



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.148 OF 2018

IN THE MATTER OF ARTICLES 2,10,20,22,23,28,29,31,35,39,47,49 AND 50 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION NO.4 OF 2015

AND

IN THE MATTER OF PUBLIC OFFICER ETHICS ACT CHAPTER 183 LAWS OF KENYA

AND

IN THE MATTER OF NATIONAL POLICE SERVICE ACT NO 11A OF 2011

BETWEEN

SAMUEL MURIGI WAIGWA.....PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE DIRECTOR FOR PUBLIC PROSECUTION.....4TH RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner through a petition dated 18th April 2018 brought pursuant to Articles 2,10,20,22,23,28,29,31,35,39,47,49 and 50 of the Constitution of Kenya 2010 seeks the following reliefs:-

- a. A declaration that the 1st Respondent's act of harassing the Petitioner without preferring charge(s) is an infringement of his rights under Articles 47 and 50(2) of the Constitution of the Republic of Kenya, 2010;
- b. An order do issue admitting the Petitioner to reasonable bail terms pending investigations and or charge by the Respondents over his purchase of land known as Land Reference Number l8136 I . R. No. 59651 measuring 0.1021Ha situated in Juja, Thika Kiambu County;
- c. A mandatory injunction and/or conservatory order be granted restraining the Respondent their servants, agents or officers from

undertaking any confiscation of the Petitioner's properties and/or interfering with the Petitioner's assets in any way howsoever or in any manner whatsoever;

d. An order for compensation of the Petitioner by the 1st Respondent for such loss incurred on account of harassment and intimidation by the 1st Respondent relating to his purchase of land known as Land Reference Number 18136 I. R. No. 59651 measuring 0.1021Ha situated in Juja, Thika Kiambu County;

e. The 1st Respondent be condemned to pay cost of the Petition to the Petitioner;

f. Any other orders and or directions this Honourable court deems fit to grant.

2. The petitioner contends, that through a Sale Agreement dated 16th February, 2017 between the Petitioner and one Margaret Wambui Gathiga (hereinafter referred to as "*the Vendor*") the Petitioner had contracted to purchase all that piece of land known as Land Reference Number **18136 I.R. No. 59651** measuring 0.1021Ha (*hereinafter called the "property"*) at price of Kshs. 12,000,000.

"a) The Sale Agreement was duly executed by the Petitioner and the vendor willfully and the Petitioner proceeded to pay the mutually agreed deposit amounting to Kenya Shilling Two Hundred and Forty Thousand (Kshs. 240,000/;) to the vendor."

3. Subsequent to execution of the Sale Agreement of the property the vendor filed a Plaint and accompanying documents all dated 28th June, 2017 being Environment and Land Case Number 637 of 2017 in the High Court of Kenya at Thika accusing the Petitioner of fraud, misrepresentation and deceit in respect to the sale of the Property. The Petitioner has since filed his defence and counter claim dated 7th September, 2017 to the suit which is still pending full determination before the Court. On account of said transaction between the Petitioner and the vendor, the 1st Respondent through its servants, officers and/or agents has been unlawfully and without any justification been harassing, intimidating and oppressing the Petitioner and his family purporting to be conducting investigations within the mandate of the 1st Respondent. In accordance with the alleged investigations, the 1st Respondent has summoned the Petitioner on various occasions to their offices along Kiambu Road within Kiambu County and have been visiting his work premises in Westlands and his homestead both located within the City County of Nairobi. He had faithfully honoured the 1st Respondent's summons but the 1st Respondent has never charged the Petitioner with any criminal offence in Court. The Petitioner, therefore, appreciates the 1st Respondent's alleged investigations as mere intimidations and harassment perhaps with an aim to extort money from the Petitioner.

4. The petitioner further contends, that the Respondents in the course of their said purported investigations, the officers and/or agents of the 1st Respondent have infringed on various constitutional rights and fundamental freedoms of the Petitioner including his right to privacy, freedom of movement, right to fair administrative action and right to fair hearing. This has subjected the Petitioner to extreme, unwarranted and unjustified distress and anguish making him reasonably apprehensive and worried of his safety and well-being as well as that of his family. Unless the Application herein is certified as urgent and heard forthwith, the Petitioner/Applicant and his family shall be immensely prejudiced in utter violation of their constitutional rights and fundamental freedoms all at the Respondents' instance. Despite demand to the 1st Respondent to cease and desist from oppressing, harassing and intimidating the Petitioner, the 1st Respondent has failed and without any justification declined to cease from said harassment and intimidation.

5. The petitioner contends, that the 1st Respondent's action are unconstitutional and unlawful and a wanton abrogation of his rights to the presumption of innocence, right to privacy, right to fair administrative action and right to fair hearing.

The 1st, 2nd and 3rd Respondent's Response

6. The 1st, 2nd and 3rd Respondents filed grounds of opposition dated 29th October 2018 setting out four (4) main grounds of opposition as follows:-

1. THAT the petitioner has not demonstrated to Court of any breach of either the Constitution or any law on the part of the respondents.

2. THAT section 24 of the National Police Service Act No. 11A of 2011 gives powers to the police which include protection of life and property, investigation of crimes, prevention and detection of crime and apprehension of offenders.

3. THAT the petitioner has failed to demonstrate that the police officers are acting outside the law while executing their lawful functions of investigation.

4. THAT the petition is frivolous to the extent that it purports to seek orders stopping the 1st, 2nd and 4th Respondents from executing their constitutional mandate which is being performed in accordance with the law.

1st and 4th Respondents Response

7. The 1st and 4th Respondents filed a Replying affidavit dated 11th February and supplementary affidavit dated 11th April 2019 sworn by No. 81840 CPL Leonard Siele on 11th April attaching the witness statement by the alleged vendor.

Analysis and Determination

8. I have very carefully considered the petition and affidavit in support and all annexures thereto; the 1st, 2nd and 3rd Respondents' grounds of opposition; the Replying affidavit and supplementary affidavit on behalf of the 1st and 4th Respondents; the written submissions by the petitioner dated 2nd July 2019, the written submissions on behalf of the 1st and 4th Respondents and authorities relied upon by respective counsel in this petition and from the above the following issues arises for consideration:-

a. Whether the Respondents have violated any of the petitioner's rights?

b. Whether the 1st Respondent's actions are fair, legal or undertaken within the prescribed legal provisions and standards of law?

c. Whether the petitioner is entitled to the orders sought?

A. Whether the Respondents have violated any of the petitioner's rights?

9. From the contents of the petition and the Replying affidavit herein dated 18th April 2018 and together with the supporting affidavit, it is clear that the petitioner seeks to restrain the 4th Respondent from charging him with the offence of forgery and forceful detainer contrary to the provisions of the penal code and is further seeking an order of prohibition prohibiting the Respondents from carrying out their constitutional mandate of carrying out investigations, and taking evidence against the petitioner. The Respondents are opposed to the petition relying on the filed grounds of opposition, Replying affidavit and supplementary affidavit which are on record.

10. The Respondents submit, that the petition is frivolous and do not meet the requirements or established principle, that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been or will be infringed in respect of him. The Respondents relies on the decision in the case of **Annarita Karimi Njeru vs The Republic (1976-1980) KLR 1272**, which set out the following principles:-

"a. Constitutional Violations must be pleaded with a reasonable degree of precision.

b. The Articles of the constitution which entitles rights to the petitioner must be precisely enumerated and how one is entitled to the same.

c. The violations must be particularized in precise manner.

d. The manner in which the alleged violations were committed and to what extent."

11. I have very carefully perused the petition and note with a lot of humility, that the petition as drawn and filed goes against the principles stated in **Annarita Karimi Njeru vs The Republic (supra)**. The constitutional violations have not been pleaded with a reasonable degree of precision; the petitioner has merely sated his rights but has failed to demonstrate specifically how each of the stated rights have been violated under various Articles on the face of the petition and in the body of the petition. The petition has not specifically pointed out the Articles of the constitution which entitles right to him and how he is entitled to the same. The petition does not disclose and/or particularize the violations in a precise manner or at all; nor does it disclose the manner in which the alleged violations were committed, to what extent and by who.

12. The petitioner submit, that the duties and responsibilities of the 1st Respondent must be exercised in light of all the laid down substantive provisions and procedural requirements under the Constitution of Kenya 2010 and other written laws. The petitioner has not disclosed, the odd visits to his home and the work place in what he calls odd hours in his submission, to justify his submission, that the investigations are either not merited whatsoever or they are tainted with elements of harassment, intimidation or oppressive. In view of the above I find the petition has not pleaded the constitutional violations with a reasonable degree of precision. The petition has offended the principles set out in **Annarita Karimi Njeru vs The Republic (supra)**.

13. Article 24 of the Constitution of Kenya 2010 sets out Limitation of rights and fundamental freedoms as it provides, that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent, that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. The petitioner herein has not demonstrated that the limitation herein is not by law nor is it not reasonable and justifiable to justify the prayers sought herein.

14. Article 160 of the Constitution of Kenya 2010, on independence of the judiciary, the courts in exercise of judicial authority, the judiciary as constituted by **Article 161**, shall be subject only to this constitution and the law and shall not be subject to the control of any person or authority. This therefore is an assurance to the petitioner that due to independence of the judiciary, he shall enjoy the right to equal protection in any court of law and a fair administrative process as his matter shall be decided on merit and not at the whim of any one.

15. Having considered the above issue, I find, that the petitioner has not demonstrated specifically how each of his rights under Articles 2,10,20,22,23,28,29,31,35,39,47,49 and 50 of the Constitution of Kenya 2010 has been violated by the Respondents.

B. Whether the 1st Respondent's actions are fair, legal or undertaken within the prescribed legal provisions and standards of law?

16. The petitioner contention is, that investigations are an administrative function of the 1st Respondent which leads to commencement of criminal trial upon valid charge being formally registered against an accused person; however such investigations must be in tandem with the

letter and spirit of the constitution, particularly the Bill of Rights. That at all the time the 1st Respondent is mandatorily obliged to abide and operate within the precepts of the constitution and the statutory framework in the conduct of its affairs and operation, failure where the court will declare a limitation of the powers of the 1st Respondent, as the powers must be exercised in conformity with the provisions of the constitution and the relevant laws.

17. The 1st Respondent is established under **section 28 of the National Police Service Act**, and the functions of the Directorate included but are not limited to undertake investigations on serious crimes.

18. The 4th Respondent, thus the Director of Public Prosecution is under Article 157(6) of the Constitution empowered to institute and undertake criminal proceedings against any person before any court (*other than court martial*) in respect of any offence alleged to have been committed. It is further provided under Article 157(10) of the Constitution, that the Director of Public prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and in exercise of his power or functions, he shall not be under direction or control of any person or authority. On prosecution **Article 157(ii) of the Constitution** stipulates as follows:-

"(2) The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President."

19. The powers of the Director of Public Prosecution conferred by the constitution are not absolute as the same may be subjected to review. In the case of **Matalulu vs DPP (2003) 4 IRC 712**, sets out the grounds upon which the powers of the **DPP** as conferred by the constitution may be subject to review. These were enumerated as follows:-

i. In excess of the DPP's Constitutional or statutory powers;

ii. Contrary to the provisions of Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and failed to exercise his or her own independent discretion.

iii. In bad faith.

iv. In abuse of the process of the court in which it was instituted.

v. Where the DPP has fettered his discretion by a rigid policy obtained that it is thought desirable.

20. In the instant suit, the petitioner has alluded to generalized harassment and intimidation, without giving any particulars, to when the incident occurred and who harassed and intimidated the petitioner. He did not give particulars as required to demonstrate infringement of his rights nor has the petitioner demonstrate the excess of the **DPP's** constitutional mandate or statutory power or how he acted contrary to the provisions of the constitution or under direction or control of another person or authority or in bad faith or acted in an abuse of the process of the court.

21. Further to the above, the petitioner has not demonstrated, that the **DPP** lacked requisite authority in the action taken or he acted in excess of jurisdiction or departed from the rules of natural justice in directing, that the Applicant be charged with the offences disclosed in the evidence so far gathered. The Respondents herein upon receipt of the Report from the complainant proceed to do as mandated by the constitution and the statutes, thus investigations commenced with a view to ascertain the genuineness of the complainants as required of them. The complainant having made a report expected investigation to be carried out and culprit brought to book. That is also what the society expects upon a complaint being lodged with the 1st Respondent. It is further expected, that upon the conclusion of investigations a decision be made to prefer charges against the suspect if there is sufficient evidence and if there is no evidence the suspect is not charged. That even when the suspect is charged he has an opportunity to explain his defence and meet his accuser for cross-examination. His defence stands to be considered and he may be acquitted and even if convicted, there is an opportunity to appeal against the conviction. In the whole process and if acquitted the suspect stands vindicated and no one accuses him anymore of the alleged offence.

22. In view of the above the Petitioner/Applicant has not demonstrated, that the Respondents actions are unfair; illegal or have been undertaken contrary to the prescribed legal provisions and standards of law. I find the Respondents acted within their mandate as provided by the constitution and the relevant laws.

C. Whether the petitioner is entitled to the orders sought?

23. The Petitioner/Applicant seeks an order of prohibition to prohibit the Respondents from carrying on with the investigations and taking evidence against the petitioner in respect of the complainant's complain of an offence of forging and forceful detainer contrary to the provisions of the penal code. It should be noted that an order of prohibition is discretionary and only tenable where a public body or official has acted in excess of their powers and as such the order requires public body to cease from performing a certain act. In such a situation it is always an obligation and duty for Applicant to state the nature of the complaint with precision and it is not enough to merely state, that the Respondents have failed to carry out sufficient investigations. In the case of **Stephen Oyugi Okero vs Milimani Chief's Magistrates Court and DCI Petition No. 537 of 2017** the court laid down the principles upon which the orders sought by the *ex-parte* Applicant would be issued:-

"i) Where it would be impossible to give an accused a fair trial.

ii) Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case".

24. In the instant suit there is no evidence or demonstration on part of the Petitioner/Applicant, that if orders sought are not granted it would be impossible for the applicant to get fair trial or the prosecution would amount to misuse of process or would amount to misuse of power or would result in contravention of the Rules of Natural Justice as alleged by the Petitioner/Applicant. It should further be noted that the Applicant has not demonstrated, that in the undertaking of the investigation, into complaint lodged with the National Police Service and in making a decision to prefer criminal charges against the Applicant, either the **DPP** or any member of staff of the **DPP** or National Police Service acted without or in excess of powers conferred upon them by the law or are guilty of infringement, violation, contravention or in any other manner failed to comply with or respect and observance of any of the relevant provisions of the Constitution of Kenya 2010 or any other provision of thereof or any other relevant provision of the law. It has not been demonstrated, that the **DPP** did not independently review and analyzed the evidence contained in the investigations file compiled by the **DCI** including witness statements, documentary exhibits and statements of the petitioner as required by law; before **DPP** giving directions to prosecute the applicant.

25. The decision to charge the Petitioner/Applicant has not been shown by the Petitioner to be without basis as it was informed by evidence collected during investigation and public interest and not any other considerations. The accuracy and correctness of the evidence cannot be put to test at this stage but can be assessed and tested by trial court which is always best equipped to deal with the quality and sufficiency of evidence gathered and properly produced and tested though cross-examination in support of the charge.

26. The law is well settled as regards a situation where there exists concurrent criminal and civil proceedings going on at the same time involving same party. **Section 193(a) of the Criminal Procedure Code (Cap 75)** legitimizes concurrent criminal and civil proceedings by providing 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."

27. In Malindi High Court Constitution Petition No. 4 of 2017 **Katana Kazungu Kitsao & Another vs DPP & Another** Korir J. stated:-

"The fact that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso, constitute an abuse for the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have for the achievement of a collateral purpose other than its legally recognized aim."

28. In view of the above I find, that there is no bar to prohibit the prosecution or stay of the prosecution of the Applicant due to the existence of a civil suit instituted at Thika in Environment and Land Case No. 637 of 2017, even if the matter in issue in the criminal proceedings is also directly or substantially in issue in any pending civil proceedings, I find by dint of **section 193(a) of Criminal Procedure Code (Cap 75) Laws of Kenya**; any stay in any criminal proceedings must be in exceptional circumstances and I find, that there has been no demonstration by the Applicant, that the current petition is in an exceptional circumstances to warrant granting permanent stay in the pending criminal proceedings. Furthermore there is no demonstration, that the 1st Respondent intention to institute criminal proceedings against the Petitioner/Applicant was informed on malice, bad faith and is an abuse of court process.

29. The upshot is that the petitioner's petition is without merit and is accordingly dismissed with costs to the Respondents.

Dated, signed and delivered at Nairobi this 31st day of October, 2019.

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J .A. MAKAU

JUDGE