



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 5 OF 2018

JAPHET NOTI CHARO.....PETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE.....RESPONDENT

JUDGEMENT

1. Through the petition filed on 21st May, 2018 Japhet Noti Charo prays for the following reliefs:-

- “1. A declaration that the OCS Malindi Police Station exceeded and/or misused his power of office in arresting the Petitioner who was executing a varied Court Order.**
- 2. A declaration that the Petitioner’s constitutional rights were infringed by virtue of the said arrest.**
- 3. General damages for unlawful arrest and detention.**
- 4. The Petitioner is entitled to costs of this petition.”**

2. The Respondent, the Inspector General of Police opposed the petition.

3. Although the submissions filed by the parties are targeted at the notice of motion application dated 21st May, 2018 for conservatory orders, the correct position is that they are in respect of the petition itself, this court having dealt with the application for conservatory orders on 25th May, 2018 and directed the parties to file and exchange submissions on the petition.

4. The facts of the case as told to the court by the Petitioner and which receives support from the documents filed disclose that the Petitioner was the plaintiff in Malindi ELC Case No. 2 of 2012 in which he had sued one Paul Mutunga, a pastor with the Deliverance Church in respect of land portion No. 14034 CR No. 52004.

5. The Petitioner later filed Malindi CM Court Land Case No. 5 of 2018 against the same defendant over the same parcel of land and on 13th April, 2018 he obtained interim orders in that case restraining the defendant from working on or disposing the parcel of land pending *inter partes* hearing on 25th April, 2018

6. Paul Mutunga moved to the Environment and Land Court on 18th April, 2018 and obtained an order in Malindi ELC No. 2 of 2012 restraining the Petitioner from executing the order issued on 13th April, 2018 in Malindi CM Court Land Case No. 5 of 2018 pending hearing and determination of the application on 3rd May, 2018. The order also directed the Petitioner to open the gate into the parcel of land to facilitate entry and exit from the land by the defendant (Paul Mutunga). The order further directed the OCPD, Malindi to provide security to the defendant while reopening the entrance and thereafter provide such support as may be necessary to ensure access and use of the suit property pending further orders of the Environment and Land Court.

7. The Petitioner’s case is that he withdrew Malindi ELC No. 2 of 2012 and at the time of withdrawing it he was not aware that interim orders had been obtained by the defendant.

8. It is the Petitioner’s case that he served the orders obtained from the CM’s Court upon the defendant and the OCS, Malindi Police Station.

9. According to the Petitioner, the defendant colluded with the OCS and caused him to be arrested purporting that he had disobeyed the orders issued by the Environment and Land Court and threatened to have him charged for disobeying lawful court orders.

10. The Petitioner's case is that the OCS had failed, ignored and or refused to recognize the orders issued by the Chief Magistrate's Court. His case is that he was in custody for a period of three hours before he was released on cash bail of Kshs.5000.
11. The Petitioner asserts that his constitutional rights were violated by the OCS upon the instructions of the Respondent and he had suffered great loss and damage including rise in blood pressure. Further, that the OCS had never charged him but had continued to block his access to his property. He therefore prays for the orders already stated.
12. Chief Inspector of Police Stephen Mwachia, the Officer in Charge of Malindi Police Station (the OCS) swore an affidavit on 11th June, 2018 in opposition to the petition. His averment is that he received a report from Paul Mutunga of Deliverance Church that unknown people with undisclosed motives were taking photographs of the congregation during service. He booked the report in the station occurrence book. He avers that on 17th April, 2018 Pastor Paul Mutunga reported to him that the Petitioner had started to seal the entrance of the church.
13. On 19th April, 2018 he received orders issued in Malindi ELC No. 2 of 2012 Japhet Noti Charo v Pastor Paul Mutunga compelling the Petitioner to open the gate to the suit property and staying the orders issued on 13th April, 2018 in Malindi CMC Land Case No. 5 of 2018. The order issued in Malindi CMC Land Case No. 5 of 2018 was also availed to him.
14. The OCS states that on 23rd April, 2018 Pastor Paul Mutunga reported to him that theft had occurred at the suit premises during the period of closure of the entrance by the Petitioner. On 26th April, 2018 a report was made that the Petitioner was erecting a wall at the entrance of the church and the OCS instructed his officers to visit the scene and effect arrest. Consequently the Petitioner and two others were arrested and escorted to the Police Station.
15. It is C. I. Stephen Mwachia's disposition that the Petitioner later produced a notice dated 24th April, 2018 withdrawing Malindi ELC No. 2 of 2012 and he released the Petitioner and the two others on cash bail pending investigations.
16. The OCS avers that he arrested the Petitioner for disobeying the order issued in Malindi ELC Case No. 2 of 2012 on 19th April, 2018 only to realize that a contrary order had been issued in the Chief Magistrate's Court in Land Case No. 5 of 2018.
17. He stated that at all material times the police acted in accordance with the law, independently, diligently and fairly in discharging their mandate. Further, that the police action was not actuated by malice or ill will against the Petitioner.
18. Counsel submitted in support of the Petitioner's case that the orders issued on 19th April, 2018 in Malindi ELC No. 2 of 2012 were not served upon the Petitioner and the Petitioner only learned about them through the Respondent's replying affidavit. Further, that the Petitioner's arrest on 26th April, 2018 came after the ELC case was withdrawn on 24th April, 2018 and there was therefore no justification for his arrest. It was the Petitioner's submission that he was arrested for executing the order issued in the Chief Magistrate's Court case without being shown the order issued by the Judge in the ELC matter on 19th April 2018.
19. Further, that the OCS had averred that he was in receipt of two conflicting orders and the only way forward was for the courts to reconcile those orders. His arrest, he submitted, was not warranted in the circumstances.
20. It is the Petitioner's position that by arresting him, the OCS violated his right to file a suit and obtain orders. Further, that the OCS exceeded his mandate by purporting to interpret court orders.
21. The Respondent's position was that the OCS acted on the strength of the order issued on 19th April, 2018 in the ELC case. It was submitted that in arresting the Petitioner the OCS was acting on his mandate under Section 24 of the National Police Service Act, 2011.
22. According to the Respondent, the Petitioner did not establish that the OCS misused his powers or abused his office in arresting the Petitioner. The Respondent therefore urged this court to dismiss the petition.
23. Piecing together the evidence placed before the court by both sides, it emerges that after the Petitioner obtained orders in the case before the Chief Magistrate's Court on 13th April, 2018, Paul Mutunga went before Justice Olola in ELC Case No. 2 of 2012 and obtained orders on 19th April, 2018 restraining the execution of the orders obtained in the Chief Magistrate's Court Land Case No. 5 of 2012.
24. On 24th April, 2018 the Petitioner filed a withdrawal notice withdrawing ELC Case No. 2 of 2012. It is noted straight away that when the Petitioner obtained orders from the Chief Magistrate's Court he had not withdrawn his case pending before the Environment and Land Court. This was a flagrant abuse of the court process. The withdrawal of the ELC matter also raises a pertinent question as to why the Petitioner never asked for the matter to be transferred from the Environment and Land Court to the Chief Magistrate's Court. Nevertheless, the Petitioner's shortcomings did not justify breach of his constitutional rights, if indeed there was such a breach.
25. The question is whether his arrest by the OCS was unjustified. Section 24 of the National Police Service Act, 2011 provides the functions of the Kenya Police Service as follows:-

“The functions of the Kenya Police Service shall be the—

(a) provision of assistance to the public when in need;

(b) maintenance of law and order;

(c) preservation of peace;

(d) protection of life and property;

(e) investigation of crimes;

(f) collection of criminal intelligence;

(g) prevention and detection of crime;

(h) apprehension of offenders;

(i) enforcement of all laws and regulations with which it is charged; and

(j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.”

26. Enforcing court orders is one of the key pillars of maintaining law and order. If it is indeed found that the OCS was executing a court order in good faith then it cannot be said that he violated the Petitioner’s constitutional rights. The averment by the OCS was that he only became aware of the withdrawal of the Environment & Land Court matter after he had arrested the Petitioner.

27. Upon the issuance by the order dated 19th April, 2018 by Justice Olola in the Environment & Land Court matter, the order issued on 13th April, 2018 by the Chief Magistrate’s Court ceased to be operational as its enforcement was suspended. There was therefore one order in force and the Petitioner could not purport to act on an order that had been suspended. He cannot also be heard to talk of conflicting orders.

28. There is no evidence on record to show that the OCS was aware of the withdrawal of Malindi ELC Case No. 2 of 2012 when he ordered the arrest of the Petitioner. Without knowledge of the withdrawal, the OCS was correct in arresting the Petitioner because the Petitioner by sealing the entrance to the Church was acting in breach of the order issued on 19th April, 2018 in ELC No. 2 of 2012.

29. No evidence of bad faith or ill motive on the part of the OCS was adduced by the Petitioner. Immediately the OCS was shown the notice of withdrawal he released the Petitioner and the other suspects on reasonably cash bail of Kshs.5,000. This was proper as the police needed to peruse the two court files in order to satisfy themselves that the Environment & Land Court matter had indeed been withdrawn. The petition is therefore without merit.

30. In order to bring this matter to conclusion, I direct the Respondent to make a decision on Paul Mutunga’s complaint within thirty days from the date of the delivery of this judgment. Otherwise the cash bail deposited by the Petitioner should be refunded to him.

31. In the circumstances of this case, the petition is without merit. The same is dismissed. This being a matter that sought to protect constitutional rights, I direct each party to meet own costs of the proceedings.

Dated and Signed at Nairobi this 9th day of May, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered and at Malindi this 20th day of June, 2019

R. Nyakundi,

Judge of the High Court