



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. E016 OF 2021

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 22, 25(a) & (b), 27(1), (2), (4) & (5), 28, 29(a), 31(d), 35, 47(1) & (2), 48, 49(1)(d) & 50(1) & (2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF ARTICLES 2, 3, 10, 19(1) & (2), 20(1), 21(1), 258(1) & 259 OF THE CONSTITUTION

BETWEEN

BENARD NAKUKU TALI.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

[1] **Benard Nakuku Tali**, the petitioner herein, approached the Court vide his Petition dated **18 July 2021**, seeking redress for violations or threatened violations of his constitutional rights. He complained that, on or about **15 July 2021** at about 6.00 p.m., while making a harassment complaint at the Central Police Station, Kitale, he was accosted and seized by one **Cpl. Maritim**, an officer of the 2nd respondent, and taken to a holding cell without being informed of the reason for his arrest. He further averred that he was held at Central Police Station, Kitale, for over 14 hours without being informed of the reasons for his detention; and that on the morning of **16 July 2021**, he was taken to the Magistrate's Court in Kitale where officers of the 2nd respondent made an application for his continued detention in **Miscellaneous Criminal Application No. E102 of 2021: Republic vs. Benard Nakuku Tali**, on suspicions of having committed an offence of cheating; but that the magistrate dismissed the application and ordered for his immediate and unconditional release.

[2] The petitioner further averred that, on the same day of **16 July 2021**, while he was waiting for the release order to be typed in order to secure his release, **Cpl. Peter Maritim** whisked him away to a waiting police vehicle and without any prior information, transported him to Eldoret where he was handed over to the OC-Crime at Central Police Station, Eldoret. He complained that, yet again, no information was divulged to him as to the reason for the action; which was in contravention of the court order issued earlier in the day.

[3] Thus, along with his petition, the petitioner filed a Notice of Motion application dated **18 July 2021**, seeking the following orders:

[a] a conservatory order prohibiting the 1st and 2nd respondents from arraigning him in court on alleged offences of cheating with relations to Income Plus Credit Limited; and further prohibiting the said 1st and 2nd respondents from requiring the petitioner to take plea before any subordinate court in the Republic of Kenya in respect of the said charges pending the hearing and determination of this application, this petition or until further orders of this Court.

[b] A conservatory order prohibiting the 1st and 2nd respondents from commencing any further criminal investigations against the petitioner, from conducting any further searches on the petitioner's offices and homes in respect to his conduct as a director of Income Plus Credit Limited, pending the hearing and determination of the application, the petition or until further orders of this Court;

[c] A mandatory injunction directing the 2nd respondent to release the applicant petitioner forthwith, and return all documents seized from the petitioner's offices and company offices in Eldoret, Kisumu, Nakuru and Kitale or as may have been seized from any other offices and premises of the petitioner subsequent thereafter and all copies made therefrom, pending the hearing and determination of the petition.

[4] The application was premised on the petitioner's Supporting Affidavit annexed thereto in which he reiterated the averments in his petition and added that Income Plus Credit Limited is a separate legal entity with its own internal operational procedures; and therefore he believes that the charges have no legal or factual foundation and that there can be no realistic prospects of his conviction on the same. He further complained that he has been subjected to unfair administrative action and illegal detention; which in effect amount to punishment for an alleged offence of cheating yet the transactions are purely of a contractual nature.

[5] The petitioner also complained of the damage or potential reputational harm that will befall him. He explained that he is a pastor and therefore a spiritual leader; and that his arrest and incarceration by the 1st and 2nd respondents have caused immense apprehension, pressure and panic to his clients and congregants. He added that his reputation and the reputation of his company and church has been tarnished irretrievably by his widely published detention; and that unless this Court intervenes and stays the illegal actions by the respondents, he is likely to suffer further unwarranted prejudice.

[6] Granted the nature of the prayers sought in the subject application, it became plain that to grant any of them, on an *ex parte* basis, would have had the effect of disposing of the entire application without hearing the other side. Consequently, directions were given that the application be served on the respondents and that a response be made to enable the Court take an informed decision. Consequently, a Replying Affidavit sworn by **Mwenga Muthui** was filed herein on **22 July 2021** on behalf of the respondents. That affidavit reveals that a report of cheating was made to Central Police Station, Eldoret, on **8 April 2021** against the petitioner; and that investigations conducted revealed that there were over 100 complainants alleging to have been swindled by the petitioner and his company known as Income Plus Credit Limited. It was further averred that the acts complained of were alleged to have occurred not only within Uasin Gishu County, but also Trans Nzoia, Kabarnet, Lodwar, Bungoma, Kisumu and Nakuru Counties.

[7] **Mr. Muthui** further averred that they were unable to locate the petitioner for purposes of recording his statement until **16 July 2021** when they received information that he was being held at Kitale Central Police Station. Arrangements were then made for him to be picked up and brought to Eldoret; and that because they were unable to present the petitioner in court the following day, which was a Saturday, they embarked on investigations with a view of his arraignment on Monday **19 July 2021**. It was further explained by **Mr. Muthui**, at paragraphs 13, 14 and 15 of the Replying Affidavit that, given the complex nature of the investigations, they were unable to complete them by **19 July 2021** as anticipated; and therefore an application was promptly filed on **19 July 2021** in **Eldoret Chief Magistrate's Miscellaneous Application No. E 409 of 2021** for the petitioner's continued detention for two more days; to which application the petitioner had no objection. The order to that effect was annexed to the Replying Affidavit as **Annexure "JO-2"**.

[8] Thus, it was the assertion of the respondents that the incarceration of the petitioner is neither illegal nor unwarranted as alleged by him. It was also averred that, at the time the petitioner was collected from Kitale, the respondents were unaware of the orders made in **Kitale Magistrate's Court in Miscellaneous Application No. E102 of 2021**, as no such order was served on them.

[9] The application was urged by **Mr. Etemesi** whose submission was that the material placed before the Court is sufficient to demonstrate that the petitioner has been subjected to inhuman treatment in that he was arrested and placed in custody for no reason; that he was denied bond and that before he could be released, having obtained a court order for such release in **Kitale Miscellaneous Application No. E102 of 2021**, he was transferred to Eldoret Central Police Station for further detention without justifiable cause. Counsel stressed the assertion that the subject matter is a civil dispute involving a limited liability company; a separate legal entity for which the petitioner ought not to be called to account.

[10] **Mr. Mugun**, counsel for the respondents, opposed the application. He relied on the averments set out in the Replying Affidavit of **Mr. Muthui** and urged the Court not to grant the prayers sought, as that would be tantamount to interference with the affairs of an independent constitutional body. He further argued that, far from being unconstitutional, the detention of the petitioner was backed by a court order issued by **Hon. Menya, SRM**, at the Eldoret Chief Magistrate's Court. He reiterated the assertion that the respondents were unaware of the Kitale court order, and pointed out that there are concurrent investigations being conducted in Trans Nzoia, Baringo, and elsewhere in the country, involving the petitioner; and therefore that there is no mischief in the transfer of the petitioner from Kitale to Eldoret .

[11] In response to the averments in the Replying Affidavit, **Mr. Etemesi** urged the Court to note that the court order annexed thereto is not only undated but also bears no court file number. He further submitted that the judicial officer who signed the order is unknown; and therefore counsel appears to doubt the authenticity of the order. He consequently prayed that interim orders be granted as prayed pending the hearing and determination of the application.

[12] I have given consideration to the application in the light of the averments set out in the Petition and the two Supporting Affidavits. I have likewise considered the averments in the respondents' Replying Affidavit and the annexures thereto. There appears to be no dispute that, whereas the petitioner was arrested and placed in custody at Kitale Central Police Station, he was also being looked for in connection

with complaints registered at Eldoret Central Police Station; for which he was transferred from Kitale to Eldoret on **16 July 2021**. There is no gainsaying that since **16 July 2021** was on a Friday, the petitioner's constitutional right to be arraigned before court within 24 hours was impracticable. Indeed, Article 49(1)(f) of the Constitution recognizes that:

“An arrested person has the right—

To be brought before a court as soon as reasonably possible, but not later than—

(ii) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;”

[13] Hence, the petitioner ought to have been arraigned before court on Monday **19 July 2021**; meaning that by the time this application was filed the respondents were still within their constitutional remit to hold the petitioner. It is now common knowledge that the following day, the **20th July 2021**, was also declared a public holiday and therefore was not an ordinary court day. Moreover, credible evidence has been presented before the Court that the respondents applied for and obtained a court order from Eldoret Chief Magistrate's Court for extension of time by two days to finalize investigations.

[14] I note that the order was impugned by **Mr. Etemesi** for being undated and for having no case number indicated thereon. He added that he was not aware that any such order had been issued by **Hon. Menya, SRM**. It nevertheless notable that the order in question bears the signature of the magistrate as well as the seal of the Chief Magistrate's Court. In the premises, until the contrary is proved, it is deemed to be a lawful and valid court order for all intents and purposes; for **Section 60 (e) and (k) of the Evidence Act, Chapter 80 of the Laws of Kenya**, recognizes that the Court shall take judicial notice of the seals of all courts of Kenya as well as the names of members and officers of the court.

[15] Proceeding on the basis that there was a valid court order in force between **19 July 2021** and **21 July 2021**, it appears to me the apprehension by the petition of breach or threatened violation of his constitutional rights seem unfounded. Additionally, although the petitioner complained that the respondents acted in breach of a court order made by Kitale Chief Magistrate's court in **Miscellaneous Criminal Application No. 102 of 2021**, no effort was made to show that the order was brought to their attention. Indeed, in the Replying Affidavit, the respondents have categorically denied having any knowledge of that order as at **16 July 2021** when the petitioner was transferred to Eldoret Central Police Station. I note too that no such order has been exhibited herein. What was annexed was an extract of the order, indicating that the suspect was to be released unless lawfully held. It is significant therefore that the respondents herein have explained why the petitioner had to be taken to Eldoret Central Police Station; and therefore that, in any event, there was a lawful reason to continue holding him in custody.

[16] In the premises, I entirely agree with the position taken by counsel for the respondents that the mandate to investigate and prosecute criminal offences is entrusted by the Constitution itself to the 1st and 2nd respondent's respectively; and therefore it cannot be said that simply by arresting the petitioner with a view of prosecution the respondents have violated the petitioner's constitutional rights. More must be established to warrant the intervention of the Court; as I am far from convinced that a bare allegation that the complaints involve a civil dispute is sufficient. **Section 193A of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya**, is explicit that:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

[17] More importantly, authorities abound to show that the best forum for testing the validity of a charge is the trial court itself. For instance, in **Erick Kibiwott & 2 Others vs. Director of Public Prosecution & 2 Others [2014] eKLR** it was held that:

“...In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. Dealing with the merits of the application, it is trite 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 under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings...”

[18] Consequently, I take the view that since **Section 89 (5) of the Criminal Procedure Act** affords the trial court an opportunity to interrogate the validity of a charge, once presented, the instant application is premature. It is also premature, granted the provisions of **Article 50 (1) of the Constitution** that:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

[19] Thus, the Constitution itself recognizes that the subordinate courts, being its own creatures pursuant to **Article 162 and 169 of the Constitution**, have the mandate and competence to hear and determine allegations. It is for the trial court to inquire into questions, such as whether the intended charge of cheating against the petitioners herein is tenable; and resolve issues such as whether the proper culprit ought to be Income Plus Credit Limited; or even whether the dispute is an entirely civil dispute. It is therefore immaterial at this point that the intended charge is hopeless; or that the intended criminal prosecution is bound to fail.

[20] In the premises, I entirely agree with **Michael Sistu Kamau & 12 Others vs. Ethics and Anti-Corruption Commission & 4 Others [2016] eKLR**, wherein a three-judge bench held that:

“The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ... “

[21] In the premises, no justification has been shown as to why the Court should, at this early stage of the proceedings, intervene in the investigative process or the intended prosecution of the petitioner. The application is accordingly dismissed. Instead, it is hereby directed that the petition be processed for hearing and determination on priority basis.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF JULY 2021

OLGA SEWE

JUDGE