



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 10 OF 2020**

**ELIZABETH CHEBIL.....1<sup>ST</sup> PETITIONER**

**WILSON KIMUTAI KIGEN.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**JAPHET NYAMBEGI,**

**OCS LANGAS POLICE STATION.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**NATIONAL POLICE SERVICE COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. Before this court is a Notice to Produce documents dated 18<sup>th</sup> December 2020 and expressed to be brought under section 69 of the Evidence Act by the Petitioners.

2. The Petition seeks declaratory orders that the detention of the 1<sup>st</sup> Petitioner from 7<sup>th</sup> May 2020 to 11<sup>th</sup> May 2020 by the Respondent was unconstitutional. Further, that the criminal charges in Criminal Case No. 1040 of 2020 are a nullity for being unconstitutional; that the confiscation of the Petitioners' goods worth kshs. 152,250/- was illegal; an order for the release of the confiscated goods or payment of the equivalent value with interest, an order for exemplary damages against the 1<sup>st</sup> Respondent, an order for general damages against the Respondents and Interested Parties and costs.

3. The Petitioners require the Respondents and Interested Parties produce the following documents for their inspection and make copies therefrom prior to the hearing of this Petition:

1. Occurrence Book extract from Langas Police Station for 5th, 6th and 7th July 2020.
2. Police Investigation Diary. For the 5th,6th and 7th July 2020.
3. Covering report relative to 5th, 6th and 7th July 2020.
4. Original handwritten inventory for the goods collected on the night of 5<sup>th</sup> July 2020.

4. The Notice is opposed by the Respondents and Interested Parties vide a Grounds of Opposition dated 10<sup>th</sup> May 2021 and filed on 19<sup>th</sup> October 2021 on the following grounds;

1. That the notice is incurably defective, incompetent, untenable, frivolous, scandalous, and vexatious and devoid of substance with unsupported conclusions and only tailored and stage-managed to unfairly and improperly hoodwink this court.
2. That the notice to produce is geared towards discovery and inspection of documents under no known procedure in law.

3. That the sole purpose of notice to produce documents under Section 69 of the Evidence Act is for trial purposes and not inspection and discovery as sought by the Petitioners.
4. That the Petitioners have not demonstrated to the honourable court any difficulty in accessing the documents serialized in the notice to produce as they are public documents.
5. That the Petitioners have not complied with the procedure enshrined in section 8 and 9 of Access to Information Act No. 31 of 2016 as regards access to the public documents.

5. The Interested Parties and the Respondents contend that it is an abuse of the court and pray the notice be dismissed with costs.

#### **DETERMINATION**

6. Having considered the instant application and the rival submissions of the parties I have identified the issue for determination as whether the Respondents and Interested Parties should be compelled to comply with the Notice to produce.

7. Section 69 of the Evidence Act provides;

**Secondary evidence of the contents of the documents referred to in section 68 (1) (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:**

**Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases–**

- (i) when the document to be proved is itself a notice;**
- (ii) when from the nature of the case, the adverse party must know that he will be required to produce it;**
- (iii) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;**
- (iv) when the adverse party or his agent has the original in court;**
- (v) when the adverse party or his agent has admitted the loss of the document;**
- (vi) when the person in possession of the document is out of reach of, or not subject to, the process of the court;**

8. Section 68(a) of the Evidence Act provides;

**Secondary evidence may be given of the existence, condition or contents of a document in the following cases–**

**(a) when the original is shown or appears to be in the possession or power of–**

**(i) the person against whom the document is sought to be proved; or**

**(ii) a person out of reach of, or not subject to, the process of the court; or**

**(iii) any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;**

9. The documents requested are documents that are in the possession of the Respondents and the Interested Parties by their very nature. Further, from the proceedings, it is evident that the Respondents and Interested Parties have been required to produce these documents and have failed to do so.

10. The Respondents and Interested Parties have not substantiated their ground of opposition that the documents required are only for discovery and not for trial. The Respondents have also failed to show how the Access to Information Act No. 31 of 2016 applies to the documents required to be produced herein.

11. In the premises, the Interested Parties and the Respondents are ordered to produce the documents in compliance with the Notice to Produce.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF DECEMBER 2021**

**E. O. OGOLA**

JUDGE