



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E 002 OF 2020**

**FRANCIS K. OMENYA.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**FREDRICK SHITAMBASI ASHIMOSI.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT**

**SAMUEL K. AGUTU.....4<sup>TH</sup> RESPONDENT**

**ARON KIPKURUI KOROS.....5<sup>TH</sup> RESPONDENT**

**RICHARD NYAKORA.....6<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT**

**AND**

**INDEPENDENT POLICING OVERSIGHT AUTHORITY.....INTERESTED PARTY**

**RULING**

**BACKGROUND TO THE APPLICATION DATED 1.12.2020**

1. **The Petitioner** is an advocate of the High Court of Kenya practicing as M/S F. K. Omenya & Co. Advocates.

He filed this Constitutional Petition and the Supporting Affidavit dated 27.10.2020 on 28.10.2020. Together with the Petition, a **Notice of Motion Application of even date**, and the supporting affidavit, under numerous Constitutional Provisions including **Article 23 (1) and (2)** – (Protection of rights and fundamental freedoms of the individual) against the 7 Respondents, and the Independent Policing Oversight Authority, as Interested Party.

2. **The 1<sup>st</sup> Respondent** is the office of the Director of Public Prosecutions established under Article 157 of the Constitution;

**The 2<sup>nd</sup> Respondent** is the Assistant Director of Public Prosecutions in charge of Kirinyaga County.

**The 3<sup>rd</sup> Respondent** is the Office of the Director of Criminal Investigations established under the National Police Service Act (No.11A of 2011);

**The 4<sup>th</sup> Respondent** is the Director of Criminal Investigations Kirinyaga County (DCI).

**The 5<sup>th</sup> and 6<sup>th</sup> Respondents** are DCI officers based in Kerugoya, Kirinyaga County.

The 7<sup>th</sup> Respondent is the Attorney General established under **Article 156 of the Constitution**.

3. The gravamen of the petition is an alleged breach of the Petitioner's rights under **Articles 28** (Right to human dignity), **29** (Right to freedom and security of the person), **47** (Right to fair administrative action), **49** (Rights of an arrested person), **50** (Right to fair hearing) & **51** (Rights of persons detained, held in custody or detained). The alleged breach of the aforementioned rights arose following a series of arrests of the Petitioner by the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> Respondents, in the later months of 2020.

4. On the 17.9. 2020 the Petitioner was arrested and arraigned in Court the following day, the 18<sup>th</sup> of September 2020. He was charged alongside two others under **Kerugoya CM'S Criminal Case No. 753/2020** on four counts:

- (1) Forgery of Judicial document Contrary to Section 351 of the Penal Code;*
- (2) Uttering false document Contrary to Section 353 of the Penal Code;*
- (3) Fraudulent procurement of registration of land titles contrary to Section 103 (1) (c) (i) of the Land Registration Act No.3 of 2021;*
- (4) Forgery Contrary to Section 345 as read with 349 of the Penal Code.*

The brief particulars of the offences above relate to the Petitioner's alleged forgery of a decree in **Kerugoya ELC Misc. Case 16 of 2017** authorizing the Land Registrar Kerugoya to transfer **Land Parcel Mutira/Kiaga/429 to one Cecily Wangeci Kagati**.

5. Upon the Petitioner's release on bail, he was re-arrested, detained at Kerugoya police cells and later transferred to Wang'uru Police Station. He deposes that the reason for his arrest was not disclosed. On 19<sup>th</sup> September, he was released on Police bond, pending plea taking on 7<sup>th</sup> October 2020. The Petitioner avers that when he attended court on **5<sup>th</sup> October 2020 for a pre-trial mention in the Kerugoya CM's Criminal Case No. 753/2020**, he was rearrested and detained by the 5<sup>th</sup> and 6<sup>th</sup> Respondents for about two hours and later released.

6. On 7<sup>th</sup> October 2020, the Petitioner took plea in **Wang'uru PM's Criminal Case No. MCCR/E046/2020** where he was charged with four counts alongside two others;

- (1) Forgery Contrary to Section 345 as read with 349 of the Penal Code;*
- (2) Uttering a false document Contrary to Section 353 of the Penal Code;*
- (3) Fraudulent procurement of registration of land titles Contrary to Section 103 (1) (c) (i) of the Land Registration Act No.3 of 2021*
- (4) Conspiracy to defraud Contrary to Section 317 of the Penal Code.*

7. The brief particulars of the offences above relate to the alleged Petitioner's involvement in forging transfer of land application for land board consent over **Mwea/Tebere/B/4045, 4046 and 4047** and the fraudulent transfer of the three parcels of land to the two other co-accused. The Petitioner took plea and was released on bail.

The Petitioner avers that the said arrests are arbitrary, unlawful and fueled by personal vendetta from the 2<sup>nd</sup> Respondent on account of his refusal to give him a bribe of Kshs.5,000,000/=, to compromise the criminal cases.

**8. THE PETITIONER THUS PRAYS FOR THE FOLLOWING RELIEVES:**

- a) A declaration that the arrest and subsequent detention of the Petitioner on 18.12. 2020 and 5.10.2020 was unlawful, illegal, and that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents jointly and severally abused their powers;*
- b) That the Petitioner's constitutional rights under Articles 28, 29, 47, 49, 50 and 51 were violated jointly and severally by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents, and the Petitioner is entitled to general damages (mental anguish; damage to professional portfolio) for arbitrary arrests and unlawful detention;*
- c) Any other orders that the Court may deem fit to grant and the costs of the Petition.*

9. On 27.10. 2020 the Petitioner filed a Notice of Motion under certificate of urgency praying for conservatory orders restraining the Respondents from harassing, intimidating, persecuting, arbitrarily arresting, detaining, commencing any impending criminal prosecution and or further prosecuting the Petitioner. On 29.10.2020 2020 the court gave the following orders and directions ex-parte, pending hearing and determination of the application inter-parties that;

- 1) That this application be and is hereby certified urgent and service thereof dispensed with in the first instance as the object of this application will be defeated unless the application is heard expeditiously.*

2) That pending inter-partes hearing of this application, conservatory orders be and are hereby issued restraining the Respondents herein, their agents, servants, employees and/or representatives from harassing, intimidating, persecuting, arbitrary arresting, detaining, commencing any impending criminal prosecution and/or further prosecuting the Petitioner/Applicant.

3) That the application shall be served and return for inter-partes hearing on the 18.11.2020.

4) That in the meantime, the Petitioner be and is hereby directed to present himself before the 4<sup>th</sup> Respondent to record a statement of complaints stated in this petition and application on the 10.11.2020 at 11.00 am with a further directive that;

5) The 4<sup>th</sup> Respondent, upon presenting himself to the DCIO Kerugoya Police Station, the DCI or his agents shall not detain and/or arrest the Petitioner pending hearing and determination of the application.

10. On 1.12. 2020, the 1<sup>st</sup> Respondent, through the 2<sup>nd</sup> Respondent filed a **Notice of Motion Application** praying for the lifting and vacation of the conservatory orders issued by the Court on 29.10.2020 with a supporting affidavit of the 2<sup>nd</sup> Respondent, as well as an affidavit sworn by the complainant in **Criminal Case No. MCCR/E046/2020**, who was 85 years old and in a sickly condition, raising issues that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are apprehensive that by virtue of the conservatory orders, prosecution of the case against the 1<sup>st</sup> accused, who is the Petitioner, cannot be commenced, and that there is a likelihood that there would be a miscarriage of justice in the two criminal cases where the Petitioner is an accused person.

11. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further deponed that there are pending investigations against the Petitioner which have also been halted on account of the orders. Finally, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that the Petitioner is abusing the orders by threatening the complainant in **Criminal Case No. MCCR/E046/2020** urging him to withdraw the case.

## 12. ISSUES FOR DETERMINATION:

(1) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's application ought to be certified as urgent;

(2) Whether the conservatory orders issued on the 29.10.2020 ought to be set aside, and vacated.

## 13. ANALYSIS AND DETERMINATION

On the first question, the decision whether or not to certify a matter as urgent is a preserve and discretional power of the court. The exercise of this discretion, as has been restated in numerous decisions, is to be anchored on evidence facts and reason.

14. In **Jared Okello v. Charles Otieno Opiyo & 3 Others, CA No. 151 of 2017**, the basis and effect of certifying a matter urgent was expressed as follows:

*“Certifying a matter urgent means that the same is to be set down for hearing and determination immediately. It gets priority over other matters, even though they were filed earlier in time and the parties have been waiting patiently for their turn. Before a matter can be allowed to jump the queue, it must be shown to deserve priority hearing. That approach is deliberate and dictated by the principles and values of fairness to all litigants and case management considerations, to the end that deserving applications filed first in time, are not relegated to the periphery while later applications of equal or less urgency get fast-tracked and given preferential treatment.”*

15. In **Benjoh Amalgamated Limited v Kenya Commercial Bank Limited & Another (2018) eKLR** the Court of Appeal limited the considerations for certifying a matter as urgent in the following words:

*“The jurisdiction of court a court invited to certify a matter as urgent is limited to determining whether the material placed before court warrants the application to jump queue and get priority hearing but does not extend to delving or forming an opinion about the matters themselves.”*

16. In **Railways & Allied Workers Union v. Rift Valley Railways Workers Union, CA No. Nairobi 29 of 2015**, it was held that to justify certifying an application urgent, the applicant must satisfy the Court that there are circumstances in the application tending to show that if the matter is not heard promptly, the application may be rendered nugatory.

17. In the present case, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents prayed for a certification of urgency on the basis that the continuation of the conservatory orders as handed down have ground to halt the two criminal cases in which the Petitioner is accused of and stopped further investigation into other offences against the petitioner. The supporting affidavit of the complainant who is apprehensive that his sickly condition coupled with his advanced age may not allow him to testify if the matter is delayed further also adds weight to the application. Indeed, as predicted, **the complainant, Fausto Muthike Mbuko, died in unclear circumstances, as deponed to by the applicants on the 7.12.2020**, upon which investigations have been opened to unearth circumstances leading to the death.

18. Upon evaluation of the Notice of Motion application, the complainant's affidavit and the affidavits of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the matter was correctly and justly certified as urgent. This is because, the right to speedy access to justice by the complainants in the two cases where the Petitioner is charged is curtailed by the passing of every day and there is the real possibility of a miscarriage of justice. The inter-parties hearing of the application did not take place and is yet to be set down for hearing by the applicant.

19. The petitioner as well as the 2<sup>nd</sup> respondent admitted before the court in their oral submissions, **that they both withheld crucial and material information from the court, in the petition dated 27.10.2020, and in the Notice of Motion of even date and in the supporting affidavits, wherein they mentioned existence of only the two criminal cases pending before the Chief Magistrate's Court at Wang'uru MCCR/E046/2020 and Kerugoya Criminal Case No. 753/2020.**

No further investigations and/or further criminal cases were mentioned, by either parties.

20. It is upon the above circumstances that this court issued the impugned orders on the 29.10.2020, since the said cases were already registered, plea taken and pending hearing before the two courts. **For clarity, this court did not bar the progression and hearing of the two disclosed cases by its orders of 29.10.2020.**

20(a) It is only after the issuance of the orders restraining the Respondents by their agents, from further harassing, arbitrary arrests, intimidating, persecuting and detaining the petitioner, pending hearing of the application inter-parties on the 10.11.2020, ten days after the order, that the parties disclosed to the court of **other** existing and pending criminal investigations, three in number (3) touching on the Petitioner, and **other investigations** against the Petitioner, on similar issue. These were stated as;

- **Constitutional Petition No. 2/2020 – at Kerugoya High Court.**
- **ELC No. E 11/2020 – at Kerugoya ELC Court.**
- **HCCC No. E 001/2020 – at Kerugoya High Court.**

Indeed, the 2<sup>nd</sup> Respondent apologized for the non-disclosure of these crucial and important material facts and circumstances to the court.

21. The Petitioner on his behalf while highlighting his submissions also disclosed existence of other cases and investigations to this court, but failed to satisfy the court the motive behind the non-disclosure in his pleadings.

It is my position that had the above disclosure been made to this court, in the parties pleadings and the commencement of the petition, the court would have arrived at different findings, and orders.

In granting the conservatory orders on the 29.10.2020 the court was guided by the material facts placed before it, hence the parties have themselves to blame.

22. I have been asked, in the application dated 1.12.2020, by the Respondents to vacate and or review the orders as they bar the Respondents from carrying out their constitutional duties and mandates stated ***under Article 157 (6) of the Constitution – to institute and undertake criminal proceedings, to take over and continue any criminal proceedings, and to discontinue any criminal proceedings at any stage before judgment is delivered.***

23. Such exercise of power is not subject to the discretion of any authority – **Article 157 (10)**. The court stated in **Paul Nga'ng'a V. Ag & 3 Others (2013) eKLR that:**

***“This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the constitution”.***

24. It is not the business of the court to interfere or direct the Director of Public Prosecutions on the way he should conduct his mandate unless there is clear evidence of violation of a party's rights under the constitution or violation of the constitution itself – **Francis Anyango Juma -vs- DPP.**

The same principles were also rendered in the cases of **Kenya Commercial Bank Limited & 2 Others Commissioner of Police & Another, Nairobi Petition No. 218 of 2012 (2013) eKLR, George Joshua Okungu & Another V. Chief Magistrate Court Anti- Corruption Court at Nairobi & Another (2014) eKLR.**

25. I have carefully considered the replying affidavit sworn by the petitioner in opposition to the application for variation and/or setting aside the orders under review, as well as the petitioner's oral submissions.

The matters raised thereof, among them conflict of interest in respect of the 2<sup>nd</sup> Respondent's duties having been sued in person and representing the rest of the respondents, alleged contempt of court orders by the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Respondents issued on the 25.2.2020 are matters that may not be appropriately dealt with in an interlocutory application such as is before me, at this stage of the proceedings.

26. At paragraph 17 of the petitioner's replying affidavit, he rightfully deponed that;

***“The orders of 29.10.2020 is only limited to issues arising from this transaction alone, and I have not in any way obstructed the Respondents from carrying on with their constitutional mandate and if anything they have continued to carry out investigations (the 4<sup>th</sup> Respondent has called in and questioned several other people involved in land transactions) even after I took plea in Wang'uru and after the granting of the said orders”.***

27. **It is therefore not in doubt that the Petitioner acknowledges that, given the circumstances under which the orders of the 29.10.2020 were granted, the court meant and intended that the said orders would refer to the matters then disclosed to the court,**

being Kerugoya Criminal Case No. 753/2020, and Wang'uru Criminal Case No. MCCR/E046/2020, as far as the alleged continued harassing, intimidation, arbitrary arrests, and detaining of the petitioner, who had already taken plea in the said cases, but did not bar or restrain the Respondents from carrying out further investigations, in respect of the two cases, and any other investigation into the alleged fraudulent and unlawful activities by the Petitioner, or in any other impending criminal prosecution, or further prosecuting the Petitioner.

28. Despite the Applicant not citing the relevant legal provisions in respect of review/setting aside of court orders – in civil proceedings – **Order 45, of the Civil Procedure Rules, 2010**, and Revision jurisdiction in criminal proceedings as well as **Article 50 (6) (b) of the Constitution of Kenya**, failure to cite a legislation that underpin the question at hand, in my view, is not fatal to an application. **Article 159 (2) (d)** of the constitution mandates courts to dispense substantive justice without undue regard to procedural technicalities unless prejudice may be caused to the opposite party.

That is also the spirit in the saving of inherent powers of the court stated under **Section 1 A, 1 B and 3 A of the Civil Procedure Act**, to handle all matters presented before it, to attain the just determination of the proceedings and efficient disposal of its business.

30. Having explained and rendered myself as above, I am persuaded that the Applicant has made out a case for the granting of the orders sought to meet the ends of justice, which is two way, both to the Petitioner, and to the Respondents. The functions and mandate of the office of the Director of Public Prosecutions are constitutional, and should not be curtailed, unless they are found to have been abused by its agents, against innocent members of the public, thus violating their rights to freedom and or expression – **Republic - vs - DPP & Another Ex Parte Chamanlal Vrajlal Kamani & 2 Others (2015) eKLR**.

In the present matter, there are pending, in various courts, criminal cases preferred against the petitioner, five in number (unless there are others not yet disclosed). Pleas have been taken and are all pending for hearing. The Respondents are still undertaking further investigations in regard thereto. However, while undertaking the further investigations, they should not be pushed by malice, or be too enthusiastic by further harassing, intimidating and detaining the petitioner arbitrarily. The petitioner presented himself before the Criminal Investigations Agencies, and recorded a statement as directed by the court.

31. There would be no legal or practical sense if, whenever the Respondents agents intent to arrest the petitioner, they would do so arbitrarily.

The Petitioner has his rights protected under the constitution. Instead they could summon the petitioner to visit their offices, to enquire and record any necessary statements to enable them to further their investigations – **Article 23, 28, 29, 47, 49 of the Constitution**.

On that basis, the orders of court dated 29.10.2020 were made in response to the many arbitrary arrest and detentions of the petitioner by the Respondents and/or their agents.

32. On the 18.11.2020 the parties were directed by this court to submit to the court written submissions as to whether the matters leading to the criminal prosecutions of the petitioner are of a criminal or civil nature. They are yet to do so. It is only upon such submissions being filed heard and determined that this court will determine the real motives and intentions of the prosecutions – **Constitution Petition No. 133 of 2020 – Scion Healthcare Ltd. & 3 Others - V- National Directorate of Criminal Investigations & 9 Others (2020) eKLR**.

33. As stated by the Court of Appeal in **Gordon Ngatia Muriuki -V- DPP & 2 Others eKLR**,

*“.....Courts are reluctant to freeze proceedings before a court of law that has jurisdiction to try criminal cases; only in instances where there trumped up charges that cannot be founded in law) or the prosecution is not undertaken according to law, or it is actuated by malice and meant to harass the appellants, having no basis at all in law and fact....”*

34. The court further rendered that:

*State organs, state officers and public officers serve the larger public. They must at all times resist the temptation of being used to settle personal vendetta between private individuals or entities.....”*

The foregoing leads to the finding that, for the ends of justice, which is two way, and double edged, both to the Petitioner and to the Respondents, to be met, the application dated 1.12.2020 ought to be allowed, on terms appearing here below.

35. Consequently, the court orders dated 29.10.2020, and issued on the 4.11.2020 are hereby varied and reviewed in the following manner;

(a) That pending inter-parties hearing of this application (dated 27.10.2020), conservatory orders be and are hereby issued restraining the Respondents herein, their agents, servants, employees and/or representatives from harassing, intimidating, persecuting, arbitrary arresting and detaining the Petitioner in respect of the two cases registered against him, for which the Petitioner has already taken plea, and pending hearing and determination, being Kerugoya Criminal Case No. 753/2020 and Wang'uru Criminal Case No. MCCR/E 046/2020.

(b) For clarity purposes, the above Order (a) does not stop or restrain the Respondents and their agents from executing their constitutional mandate stated under Article 157 of the Constitution, and Section 4 of the office of the Director of Public Prosecutions Act, No. 2 of 2013, by commencing and/or undertaking further investigations and prosecution in regard to the two stated cases, or in any other impending criminal prosecution of the petitioner.

36. **RECUSAL BY JUDGE ON OWN MOTION**

**Further to the Ruling above**, this court, on its own motion, feels that it ought to recuse itself from further hearing of this **Constitutional Petition No. E002 of 2020**.

As clearly captured in the petition, the Respondent is the Assistant Director of Public Prosecutions in-charge of Kirinyaga County within which this court is situated. Mr. Fredrick Shitambasi Ashimosi is in-charge of the High Court, at Kerugoya and to prosecutes all criminal cases in the High Court, and appears before me during all proceedings of criminal nature.

37. By the petition, the Assistant Director of Public Prosecution is alleged to have been engaged in numerous criminal activities, including soliciting for bribes from the petitioner, an Advocate of the High Court who has numerous pending criminal cases against him before the Kerugoya Subordinate Courts which this court has supervisory jurisdiction.

38. It is a cardinal principle in the administration of justice that the virtue of judicial impartiality is one of the key values to aid a judge to dispense justice without fear, favour, or ill-will.

In **R-V-S (RD) CCC (SCC) cited in Re-Estate of Daniel Bernard Hefti (deceased) 2020 eKLR**, the court rendered that;

*“A cornerstone of any fair and just legal systems the impartial adjudication of disputes which come before courts and other tribunals.....*

*Nothing is more likely to impose confidence in such proceedings, whether on the part of litigants or the general public, they actual bias or the appearance of bias in the official of officials who have the power to adjudicate on disputes”.*

39. Given the facts stated above, the question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case. The reasonableness of the apprehension must be assessed in light of the oath of office taken by the Judges to administer justice without fear and favour.

40. Removal of oneself as a judge in a particular case requires serious thought, and the perception the litigants may have against the judge.

In **Jasbir Singh Rai & 3 Others V. Tarlochan Singh Rai & 4 Others (2013) eKLR**, the Supreme Court rendered thus;

*“Recusal as a general principle, has been much practiced in the history of the East African Judiciaries, even though, its ethical dimensions have no always been taken into account. The term is thus defined in a particular matter, (especially) because of conflict of interest”.*

41. However, a judge ought not disqualify himself or herself because a litigant has been or continues to be adversely critical of him even to the point of being defamatory and contemptuous.

In **Barnaba Kipsongok Tenai V- R. (2014 eKLR)**, cited with approval the test set out in **Jabir Singh Rai (Supra)**, the question of recusal is dictated by several considerations;

*“Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for.*

*The object in view, in the recusal of judicial officer is that justice as between the parties be uncompromised , that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be to have remained uncompromised”.*

42. In the circumstances of this petition before me, the daily interactions between the judge and the Assistant Public Prosecution, being sued in person, and at the same time representing the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents would no doubt create a perception of imagined bias by the judge, in the matter of conflict of interest, by parties to this suit and the public in general.

43. **By the foregoing, I find it necessary and proper to recuse myself from any further handling and/or hearing of this petition.**

**I therefore direct that this Constitutional Petition No.E002 of 2020 be forthwith transferred for hearing and determination at the High Court of Kenya at Embu.**

**Orders accordingly.**

**Dated, Delivered and Signed at Kerugoya this 24<sup>th</sup> Day of February, 2021.**

**J.N. MULWA**

**JUDGE**

By consent of the petitioner and Respondent by the 2<sup>nd</sup> Respondent, this ruling has been delivered electronically by email, to their respective email addresses.

**J. N. MULWA**

**JUDGE**