. In *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR, the learned judges of appeal stated;

"However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual."

20. Lastly, in *Khalwali Miima v Director Public of Prosecutions & 2 others* [2017] eKLR, the Court stated:

"The circumstances under which the Court will grant stay of a criminal process in these kinds of proceedings is now well settled. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings....."

That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings."

22. From the above principles, it is clear that for the court to interfere and forestall the intended prosecution, the petitioner ought to establish the principles enunciated in the above cases. The petitioner for instance has not demonstrated that the respondents have abused their powers and or that they are actuated by ulterior motives in the intended joinder and prosecution of the petitioner.
23. The petitioner does not dispute the fact that one of the title deeds surrendered to the 2nd interested party to secure the repayment of her money is registered in her name. She is the wife of the 1st interested party and the police having conducted their investigations are satisfied that the petitioner may have played a role in the commission of the offence.
24. The petitioner alleges that the issues raised therein are civil in nature and ought to be settled in a civil suit as is the suit already filed in court against the 1st interested party. I find this line of argument not to be in tandem with the principles already stated in the above authorities.
25. I have considered the affidavit evidence and the 2nd respondent's investigation file and I am satisfied that the respondents have not in any way infringed upon and or threatened to violate the petitioner's rights. In any event, the respondents are legally mandated to assist the parties achieve justice by prosecuting those found culpable. Our criminal justice system has enough safeguards to ensure attainment of justice by all parties. Whereas the petitioner bears the burden of proof of the alleged violations of her constitutional rights by the respondents in the intended prosecution, she has failed to discharge that burden of proof.
26. On the balance, I therefore find no merit in this petition. The same is dismissed and the interim orders now in force are hereby vacated.
27. Each party shall bear its own costs.



DELIVERED, DATED AND SIGNED AT CHUKA THIS 10TH DAY OF AUGUST 2023.

MWANAISHA. S. SHARIFF

JUDGE

In the presence of:

