



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CONSTITUTIONAL PETITION NUMBER 9 OF 2019**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19,20, 21, 23, 27, 28, 29, 47, 48, 50 AND 73 OF THE CONSTITUTION OF KENYA  
2010**

**AND**

**IN THE MATTER OF CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION**

**BETWEEN**

**DR. PETER MBAE.....PETITIONER**

**-VERSUS**

**THE DIVISIONAL CRIMINAL INVESTIGATIONS**

**OFFICER, RONGAI, .....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**PERRY MANSUCH KANSAGRA.....3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. This petition dated 13<sup>th</sup> March 2019 together with a Notice of Motion of even date were brought by one Dr. Peter Mbae, a Member of the Nakuru County Assembly for Kabazi Ward, through his advocates M/S Gordon Ogola Kipkoech & Co. Advocates and directed against the four respondents stated thereon.

It is a constitutional petition based upon Articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 29, 47, 48, 50 and 73 of the Constitution.

2. The Petitioner alleges that the Respondents have violated the above constitutional provisions, ignited and condemned a recipe for dissemination, malicious prosecution and abuse of office by barring the petitioner from exercise his oversight role, legislation and representation of his constituents and specifically the victims of the Solai Dam tragedy without any lawful or justifiable reasons.

3. It is alleged that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have fabricated and preferred criminal charges against the petitioner vide **Nakuru CMCR No. 468 of 2019** for the only reason that he is a politician and Member of the County Assembly for Kabazi Ward within Nakuru County, and charged with eight (8) others with the offence of

**Count 1:** Incitement to violence contrary to Section 96(b) of the Penal Code.

**Count 2:** Setting fire to crops of cultivated produce contrary to section 334(c) of the Penal Code.

**Count 3:** Malicious damage to property contrary to Section 339 (1) of the Penal Code.

4. The material date of the offence is stated as the 30<sup>th</sup> January 2019 at Solai area.

The complainant is stated as the Republic through the DCIO Rongai, with 4 witnesses among them Mansukh Patel whose farm was targeted for destruction of his coffee trees, Cyprus and Eucalyptus and others all valued at Kshs.7,000,000/=.

5. Following the above the Petitioner was arrested and charged under the criminal case stated above and released on bond.

The case was scheduled for hearing on the 22<sup>nd</sup> July 2019.

6. **By an application dated 13<sup>th</sup> March 2019** the petitioner/applicant, citing the constitutional provisions stated above sought for ORDERS that:

(1) ----- spent

(2) -----spent

(3) *That pending hearing and determination of this application this court be pleased to grant conservatory orders staying further proceedings and criminal charges against the petitioner in **Nakuru CMCR 468 of 2019-Republic –vs- Peter Mbae & Others***

(4) *That pending hearing and determination of this petition the court be pleased to grant conservatory orders staying further proceedings and criminal charges against the petitioner in Nakuru CMCR No. 468/19*

(5) *That the court do give certain directions as it may deem just and fit.*

7. The grounds in support of the application are stated at the face of the application, and further supported by the affidavit of the Petitioner sworn on even date and filed on same date.

8. The application is opposed by all the Respondents by Replying affidavits and grounds of opposition.

The 3<sup>rd</sup> Respondent, Perry Mansukh Kansagra filed a notice of Preliminary Objection (P.O) on the 30<sup>th</sup> April 2019.

9. I shall deal with this P.O in the 1<sup>st</sup> instance. It is stated that the 3<sup>rd</sup> Respondent is not a necessary party in the criminal prosecution, having no prosecutorial powers as such powers are given exclusively to the Director of Public Prosecutions (DPP) under **Article 157(6) of the Constitution**.

I have looked at the charge sheet. One of the witnesses is stated as Mansukh Patel whose farm and crops were targeted for destruction. It appears to me that this proposed witness is the 3<sup>rd</sup> Respondent. I stand guided if not the case.

10. **Under Article 157(4)**, it is the Director of Public Prosecution who has power to direct the Inspector-General of the National Police Service to investigate any allegations of Criminal nature and conduct.

To that extent, I agree with the 3<sup>rd</sup> Respondent that he is not a necessary party in the petition, but perhaps in a different capacity, as a witness.

Further **Article 157(6)** gives the Director of Public Prosecutions powers to institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence alleged to have been committed.

11. I therefore find that the 3<sup>rd</sup> Respondent was improperly enjoined in these proceedings as he possesses no powers either to investigate or charge any person. The applicant has not demonstrated the necessity of the 3<sup>rd</sup> Respondent in these proceedings - See **Order I of the Civil Procedure Rules 2010**.

At this very early stage, **I proceed to strike out the 3<sup>rd</sup> Respondent's names from this application and the petition with costs, to be borne by the applicant/petitioner** to the 3<sup>rd</sup> Respondent.

12. I have considered the remaining parties written submissions and their highlights.

The issues that present themselves for determination are

***Whether the petitioner's Constitutional rights have been violated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by instituting criminal charges against him.***

***(1) Whether the petitioner has made out a case for conservatory orders to stay further proceedings in the criminal case against the petitioner pending hearing and determination of the petition.***

13. At this stage, my duty is not to delve into the merits or otherwise of the petition.

The applicant is obligated to demonstrate that he has a *prima facie* case with a likelihood of success and unless a conservatory order is granted, there may be real danger that he would suffer prejudice as a result of the violation of his constitutional rights – **Education and Awareness (CREAW) and 7 Others –vs- A.G. And Others (2011) e KLR.**

14. **Article 157(6)** gives the Director of Public Prosecutions powers to investigate any allegations of criminal nature and conduct against any person or body and if satisfied, proceed to institute criminal proceedings against such person/body.

It matters not that the alleged perpetrator is a public figure, a politician, or even a child. Every person is equal before the law and has the right to equal protection and benefit of the law – **Article 27(1) (4).**

15. The constitution gives authority to the courts to uphold and enforce the Bill of Rights and to hear and determine any alleged violations, or threat to the fundamental freedoms thereto. These rights are however not absolute, but subject to other peoples rights, and it is upon such violations that the ODPP is mandated to investigate and prosecute when necessary.

16. I have considered the alleged criminal activities by the petitioner and others. They are serious crimes – incitement to violence, setting fire to crops of cultivated produce and malicious damage to property.

17. Before the DPP makes a decision to charge a party cogent and credible evidence ought to have been properly obtained and strong enough to sustain a conviction.

That is the core mandate of the Director of Criminal Prosecutions as granted under **Article 157.**

18. By charging the petitioner with the alleged offences, the 1<sup>st</sup> Respondent (DCIO) was acting within the law. It is a matter for strict proof that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents colluded against the petitioner and fabricated the criminal charges against him. The mandate of the 1<sup>st</sup> Respondent is stated under **Section 35 of the National Police Service Act.** Among its duties is to collect and provide criminal intelligence, undertake investigations on serious crimes, maintain law and order, detect and prevent crime and apprehend offenders among others.

19. To that extent, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted lawfully in fulfilment of their duties.

If indeed the charges against the petitioner are fabricated by collusion as alleged, the petitioner will have his constitutional rights to challenge the same before the trial court in a fair hearing guaranteed under **Article 50** and to prove that the said charges are fabricated. It is only the trial court that is empowered to determine upon full hearing on evidence whether or not the charges are fabricated. – **See Hussein Khalid & 16 Others –vs- A.G. & 2 Others (2014) e KLR.**

20. To treat the petitioner otherwise would be in violation of the constitutional imperatives and curtailing the powers granted to the Director of Public Prosecutions and the Criminal investigative arm of the Government from performing their duties. I decline to do so.

21. Without going into the merits of the petition, while the petitioner has a right to represent the best interest of the electorate within the Kabazi Ward of Nakuru County, he has a corresponding obligation to maintain peace and order, within and without his electoral ward, and be guided by provisions of **Article 10** of the Constitution.

22. For the foregoing, I come to a finding that the petitioner’s constitutional rights were not violated by either of the Respondents by instituting the criminal charges against him. Further, I find that the petitioner has failed to make out a *prima facie* case to persuade the court to grant conservatory orders sought in the application.

Accordingly, the application dated 13<sup>th</sup> March 2019 is dismissed with costs. The interim conservatory orders issued on the 26<sup>th</sup> June 2019 stand discharged.

23. Pursuant to **Article 50(2) (e)** that a trial ought to begin and be concluded without unreasonable delay, I direct that the parties hereto take urgent and deliberate steps to progress the hearing of the criminal case facing the petitioner without unreasonable delay.

It is so ordered.

**Delivered, Dated and Signed at Nakuru this 31st Day of July 2019.**

.....

J.N. MULWA

**JUDGE**