



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 386 OF 2018

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 36, 38, 39, 40, 47, 48, 49, 57, 165(3), 258

OF THE CONSTITUTION OF KENYA AND RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

(MUTUNGA RULES)

BETWEEN

VINCENT ONYANGO NYANGAYO.....PETITIONER

AND

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

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

PHILIP KIBET TONUI.....INTERESTED PARTY

JUDGMENT

PETITION

1. The Petitioner through a Petition dated 7th November 2018 seeks the following reliefs:-

- a) A Declaration be and is hereby issued that the 1st Respondent's action of purporting to order for or threaten the arrest of Petitioner is accordingly null, void and of no effect in law.*
- b) A Declaratory Order that alleged exercise of power to arrest by the 1st Respondent's officers as alleged or at all is illegal, unconstitutional and contrary to Article 24 and 25 of the Constitution.*
- c) A Declaratory order restraining the Respondents from harassing the Petitioner who is duty-bound by the agreements and to act diligently in his professional capacity.*
- d) A Declaration validating the Arrangers Agreement dated 25th February, 2018.*
- e) Costs of the Petition.*
- f) Any further relief or orders that this Honourable Court may deem just and fit to grant.*

PETITIONER'S CASE

2. The facts of the suit are that the Petitioner and the Interested Party entered into an Arrangers Fee Agreement over the sale and purchase of the Interested Party's property known as L.R No 29623 at the reserve price of Kshs.15,000,000/= but arranger marketed the property and

managed to sell it at Kshs.24,500,000/=.

3. The Petitioner avers that the Interested Party, in breach of the Agreement, now demands the full purchase price and not the reserve price set and agreed with the arrangers. It is alleged that the Interested Party has enlisted the Respondents and specifically the 1st Respondent to harass and intimidate the Petitioner with arresting and charging him with an offence of obtaining money by false pretences. However, the Petitioner claims that he has an obligation to retain the monies meant for the arrangers as was agreed.

4. The Petitioner complains that the alleged actions of the Respondents have violated his rights under the Constitution of Kenya and particularly **Articles 24, 27, 28, 29, 47, 49, and 50 of the Constitution**.

5. The Petitioner also filed a Replying Affidavit dated 31st May 2019 in response to the Interested Party's Replying Affidavit filed on 5th December 2018.

2ND RESPONDENT'S CASE

6. The 2nd Respondent is opposed to the Petition and has filed a Replying Affidavit sworn by No. 58806 PC Justus Ndiritu on 7th December 2018. The 2nd Respondent contends that on 8th November 2018 the Petitioner was informed of the allegation against him and instructed to make a statement on the same. However, the 2nd Respondent, was instead served with the instant Petition filed by Vincent Onyango Nyangayo. The 2nd Respondent pray that this Court do compel the Petitioner to report to it to record and answer questions in relation to the complaint by the Interested Party.

INTERESTED PARTY'S CASE

7. The Interested Party is opposed to the Petition and in doing so filed a Replying Affidavit dated 4th December 2018 sworn by himself. It is the Interested Party's case that the Petitioner has not demonstrated that in deciding to prefer criminal charges against him, the 1st and 2nd Respondents acted without or in excess of the power conferred upon them by the law. Furthermore, he has not demonstrated how they have infringed, violated, contravened or in any other manner failed to comply with the provisions of the Constitution of Kenya.

8. The Interested Party also urges that the proceedings before this honourable Court are not the proper proceedings in which the correctness of the evidence or truthfulness of the witness is to be gauged.

SUBMISSIONS BY PETITIONER

9. The Petitioner in his Written Submissions dated 31st May 2019 argues that the DPP and the police have exercised their powers to investigate and prosecute this case in an arbitrary manner. This is because the Petitioner was arrested without being given an opportunity to give his side of the story.

10. The Petitioner submits that he has not been treated equally as the police are only relying on the complaint made by the Interested Party as the basis for his arrest and prosecution. It is further asserted that the police ought not to have preferred charges against the Petitioner as the transaction complained of is civil in nature. Reliance is placed on the decision in **Joram Mwenda Guantai v The Chief Magistrate Court [2007] 2EA**. The Petitioner avers that the decision of the 1st Respondent was as a result of bad faith and fraud as it was directed on what to do by the Interested Party.

11. The Petitioner urges this Court to find that there was no objective appraisal or evidence together with the fact that serious evidence supporting a prosecution has not been carefully considered; and that the decision to prosecute was a decision no reasonable prosecutor could have arrived at. The Petitioner supports this contention with several cases including **Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & others [2014] eKLR and Republic v Attorney- General & another ex parte Kipng'eno arap Ng'eny [2001] KLR 612**.

12. The Petitioner submits that the discretion to prosecute can be interfered with by this Honourable Court if it is demonstrated that it was exercised to achieve certain extraneous goals other than those meant to protect the criminal justice system. Reliance is placed on the decision in **Joram Mwenda Guantai v The Chief Magistrate Court [2007] (Supra)**.

SUBMISSIONS BY INTERESTED PARTY

13. The Interested Party by way of Written Submissions dated 6th December 2019 reiterates that he approached the Respondents after the Petitioner refused to release the balance of the purchase price which the Petitioner was holding in trust for him. The Interested Party submits that the Petitioner was summoned to record his statement but chose to file this petition instead. The Interested Party relies in the case of **Lydia Lubanga v Inspector General of Police & 4 others [2016] eKLR** in which, the Court determined that the High Court will only interfere with the exercise of power by the DPP if it is clearly demonstrated that; he acted without due regard to the public interest, acted against the interests of the administration of justice, or has not taken account of the need to prevent and avoid abuse of the process of the Court.

ANALYSIS AND DETERMINATION

14. I have carefully considered the Petitioner's and Respondents pleadings as well as the Interested Party's response, the parties rival submission and from these aforesaid only one (1) issue arises for consideration.

a) Whether the Petitioner has established that the 1st and 2nd Respondents have infringed on his rights as guaranteed by the Constitution?

15. The Petitioner in his Petition contend that the 1st and 2nd Respondents have exercised their powers to investigate and prosecute him in an arbitrary manner. It is further averred that when Petitioner was summoned to record a statement, that was not done but instead the Petitioner was promptly arrested, his fingerprints taken and that the officers did not bother to record or hear the Petitioner's side of the story. The Petitioner urges that this Honourable Court has power in its exercise of administrative law to contribute to proper regulation at the pre-trial stage to challenge the prosecutorial decision that lacks foundation.

16. The 1st and 2nd Respondents contend that the Petitioner was on 8th November 2018 summoned by IP Muchai of DCI Nairobi County Headquarters to go and record statement as regards the Interested Party's complaint that he was holding Kshs.3.7 million belonging to the Interested Party. The Petitioner reported to DCI Headquarters as was instructed but on being informed of the Interested Party's allegation, he requested for one week to return with documents so as to record his statement in relation to the alleged offence of stealing by agent. On being granted one week, he failed to return back but instead proceeded to file the present petition. The Respondent pray that the Petitioner be compelled by the Court to report to DCI Headquarters to record statement and answer questions in relation to the complaint by the Interested Party.

17. **Article 157 (11) of the Constitution** states that in exercising the powers conferred by this Article, the Director of Public Prosecution shall have regard to public interest, the interests of the administration of Justice and the need to prevent and avoid abuse of the legal process.

18. The question that must be considered and answered in this Petition is whether, in these circumstances of this case, whether the Court can interfere with the exercise of powers by the 1st and 2nd Respondents.

19. According to **Article 157 (10) of the Constitution**, the Director of Public Prosecutions when exercising his powers to commence criminal proceedings against an individual or any other powers or function as proscribed in the Constitution, shall not be subject to the control or direction of or require the consent of any person or authority. The office of the Director of Public Prosecutions is established under the Constitution as an independent body whose authority shall not be interfered with. However **Article 157 (11) of the Constitution** establishes certain limits to the exercise of power by the Director of Public Prosecutions. It is clearly provided that wherever exercising his powers the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process.

20. **Article 157(4) of the Constitution** provides that 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 directions.

21. The Provisions of **Article 157 (4) of the Constitution** was considered in the case of **Republic v Commissioner of Police & Another Ex-Parte Michael Monari & Another [2012] eKLR** where it was held that:-

“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.”

22. Similarly in the case of **Wilfred Masinde Wanyonyi v Director of Public Prosecutions & another [2015] eKLR** it was stated that:-

“36. It has been observed in various decisions of this Court that the office of the DPP is constitutionally mandated to undertake prosecutions, and that the Court will not interfere with the exercise of such powers unless a clear violation of the Constitution or abuse of the constitutional powers has been made out. In the case of Francis Anyango Juma vs The Director of Public Prosecutions and Another, Petition No 160 of 2012, this Court observed as follows with respect to the powers of the DPP under Article 158(10):

[28.] Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution, or violation of the Constitution itself.”

23. From the provisions of **Article 157 of the Constitution** and the authorities cited herein above, and although the Director of Public Prosecution is an independent body, the Court may interfere with its exercise of its powers where it is demonstrated that the DPP has acted in a manner contrary to its constitutional mandate, or where there is a clear violation of the provisions of the constitution or the constitutional rights of an individual. Further it follows that the DPP has mandate to direct the Inspector General of the National Police Service to Investigate any information or allegation and in doing so he can even summon any individual to record statement following a complaint against him or her. The Police therefore have a duty to investigate on any complaint once a complaint is made and have no option not to do so as by declining to do so would be failing in their constitutional mandate to detect and prevent crime. The Police are therefore required to establish reasonable suspicion before preferring charges against the suspect. I find that as long as the summoning, investigation and prosecution is not contrary to the Constitution and decision to charge is arrived in accordance with constitutional provisions and in a manner that is reasonable and not in exceeding the mandate given by the Constitution, the Court would be reluctant to interfere. I wish to add that it is not at this stage the duty of this Court to go into the merits and demerits of any intended charges, that may be preferred against any party as that is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the charge.

24. In the instant Petition the Petitioner complains that his rights has been infringed upon as the police have exercised their constitutional mandate to summon, investigate and prosecute, if need be, in this case in an arbitrary manner. The Petitioner avers that he was arrested without being given an opportunity to give his side of the story. However, the 2nd Respondent and Interested Party contend that the Petitioner was summoned and requested to record statement on the allegations made against him by the Interested Party but instead of doing so proceeded to file the instant petition in which interim orders were issued. I find to the contrary that the Petitioner has not demonstrated through evidence that he was charged with any crime before giving his statement to the police officers and that the police carried out investigation with bias. Further the Petitioner has not demonstrated how and in what manner his constitutional rights have been infringed or threatened by the Respondents herein.

25. Upon considering the facts of this Petition, the provisions of **Article 157 of the Constitution** and evidence relied upon by Petitioner, Respondents and Interested Party, I am not convinced that there has been any wrongdoing or misconduct on part of the 1st, and 2nd Respondents nor the Interested Party toward the Petitioner. As already pointed out there is no evidence of the Petitioner having been formally charged by the Respondents with any crime. The Respondents are only seeking to have statement from the Petitioner to follow up on a complaint made to them by the Interested Party which they are under **Article 157 (11) of the Constitution** mandated to investigate in regard to public interests, the Interest of the administration of justice and the need to prevent and avoid abuse of the legal process. In view of the facts of this case. I see no reason or justification to interfere with the exercise of the mandate of both the Respondents at this stage as it has not been demonstrated that there is any violation or infringements or breach of the Petitioner's constitutional rights as alluded in this Petition.

26. I therefore find that the Petitioner has failed to establish that his rights under **Article 24, 27, 28, 29, 47, 49 and 50 of the Constitution** has been violated, or infringed or breached or threatened by the 1st and 2nd Respondents. Further the petitioner has failed to demonstrate that the Respondents have in any way violated or infringed or breached upon their constitutional and legal mandate or violated any provisions of the **Constitution of Kenya 2010**. The Petitioner is therefore not entitled to the declaratory reliefs sought in this Petition.

27. ***The upshot is that the Petitioner's Petition dated 7th November 2018 is without merits. Accordingly the Petition is dismissed with costs to the Interested Party***

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY, 2021.

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J. A. MAKAU

JUDGE