



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 13 OF 2020**

**IN THE MATTER OF: ARTICLE 10, 22, 23, 27, 28, 29, 40, 47, 48, 50 and 165 OF THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 376 OF 2020 AT MALINDI**

**BETWEEN**

**ENRICO QUERCIOLI.....1<sup>ST</sup> PETITIONER**

**MAURIZIO CALLARI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

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

**THE DCIO MALINDI SUBCOUNTY.....2<sup>ND</sup> RESPONDENT**

**HON. CHIEF MAGISTRATE.....3<sup>RD</sup> RESPONDENT**

**AND**

**MARIA ANGELA.....INTERESTED PARTY**

**CORAM: Hon. Justice Reuben Nyakundi**

**Mr. Matini of Machuka & Co. Advocates for the Petitioners**

**Ms. Chepkwony Advocates for the Interested Party**

**Mr. Alenga for The Director of Public Prosecutions**

**Mr. Mkala for The Hon. Attorney General**

**RULING**

This Petition is against the decision by the Director of Public Prosecution to initiate and or undertake Criminal Proceedings involving the Petitioners **Enrico Quercioli** and **Maurizio Callari** for the offence of conspiracy to defraud contrary to section 317 of the Penal Code. The particulars of the charged premises in the charge sheet are that on the 17<sup>th</sup> November, 2018 at Watamu with another already before court defrauded **Maria Coppo Plot No.1040** in **Watamu**.

That plea though registered as Criminal Case No. 376 of 2020 before the session magistrate at Malindi Chief Magistrate Court was never processed for reasons of non-availability of the named accused persons. The plea Court moved in earnest to issue Warrant of Arrest against the suspects to face the full force of the criminal justice while the Warrants of Arrest remained in abeyance on 14<sup>th</sup> July, 2020 a Constitution Petition was filed before this Court purported to be that of the suspects challenging the constitutionality of the criminal prosecution for the conspiracy charge. The petition pleaded *inter alia* that pursuant to the decision by the Director of Public Prosecution to initiate the criminal proceedings he is in violation of Articles 22, 23, 28, 29, 40, 75, 47 and 48 of the Constitution.

With that violations and infringement of the fundamental rights and freedoms by the Director of Public Prosecution against the suspects herein, named petitioners, the following declarations were prayed for:-

- 1) *An Order do issue to stay criminal proceedings in Criminal Case No.376 of 2020 at Malindi and an Order prohibiting the arrest and trial of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners by the 1<sup>st</sup> and 3<sup>rd</sup> respondents before the Magistrates Court in relation to Criminal Case No.376 of 2020 at Malindi or any other charge that may be founded on the same facts raised therein.*
- 2) *A Declaration that the acts of the 2<sup>nd</sup> Respondent to investigate, arrest and arraign the Petitioners before Court in a charge of fraud or conspiracy to commit fraud without any sound legal basis are in violation of article 47, 50 of the Constitution and that such acts contravene the right of the petitioners.*
- 3) *A Declaration that the Petitioners have an inherent right to right to inherent dignity and the right to have that dignity respected and protected and that the acts by the 3<sup>rd</sup> respondent to authorize the arrest and prosecution of the Petitioners in Criminal Case No.376 of 2020 at Malindi without any legal basis amounts to an abuse of the Court process and of the powers of the office of the Director of Public Prosecutions and is a violation to the Applicants Right to freedom and security of the person, which includes the right not to be deprived of freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause and a declaration that the respondents acts in the matter contravenes Article 27 (1) 28 and 29 of the Constitution of Kenya, 2010.*
- 4) *A Declaration that the intended arrest, trial and subsequent prosecution of the 1<sup>st</sup> and 2<sup>nd</sup> petitioner applicants herein together with any ensuing proceedings AND acts in respect thereto are in violation of their constitutional rights and thereby bad in law.*
- 5) *An Order of Certiorari bringing into this Honourable Court and quashing the recommendations of the 1<sup>st</sup> and 2<sup>nd</sup> respondent and the consequential decision of charging the petitioners' and or any other charge that may be founded on the 1<sup>st</sup> petitioner's acts of purchasing the ground floor house on Portion No.1040 Cr. 46208, Watamu.*
- 6) *An order lifting the Warrants of Arrest issued against the applicants do issue.*
- 7) *General and exemplary damages for malicious prosecution.*
- 8) *Costs to the Petitioners.*
- 9) *Any such other orders as this Hon Court deem fit and just to grant.*

The Petition proceeded to be served upon the cited respondents: As at the close of pleadings, a pretrial conference can be held in terms of order 11 of the Civil Procedure Rules. The Court on perusal of the affidavits in support of the Petition established they were not sworn and were not signed personally by the Petitioners but on their behalf by one Hassan. The Court unhappy with that non-disclosure of such a material factor in exercise of the inherent jurisdiction under section 3A of the Civil Procedure Act sought leave of the partis to make a determination on this sole issue of *locus standi* to litigate on behalf of the Petitioners.

The second consideration is whether there exists a sufficient nexus between the individuals who filed and signed the corresponding verifying affidavits and the ones in support in their capacities/capacity as individuals and the right to litigate on the subject matter of the petition.

## **Determination**

### **The Law**

In relation to these issues and matters arising on *locus standi* Article 22 of the Constitution is crystal clear on the onus of a party seeking to approach the Court on buttressed facts that certain rights are threatened or being infringed and require protection. As stated in the case of **John Wekesa Khaoya V Attorney General [2013] eKLR**; -

*“The locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by the constitution in Article 22 and 258 of the Constitution which ensures unhindered access to justice.” (See also Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others [2021] eKLR in which the Court explained itself thus inter alia; -*

*“In this broader context, this Court cannot fashion nor sanction an installation to a judicial standard of locus standi that places hurdles on access to the Courts, except only when such litigation is by political abstract or is an abuse of the judicial process. However, we must hasten to make it clear that the person who moves the Court for judicial redress in cases of this kind must be acting bonafide with a view to indicating the cause of justice where a person is acting for personal gain or private profit or over political motivation or other oblique consideration, the court should not accord itself to be seized at the instant of such person and must reject the application on the threshold.”*

Presently, the fundamental rights enforcement procedure rules christened **Mutunga Rules** regulate the practice and procedure for the enforcement of human rights before Kenyan Courts. The Rules brought a new dawn which encourage the Courts to admit public interest litigation on the Constitutional infringement and violations so as not to strike such petitions for want of *locus standi*. Notwithstanding that legal position to sustain a petition before our Courts, the Petitioner's identity must first be determined followed with his or her *locus standi* and sufficient interest in the dispute or issue at hand.

As a consequence, *locus standi* is required in a litigation involving violation of fundamental rights, to be capable of sustaining the petition. In my humble view, if a petitioner applies to the Court to declare a law or a decision by a public body invalid, he or she must be able to prove to the Constitutional Court not only is the decision or provisions of the statute invalid but if no remedy is availed, he/she will suffer injury as a result of the violation or some other class of persons.

It is true as stated in various precedent setting decisions that the Question on *locus standi* must not be construed in a narrow and pedantic sense, for a constitution like ours embodies fundamental rights with far reaching consequences when threatened with infringement or violations. In our present reality, the provisions of Article 22 & 23 of the Constitution are intended to afford protection to the fundamental rights and freedoms granted to the individual. For this reason, it is desirable that all persons, individuals and organizations should have access to the High Court as a creature of the Constitution under Article 165 (2) (b) & (d) and Article 23 to seek redress for any perceived contravention of their rights. These are the attendant provisions of the Constitution must therefore be interpreted liberally to give wide access to the Courts under Article 48 of the same constitution. As standing to sue epitomizes the phraseology that the Court is no place for Busy Bodies. Any person who wants to sue either as an individual, organization, body corporate must show that he or she has *locus standi* being the right to sue for a remedy and capacity to pursue it before a Court of law. *Locus standi* does not even rest on the consent of parties to litigate on behalf of each other.

The evolution of the public interest litigation at the dawn of the new constitution dispensation as a vehicle for social re-engineering did not oust the locus standi threshold as known in law. From comparative jurisprudence stand point, the Court in *Sierra Club V Morton 405 US at 753-55* articulated the concept on standing as a representative of the public in the following passage;-

***“It is clear that an organization whose members are injured may represent, those members in a proceeding for judicial review, but a mere interest in a problem no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization adversely affected or aggrieved to assert the interest of the general public. Here what matters is that the benefits of the remedies granted by the Court will accrue to the general public or group of people. Conversely, the standing to facilitate judicial access to private litigants seeking to vindicate their Constitutional rights must establish the logical nexus, or injury to the fact on infringement or violation to entitle them of a remedy in terms of Article 23 of the Constitution. The salutary rule of self restraint stems from the principle that not every busy body should be mandated to intervene in a constitutional controversy which are ill defined and speculative.*”**

I hold a strong view that for the Courts to permit litigants who have no concrete injury, in particular violations against private citizens/claimants of a right to rule on serious constitutional issues, in the abstract would most likely create an abuse of the Court process.

In the instant petition according to the earlier characterization of the facts in Criminal Case No.376 of 2020, the petitioners charge sheet indicates that they are persons of concern to the state which is properly pursuing a prosecution against them for a charge of conspiracy contrary to section 317 of the Penal code. In this context in the eyes of the Kenyan Courts, by any circumstances prescribed in the charge sheet, the petitioners must submit themselves personally to the competent jurisdiction of the Court under Article 50 (1) of the Constitution capable of presiding over the criminal proceedings. The rationale for this rule is that a person who is present within the jurisdiction of that Court has the benefit/protection of the law applicable to that Country. From the record, the petitioners are yet to accept the amenability to the process of our Courts. It remains open whether constructive presence of the petitioners is sufficient to give this Court jurisdiction over them.

With regard to the relief being sought by the petitioners, the learned authors *Dicey Morris, the Conflict of Laws 15ch Ed [2012] the Dicey Rule* observed; -

***“It is obvious that a person who applies to a tribunal as a claimant is bound to submit to its judgement, should that judgement go against him, if so, no other reason than that fairness to the defendant demands this; -This case rests on the simple and universally admitted principle that a litigant who has voluntarily submitted himself to the jurisdiction of a Court by appealing before it cannot afterwards dispute its jurisdiction.”***

The touchstone of this petition is on the basis of the initiated criminal proceedings against the petitioners. There has been no waiver for their personal attendance in answering the charge and participating in that ensuing trial. A step taken to file the petition challenging the criminal process is not consistent with our constitution and enabling statutes to obtain stay without first submitting to that jurisdiction. Notwithstanding this jurisdictional issue, the Court observes that the justiciability of the constitutional petition is being pursued on the merits as a surrogate against the decision to charge and prosecute the petitioners, yet to submit to the jurisdiction of the Court.

The facts of the case discloses that the verifying affidavits dated 10<sup>th</sup> July, 2020 is stated to be sworn by the Petitioner **Enrico Quercioli**, through his Attorney **Abdulmanshah Sheikh Hassan**. The signature of the deponent is that of the petitioners Attorney duly commissioned by a **Mr. Patrick Swara**, an advocate of the High Court and commissioner for Oaths. The Attorney sought to challenge the Director of Public Prosecution to prosecute the petitioners without first putting himself first in the vulnerable position of the impending prosecution. The affidavit in support as sworn and endorsed by the Commissioner of Oaths cannot be attributable to the Petitioner Enrico despite the fact that he has not appeared before the Commissioner for Oaths. Much may be said no doubt on this petition that an individual in the presence of a petitioner may without subjecting himself to a prosecution for a criminal offence have the standing to question the legality of the decision-making process to undertake a criminal proceeding against him on a cognizable offence.

The Court has to decide at the end of it all whether, the Legal Counsel Sheikh Hassan who signed the affidavit on behalf of the petitioners has vested right in virtue of the breach of the constitution that entitle the Court to grant a remedy under Article 23 of the Constitution; to afford protection against the petitioners. In this regard being had to the petition I point out that the general rule in Kenya legal system is a litigant could not sue for protection against a wrongful act unless that constituted breach of duty owed to him personally against a wrongful act or the act constituted a breach of duty owed to a class, or group of persons in which some infringement is detectable in the Constitution. The grounds in the filed petition are to be inquired into and sufficiently established within the nexus of the constitutional mandate of the Director of Public Prosecution under Article 157 (6) (7) (8) (10) of the Constitution as against the criminal acts complained of against the

petitioners.

In determining this petition, I attach significance to the inherent jurisdiction of the Court. The **Learned Author I. H. Jacob in an article on the court's inherent jurisdiction {1970} 23 CLP** defines inherent jurisdiction as the:

***“the residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them. Jacob summarized the fundamentals of the inherent jurisdiction as follows:***

- 1. The inherent jurisdiction is exercised as part of the administration of justice and in relation to the process of litigation: it is procedural, not substantive;***
- 2. Its distinctive and basic feature is that it exercised by way of summary process rather than normal trial;***
- 3. Its nature as part of the machinery of justice means that a court can exercise it against anyone, whether a party to proceedings at issue or not;***
- 4. It is distinguishable from the exercise of judicial discretion; and***
- 5. Rules of court provide powers in addition to – not as a substitute for – the powers arising from the inherent jurisdiction.”***

The whole issue in this petition is complicated by further jurisdictional concerns founded on non-submission of the petitioners to the trial Court which has the ability to hear and determine the criminal case. To be clear, the focus on the jurisdiction of this Court over inferior tribunals is as outlined under Article 165 (6) & (7) of the Constitution which states as follows:

***“[6] The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

***[7] For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”***

Applied to the current case, the basic rule is that subject to certain established procedural law, the Court cannot exercise its power over the inferior tribunals on matters of this nature unless the petitioners have taken the step to be confronted by their accusers. It would be impossible for the Court to make any declarations under Article 23 of the Constitution in absence of the petitioners invoking the jurisdiction of the trial Court. It is in this spirit having regard to all of the circumstances the petition can be said to be justiciable.

The special circumstances which exist here are of a nature where a private litigant seeks a remedy in a cause of action not for the interest of the general public. The matter concerns a petition to review and set aside the decision of the DPP to proceed with indictment lodged by the complainants. It follows therefore that the petitioners' failure to submit themselves to the jurisdiction of the inferior court and locus standi of the signatory to the affidavits is offensive to both procedural and substantive law jurisdiction. It is an abuse of the Court process for which the Court should be ardent protector. The justiciability of the motion is moot.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF JULY 2021**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mettoh for Chepkwony advocate for the interested party
2. Mr. Mwangi for the state
3. Mr. Matini advocate for the petitioners