



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. E022 OF 2021

GEOFFREY NYAGICHUHI.....PETITIONER

VERSUS

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

ELIAS BAYA.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

OCS CENTRAL POLICE STATION NAKURU.....5TH RESPONDENT

AND

INDEPENDENT POLICING OVERSIGHT AUTHORITY.....1ST INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS....2ND INTERESTED PARTY

RULING

1. The Petitioner/ applicant filed a **Notice of Motion** dated **16th September 2021** under **Articles 22(1), 23(1) (c), and 165(3)(b)** of the Constitution of Kenya and prayed for the following orders;

a) That pending the hearing and determination of this suit, an interim conservatory order does issue staying proceedings in Nakuru Criminal Case No. E3689 of 2021.

b) That costs of and incidental to the application be provided for.

c) Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

2. The application is premised on supporting affidavit sworn by the petitioner/applicant and the following grounds;

3. That the petitioner/applicant on or around the 18th day of August, 2021, was apprehended by the 2nd respondent in Nairobi, at around 9 am, as part of an alleged investigations into an alleged offence of obtaining money by false pretenses that had allegedly happened on 21st July, 2021.

4. That however, the 2nd respondent insisted that the petitioner/applicant was not under arrest and that he wanted him to assist him in the identification of persons he deemed to be suspects of the alleged offence. That further, the 2nd respondent proceeded to seize a Network Video Recorder (NVR) from the petitioner's/applicant's company, Euro Networking International Led. That the 2nd respondent claimed that the persons of interest were in petitioner's/applicant's company and the NVR machine would assist in identifying them and lead to possible arrests.

5. The petitioner/applicant complied and co-operated with the 2nd respondent in the full knowledge that he was in no way incriminating himself since he was doing his civic duty in assisting the police in their work and he was subsequently ferried from Nairobi to Nakuru where nothing much happened but he was issued with a Notice compelling him to appear before the 2nd respondent on 31st August, 2021 to

assist with further investigations.

6. It was averred that before the said date could materialize, the petitioner/applicant was picked up from his office at Brandon Court, Nairobi by 2nd respondent accompanied with other officers, on August 26th 2021 at around 8:30am and he insisted that the petitioner/applicant was simply a witness helping with new leads that they had. That the 2nd respondent directed the petitioner/applicant to take him to the places where the suspects were believed to either reside or work and he obliged, but only to the extent that he was willing to identify them since he did not know where any one of them either lived or worked.

7. That the 2nd Respondent informed the petitioner/applicant that his 'seniors' in Nakuru were interested in hearing from him only as a witness but on arriving in Nakuru at around 1 pm he was placed in custody at Central Police Station, Nakuru. He was however not processed and that was when he decided to call his advocates. The applicant was however held in custody and brought before court the following day for plea vide Nakuru Criminal Case No. E3689 of 2021 with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code, Cap 63.

8. This petition is therefore challenging the arrest, detention, and the entire criminal proceedings on account of being unlawful, illegal, and unconstitutional, having been instituted in blatant contravention of the Constitution, the National Police Service Act, Cap 84, the Criminal Procedure Code, Cap 75, and the National Police Service Standing Orders. He adds that this Court does not require to look into the merits of the criminal process and/or the nature of the evidence adduced against the petitioner in the criminal case but rather to answer the question of whether the process by which he came to be charged in Nakuru MCCR No. E3689 of 2021 was lawful or otherwise thereby warranting a finding that the said cases are a nullity.

9. Only the advocate for 1st, 3rd and 5th respondent's filed a response to the application vide grounds of opposition dated 21st September 2021. The grounds raised are that the 1st, 3rd and 5th respondent's acted within their constitutional and statutory mandates, therefore this court could not interfere with the ongoing criminal proceedings against the petitioner in Nakuru MCCR No. E3639 of 2021 as they are *sui generis* and none of his fundamental rights under the constitution have been violated. That the petition did not disclose adequate particulars in support of the alleged violations of the Constitution to enable the court to grant the reliefs sought and that the criminal proceedings against the petitioner do not constitute a breach of any of the petitioner's rights and fundamental freedoms under the Constitution or any other law. In addition, that the same had not been pleaded with specific particularity as was held in the cases of **Anarita Karimi Njeru** and **Mumo Matemu**.

10. Lastly, that the application and petition were bad in law, sensational, frivolous, vexatious, speculative, misconceived, made in bad faith with the sole intention of derailing the course of justice and therefore a proper candidate for dismissal with costs to the respondents

11. The court directed that the matter be disposed by way of written submissions but only the petitioner has complied.

Petitioner's/Applicant's submissions

14. The petitioner/applicant in his submission raised three issues for determination. The first issue was whether the continuation of the proceedings would constitute an abuse of the process. It was submitted for the petitioner/applicant that the purpose for which criminal proceedings are instituted was for vindication of commission of a criminal offence and any other contrary purpose would be unlawful and should not be allowed to stand.

15. On what constituted abuse of the court process, the petitioner/applicant placed reliance on the case of **Office of the Director of Public Prosecutions v Johnstone Muthama [2017] eKLR** which cited with approval the case of **Attorney General v Attorney General for and on behalf of the Inspector General of Police & 3 others ex parte Thomas Nganga Munene [2014] eKLR**. That the same entailed the discretion of the Director of Public Prosecution being abused or used to achieve some collateral purposes which were not geared towards the vindication of the commission of a criminal offence. It was submitted further that the chronology of events leading to the him being charged, not availing evidence to support the elements of the charge, illegal arrest and detention of the petitioner/applicant and the manner in which investigations were done pointed to the respondents abusing the court process.

16. On the second issue, whether the resultant trial would be unfair to the accused, he relied on the case of **Charles Ochieng Wamiya (supra)** where the court held that courts should consider whether or not there was anything in the trial to prevent a fair trial and if there was, then the court ought to stop the prosecution. He submitted further that **Article 49** of the **Constitution 2010** provided for the rights to be accorded to an arrested person. That contrary to the provisions of the said article, the accused was not informed the reason of his arrest, his right to remain silent and was denied police bond and no reason was given.

17. The court's attention is drawn to the cases of **Centre for Rights Education and Awareness (CREAW) & Another v Speaker of the National Assembly & 2 others [2017] eKLR**, **Moses Tengenya Omweno v Commissioner of Police & Another Civil Appeal 243 of 2011 [2018] eKLR** and **Republic v Naftali Chege & 2 others [2018] eKLR**.

18. On the last issue, whether the continuation of the proceedings would tend to undermine the integrity of the criminal justice system, he said that the discussions captured in the first and second issues was proof of undermining the integrity of the criminal justice system. While placing reliance in the case of **Charles Ochieng Wamiya (supra)** the petitioner/applicant submitted that a wrong decision to prosecute tend to undermine the confidence of the community in the criminal justice system.

19. In conclusion, it was submitted that if the conservatory order is not issued, the intended petition would be rendered nugatory. While placing reliance on the case of **Pravin Galot**, it was submitted that the respondents had not given any reasons why the criminal proceedings in the magistrate court should not be stayed. The court was urged to allow the application dated 16th September 2021 with costs to the petitioner/applicant.

Analysis and Determination

20. I have considered the application which is the subject of this ruling and the submissions made on behalf of the petitioner/applicant. In my view the only issue for determination is **whether this Court should grant stay of proceedings in Nakuru Criminal Case Number E3689 of 2021 pending hearing and determination of the petition herein.**

21. This court has powers to stay proceedings under its inherent jurisdiction reserved in section 3A of the **Civil Procedure Act** which provides as follows: -

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

22. The court in **Kenya Wildlife Service vs. James Mutembei [2019] eKLR** cited with approval the case of **Re Global Tours & Travel Ltd HCWC No. 43 of 2000** where **Ringera, J** (as he then was) held that:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matter, it should bear in mind such factors as the need for expeditious disposal of case.....and whether the application has been brought expeditiously.”

23. In the case of **Kenya Wildlife Service (supra)** the court held that:

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.”

24. The same court further quoted **Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332**, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.

25. In the instant case, the applicant herein has filed a petition where he intends to challenge the arrest, detention and trial on account of being unlawful, illegal and unconstitutional, having been facilitated in blatant contravention of the Constitution 2010, the **National Police Service Act, Cap 84, the Criminal Procedure Code Cap 75 and the National Police Service Act** by the respondents. That on 26th day of August, 2021, he was apprehended by the 2nd respondent in Nairobi, as part of an alleged investigations into an alleged offence of obtaining money by false pretenses that had allegedly happened on 21st July, 2021 and was later charged with the said offence.

26. That further, the Investigating Officer, 2nd respondent herein, for reasons known to himself, opposed his release on police bond even though he had been out on free bond from the 18th of August, 2021. In addition to this, that the chronology of events leading to the him being charged, not availing evidence to support the elements of the charge, illegal arrest and detention of the petitioner/applicant and the manner in which investigations were done pointed to the respondents abusing the court process. The petitioner apprehends that he will be subjected to unfair and high prejudicial judicial process if the said criminal process is allowed to continue.

27. The court has perused the annexures to the affidavit in support of the application. There is attached to it a charge sheet which indicates the nature of the offence the respondents have brought against the applicant. The applicant has urged this court not to consider the merits of the criminal matter already in court but the process in which he has been subjected to. This for now is the right position.

28. From the history as narrated in his affidavit, its apparent that the applicant was all along under the supervision as it were of the 2nd respondent. He was brought from Nairobi twice to Nakuru. He was even released on a police bond and it was only the second round that he was held in custody and later the following day arraigned in court.

29. What law or portion of the constitution was breached by the respondents.? The applicant enjoyed police bond till the period he was charged. Thereafter, i presumed, he was granted bail by the trial court. As it is, he is now free courtesy of the said bond. He was not held by the respondents beyond the constitutional timelines of 24 hours. In his own admission he was held on 27th August 2021 and arraigned in court on the 28th, the following day.

30. It is the business of the police to investigate crime and prefer charges against a suspect. In this case whatever the worth of the matter at the lower court the applicant shall have the opportunity to defend himself. If not satisfied, then the appeal processes are open to him.

31. The charge of obtaining by false pretenses under Section 313 of the Penal code is known in law and it cannot be held at least for now to be unconstitutional. It is thus the mandate of the respondents jointly and severally to prefer charges against the applicant and or a suspect and he shall have the opportunity to disprove or rebut the same at the appropriate time.

32. I think the court has said much to show that the process of charging the applicant including the arrest was proper in law and nothing unconstitutional. No fundamental rights were breached or at all. To stay the criminal proceedings against him would be overreaching the mandate granted constitutionally to the respondents.

33. The application is otherwise dismissed. Costs shall abide the outcome of the main petition.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO CALL THIS 17TH DAY OF FEBRUARY 2022.

H K CHEMITEI.

JUDGE