



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.228 OF 2018

IN THE MATTER OF ARTICLE 31, 40 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUAL

BETWEEN

JAMES SAMUEL KINYANJUI.....PETITIONER

VERSUS

BANKING FRAUD INVESTIGATION DEPARTMENT.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

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

JUDGMENT

Petitioner's Case

1. The petition through a petition dated 19th June 2018 brought to this court pursuant to Articles 31, 40 and 47 of the Constitution of Kenya seeks the following orders:-

- a) A declaration do issue that the Respondent's actions of circulating the Petitioner's name and having him listed in the Anti-Money Laundering records without hearing the Petitioner and/or commencing any prosecution against him contravenes his right to fair administrative action as enshrined, guaranteed and protected under Article 47 of the Constitution of Kenya 2010 and the Fair Administration Actions Act.
- b) A declaration that the action of the 1st Respondent contravenes the Petitioner's Right to Property and Privacy as enshrined guaranteed and protected under Article 36 and 40 of the Constitution.
- c) A declaration that as a consequence of the violation of the Petitioner's Constitutional Rights to Fair Administrative Action, Right to Property and Right to Privacy is entitled to damages and upon inquiry an award on damages be made.
- d) An order of injunction do issue restraining the Respondents from circulating the Petitioner's name under the Proceeds of Crime and Anti-Money Laundering Act and withdraw his name from the Anti-Money Laundering Records.
- e) The Petitioner be awarded the costs of these proceedings.
- f) Such other or further orders as to this court may deem just.

2. The petitioner avers that in a previous petition No. 532 of 2015 which he had filed on 2nd December 2015; on 3rd February 2016 Hon. Justice Lenaola issued orders that:-

a) **The Petitioner shall be allowed to access his account No. 001xxxxxx of Diamond Trust Bank Ltd, Diamond Plaza subject to the usual banking regulations and laws.**

b) **The Investigators are at liberty under the POCAML Act to engage in such lawful investigation and take such lawful actions in the usual manner.**

c) **The Petition be and is hereby settled in the above terms without any orders as to costs.**

3. The petitioner avers that since the issuance of the orders by this Honourable Court no communication or action has been made by the Respondents to either charge or in any manner react to find any activity by the petitioner objectionable or made contrary to the Banking Act or Regulations to warrant any adverse acts on the petitioner by the Respondents; notwithstanding the Respondents have had over four years to conduct investigations and have not reached to the petitioner to inform him of any decision made as a consequence of the investigations they may have conducted. That the petitioner has not been informed if anything is or was found against him during the investigation and that he has always been ready to face the sanction of the law. It is petitioner's contention to date no informal or formal charge has been preferred against him.

4. The petitioner contention is that he is a businessman with vast international business and that he is an investor with heavy investments in commercial and real estate. He interacts with banks to borrow and transact. It is petitioner's contention that the actions of the Respondents deny him, his fundamental right to basic decency and human dignity and fair administrative action protected under the constitution.

5. The petitioner claim the 1st Respondent circulated his details to banks and financial institutions under the proceeds of Crime and Anti-money Laundering Act, and listed the petitioner under the Anti-money Laundering records. The petitioner avers that he was not given an opportunity to challenge the decision leading to the circulation of his name, and that no official proceedings were brought against him on the same matter. He avers that several of his constitutional rights has been contravened, these being; the right to property under Article 40 of the Constitution; the right to fair administrative action under Article 47 of the Constitution and Fair Administrative Actions Act; the right to privacy under Article 37 of the constitution leading to making prayers in his petition.

6. The petitioner aver that he has been blacklisted in various institutions dispute court granting conservatory orders, as the Respondents continue to issue directives to the banks and other financial institutions thereby denying him an opportunity to conduct his business affairs. The petitioner contends in one of the companies where he is a director; Pricewater house Coopers Limited has refused and/or declined to give his company tax consultancy services because of the adverse reports by respondents which have no basis as per copy of the correspondence with the pricewater house Coopers Ltd marked "JSKA". The petitioner further contends he is involved in a multibillion investment project in Kenya which is likely to stall because of the actions of the Respondents which have no basis in law.

The 2nd Respondent's Case

7. In this petition out of the three Respondents, it is only the 2nd Respondent who filed Replying affidavit sworn by No. 236114 Julius Musogi dated 25th September 2018; who avers that he is one of the investigating officers in this case and also authorized and competent to swear the affidavit on behalf of the Respondents.

8. The deponent No. 236114 Julius Musogi depones that the Banking Fraud Investigation Department is charged with and mandated to attend to all criminal investigations related to fraud and general finances including and not limited to all suspected acts of money laundering within the banking and larger financial sector within the Republic of Kenya. That the Department wrote a letter dated 28th October 2015 to Diamond Bank Trust Ltd advising the Bank to be cautious of the transactions done by the petitioner in respect of his account. The 2nd Respondent contention is that the letter did not seek to restrict all transactions in any other Banks as alleged by the petitioner but it was only addressed to Diamond Bank Trust Ltd.

9. It is Respondents contention that the petitioner in the year 2015 filed a petition raising almost similar issues as raised in the present petition. The same was dealt with and an order issued by Hon. Justice Lenaola on 3rd February 2016 directing the petitioner be allowed to access his account No. 0014180001 subject to the usual Banking Regulations and Laws and that the investigations were also allowed under **POCAML Act** to engage in lawful investigation and take such lawful actions in the usual manner. That the petitioner has been operating the same account since then free from interference by the 1st Respondent. That the Banking Fraud Investigations Department has been continuing with investigations and infact there is a letter that was written to the office requesting Nigeria for mutual legal assistance with regards to this as per annexures marked "JM1".

10. The 1st Respondent contend the petition herein has been filed in bad faith, is misconceived and an abuse of the court process and meant to defeat the cause of justice and prays for the suit to be dismissed.

Analysis and Determination

11. I have considered the petition, the affidavit in support, further affidavit, Replying affidavit, Counsel written submissions and all submissions as well as the authorities in support. From the aforesaid the following issues arises for consideration:-

a) **Whether the petitioner's fundamental rights under the constitution have been violated?**

b) **Whether an order of injunction can issue restraining the Respondents from circulating the petitioners name under the proceeds of Crime and Money Laundering Act and withdrawal of his name from Anti Money Laundering Records?**

c) Whether the action of the 2nd Respondent necessitates intervention?

A. Whether the petitioner's fundamental rights under the constitution have been violated?

12. In the court's ruling in **Hc Petition No. 532 of 2015** delivered on 3rd February 2016, the court stated that:-

"The investigators are at liberty under the POCAML Act to engage in such lawful investigation and take such lawful actions in the usual manner."

13. The petitioner contention is that in 2018 he went to several banks and was informed that the 1st Respondent had circulated his name to all banks under the proceeds of Crime and Anti-Money Laundering Act, and further alleges that was done without having conducted the investigation as ordered and found that he had done anything that contravened the Banking Act or even contacted the petitioner failure whereof the petitioner was forced to file this petition.

14. The Respondents submit the prayers sought by the petitioner are unconstitutional as long as they seek to prevent the Respondents from exercising their mandate as provided in law. Urging if the orders sought are granted this would result to a greater injustice in the criminal justice system and public interest. That the orders if granted would insulate the petitioner against future liability in the matter notwithstanding discovering of new evidence.

15. It is trite that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and point out how the same have been or will be infringed in respect of him. In the case of **Anarita Karimi Njeru vs. the Republic [1976-1980] KLR 1272** the established principle states thus:-

- **"Constitutional Violations must be pleaded with a reasonable degree of precision.**
- **The Articles of the constitution which entitles right to the Petitioner must be precisely enumerated and how one is entitled to the same.**
- **The violations must be particularized in precise manner.**
- **The manner in which the alleged violations were committed and to what extent."**

16. In the instant petition the petitioner has not pleaded the Articles of the constitution in the body of the petition with a reasonable degree of precision; nor has the Articles of the constitution which entitles the rights to the petitioner been precisely enumerated and how the petitioner is entitled to the same. The petition does not enumerate the manner in which the alleged violations were committed and to what extent and as such I find that it offends the principles set out in **Anarita Karimi Njeru vs Republic (supra)** case.

17. It is proper at this stage to point out that at any rate **Article 24(1) (d) of the Constitution of Kenya 2010** 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 facts including:-

a)

b)

c)

d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and in view of the aforesaid the petitioner is entitled to enjoy the right to equal protection in any court of law and a fair administration process; where matters are decided on merits.

18. It is trite law that he who alleges must prove his claim, which must be proved on evidentiary foundation. In the case of **Leonard Otieno vs. Airtel Kenya Limited (2018) eKLR**, Hon. Justice Mativo stated thus:-

"It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypothesis."

19. In the instant petition the petitioner has made serious averments against the respondents and in particular alleges that the petitioner went to several banks where he was informed that the 1st Respondent had circulated his name to all banks under the proceeds of Crime and Anti-Money Laundering Act. He further deponed pricewaterhouse Coopers Limited refused and/or declined to give his company tax consultancy service because of adverse report by respondents which had no basis and produced a correspondence with the said company "**JSKA**" which reveals Mr. J.S. Kinyanjui as being adversely mentioned in the media. The petitioner has not other than making an allegation produced any documentary evidence to demonstrate that the Respondents indeed acted as he alleges. He has only made allegations which he has failed to

prove. He has not discharged the burden of proof and I find that a decision on violation of constitutional rights requires to be based on clear evidence but not on unsupported hypothesis. I find the petitioner has failed to prove that his fundamental rights under the constitution has been violated by the Respondents.

B. Whether an order of injunction can issue restraining the Respondents from circulating the petitioners name under the proceeds of Crime and Money Laundering Act and withdrawal of his name from Anti Money Laundering Records?

20. In the instant petition, the petitioner avers that he has been blacklisted in various institutions despite the court granting conservatory orders as it did, the Respondents continue to issue directives to the banks and other financial institutions thereby denying the petitioner an opportunity to conduct his business affairs. The Respondents through an affidavit of No.236114 Julius Musogi sworn on 25th September 2018 contend that the Banking Fraud Investigation Department wrote a letter dated 28th October 2015 to Diamond Trust Limited advising the Bank to be cautious of the transactions done by the petitioner in respect of his account and that in the aforesaid letter it did not seek to restrict other transactions in any other Banks as alleged by the petitioner but it was only addressed the issue to Diamond Bank Trust Ltd. The petitioner filed petition No. 532 of 2019 in which the court allowed the petitioner to access his account No. 001xxxxxx subject to the usual banking regulations and laws.

21. The investigators were allowed under **POCAML Act** to engage in lawful investigation and take such lawful actions in the usual manner. It should be noted the petitioner has since been operating the same account since then free from interference by the 1st Respondent as the Banking Fraud Investigations Department has been on going with the investigation and it has been demonstrated that a letter was written to the office requesting Nigeria for mutual legal assistance with regards to this case.

22. The petitioner has not demonstrated in his petition and affidavit that there has been circulation of letters or letter or any document from the 1st Respondent with the petitioner's name under the Proceeds of Crime and Money Laundering Act to any banking institution.

23. I find that the petitioner has not met the threshold to justify granting of an order of injunction against the Respondents. He has failed to demonstrate that he has a prima facie case with probability of success. He has only brought a case based on speculation and I find that orders of injunction are granted only upon meeting certain threshold which the petitioner has not met. The Respondents have not circulated the petitioners name under the Proceeds of Crime and Money Laundering Act and it has not been demonstrated they are threatening to do so. In view of the aforesaid I find no basis or justification to issue orders as sought.

C. Whether the action of the 2nd Respondent necessitates intervention?

24. The petitioner in this petition seeks conservatory orders be issued to prohibiting the 2nd Respondent from prosecuting the petitioner and/or commencing any prosecution against him due to contravention of the petitioners right to fair administrative action as enshrined, guaranteed and protected under Article 47 of the Constitution of Kenya 2010 and the Fair Administration Actions Act.

25. **Article 47(1) of the Constitution** provides thus:-

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

26. The petitioner contends that the 1st Respondent was ordered by this court if it intended to investigate the petitioner to take such lawful actions in the usual manner. The petitioner urges the 1st Respondent has failed so to do, and that their alleged administrative actions are neither expeditious, efficient, lawful nor reasonable taking into account the facts of this case as they have not made conclusive investigations and have also failed to inform the petitioner of the same but instead went ahead to circulate the petitioner's name under the **Proceeds of Crime and Anti-money Laundering Act. Article 47(2) of the constitution** provides:-

"(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

27. The petitioner further contend that the action taken by 1st Respondent infringes upon his fundamental right of dignity and that dignity is protected under Article 28, and his right to privacy is also protected and Article 31, and the right to property is protected under Article 40. The petitioner claims pursuant to this courts order issued by Hon. Justice Lenaola, the petitioner therefore had the right to be informed of the reasons behind 1st respondents decision to circulate his name to all banks and any outcome of investigations; if any.

28. The courts order by Hon. Justice Lenaola of 3rd February 2016 in Hc. Petition No. 532 of 2015 stated thus:-

"The investigators are at liberty under the PPOCAML Act to engage in such lawful investigation and take such lawful actions in the usual manner."

From the reading of the order the Respondents were and are not under any obligation to carry out any investigation in the subject matter and even if they were to do so, there is no order to inform the petitioner of their action unless they so wish. I have found, that the petitioner did not prove that the Respondents circulated his name as alleged. The jurisdiction of the courts to interfere with the exercise of the discretion of the 2nd Respondent (DPP) in making prosecution decisions should be sparingly exercised and in the clearest evidence of acting in unconstitutional manner. Article 157(10) of the constitution provides the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and in the exercise of his or her powers of functions, shall not be under the direction or control of any person or authority.

29. I therefore find that it is not for the court to direct the Respondents on how to exercise their constitutional powers although this court can intervene; in cases where that power is proved to have been unfairly, improperly or unjustly exercised. The law authorizes the courts to check the abuse of prosecutorial powers where sufficient evidence is presented to the court. In the case of **Douglas Mwangi vs Kenya Revenue Authority and another Hcc Petition No. 528 of 2013** D.S. Majanja held:-

"When dealing with the decision as to whether or not to prosecute the office of DPP exercises independent judgment and the court cannot interfere unless it is shown that the exercise is contrary to the constitution, in bad faith or amounts to an abuse of process...I do not find any reason or ground to intervene in that decision nor is it the obligation of the court to supervise the minutiae of investigation and prosecution."

30. I find that judicial intervention should be limited to acts that are manifestly in breach of the law or where the court is satisfied, that the decision maker reached a wrong decision influenced by other considerations other than the law, evidence and the duty to serve the substantial interest of justice. The petitioner has not demonstrated any grounds or basis to justify this courts intervention. Further in this matter a decision to charge or not to charge the petitioner is yet to be made by the 2nd Respondent. The petitioner has not demonstrated that the 2nd Respondent will contravene the law, abuse the process and/or breach any national values and principles of governance while considering any evidence brought before him by the investigative agency. I find that it would be wrong to give an order in anticipation of an event.

31. For reasons stated therein above I find that the petition has no merit and is dismissed accordingly with no orders as to costs. Each party to bear its own costs.

Dated, signed and delivered at Nairobi this 19th day of December, 2019.

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J .A. MAKAU

JUDGE