



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. E011 OF 2020

**IN THE MATTER OF: OF AN APPLICATION UNDER ARTICLES 20, 21, 23, 25, 28, 29, 39, 49 AND 50 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 (PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

SULEMAN AHMED ALIMOHAMED T/A SALYANI

PROPERTIES LIMITED.....PETITIONER/APPLICANT

VERSUS

1. THE NATIONAL POLICE SERVICE

2. THE HON. ATTORNEY GENERAL.....RESPONDENTS

JUDGMENT

The Petition

1. By a petition herein dated 16/11/2020 the Petitioner states that he is an adult male residing and doing business within the Republic of Kenya, Mombasa, email isasenabi1977@gmail.com. The 1st Respondent, National Police Service is a constitutionally constituted office pursuant to provisions of Article 243 of the constitution, while the 2nd Respondent is also constitutionally established under Article 156 of the constitution. The Attorney General is enjoined herein as the principal legal advisor to the Government under Article 156 of the constitution, and for and on behalf of the 1st Respondent.

2. The Petitioner states that he is a real estate developer and the director of Salyani Properties Limited which is located within Mombasa Kenya. Sometime in the year 2018 the Petitioner offered to construct apartments to be called the Tudor Heights and Fort Jesus Sea View apartments within Mombasa. As is the custom in construction industry, the purchase of the apartments was done off plan and over 70 purchasers paid varying sums of deposit to the Petitioner before construction could commence. The Petitioner commenced the construction of the apartments sometime in late 2018 but due to hard economic times towards the end of 2019, the projects stalled. The Petitioner later on in 2020 approached financiers who agreed to finance the remaining construction to its conclusion.

3. However, the Petitioner avers that some of the purchasers being dissatisfied with the delayed construction lodged complaints at the Central Police Station in Mombasa against the Petitioner over allegations of obtaining money by false pretence. Consequently, the police officers at Central Police Station summoned the Petitioner to the station sometime in the month of September and October 2020 to record a statement concerning allegations of obtaining money by false pretence from the purchasers of the apartments. The Petitioner avers that he was thereafter threatened with arrest by police officers from Central Police Station, and he raised the issue with the DPP who addressed the issue with the DCI. They concluded that the issue is commercial in nature having arisen from agreements to construct apartments and which construction already commenced albeit having stalled for a while and it does not fall within the purview of police investigations.

4. The Petitioner is apprehensive that in case the orders sought herein are not granted, he will be arrested and detained by the police who have since been trailing him. The Petitioner avers that he is entitled to protection by this Court on grounds of denial or threatened denial, infringement and violation of the Bill of Rights. Further, the Petitioner contends that this Court has the jurisdiction to uphold and enforce the

Bill of Rights and to grant appropriate orders under Article 23 of the Constitution of Kenya. The Petitioner seeks for the orders to protect his rights and liberty, and is ready to abide by any conditions as may be set by the Court in granting the orders sought.

5. The Petitioner avers that it is in the interest of justice that the orders sought be granted as prayed, because any arrest and detention on allegations of obtaining money by false pretence arising from facts herein stated shall be without a factual basis, and a violation of guaranteed human rights and freedoms and should be checked and halted by this Court.

6. The Petitioner prays for the following orders:

(i) Any complain arising out of the construction of Tudor Heights Apartments and Fort Jesus Sea View Apartments is civilian in nature and does not fall within the purview of police investigation. Any party aggrieved should therefore seek a civil remedy as opposed to police action.

(ii) An order be and is hereby granted prohibiting the 1st and 2nd Respondents from interrogating, arresting and/or detaining the Petitioner on allegations arising out of the construction of Tudor Heights Apartments and Fort Jesus Sea View Apartments, as this amounts to gross violation of the fundamental rights of the Petitioner.

(iii) Other/further orders this Court shall deem fit to grant for the ends of justice.

(iv) Costs of this petition.

7. The petition is supported by affidavit sworn by Suleiman Ahmed Alimohamed sworn on 16/11/2020, and a Further Affidavit by the same deponent sworn on 27/11/2020.

8. The Petitioner avers that on 18/11/2020 he was summoned to appear at the police station for interrogation; that he honoured the call and went to Central Police Station on the said date at around 10.00 a.m.; that after interrogation and recording a statement, he was booked vide OB 88/10/9/2020; that he was then informed that he had been arrested for the offence of obtaining money by false pretence from an undisclosed complainant over the construction and purchase of an apartment on the Fort Jesus Sea View Apartments; that he was informed that he could be arraigned in Mombasa Court on 20/11/2020 and in the meantime was required to deposit a police cash bail of Kshs. One hundred thousand (100,000/=); that on 2/11/2020 the police file was not brought before Court contrary to what he had been told, and that to date, he has never since been arraigned before the Court, that the Petitioner believes that the action of the police of arrest and detention was ill advised and in contravention of his constitutional rights and freedoms and was solely aimed at harassing and intimidating the Petitioner since he has not committed any criminal offence with regard to construction and sale of the Tudor Heights Apartments and the Fort Jesus Sea View Apartments; that this Court should therefore grant the orders sought to safeguard Petitioner's rights and freedoms as enshrined in the Kenya Constitution 2010 and that it is in the interest of justice that the orders sought herein be granted as prayed.

The Response

9. The petition is opposed by the Respondents vide Grounds of Opposition dated and filed herein on 24/11/2020. The Respondents' case is that the application and petition are misconceived, frivolous, vexatious and an abuse of the court process; that the 1st Respondent is empowered by law to investigate and prosecute criminal offences pursuant to the provisions of Section 24 of the National Police Service Act and Articles 243 and 245 of the Constitution; that the Applicant/Petitioner has not shown how the Respondents will not respect his constitutional rights; that it is incumbent for the Applicant/Petitioner to demonstrate before this Court that the intended police investigations are hinged on illegality or bad faith; that it is also noted that even though the dispute herein is one of a civil nature there is no bar to the 1st Respondent from instituting criminal proceedings by dint of the provisions of Section 193A of the Criminal Procedure Code that allows concurrent criminal and civil proceedings; that the Applicant/Petitioner has merely alluded to constitutional provisions and has not shown with exactitude how his rights and fundamental freedoms will be infringed to meet the threshold for the court's intervention; that the 2nd Respondent is only responsible for defending the government in civil litigation and has nothing to do with investigations and prosecution in criminal cases; that for the Court to interfere it would have to be satisfied that the criminal process which has been initiated is being used with a view of forcing the Applicant/Petitioner to settle the civil claim, evidence which has not been brought before this Court; that the Applicant/Petitioner has failed to bring before this Court any scintilla of evidence to show that he will not be accorded fair trial and therefore justice, and that it is in the interest of justice that this Application and Petition be dismissed with costs to the Respondents.

Submissions and Determination

10. The Petitioner filed submissions on 29/12/2020; while the Respondent did the same on 27/1/2021.

11. I have carefully considered the submissions. In my view, the issues for determination are as follows:

(i) Whether there has been a violation or threatened violation of the Petitioner's constitutional rights in his being summoned to record statement, and being threatened by arrest.

12. To address this issue I turn to Article 165(3) (b) of the constitution which states as follows:

“(3) Subject to clause (5), the High Court shall have—

(a) ...

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) ...

(d) ...”

The matter before this honourable court is no doubt anchored on Articles 165(3) (b) as read together with Article 258 of the Constitution, which deals with enforcement of the Constitution, and states:

“258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) ...”

13. The Petitioner submitted that he has a right to move the High Court under Articles 22, 165(3) (b) (6) and 258 of the Constitution for the remedies set out in Article 23 of the Constitution, among others.

14. The Respondents, on their part submitted that whereas under the constitution there is a duty by the court to protect the functional administrative and operational independence of the 1st Respondent, there is also a corresponding duty to protect citizens against exercise of functions by state agencies in a manner that violates the Constitution, and in the context of the present cause, to ensure that the 1st Respondent exercises its functions with due regard to public interest, the interest of public administration of justice and the need to prevent and avoid abuse of the legal process. The Respondent referred to **Hassan Ali Joho v Inspector General of Police & 3 others [2017] eKLR**, where the court stated that a threat of arrest or of violation of fundamental rights and freedoms per se, is not reason enough to stop the 1st respondent carrying out his functions, and that what the law seeks to prevent is arbitrary arrest without probable cause. Articles 49 and 50 of the Constitution anticipate arrests of individuals, and it is with that in mind that it makes provision for rights of arrested persons. A threat of arrest per se is not unconstitutional, so long as due process is followed and the constitutional rights of the arrested person are observed.

15. Mr. Makuto, learned counsel for the Respondents submitted that what the court needs to consider is whether the rights of the petitioner were observed. Specifically, the court will need to consider whether the investigations and the charges preferred against Petitioner abuse the criminal process, or are unfair to him, or are against public interest.

16. The allegation herein is that the 1st Respondent summoned the Petitioner to the police station, with respect to a transaction that was purely commercial. The Petitioner then proceeded to record a statement; he was detained in the police cells and later deposited a cash KShs. 100,000/= bail after which he was told he would be arraigned in court for plea taking something that has never happened to date. In **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and others [2013] eKLR**, it was said:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith ... It is not in the public interest or in the interest of administrative justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court.”

17. The facts giving rise to the petition are civil in nature. However, those facts can assume a criminal trajectory should there be element of fraud. The Petitioner is however entitled, under Article 22 of the Constitution to move this Court for relief where the facts disclose an actual or threatened violation of fundamental rights and freedoms. The Court is entitled to act *quia timet* where the circumstances call for it to act once it is satisfied that fundamental rights and freedoms are threatened. In light of Section 193A of the Criminal Procedure Code, the High Court may stop proceedings where such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of fundamental rights and freedoms. This power though must be exercised sparingly as it is in public interest that all crimes are detected and investigated and those suspected of criminal conduct are brought to face the consequences the law prescribes.

18. 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 the 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.

19. I have seen a letter by the Office of the Director of Prosecutions to the Regional CID Coordinator which sought to clarify that the dispute was of a commercial nature and not in any way criminal. With this in mind, it is now clear why the DPP has not been joined to these proceedings.

20. There is a need to safeguard the sanctity of the criminal process. In **Francis Kirima M’Ikunyua & 2 others (suing as the Chairman, Secretary and Treasurer on behalf of Zimman Settlement Scheme Society) v Director of Public Prosecutions & 4 others [2017] eKLR**, the court found that the criminal justice system was being used to settle what was otherwise a civil dispute which had been the subject of several court cases, while in **Investments & Mortgages Bank Limited (I&M) vs. Commissioner of Police and the Director of Criminal Investigations Department & DPP, & 2 others [2013] eKLR**, the court asserted its duty to ensure that its processes are not

abused or otherwise used to perpetuate injustice or for improper motives.

21. As to whether the facts herein are criminal in nature so as to warrant police action against the Petitioner leading to a criminal prosecution for the offence of obtaining money by false pretence, it is evident that the issues herein are not criminal but rather civil in nature. Having entered into purchase agreements for the apartments, each purchaser entered into a contract of sale. If there is a default of any nature, this will be resolved through the sale agreement. It cannot be said that the Petitioner had a criminal intent of obtaining money from the purchasers by false pretence. The Petitioner has been in the real estate industry for over 20 years and that is the reason why over 80 different purchasers had the confidence of depositing their cash with him with the hope of owning a home that the Petitioner is currently constructing, albeit having stalled due to hard economic times and this was not foreseen by any of the parties. However, it is also in the public interest that if there are any fraud in the said sale, the police must be at liberty to investigate the same.

(b) As to whether the rights of the Petitioner have been infringed by the 1st Respondent to warrant the prohibition orders sought herein, it is clear that the answer is in the affirmative. The Petitioner was arrested on 18/11/2020 at 8.00 a.m. He was put in the cells at central police station Mombasa and later released at 6.00 p.m. after he deposited a cash bail of Kshs. 100,000/=. He was informed that he could be arraigned before the Mombasa Law Court on 20/11/2020 for plea taking. The Petitioner presented himself before Court but to his utter dismay, the police file was never brought before the Court and there was no charge sheet drawn against the Petitioner. Up to this date, the Petitioner has never taken plea and his deposit of Kshs. 100,000/= has never been refunded. As already said herein, the 1st Respondent is desirous of charging the Petitioner but the DPP is of the opinion that no criminal charge has been disclosed by the facts in issue.

22. The right to liberty and freedom is a fundamental right that is inherent to every human being. This is recognised by Article 29 of the 2010 Constitution of Kenya. It provides:

“Every person has the right to freedom and security of the person, which includes the right not to be –

(a) Deprived of the freedom arbitrarily or without course

(b) Detained without trial, except during a state of emergency, in which case the detention is subject to Article 58.”

23. In the same authority Justice Kimaru also referred to the case of **Republic v Danson Mgunya & Another [2010] eKLR** where Justice Ibrahim (as he then was) rendered that:

“Liberty is precious and no one’s liberty should be denied without lawful reasons and in accordance with the law. Liberty should not be taken for granted. I will never take liberty for grantedwe must interpret the constitution in enhancing the rights and freedoms granted and enshrined rather than in a manner that curtails them. Each case must be decided in its own circumstances, touch and context.”

24. Article 21(1) of the constitution imposes a duty upon the state and all the state organs including the judiciary to *‘observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bills of Rights’*.

25. However, this Court cannot discount the possibility of criminal culpability in the sale agreements. If, after the purchase agreements were concluded, or if the purchase agreements disclose a latent criminal intention, this Court cannot issue a prohibitory order. Despite falling into financial difficulty, the Petitioner still owes a duty of specific performance to the purchasers, and any orders issued to the Petitioner in this petition do not in any way shield the Petitioner from the obligations of the purchase conditions he entered into. These orders only shield the Petitioner from police harassment. They do not stop the police from investigating the past, present or future conduct of the Petitioner respecting the performance of the aforesaid sale agreements.

26. In the upshot, I am satisfied that the Petitioner has established a threatened violation of his constitutional rights. I accordingly issue the following orders:

(i) The Respondents are directed to forthwith stop any harassment of the Petitioner.

(ii) If the Respondent shave a case against the Petitioner, the Respondents are hereby directed to charge the Petitioner in court within 48 hours from today; or refund the Petitioner’s cash bond of Kshs. 100,000/= within the said 48 hours. Costs to the Petitioner.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Mkok for Respondents

No appearance for Petitioner

