



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.594 OF 2014**

**BETWEEN**

**ALFRED KIMATHI MEME.....PETITIONER**

**AND**

**INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup> RESPONDENT**

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

**SAICOM LIMITED.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. In his Petition filed on 3<sup>rd</sup> December 2014, Alfred Kimathi Meme states that he was previously an agent of Capital Housing Co-operative Ltd, for purposes of getting a tenant for the latter’s property known as Githaku House situated along River Road, Nairobi. That his Petition relates to attempts by the police to arrest and charge him in Court on allegations made to them by the 3<sup>rd</sup> Respondent regarding a certain payment made by the latter as good will for renting the said premises which transaction later aborted.

2. The Petitioner therefore seeks the following orders;

*a) The Honourable Court do issue a declaration that the intended arrest and prosecution of the Petitioner by the Respondents, acting jointly and severally and in concert, in regard to civil debt owed to the 3<sup>rd</sup> Respondent is unconstitutional and unlawful and an abuse of the process of Court.*

*b) The Honourable Court do [issue] an order prohibiting the Respondents, or any of them, from investigating arresting, prosecuting and or in any other manner harassing the Petitioner in regard to the civil debt owed to the 3<sup>rd</sup> Respondent.*

*c) Costs of this Petition.*

**Petitioner’s case**

3. It is the Petitioner's case that in July 2014 his company, Lead Marketing Concepts Ltd, was contracted by Capital Housing Co-operative Society Ltd to be the sole letting agent for Githaku House. In August 2014, the 3<sup>rd</sup> Respondent expressed interest in taking up space in the said building and it was eventually agreed that he would pay a deposit of Kshs.5 Million as part of an agreed sum of Kshs.7 Million being good will. The remaining Kshs.2 Million was to be paid later.

4. According to the Petitioner, the 3<sup>rd</sup> Respondent was also to pay three months' rent in advance plus a rent deposit equivalent to three months' rent. That the 3<sup>rd</sup> Respondent paid the agreed deposit but did not meet all the other initial terms of their agreement and therefore no lease agreement could be prepared. The transaction subsequently collapsed and the 3<sup>rd</sup> Respondent demanded a refund of his monies.

5. It is the Petitioner's further case that he got his principal, Capital Housing, to refund Kshs.2.6 Million but allegedly in collusion with police officers at Kamukunji Police Station, the 3<sup>rd</sup> Respondent has had him summoned to the said Station on more than ten occasions in a bid to coerce him to pay whatever monies the 3<sup>rd</sup> Respondent was demanding.

6. It is his submission that relying on the case of **Njuguna S. Ndung'u v Ethics and Anti-Corruption Commission and 3 Others [2014] eKLR**, where criminal proceedings are used to force a party to submit to a civil claim, then that is tantamount to abusing the criminal justice system.

7. Further, that following **Kuria and 3 Others v AG [2002] 2 KLR 69**, the Courts should not allow the criminal justice system to settle personal feuds and vendetta and that the purpose of a criminal justice investigation should not be the advancement of or frustration of purely civil claims – see also **R v Chief Magistrate's Court at Mombasa Ex Parte Ganjee and Anor [2002] 2 KLR 703**.

8. For the above reasons, the Petitioner prays that the Petition be allowed.

### **The 3<sup>rd</sup> Respondents' case**

9. The 3<sup>rd</sup> Respondent states that the Petition is devoid of merit and is an attempt at injuncting independent bodies and offices from executing their constitutional mandates which power this Court lacks.

10. Further, that the Petitioner executed a scheme to obtain money from the 3<sup>rd</sup> Respondent by false pretences when all along he knew that he had no intention of executing any lease agreement.

11. Regarding alleged violation of fundamental rights and freedoms, the 3<sup>rd</sup> Respondent's submission is that our criminal justice system is designed to ensure their protection at all times and stages and that the Petitioner therefore has nothing to fear in that regard. In any event, while **Articles 10, 24, 25, 47 and 50** of the **Constitution** have been invoked, the Petitioner has failed to show how the rights enshrined therein have been violated by any of the Respondents.

12. Relying on the decisions in **G.N.M. alias G.K. v D.R.K. [2012] eKLR**, it is the 3<sup>rd</sup> Respondent's case that unless it can be shown that the criminal process is being used unfairly, vexatiously, oppressively or in bad faith, it must be allowed to run its full course. Further, that the issue is one of clear fraud, including the Petitioner issuing a cheque that bounced and that to grant his prayer to stop the investigation of such a matter would be greatly prejudicial to the integrity of the criminal justice system.

13. For the above reason, the 3<sup>rd</sup> Respondent prays that the Petition be struck out with costs to it. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, from the record filed no responses to the Petition.

### **Determination**

14. From the prayers in the Petition, which I have reproduced above, it is the Petitioner's chief prayer that

this Court ought to stop the investigations against him as well as his intended arrest and prosecution. Whereas his advocate in submissions has stated that ***“the actions of the Respondents, jointly and severally, thereafter to violate the rights of the Petitioner to dignity, freedom and security of the person and the right to fair administrative action”***, how those rights are actually threatened with violation, I do not know. It bears only repeating that in our realm, it is not enough to allege violation or threats thereto without at the very least showing how the said violations or threats actually happened – See ***Annarita Karimi Njeru v Republic (1976-1980) 1 KLR 14*** and ***Trusted Society of Human Rights v Mumo Matemu and Another Petition No. 279 of 2012***.

15. That being the case, I will only address the question whether the criminal justice system in the present case has been used to settle what is otherwise a civil debt.

16. In that context, I must begin by noting that save for the fact that the Petitioner may have attended Kamukunji Police Station on a number of occasions, there being no response to the Petition by the Inspector General of Police and the Director of Public Prosecutions, there is absolutely no evidence before me that a decision has been made to arrest and charge the Petitioner. That fact alone would have sounded a death knell to the Petition if looked at in the context of my finding above that there is also no evidence whatsoever that any of his rights are under threat of violation.

17. That fact notwithstanding, it is the law that the fact that a dispute appears civil in nature is no bar at all to the institution of criminal investigations and if need be, prosecution of a suspect on the same facts. That is why **Section 193A** of the **Criminal Procedure Code** provides as follows:

***“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.”***

18. The reasoning in **G.N.M. (supra)** is also sound as the Court on the same point stated thus:

***“The principle of general application which appear to emerge from the cases is that the Court will stop criminal process which is being used unfairly, vexatiously, oppressively and in bad faith for ulterior purposes so as to amount to an abuse of the Court process. So that if a criminal prosecution is shown to be instituted unfairly, oppressively and for ulterior purposes, or in bad faith, it would be an abuse of the Court process and liable to be prevented whether the accused is a party to a civil dispute, a witness in any Court proceeding or otherwise: the criminal prosecution must be shown to be mala fides.”***

19. Where then is the evidence that the criminal system is being used unfairly, vexatiously, oppressively or *mala fides* in the present circumstances? In fact save for the fact that the 3<sup>rd</sup> Respondent’s representative made a criminal complaint against the Petitioner and that he was summoned severally to Kamukunji Police Station, there is no other action on record that the Respondents took.

20. Suppose in fact the police determine that there is no evidence to charge the Petitioner (I note that the initial complaint was made on 27<sup>th</sup> October 2014, more than 2 years ago). What purpose would any order of this Court, at this stage of the criminal process serve?

21. More fundamentally, under **Section 24** of the **National Police Service Act, No.11A of 2012**, some of the functions of the Police are the **“investigation of crimes”** and **“apprehension of offenders”**. The DPP on the other hand is by dint of **Article 157(6)** of the **Constitution** is obligated to institute criminal proceedings against any suspect. What wrong has any of those offices committed in the present case? Where is the evidence of *mala fides*? In fact in the case of the DPP, there is absolutely no evidence that his office is even aware of any complaint against the Petitioner.

22. This Court, it must be noted, cannot interfere in the mandates of independent criminal justice offices under the Constitution unless it can be shown that they have acted afoul of **Article 157(11)** of the **Constitution** (in the case of the DPP). See – **DPP v Kathenge [2016] eKLR**. I see no such action

presently and therefore the Petition is both premature and misguided. It must fail.

**Disposition**

23. The Petition before me is without merit and is dismissed. As to costs, let each Party bear its own costs.

24. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2017**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2017**

**E. CHACHA MWITA**

**JUDGE**