



Kinuthia & another v Inspector General of Police & 5 others (Constitutional Petition 1 of 2022) [2023] KEHC 21897 (KLR) (10 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CONSTITUTIONAL PETITION 1 OF 2022**

MS SHARIFF, J

AUGUST 10, 2023

**IN THE MATTER OF ARTICLES 2(1)(2),10, 19, 20, 21, 22,
23,24,25(A),27, 28,29,39, 47,49,73,159,232,258,25 AND
260 OF THE CONSTITUTION**

AND

**IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS PRACTICE AND
PROCEDURE RULES),2013.**

AND

**IN THE MATTER OF VIOLATION OF SECTION 4 OF THE FAIR
ADMINISTRATIVE ACTIONS ACT, 2014**

BETWEEN

HENRY KINUTHIA 1ST PETITIONER

TERRA CRAFT (K) LTD 2ND PETITIONER

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

DIRECTOR, CRIMINAL INVESTIGATION 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT

**MINISTRY OF TRANSPORT, INRASTRUCTURE, HOUSING, URBAN
DEVELOPMENT PUBLIC WORKS 5TH RESPONDENT**

THARAKA NITHI COUNTY 6TH RESPONDENT



JUDGMENT

1. By a petition dated 22nd February, 2022, the petitioner sought the following reliefs;
 - a. A declaration that the respondents violated articles 2(1), 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 39, 47, 49, 73, 159, 232,258,259 & 260 as well as the provisions of Chapter 6 of the Constitution.
 - b. A declaration that the 2nd respondent violated the petitioners' right to liberty and security by arbitrarily arresting and illegally detaining the 1st petitioner herein on 14th February, 2022.
 - c. That the respondents, jointly and severally, be ordered to pay the petitioners damages and or compensation for violation of rights and fundamental freedoms.
 - d. Conservatory orders do issue restraining the 2nd respondent from arresting or charging the 1st petitioner and or the 2nd petitioner's directors for claims arising from dealings between the petitioners and the 5th and or the 6th respondents.
 - e. A declaration that the intended prosecution of the 1st petitioner and or the 2nd petitioner's directors in the manner proposed by the 2nd respondent is ultra vires the powers of the 2nd respondent and is therefore unconstitutional and untenable.
 - f. A declaration do issue that the intended prosecution of the 1st petitioner and or the 2nd petitioner's directors in the manner proposed is unfair, discriminatory, an abuse of the process of the court, irrational, unreasonable, malicious, vexatious, oppressive and therefore unconstitutional and untenable.
 - g. An order be issued prohibiting the 4th respondent from sustaining proceedings, hearing, conducting or in any manner dealing with any intended charges a result of the botched and malicious investigations.
 - h. A declaration do issue that any intended charges, prosecution and proceedings against the 1st petitioner and or the 2nd petitioner's directors are unconstitutional and abuse of the legal process.
 - i. Any other relief the court may deem just and fit.
 - j. Costs of the petition.
2. The facts giving rise to the instant petition are that the 1st petitioner is a director of the 2nd petitioner. The 2nd petitioner entered into a contract with the 6th respondent for the construction of the county headquarters in the year 2015. On 15th February, 2019, the 6th respondent purported to terminate the contract out of which the 1st petitioner initiated arbitration proceedings which were subsequently withdrawn by consent of the parties and the works resumed.
3. The petitioner avers that despite the consent, the 5th and 6th respondent continued to frustrate the petitioners by failing to pay and certify the work done by the petitioners. The 1st petitioner states that in a follow up of the money owed by the 6th respondent to the 2nd petitioner, he was invited for a meeting on 14th February, 2022 at the 5th respondent's offices.
4. When he got to the venue, he was arrested and frog marched to the 2nd respondent's headquarters and was threatened with a prospective criminal prosecution for the offence of obtaining money by false



- pretences. While in custody of the 2nd respondent, he was informed that he would only be released if he signed off the contract he was undertaking for the 6th defendant to a totally different company.
5. The 1st petitioner stated that, being fearful for and apprehensive of his health, he, under duress, signed off the contract to a different company and was asked to report back on 18th February, 2022 failing of which he would be detained.
 6. The petitioners aver that the above set of facts shows that the 2nd, 5th and 6th respondents officers have been biased, have no regard to public interest, have blatantly abused their offices and the court should intervene as the petitioners' rights have been violated, infringed and denied by persons bound by the constitution.
 7. The petition is opposed through grounds of opposition filed by the 1st, 2nd, 3rd and 5th respondents. The gist of the opposition is that the orders sought are untenable as the petitioners seek to restrain the 4th respondent from performing their statutory mandate, that the petition does not meet the threshold for a constitutional petition as set out in Anarita Karimi Njeru V Republic (1979) eKLR, that the petition does not disclose a reasonable cause of action against the respondents, that the petition offends Order 4 Rule 1(4) of the Civil Procedure Rules as the 2nd petitioner did not give authority for the institution of the proceedings.
 8. Subsequently, the petition was disposed of by way of written submissions.
 9. The petitioners on the issue of whether the petition has been properly put before the court submit that the 1st petitioner is the 2nd petitioner's director and he cannot therefore be a stranger or an unauthorized person as he does represent the 2nd petitioner's interests. The petitioners cite; Spire Bank Limited V Land Registrar & 2 others (2019) eKLR, Raymark Limited V John Lokorio (2021) eKLR, Leo Investments Ltd V Trident Insurance Company Ltd (2014) eKLR and Kenya Ports Authority V Kenya Power & Lighting Co. Ltd (2012)eKLR for the proposition that absence of a special resolution form the company is not fatal to an action.
 10. The petitioners further submit that their petition raises pertinent issue relating to various article of the constitution including articles 2(1), 2(2) and 10 of the Constitution which bind all persons and state organs. They cite the authority in Okiya Omtata Okoiti V Commissioner General, KRA & 2 others (2018) eKLR.
 11. On whether the limitation of petitioner's rights is justifiable, it is asserted that the arbitrary arrest and detention of the 1st petitioner is unreasonable, discriminatory, unfair, irrational, malicious and oppressive. That the justification for limitation was explained in Kenya Human Rights Commission V Communications Authority of Kenya & 4 others (2018) eKLR and Daniel Waweru Njoroge & 17 others V Attorney General (2015) eKLR.
 12. The petitioners maintain that they are entitled to damages for violation of their rights as espoused in Shiverenje Simani V Star Newspaper & another (2021) eKLR, Gitobu Imanyara & 2 others V Attorney General (2016) eKLR and Mohamed Feisal & 19 others Vs Henry Kandie, Chief Inspector of Police, OCS Ongata Rongai Police Station & 7 others: National Police Service Commission & another (Interested Party) (2018) eKLR.
 13. On whether the court has power to restrain the DPP from prosecuting the 1st petitioner, it is submitted that section 4 of the ODPP Act limits the manner in which the director can exercise his powers and the discretion donated by article 157 can be challenged in court as was stated in Maina & 4 others V the Director Of Public Prosecutions & 4 others (2022) KEHC 15 (KLR). Further that under article 165, the Constitution donates to this court the power to inquire into violation of rights.



14. The 1st, 2nd 3rd and 5th respondents submit that this court should presume that their official duties have been properly discharged and all procedures duly followed until the challenger presents clear evidence to the contrary. It is posited that in the instant case, the petitioner has made unsubstantiated allegations of violations. The authorities' in Chief Land Registrar & 4 others V Nathan Tirop Koech & 4 others (2018) eKLR, Teresia Kamene King'oo V Harun Edward Mwangi (2019) eKLR,
15. On whether the petitioners discharged their burden of proof, the respondents submit that the petitioners have failed to table evidence of illegal detention of the 1st petitioner by the respondents in order to coerce him into signing over the 2nd petitioner's rights. They cite Section 107 of the [Evidence Act](#) and authorities Kenya Pipeline Company Ltd V Corporate Business Forms (2019) eKLR and Mbuthia Macharia V Annah Mutua & another (2017) eKLR.
16. They further argue that the respondents were simply exercising authority conferred upon them by [the constitution](#) and statute.
17. On the part of 4th respondent, it is submitted that the petitioners herein seek to quash a future event whose occurrence is uncertain. Further that the powers to quash criminal proceedings has to be exercised sparingly as was held in Lalchan Fulchand Shah Vs Investments & Mortgage Limited & 5 others (2018) eKLR, Republic Vs Attorney General & 4 Others Ex Parte Kenneth Kariuki Githii (2014) eKLR, Bernard Mwikya Mulinge V Director of Public Prosecutions & 3 Others (2019) eKLR

Analysis and determination.

18. The facts leading to the institution of this matter have been given in the preceding paragraphs and need not be reproduced herein. The issues relate to the alleged arrest and detention of the 1st petitioner by the 2nd respondents due to a contract he had been awarded by the 6th respondent.
19. The petitioners acknowledge from the onset that the 1st, 2nd and 4th respondents have a constitutional mandate to prevent the commission of crime as well as investigate the possible commission of a crime. These powers are found in the various legislations.
20. The office of the Inspector General is an independent office with the power to investigate any offence created by Article 243 of [the constitution](#) which establishes the National Police Service and Article 245(4) and (5) provide 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.”



21. The specific roles and duties are further provided for under Section 24 of the [National Police Service Act](#). 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.
22. The office of the Director of the Public Prosecution on the other hand 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.
23. The specific powers donated to the office of the Director of Public Prosecution are provided for 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).



24. Specific instances under which this court can interfere with the functions of such offices has been the extensively discussed and there exists a plethora of judicial pronouncement on the subject. In *Republic v Commissioner of Police & another Ex parte Michael Monari & another* [2012] eKLR.

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.”

25. 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.

26. 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.

27. It is crystal clear from a reading of the principles enunciated from the afore cited precedents that for this court to interfere and forestall the intended prosecution, the petitioner ought to establish the existence of the said principles.
28. The petitioner has adduced evidence in form of a requisition to compel attendance under Section 52 (1) of the *National Police Service Act*. The notice indicates the police are inquiring into the offence of obtaining money by false pretences.
29. The petitioners aver that the gist of the summons is in relation to the contract he had been awarded by the 6th respondent. There is however, no link between the summons by the Police and the contract he was undertaking. The petitioner has not established that the summons is in relation to the contract.



30. In any event, the disputes arising out of the contract is civil in nature and the summons have nothing to do with the contract, or, none has been established.
31. Due to the remoteness of the relationship between the contract and the summons, I find that no enough material has been placed before this court to prove that the two issues are related and or inter-related or that the summons was issued in relation to the contract.
32. Due to the above reasons and bearing in mind that the respondents are constitutional offices, I decline to issue orders in terms of the prayers sought. Any issuance of the orders sought would in the circumstances obtaining herein amount to interference with and/or usurpation of the constitutional and statutory mandates of the respondents. Moreover, to do so, would be an abrogation of the doctrine of separation of powers of the three arms of government.
33. The petitioners have not shown that if they attend to the summons, they will be treated unfairly and or be subjected to treatment likely to lead to infringement of their rights. They have failed to demonstrate the existence of an imminent threat to their rights to warrant the issuance of the orders sought.
34. In light of the above findings the petition dated 22nd February, 2022 is hereby dismissed with no orders as to costs.

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

MWANAISHA. S. SHARIFF

JUDGE

