



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL DIVISION

CRIMINAL PETITION 13 OF 2017

BETWEEN

POLICE CONSTABLE (PC) MOSES KIBET BIWOT.....PETITIONER

AND

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

THE REGIONAL POLICE COMMANDER, WESTERN.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

RULING

Introduction

1. The petitioner herein is a police Constable attached to the DCIO Divisional Criminal Investigation Office Hamisi Constituency Vihiga County. He previously worked in Kakamega County Criminal Investigation office where he investigated a land fraud case touching on land Parcel Number Butso/ Shikoti/1329.

2. He filed the Constitutional Petition herein and together with it the Notice of Motion dated 30th November, 2017 wherein he seeks orders:-

(1)spent

(2) That this Honourable Court be pleased to issue a temporary order of prohibition against the 1st to 4th Respondents, their agents, representatives and/or any other police officer involved in the investigations against the petitioner touching on Land title deed registration number **Butso/ Shikoti/1329** prohibiting them jointly and severally from arresting, prosecuting detaining or preferring any criminal charges against the petitioner pending the inter parties hearing and determination of this application or until further orders of this court.

(3) That the temporary order of prohibition in terms of prayer (2) above be confirmed pending the hearing and determination of the petition herein.

(4) That the order herein be served upon the respondents or any other officers working under their command for due compliance

(5) That costs of this application be in the cause.

3. The application was brought pursuant to Rule 23(1) and (2) of the constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013, popularly known as the Mutunga Rules and is based on grounds on the face of the application itself and is supposed by the petitioner's own affidavit. Rule 23(1) of the Mutunga Rules provides as follows:-

“23(1)Despite any provision to the contrary a Judge before whom a petition under Rule 4 is presented shall hear and determine the application for conservatory or interim orders”.

Such an application can be made by way of Notice of Motion or by informal documentation. See Rule 24(1) of the Mutunga Rules.

4. In the affidavit in support of the motion the Petitioner gives background information leading to his commencement of investigations into allegations of a forged land transaction entered into between one Florah Maureen Atsango (seller) and Mary Wangari Kinyanjui and Stephen Thiongo Haron (The purchaser) wherein the purchasers paid to the seller a total of Kenya Shillings Two Million (Kshs. 2,000,000/-). The petitioner deponed further that when the purchasers sought to transfer the land known as **land parcel Butso/Shikoti/1329** they discovered that the title documents they had been shown by the seller were fake documents and further that the said title belonged to a person other than Florah Maureen Atsango. The petitioner also deponed that during his investigations he formed the opinion that the land Registrar Kakamega, one Mr. John Fundi was a major suspect in the fraud and that as a result, the said John Fundi together with the Respondents was out on a mission to silence the truth touching on the fraudulent activities at the Lands Office in Kakamega. The petitioner prays that his application be allowed as prayed.

Response to the Application

5. The application was opposed vide the Replying Affidavit sworn by No. 230184 Mr. Robert Murithi of Mumias DCI. The gist of the Replying Affidavit is found at paragraphs 4,5,6,7 and 8 of the Affidavit to the effect “4. *That I am aware of my own knowledge that the Constitution and the ODPP Act empowers the ODPP to commence take over and terminate the prosecution of an individual as well as to determine whether or not to prefer charges . 5) That in this matter I have performed my duties as per the constitution and the National Police Service Act by compiling the evidence and forwarding the same to the Office of Director of Public prosecutions for advice and directions (annexed herein and marked “ Rm S1” 6). That as I am concerned my investigations have not breached any individual’s human rights or violated the same 7). That during my investigations I have not come across any Occurrence Book Record reflecting a complaint by Mary Wangari Kinyanjui and Stephen Thiongo and the same has never been minuted to the applicant for investigations. 8). that the issues raised by the applicant herein are best addressed in a full trial if the Director of Public, Prosecutions approves that we prefer charges.”*

6. The deponent of the replying affidavit prays that the Notice of motion dated 30th January, 2017 be dismissed in it’s entirety.

Submissions

7. The application was canvassed by way of written submissions. The petitioner’s submissions are 17th December, 2017 and filed on 18th December, 2017 while the respondent’s submissions are dated 20th December, 2017 and filed on the same date. I have carefully read through the two sets of rival submissions and the authorities attached thereto. Both counsels are commended for their efforts in this regard.

Issue for Determination

8. The main issue for determination in this case is whether the petitioner has, at this stage, established a prima facie case to warrant the grant of the conservatory orders sought. In determining this issue this court will also consider the constitutional threshold of what amounts to a prima facie case in matters of this nature.

The Arguments

9. The petitioner has argued that he has established a prima facie case warranting grant of the orders sought. In this regard reliance is placed on the provisions of Article 23(3)(c) of the Constitution which provides – “ *In any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order*”. Article 22(1) of the Constitution makes provision to the effect that “ *Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied , violated , infringed or is threatened*”.

the petitioner also placed reliance on the persuasive decided case of **Kevin .K. Mwiti & Others Vs Kenya School of Law & others (2015) eKLR in which Justice G.V. Odunga** defined a prima facie case in the following words:-

“ ... the first issue for determination is whether the petitioner has established a prima facie case. A prima facie case it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous, in other words the petitioner has to show that he or she has a case which discloses arguable constitutional issues. it has been held that in considering an application for conservatory orders , the court is not called upon to make any definite finding either of facts or law as that is the province of the court that will ultimately hear the petition.

At this stage the applicant is only required to establish a prima facie case with a like hood of success. Accordingly in determining this application, the court is not required – indeed it is forbidden from making any determinations whose effect would be to prejudice the hearing of the main petition/ application”.

10. On the basis of the above definition the petitioner urged the court to make a finding that he has established a prima facie case for the orders sought.

11. On the other hand, the respondents submitted that a broad look at the instant application shows at once, that the application has no merit as the petitioner has failed to establish a prima facie case to warrant the grant of the orders sought. He has failed to prove violation of any of his fundamental freedoms and rights and /or infringement of any law or regulation or abuse of discretion and breach of any of the rules of

natural justice. The respondents contend that the petition is only meant to frustrate the ongoing investigations against the petitioner. Citing the case of **Anareta Karimi Njeru Vs Republic [1979] eKLR 154**, the respondents submitted that the petitioner has failed to set forth with reasonable clarity, that which he complains of, the provisions of the Constitution that have been infringed or threatened with being infringed and the manner of such infringement or threatened infringement.

12. It was also respondents' submissions that the petitioner was wrong in including the ODPP in this matter as doing so amounts to the petitioner questioning the power of the ODPP as donated to that office under Article 157 of the Constitution. See **Diana Kethi Kilonzo Vs IEBC & 2 Others Nairobi HCCP No. 359 of 2013** for the above prosecution.

13. It was further submitted on behalf of the respondents that this court has no basis for interfering or prohibiting the prosecution of the petitioner herein, whether or not there is a strong case, against him and that whatever defences the petitioner has should await his formal arraignment and subsequent trial by a court of competent jurisdiction. For this proposition, the respondent placed reliance on the case of **Kusia & 3 others Vs Attorney General [2002] 2KLR 69** in which the court stated that there is public interest in every prosecution that needs to be zealously guarded as well as the private interest on the rights of an accused person to be protected.

14. In summary the respondents submitted that this court should not halt, the ongoing investigations against the petitioner and that in any event this court lacks the jurisdiction to determine this matter. Counsel for the respondents urged the court to dismiss the petition as being unfounded and baseless.

Analysis and Determination

15. I must point out at the outset that what is before me for determination is the application dated 30th November, 2017 and not the petition itself and as pointed out by G.V Odunga J in the case of **Kevin K. Mwiti & others** (above) I must tread carefully lest I fall prey to delving into the merits and demerits of the petition. Consideration of the merits and demerits of the petition have to await the full hearing of the petition for apart from establishing a prima facie case, for the conservatory orders sought in the instant application the petitioner shall at that later time be required to prove every allegation of fact referred to in the petition.

16. At this stage, I need only satisfy myself that on the face of it the petitioner has a genuine complaint against the respondent. The petitioner need not show that his case will indeed succeed.

17. Having said the above, I am satisfied that the petitioner is properly before this court on his application for conservatory orders, having brought both the petition and the Notice of Motion under the relevant provisions of the Mutunga Rules and in particular Rule 23(1) of the said rules. I am also satisfied that the provision of Article 22 of the Constitution donate power to every person to institute proceedings of this nature before the courts, claiming that a right or fundamental freedom in the bill of rights has been denied violated or infringed is threatened with such violation or infringement.

18. In the instant case, the petitioner who is a Police officer has shown that his right to investigate a matter that is of public interest is being frustrated by named persons with vested interests to have the status quo maintained and not to bring to light some alleged under-hand dealings. The petitioner has also shown that unless he is protected by this court, at least in the interim, his person and his job are in danger. He has deponed to the fact that the 1st and 2nd Respondents have persistently harassed him over his initial investigations involving the "sale" of **land parcel Bustostso/Shikoti/1329**, as was evident from the petitioner's sudden transfer to Hamisi Sub county and his being ordered to surrender the investigation file to his supervisors for purposes of investigating the investigations carried out by the petitioner.

19. The petitioner also alleged that the 1st and 2nd Respondents have put the petitioner under pressure to have his fingerprints taken with a view to using the same to support some undisclosed offence against the petitioner. Although having one's fingerprints taken per se is not wrong, the circumstances under which the 1st and 2nd Respondents have asked for the petitioner's fingerprints smells of some mischief.

20. I have read the detailed submissions made on behalf of the respondents but find that these submissions are better left for the time when the parties will be canvassing the petition. In the instant case, I am satisfied that the petitioner has established a prima facie case with a likelihood of success, and it is apparent to the court that unless the orders sought are granted, the petitioner will suffer prejudice in the form of continued harassment by his superiors. This court has the power to grant appropriate interim relief to the petitioner pending hearing and determination of the petition. See **The Centre for Human Rights and Democracy & Others Vs The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012** where the court held, inter alia that where a constitutional breach has been committed or is threatened to be committed, "... the High Court has powers to grant appropriate relief so that the aggrieved party is not rendered helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable evils or risks by inaction or omission". I entirely agree with the above and add that in the present case, the conservatory orders sought are intended to shield the petitioner from his supervisors in a matter that clearly appears compromised and for which there is an intention to punish the petitioner.

21. In the case of **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others (2014)eKLR**, the Supreme Court defined the nature and purpose of conservatory orders in the following words, "*Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court in the public interest. Conservatory orders, therefore are not unlike interlocutory injunctions linked to such private – party issues as the prospects of irreparable harm occurring during the pendency of a case, or high probability of success in the applicant's case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of the case, bearing in mind the public interest the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.*"

22. In reaching the conclusion that the instant application has merit, I am guided by the Supreme Court's analysis of the circumstances under which the court would grant conservatory orders as set out in the Gatirau **Peter Munya** case (above). That case was cited with approval in the **Kevin K. Mwiti** case (supra) as follows: "*Bearing in mind the nature of the competing claims against the background of the public*

cause, we have focused our perception on the public interest and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance ; and the court by their established attribute of line – drawing must ever have an interest in contributing to the safeguarding of such resources ... These principles dictate that our conscientious sense of proportions stands not in favour of allowing the conduct of fresh elections for Meru County’s gubernatorial Office during the pending of an appeal . By our cause of responsibility, the court’s contribution to good governance in that contest, takes the form of an expedited hearing for the appeal. Just that.”

23. In the context of the instant application, the principle of good governance dictates that the application be allowed pending the hearing and determination of the petition. It will be at the hearing of the petition that the respondents will have the opportunity to ventilate their case touching on the issues raised in their detailed submissions. Whether the petition succeeds or fails will be determined by the court hearing the petition.

Conclusion

24. Having stated the above, I now make the following orders:-

*1. That pending the hearing and determination of the petition herein, there be and is hereby issued a temporary order of prohibition against the 1st ,2nd , 3rd and 4th respondents, their agents representatives and or any other Police officer involved in the investigations against the petitioner touching on land title registration under **Bustotso/Shikoti/1329** prohibiting them jointly and severally from arresting prosecuting, detaining or preparing any criminal charges against the petitioner.*

2. That the petitioner shall within thirty (30) days from the date of this ruling , set down the petition for giving of directions in default the petition shall be deemed as abandoned and shall accordingly, be dismissed for want of prosecution.

3. The cost of the application shall be in the cause.

Ruling delivered and signed in open court at Kakamega this 16th day of April, 2018

RUTH N. SITATI

JUDGE

In the presence of:

.....Mr. Shifwoka holding brief for Mr. Shivega.....for Petitioner

.....Mr. Ngetich (present)...for all the respondents.... for 1st – 5th Respondent

.....Polycap Mukabwa..... Court Assistant