



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 05 OF 2018

CHIBEU SHAMALA IMBOGO.....1ST PETITIONER

BENJAMIN J.S.S. SHAMALA.....2ND PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS2ND RESPONDENT

THE OCS MALAVA/POLICE STATION KABRAS.....3RD RESPONDENT

JAMES MUGANDA 4TH RESPONDENT

SOLOMON MUNGANDA 5TH RESPONDENT

JUDGMENT

1. The petitioners have filed this petition seeking for:-

(a) An order of prohibition prohibiting the 2nd and 3rd respondents from prosecuting them in respect of sale of land agreement dated 18/2/2012.

(b) A declaration that the provisions of Article 28 and 29 were violated by the arrest and subsequent detention of the 1st Petitioner for 4 hours.

(c) Declaration that the rights of the parties to the agreement dated 18th February, 2018 are fully covered under the agreement and statutory provisions and are not subject to criminal investigation.

(d) General damages for violation of Articles 28 and 29 of the Constitution.

2. The application is based on the grounds set out in the petition and is supported by the affidavit of the 1st petitioner. The same is opposed by the respondents through the replying affidavit of the 4th Respondent. The petitioners contend that the 2nd petitioner is a brother to the 1st petitioner. That the 2nd petitioner is the registered owner of land parcel S. Kabras/Chesero/1217. That the 2nd petitioner entered into a sale agreement with the 4th and 5th respondents to sell 0.8 Ha of the said land to them. That the 1st petitioner only signed the agreement as a witness to the transaction. That the purchasers failed to pay the full consideration of Ksh. 660,000/=. That on the 4/4/2018 the 1st petitioner was summoned to the office of the Deputy County Commissioner, Malava, wherein the purchasers wanted the 2nd petitioner to transfer the land to them. That the said official referred the 1st petitioner to Malava Police Station. That on getting there he was arrested and locked in for 4 hours. That he was released upon being warned that he would be charged on 19/4/2018 if he failed to transfer the land to the purchasers. He filed the instant petition.

3. The 1st petitioner contends that there was nothing criminal in the agreement dated 18/2/2012. That the relationship of the parties is governed by the terms of the agreement and the relevant statutory law. That his arrest and detention was in contravention of Articles 28, 29 and 40 of the Constitution and Sections 6 – 8 of the Land Control Act. That the intended charges are a misuse of power by the 3rd respondent and is meant to give the purchasers and their agents undue advantage. That the dispute is purely of a civil nature in which the 2nd

and 3rd respondents have no role to play.

4. The 1st petitioner did annex a copy of the sale agreement to the notice of motion.

5. The notice of motion was opposed by the respondents through the replying affidavit of the 4th respondent. The 4th respondent deponed that he entered into a sale agreement with the 2nd petitioner in respect to the said parcel of land which the 2nd petitioner was selling to him. That he paid part of the purchase price and the balance was to await obtaining consent from the Land Control Board. That the 2nd petitioner conspired with the 1st petitioner wherein the land was transferred to the 1st petitioner with a view to defrauding the 4th respondent. That further to this the petitioner forged a land sale agreement dated 18/2/2018 where the agreed terms of the agreement were forged. That he reported the matter to the police for investigations for offences of forgery, obtaining money by false pretences and conspiracy to defraud. That the petitioner does not disclose any violation of the constitution and is utter abuse of due process of this court that is meant to frustrate him from getting justice. He did attach a copy of the sale agreement to the replying affidavit.

6. The advocates for the petitioners, **Akwala & Co. Advocates**, submitted that the agreement categorically stated that the balance was to be paid in a period of 3 months. That the balance was not paid within the stated period. That the 4th and 5th respondents were in breach of the agreement. That the agreement is void for failure to obtain consent of Land Control Board within 6 months as provided by Section 8 of the Land Control Act. That there was no evidence of fraud as the search certificate shows that the 2nd petitioner was the registered owner of the land in issue at the time that the agreement was made.

7. The state counsel appearing for the 1st and 3rd respondents, on the other hand submitted that the petitioners have not demonstrated with clarity and precision how the actions of the respondents have violated their rights under Articles 28 and 29 of the Constitution. That there is no evidence that the petitioners were arrested or threatened with arrest by the 3rd respondent. That the allegation that the 1st petitioner was arrested and kept in custody for 4 hours is a mere allegation. That it is trite law that the burden of proving violation or threat of violation of constitutional rights is upon the petitioner. That the petitioner does not meet the threshold of filing constitutional petitions by precisely stating the manner in which their rights were violated as held in the case of **Anarita Karimi Njeru –Vs- Republic (1976-80) KLR**.

8. Further that the petitioners have not demonstrated that the 3rd respondent acted outside their constitutional mandate as provided under Article 245 of the Constitution and the National Police Service Act. That the mere summoning of the petitioners to the police station in itself is not a violation of their constitutional rights. In so holding they relied on the decision of Warsame J. (as he then was) in **Republic -Vs- Commissioner of Police and Another Exparte Michael Monari & Another (2012) eKLR** where the learned Judge held that it is the duty of the police to investigate crimes.

9. The petition is brought under various articles of the constitution and more specifically Articles 28 and 29 of the Constitution and under Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. There is no dispute that the petitioners have a right under our constitution to move to court where there is perceived violation of or threat to their constitutional rights. The court has power to make orders for redress of violation of or threat to a right or fundamental freedom.

10. The petition does not cite the articles of the Constitution under which it is brought. The application that was filed together with the petition indicates that it was made under Rule 3 (4) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 that provide that:-

“4. (1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”

The said rule is made pursuant to Article 22 of the Constitution that entitles a party who alleges that his rights have been threatened, infringed or violated to move to the High Court for redress.

11. A petitioner in a constitution petition is required to set out with due particularity the nature of his claim by identifying the specific right violated and how it is violated. This principle was set out in the case of **Anarita Karimi Njeri –Vs- Republic (supra)** where the court held that:-

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (see also Meme Vs. Republic & another [2004] 1 KLR 637)

12. The same was emphasized by the Court of Appeal in **Mumo Matemu –Vs- Trusted Society for Human Rights & 5 Others (Supra)** where it stated that:-

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

13. However in **Mumo Matemo –Vs- Trusted Society of Human rights Alliance & 5 Others (2013) eKLR** the High Court seemed to be

of the view it is sufficient if the complaint is fashioned in a way that gives proper notice to the respondent about the nature of the claim being made so that they can respond to it. I am in agreement with that proposition. Though the petition herein is not fashioned in the manner demanded by the principle in **Anarita Karimi** case it gives sufficient notice as to the nature of the prayers being sought. The petition is therefore proper.

14. Article 29 of the Constitution provides that:-

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

- (a) deprived of freedom arbitrarily or without just cause;**
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;**
- (c) subjected to any form of violence from either public or private sources;**
- (d) subjected to torture in any manner, whether physical or psychological;**
- (e) subjected to corporal punishment; or**
- (f) treated or punished in a cruel, inhuman or degrading manner.”**

15. The House of Lords in **O’Hara v Chief Constable of the Royal Ulster Constabulary** (cited in **Kenneth Omondi Ochiengo & 38 Others –Vs- Republic, Nairobi Criminal Revision No. 141 & 143 of 2019 (Consolidated) (2019) eKLR**) considered whether the police had established whether there were *prima facie* grounds for the arrest of the appellant. The court, in interpreting **Section 12(1)** of the **English Prevention of Terrorism (Temporary Provisions) Act 1984** which read as follows:-

“...a constable may arrest without warrant a person whom he has reasonable grounds of suspecting to be –

(b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this part of this act applies...”

held thus:

“Certain general propositions about the powers of constables under a section such as section 12(1) can now be summarised. (1) In order to have a reasonable suspicion the constable need not have evidence amounting to prima facie case. Ex hypothesi one is considering a preliminary stage of the investigation and information from an informer or a tip-off from a member of the public may be enough: *Hussien v. Chong Fook Kam* [1970] A.C. 942,949. (2) Hearsay information may therefore afford a constable a reasonable grounds to arrest. Such information may come from other officers: *Hussien’s case*, *ibid*. (3) The information which causes the constable to be suspicious of the individual must be in existence to the knowledge of the police officer at the time he makes the arrest. (4) The executive “discretion” to arrest or not as Lord Diplock described it in *Mohammed-Holgate v. Duke* [1984] A.C. 437,446, vests in the constable, who is engaged on the decision to arrest or not, and not in his superior officers. Given the independent responsibility and accountability of a constable under a provision such as section 12(1) of the Act of 1984 it seems to follow that the mere fact that an arresting officer has been instructed by a superior officer to effect the arrest is not capable of amounting to reasonable grounds for the necessary suspicion within the meaning of section 12(1).” Per Lord Steyn.

Lord Hope of Craighead held thus:

“My Lords, the test which section 12(1) of the Act of 1984 has laid down is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.”

16. Section 59 of the National Police Service Act gives powers to the police to arrest a person without warrant where there is reasonable grounds that a person has committed a cognizable offence and where a police officer suspects upon reasonable grounds a person of having committed or being about to commit a felony. Besides the powers of arrest the police have power under Section 52 (1) of the National Police Service Act to summon a person to a police station whom he has reason to believe has information which may assist in the investigation of an alleged offence.

17. The gist of the 1st petitioner’s complaint is that he was summoned to the Deputy Commissioner’s office from where he was referred to Malava Police Station where he was arrested and locked up for 4 hours. The 1st petitioner has not filed any document to show that he was summoned to the office of the Deputy Commissioner. He has not filed any document to show that he attended at Malava Police Station and was locked up for 4 hours. Section 108 of the Evidence Act places the burden of proof in a suit or proceeding on the person who would fail if no evidence were given on either side. If the petitioner was locked up at Malava Police Station it is surprising that he could not produce any document to show that he was so locked up. It is common knowledge that before a person is placed in police cells he is booked in the

Occurrence Book. That there was no such evidence adduced leads me to the conclusion that there was no proof of incarceration of the 1st petitioner in police cells. There is no evidence of violation of the right of the 1st petitioner by arrest and detention.

18. The petitioners are further seeking for orders of prohibition to stop the 2nd and 3rd respondents from prosecuting them over sale of land agreement dated 18/2/2012. Though the 3rd respondent stated that the petitioners had forged the agreement dated 18/2/2012, they did not produce the forged agreement. The one they produced was similar in all respects to the one produced by the petitioners. There was then no evidence of forgery of the agreement. The agreement being of sale of land is governed by the Law of Contract Act. Any dispute therein as to the terms and conditions ought to be settled in a civil matter. There is no criminal element disclosed in the agreement. An order of prohibition against the respondents is therefore deserved. The declaration sought that the rights of the parties under the agreement is not subject to criminal investigation has been proved.

19. The upshot is that the court grants prayers (a) and (c) of the petition while prayers (b) and (d) of the petition are declined. The court therefore issues the following orders:-

(1) An order of prohibition does hereby issue against the 2nd and 3rd Respondents from prosecuting the petitioners in respect of sale of land agreement dated 18/2/2018.

(2) A declaration does hereby issue that the rights to the parties to the agreement dated 18/2/2018 are covered under the agreement and statutory provisions and are not subject to criminal investigation.

Orders accordingly.

Delivered, dated and signed at Kakamega this 22nd day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Petitioners

No appearance for Respondents

Petitioners - absent

Respondents - absent

Court Assistant - Polycap

14 days right of appeal.