



**Kangethe v National Police Service Commission & another; Agriculture
Development Corporation & another (Interested Parties) (Petition 476 of 2019)
[2022] KEHC 15440 (KLR) (Civ) (18 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15440 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

PETITION 476 OF 2019

HI ONG'UDI, J

NOVEMBER 18, 2022

**IN THE MATTER OF THREATENED INFRINGEMENT AND CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
10(1), 19, 21(1), 23, 24, 27 & 29 OF THE CONSTITUTION OF KENYA**

BETWEEN

GEORGE CHEGE KANGETHE PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

AND

AGRICULTURE DEVELOPMENT CORPORATION INTERESTED PARTY

FRANCIS WAMBUGU MWANGI INTERESTED PARTY

JUDGMENT

The Petition

1. The petitioner filed petition dated 27th November 2019 seeking the following reliefs: -
 - a. A declaration that the arrest and impending prosecution of the petitioner is unlawful and unconstitutional.
 - b. That a permanent injunction to issue restraining the 1st and 2nd respondents by themselves, their officers, servants, agents or anyone acting on their behalf from arresting, detaining, restricting or otherwise confining or in any other way interfering with the liberty of the



petitioner herein in respect of or in connection with the complaint or allegations made arising from or in relation to this matter.

- c. That a permanent injunction to issue restraining the Director of Public Prosecutions by himself, his officers, servants, agents or anyone acting on his behalf from instituting, charging or prosecuting the petitioner herein in respect of or in connection with the complaint or allegation(s) made arising from or in relation to this matter.

The Petitioner's case

2. The petition is founded on Articles 2(1), 3(1), 10, 21(1), 23, 27 (a) & (b), and 129 of *the Constitution*.
3. A summary of his case as set out in his petition and supporting affidavit sworn on even date, is that, the 1st interested party allotted to him parcels of land namely; LR No. 132387/128; LR No. 132387/45; L.R. No. 132387/145; and L.R. No. 132387/146 among others all of which are situated at North of Njoro Town in Nakuru County.
4. Several other people who are not parties herein were also allotted parcels of land situated in the same area, all of which were subdivided out of Land Reference Number 132274141 or being delimited on Land Survey Plot Number 143814.
5. On or about 18th June 2019, the petitioner was shocked when police officers from Muthaiga Police Station arrested and detained him on alleged charges of obtaining money by false pretences from the 2nd interested party, by allegedly pretending that he was in a position to sell to him the said parcel LR No. 132387/146. He was later charged with a criminal offence and he pleaded not guilty and was released on bond.
6. According to him, the accusation is baseless and malicious since he sold the said parcel to the 2nd interested party in his capacity as the actual and lawful owner, save for the fact that he is yet to acquire the final certificates of title which is being processed.
7. He averred that he has sold several other such parcels to other 3rd parties who are not parties to this suit, and is apprehensive that unless the court intervenes, the other purchasers may also move to press charges against him and cause him to be further arrested and charged as such. He feels that his social economic rights are threatened.

The 2nd respondent's case

8. The respondent filed grounds of opposition dated 1st March 2021. The grounds are that: -
 - i. The petition lacks clarity and precision in setting out the alleged directives in relation to the 2nd respondent.
 - ii. The petition discloses no cause of action as against the 2nd respondent as the matter relates to the conduct of the 1st respondent and not prosecutions.
 - iii. The orders sought are therefore not tenable against the 2nd respondent as the petitioner does not show how the 2nd respondent has a duty in the matter raised.
 - iv. Article 157 of *the Constitution* is to the effect that the 2nd respondent shall institute criminal proceedings only where a criminal offence has been committed. The Applicant has failed to disclose whether in fact a criminal offence has been committed for the 2nd respondent to invoke its powers of prosecution.



The 1st interested party's case

9. The 1st interested party filed a replying affidavit by Lilian Kosgey sworn on 13th December 2019. She deposed that the LR No. is 13287/1287 and not 132387 as alleged and the Land LR No. 13287/128 was allotted to Ngata Hospital, LR No. 13287/145 was allotted to one Dr. Laban Kiptui, LR No. 13287/145 was allotted to one Bekyilbei Ndoigo and LR No. 13287/146 was allotted to one Reuben Cheruiyot and not the Petitioner, (LCK 1).
10. That Land Reference Number 132274141 has never been in the possession of the 1st interested party and as such not in their records. What was in their possession was Land Reference Number 13287 where the subdivisions of the above mentioned parcels were made from. Further that the allocation letters are an outward forgery and should be dismissed.
11. Further that there is no pending process of the title documents and the rightful owners of the said parcels of land possess their title documents. That in the ongoing criminal investigations by the Director of Criminal investigations, they confirmed that the documents relied upon by the petitioner were a forgery and should not be admitted by this Court. She therefore urged this court to expunge the 1st interested party from this suit as she could only be a witness.

Submissions

12. The petitioner filed submissions dated 11th May 2021 through Mr. Okatch & Partners. I have noted in the proceedings of 16th June 2022 that the petitioner told this court that the submissions dated 11th May 2021 are in respect of the Petition & not the Application. I have looked at the said submissions and I note that the petitioner is mainly addressing the issue of conservatory orders and the factors to be considered in granting the said orders. These are issues in the application. In my humble view, I do not think that the said submissions address the petition. I have also noted from the proceedings of 20th December 2021, that the court directed that the status be maintained and the petition be heard. There was therefore no need of filing submissions to the application.
13. Nonetheless, I will proceed to give a summary of the said submissions. Counsel submitted that the grant for conservatory orders and or prayers in petitions are well settled in Kenyan Courts. He relied on Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General, Nairobi High Court Petition No. 16 of 2011; [2011] eKLR and Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR and argued that for the petitioner to succeed he has to demonstrate that he has a prima facie case and that he will suffer prejudice unless the court grants the conservatory orders is vis a vis the interest of the public.
14. Regarding a prima facie case, he relied on the case of Platinum Distillers Limited v Kenya Revenue Authority (supra) and argued that the crux of this Petition and application is anchored on the provisions of Articles 10(1) (2), (3), 27 and 49 of *the Constitution* as well as Article 9 of the International Covenant on Civil and Political Rights.
15. Reiterating the contents of his pleadings, counsel submitted that notwithstanding the pendency of the matters before a competent court, there has been disquiet on the ground precipitated by the fact that besides the 1st and 2nd respondents preferring criminal charges as against the petitioner in connection with issues arising out of the petition, they have continued to harass, threaten, intimidate arrest, detained and interfered with his liberty.
16. Further that the respondents have charged him and the court has pronounced itself on the issue of bail but despite that, he is being arrested and the same amounts to abuse of power and there is eminent risk



- of the said arrest being executed. He argues that in many instances the petitioner and other officials have been summoned by the 1st respondent, furnished all this information including the Court documents but the latter is hell bent on interfering and usurping the powers of the court.
17. Counsel submitted that the actions of the 1st respondent are punctuated by malice; amount to abuse of his powers under the *National Police Service Act* under the guise of conducting investigations and this court has to intervene. For this argument, he relied on *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others* which cited with approval the case of *Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire Country Council* [1986] AC.
 18. Accordingly, he argued that the actions of the 1st Respondent amount to infringement of the petitioner's constitutional right to fair administrative action under Article 47(1) of *the Constitution*. He relied on *Judicial Service Commission v Mbalu Mutava & another* [2014] eKLR, and submitted that a prima facie case, has been demonstrated.
 19. On whether the petitioner will suffer prejudice, and while relying again on the case of *Platinum Distillers Limited v Kenya Revenue Authority* (supra), and Article 9 of the International Covenant on Civil and Political Rights he submitted that he will be greatly prejudiced if the court does not grant the orders as there is a high likelihood of them being arbitrarily arrested and deprived of liberty. He relied on *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR and urged the court to allow the application.
 20. The 2nd respondent filed submissions dated 16th December 2021 through Njoki Kihara Prosecution counsel. Relying on Article 245 of *the Constitution* and section 35 of the *National Police Service Act*, he argued that the police are functionally independent and can only take directions to investigate from the DPP and no other authority which needs to be in writing. That the petitioner has not presented any such written directive to the police by any authority to justify his claim that investigations have been commenced for a collateral purpose.
 21. Relying on *Dr. Alfred N. Mutua vs the Ethics and Anti-Corruption Commission & Others*, Misc. Application No. 31 of 2016, he submitted that the law allows the police and any other investigative agency to investigate him if there's probable cause to do so, the status of the petitioner notwithstanding. The police received a complaint and were duty bound to investigate.
 22. Relying on *Republic v the Commissioner of Police & the Director of Public Prosecution Ex parte Michael Monari & another* Misc. Application No. 68 of 2011, Nairobi and *Cascade Company Limited vs Kenya Association of Music Production (KAMP) & others*, Petition No. 7 of 2014 High Court, Murang'a, he argued that the unless the petitioner establishes that the police are acting ultravires to their powers, the court should not unnecessarily inhibit them from investigations.
 23. Regarding the prosecutorial authority of the DPP, he relied on Article 157 (1) and (10) of *the Constitution*, section 5 of the Office of the Director of Public Prosecution Act, and the cases of *Hon. James Ondicho Gesami vs The Attorney General & Others*, petition No. 376 of 2011; *Mohamed Ali Swaleh vs the Director of Public Prosecution & Another*- High Court Mombasa Petition No. 2 of 2017; and *Republic vs Commissioner of Police & Another* (2012) eKLR, and submitted that the primary test in making a prosecutorial decision on the part of the DPP is whether or not the material gathered meets the evidential and public interest threshold.
 24. He argued that it is not for this court to decide who should be charged and with what offence. Further, that the court should shy from accepting invitations by litigants to interfere with the independence of the DPP except in those cases where such organs and offices are acting ultra vires, outside the confines of reasonableness, procedural fairness, malafides and in total disregard of the doctrine of



proportionality on decision making. That there is no such reason advance herein. He relied on Pauline Raget Adhiambo Agot v DPP and 5 others (2010) Petition No. 446 of 2015; AG v AG & 3 others Ex parte Thomas Ng'ang'a Munene (2014) Petition No. 166 of 2013; and Republic v Attorney General & 4 others Ex parte Kenneth Kariuki Githii (2014) eKLR Miscellaneous Application No. 151 of 2013 (LOA No. 14); Hon. James Ondicho Gesami vs the Attorney general & others Petition No. 376 of 2011; Thuita Mwangi & 2 others vs Ethics and Anti- Corruption Commission & 3 others (2004); and Total Kenya Limited & 9 others vs Director of Criminal Investigation Department and 3 others, 2013.

25. He submitted that for orderly functioning of state organs, each arm of government should be allowed to exercise its powers without interference from any of the other arms unless the power is abused or exceeded. Further that too much of superintendence by one organ could render the other arms of government dysfunctional, which is clearly a threat of the Rule of Law and could possibly lead to a constitutional paralysis or crises in government. As such any intervention has to be justified. He relied on Dr. Alfred N. Mutua case (supra) and urged that the petition be dismissed.
26. The 1st respondent and 2nd interested party did not file response and submissions to the petition and, the 1st interested party did not file submissions to the petition.

Analysis and Determination

27. Having carefully considered the parties' pleadings, submissions, cited authorities and the law I find the following issue to arise for determination: -

Whether the petitioner should be granted the reliefs sought

28. In essence what the petitioner is seeking from this court, is for this court to bar the respondents from arresting, charging and prosecuting him. On the mandate of the 1st respondent, Article 245 (1) of *the Constitution*, establishes the office of the Inspector- General of the National Police Service. Sub-article (4) provides for the mandate and autonomy of the said office with regards to; the investigation of any particular offence or offences, the enforcement of the law against any particular person or persons and the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service, Article 157 (3) of *the Constitution*, empowers the Director of Public Prosecution to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and he is required to comply.
29. Section 28 of the *National Police Service Act* establishes the Director of Criminal Investigation. Section 34 of the said Act provides for the functions of the Director and Section 35 provides for the functions of the directorate among them, collecting and providing criminal intelligence; undertaking investigations on serious crimes; maintaining law and order; detecting and preventing crime; apprehending offenders; maintaining criminal records; conducting forensic analysis; executing the directions given to the Inspector General by the Director of Public Prosecution etc.
30. In the case of Dr. Alfred N. Mutua v The Ethics and Anti- Corruption Commission & Others. Misc. Application No. 30 of 2016, the court held as follows-

“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...”



31. In Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another [2019] eKLR the court stated: -

“67. Therefore, the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. The mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect

Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power.”

Also see Republic v The Commissioner of Police & Director of Public Prosecution Ex parte Michael Monari & Another Misc. application No. 68 of 2011.

32. What is evident from the cited provisions of the law and the above decisions, is that the mandate of the 1st respondent is not subject to anyone’s control and should not be interfered with unless there is reasonable ground to do so.
33. On the mandate of the 2nd respondent, Article 157(1) of *the Constitution* establishes the Office of the Director of Public Prosecutions. Sub-article (6) and section 5(1) (a) (b) of the Director of Public Prosecutions Act provides for the powers to institute and undertake criminal proceedings, take over and continue any criminal proceedings commenced in any court and discontinue any criminal proceedings at any stage before judgment is delivered. Sub-article (10) and Section (6) of the Office of the Director of the Public Prosecutions Act prohibit any person or authority from controlling the Director of Public Prosecutions while performing its mandate. Sub-article (11) requires the Director of Public Prosecutions while discharging its mandate to have regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process.
34. In emphasizing the mandate of the Director of Public Prosecutions, the court in Republic vs DPP Exparte Victory Welding Works and another High Court Misc. No. 249 of 2020 stated;

“The law is that 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 interfering with those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision-making process... It follows that the office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to control by the Court based on the aforesaid principles of illegality, irrationality and procedural impropriety.”



35. In *Mohamed Ali Swaleh v The Director of Public Prosecution & another* – Petition No. 2 of 2017 it was held;

“The decision whether or not to institute criminal proceedings is made based on the evidence collected. Once the investigations establish reasonable suspicion that a person committed a crime he ought to be charged in a court of law.”

Also see:

- i. *Republic v Director of Public Prosecution & 2 others Ex-parte Stephen Mwangi Macharia* [2014] eKLR.
- ii. *Jamal Shariff Swaleh v Director of Public Prosecution & 4 others* [2014] eKLR.

36. The grounds upon which the prosecution may be prohibited were considered in *Director of Public Prosecutions V Martin Maina & 4 others* [2017] eKLR, wherein the Court cited, with approval, the decision by the Supreme Court of India in *State of Maharashtra & Others V Arun Gulab Gawali & Others*, Criminal Appeal No. 590 of 2007. The grounds are as follows:

- (i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
- (ii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
- (iii) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and
- (iv) Where the allegations constitute an offence alleged but there is either no legal evidence adduced clearly or manifestly fails to prove the charge.”

The court went further to state that: -

“The power of quashing criminal proceedings has to be exercised very sparingly with circumspection and that too in the rarest of rare cases.”

37. The court in the case of *Jamal Shariff Swaleh v Director of Public Prosecution* (supra) also stated:

“It is only where there has been shown to be an abuse of court process or a breach of *the constitution* that the courts will act to interfere with the discretion of the Director Public Prosecutions. In the case of *KENYA COMMERCIAL BANK LIMITED & 2 OTHERS – VS. COMMISSIONER OF POLICE AND ANOTHER, NAIROBI PETITION NO. 218 of 2011* (unreported) Hon. Majanja J. held that:

“The office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to *the constitution* and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where



the facts disclose a violation of the rights and fundamental freedoms guaranteed under *the constitution*.” [my emphasis].

Also see: Ahmed & another v DCI, Nyali Police Station & 2 others; Agango (Interested Party) (Constitutional Petition E047 of 2021)[2021] KEHC 175 (KLR) (4November 2021), where Mativo J (as he then was) stated:

“ 32. The inherent jurisdiction of the court to stop investigations or a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.²¹ The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. The provisions of *the Constitution* conferring powers upon the High Court to grant such remedies as conservatory orders are a device to advance justice and not to frustrate it.”

38. As noted on the mandate of the director of public prosecution, it is not unfettered, and the court will not hesitate to act where it has acted contrary to the law as elucidated in the cited authorities. But generally, the court is required to restrain itself from usurping the mandate of the 2nd respondent.
39. Coming back to this case, the petitioner besides stating how he has been arrested and charged has not demonstrated the illegalities executed by the 2nd respondent. The 2nd respondent acts on the material placed before him/her and makes a decision on whether to charge or not. Borrowing from the above cases the respondents should be left to undertake their mandate without any interference by this court, unless there is good reason to do so.
40. Having determined that the petitioner has not demonstrated how the constitutional provisions will be violated or have been violated and that the court should not interfere with the mandate of the respondents unless there is strong reason to, the prayers sought in the petition cannot be granted. The petitioner has not demonstrated that the respondents acted outside their constitutional mandate or made a case to warrant the intervention of this court on the mandate of the respondents.
41. On the issue of costs, Rule 26 (1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that the award of the costs is at the discretion of the Court. Sub Rule (2) provides that in exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms. I shall therefore order each party to bear its own costs.
42. The upshot is that this petition lacks merit and is hereby dismissed. Each party to bear its own costs.
Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 18TH DAY OF NOVEMBER, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. Ong’udi

Judge of the High Court

