



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CONSTITUTIONAL PETITION NO.14 OF 2015**

**BETWEEN**

**GEOFREY MUHUZANI ANYIRA .....PETITIONER**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

**Introduction**

1. Through his Constitutional petition dated 27<sup>th</sup> February 2015, the petitioner seeks orders:-

a) THAT this Court declares that the continued threats of arrest and prosecution of the petitioner in relation to the succession causes pending before Court and the intended fresh prosecution of the petitioner with regard to the charges withdrawn in Kakamega CMCC No.1086 of 2014 is a violation of the petitioner's fundamental rights and freedoms guaranteed under the Constitution.

b) THAT this Court declares that the intended arrest and prosecution of the Petitioner in relation to the charges withdrawn under Section 87(a) of the Criminal procedure Code is an abuse of the Court process.

c) THAT this Court declares that the searches made in the petitioners home at or any other time of the day without a search warrant or a warrant of arrest are illegal and a violation of the petitioners fundamental rights and freedoms.

d) THAT this Court issues an order restraining the respondents by themselves, agents and/or subordinates working under them from arresting, charging prosecuting, threatening the petitioner and his family.

e) THAT this Court awards general damages for breach/or infringement of fundamental rights and freedoms.

f) THAT the respondents be condemned to pay costs of this petition.

g) Any other relief this Honourable Court deems just and fit to so grant.

### **PETITIONERS CASE**

2. The petitioner's petition is supported by his own affidavit sworn on 27/02/2015 wherein he reiterates what is contained in his petition. Briefly, the petitioner states that after his case was withdrawn under Section 87(a) of the Criminal Procedure Code being Kakamega Cr. C.No.1086 of 2014 by the Senior Assistant Director of Public Prosecutions he was arrested and re-arrested over ten (10) times, taken to the CID offices at Kakamega where he was compelled to give his specimen signature and handwriting without his consent.

3. According to the petitioner, his numerous arrests and re-arrests was contrary to the provisions of Article 50(2) (1)) of the Constitution thereby breaching his fundamental rights and freedoms. He claims that his home was searched without any search warrant and his school at Ikumba Friends Secondary school where he works as Principal, was also searched and this subjected him to mental torture and anguish and has caused him to suffer public ridicule.

4. The Petitioner also states that CID officers have incessantly called him to appear at their offices for purposes of being charged afresh with the offences relating to the estate of his late mother and more particularly the changes which were withdrawn. He further explains that his letters written through his advocates JAMSUMBAH & Co. ADVOCATES to the Senior Assistant Director of Public Prosecution at Kakamega and copied to the DCIO Kakamega seeking to know the additional evidence so far gathered against him have gone unanswered, an omission which he says is contrary to Articles 35 and 47 and to the Constitutional principles as enunciated under Article 232 of the Constitution. He adds that the 1<sup>st</sup> respondent intends to exercise its powers under the Constitution without regard to the principles enunciated under the Constitution and the provisions under Article 157 (11) of the Constitution. He has listed the number of cases filed in this Court being Succession cause No. 917 of 2013, Succession cause no.28 of 2014, Succession cause no.731 of 2007 both of which are in respect of the estate of DORCAS OMENA BINAYO (deceased). There is also Succession Cause No.731 of 2007. In the matter of ESTHER TAM BINAYO (deceased) respectively. He has also explained the origin of the complaint in Cr. Case no.1086 of 2014.

5. He adds that the intended arrest against him and any subsequent prosecution is meant to vex him so that he may give up pursuing the various succession causes that are pending before this honourable Court, especially so because one Esnas Kyungu Mutie who is involved in all these succession causes has never complained against him. He prays for the orders.

### **Respondents Case**

6. The petition is opposed. All the three respondents filed their responses. The 1<sup>st</sup> respondent filed their replying affidavit on the 4<sup>th</sup> March 2015 while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have filed grounds of opposition dated 10<sup>th</sup> March 2015. The 1<sup>st</sup> respondent's affidavit has been sworn by CHARLES MWAZO MWAIZINGA a Superintendent of Police and currently the DCIO sub County Kakamega County.

7. Briefly he depones that he is in charge of the investigations involving the petitioner herein. He depones that the petitioner made a complaint on 9<sup>th</sup> September 2013 claiming that his aunt ESNAS KYUNGU MUTIE had produced a WILL that was forged. He adds that he received directions and advice from the Senior Assistant Director of Public prosecutions Kakamega directing him to arrest and charge the petitioner for the offence of making a false document, uttering a false document and intermeddling with the deceased's properties. He explains that before the instructions were received from the Senior Assistant Director of Public prosecution the petitioner had been charged vide Kakamega CMCR. Case no.1086 of 2014, which case was withdrawn under Section 87(a) of the CPC pending further investigations into the matter.

8. The deponent states that investigations were carried out as ordered and the Director of Public Prosecutions directed that the petitioner be charged afresh which decision he says was within the provisions of Article 157 of the Constitution of Kenya 2010 hence no abuse of Legal process. The 1<sup>st</sup> Respondent claims that their efforts to apprehend the petitioner have been futile as the petitioner has gone underground and cannot be traced. He 1<sup>st</sup> respondent adds that he registered a charge sheet in Kakamega Chief magistrate's Court being criminal case number 781 of 2015 and summons have been issued to petitioner to plead to the charge whereafter he (petitioner) will be provided with witness statements and exhibits to enable him prepare for his defence.

9. Finally, Mr. Mwaizinga depones that withdrawal of Kakamega CM CR.C No.1086 of 2014 is not a bar to any subsequent arrest and prosecution which is contemplated by law and does not of itself constitute a violation of the petitioner's fundamental rights and freedoms nor does it amount to abuse of Court process. He maintains that the petition lacks merit and is an abuse of Court process and therefore ought to be dismissed.

### **Grounds of Opposition**

10. The grounds of opposition set out by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are as follows:-

1. There is no threat to constitutional violation of fundamental rights and freedoms of the petitioner/applicant by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents:
2. The claim of threat of violation of fundamental rights and freedoms of petitioner does not meet the constitutional threshold.
3. The petition/application is frivolous and an example abuse of the Court process. (sic)
4. The petitioner/applicant has not satisfied the requirement for grant of conservatory orders.
5. The petitioner/applicant has not demonstrated how the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is a threat to his fundamental rights and freedoms under the Constitution.
6. The petition is against the mandate of the 1<sup>st</sup> respondent under Article 157 of the Constitution.
7. The application/petition has been overtaken by events as the petitioner has already been charged at the Kakamega Chief Magistrate Court being Kakamega Criminal Case no.781 of 2015.
8. The withdrawal of the criminal case against the petitioner/applicant under Section 87 (a) [of the CPC] is not a bar to further arrest and prosecution of the applicant/petitioner.

### **Submissions**

11. The Petition was canvassed by way of written submissions which the parties highlighted at length. In his submissions the petitioner has singled out the following: that when the charges in criminal case no.1086/14 were withdrawn under Section 87(a) he opposed the said withdrawal through his advocates and pointed out they were willing to accommodate the prosecution to do further investigations during the pendency of the said case. He has details of the threats of harassment and arrest he has received from the State and also brought out the differences in the charge sheets in criminal case 1086 of 2014 and criminal case 781 of 2015. He claims that refusal and/or ignoring to respond to the letter seeking new evidence from the D.P.P and the Police infringes on his rights as enshrined under Articles 35 and Article 50 (2) a,b,c and j.

12. The petitioner also submits that the arbitrary searches of his house and place of work without warrant as admitted by the DCIO also infringed his rights. He claims that the actions by the respondents have been actuated by malice and explains the same. He further submits that in as much as Section 87 (a) of

the Criminal Procedure Code permits the office of Director of Public Prosecutions to re-arrest and charge an accused person against whom charges have been withdrawn that must not be done capriciously and must avoid abuse of the legal process.

13. The 1<sup>st</sup> respondent also notes that Section 87(a) of the CPC allows the withdrawal of charges at any time before an accused person is called upon to make his defence and further that the withdrawal under the said Section if allowed by the Court does not act as a bar for subsequent proceedings on account of the same facts.

14. He further submits that Article 157 (8) of the Constitution empowers the Director of Public Prosecutions to discontinue a prosecution but the discontinuation must be approved by the Court and since the Court allowed the application for withdrawal this Court should not revisit the issue unless it is satisfied that the application for withdrawal was erroneously made.

15. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have submitted on three issues:-

a) Whether the continued threats of arrest and prosecution of the petitioner and the intended fresh prosecution of the petition with regard to charges withdrawn in Kakamega CMCCR 1086 of 2014 is a violation of the petitioner's right. On this issue, they maintain that the petitioner's fundamental rights and freedoms have not been infringed and that the withdrawal of a case under Section 87 (a) of the CPC is not a bar to fresh charges. They further submit that the decision to institute criminal proceedings by the Director of Public Prosecutions is discretionary and is not subject to the consent of any person or authority, and shall not be under the direction or control by any authority as stipulated under Article 157 (10) of the Constitution and as replicated under Section 6 of the Office of the Director of Public Prosecutions Act no.2 of 2013. They argue that the petitioner has failed to prove that the intended criminal proceedings have been instituted for purposes other than the honest enforcement of the criminal law and that the petitioner can raise his issues at the trial Court which is the proper Court to verify his allegations and the criminal trial will provide him with the platform to ventilate his issues.

b) On whether the intended arrest and prosecution of the petitioner with the charges similar to those withdrawn under Section 87(a) of the Criminal Procedure Code is an abuse of the Court process, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents submit that it is not an abuse of the Court process but is well within the Constitutional mandate of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

c) On whether the searches made at the petitioner's home were illegal and a violation of the petitioner's rights and freedoms under the Constitution, they submit the petitioner has not demonstrated with precision on how the searches conducted by the 2<sup>nd</sup> respondent violated his fundamental rights and freedoms under the Constitution. All the respondent's pray that the petition herein be dismissed.

### **Determination**

16. The petitioner brings his petition under various provisions of the Constitution, the Criminal Procedure Code Sections 87 (a) and 193 (a) and the Rules of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. The main issues surround Articles 157 (10), (11) 35, 50, 232 of the Constitution and Section 87(a) of the Criminal Procedure Code.

17. As this is a petition alleging violation of Constitutional rights, it is incumbent on the petitioner in order to succeed to demonstrate with a reasonable degree of precision the provisions of the Constitution which have been violated with regard to him and the manner of such violation. See the decisions in **ANARITA KARIMI NJERU (1976 – 80) 1 KLR 1272** and **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE –VS- ATTORNEY GENERAL & OTHERS HIGH COURT PETITION NO.229 OF 2012.**

18. From the respective pleadings and submissions of the parties to this petition, this Court takes the view that in order to succeed, the petitioner must demonstrate a violation of his rights under Article 35 (1), 50 (2), 157 (10), (11), and 232 of the Constitution. Article 35 (1) (a) gives every citizen as of right, access to information held by the State or by another person and required for the exercise or protection of any right or fundamental freedom. The petitioner claims to have written a letter to the DPP seeking information on new evidence which would lead to his arrest and prosecution. The said letter was not replied to and reasons as to why the addressee did not respond were not given an action which the petitioner claims has violated his rights and freedoms. The respondents maintain that the petitioner will be provided with witness statements and exhibits once he pleads to the charge and it is premature for him to demand evidence from the Police before he pleads to the charge.

19. On the other hand, Article 157 (10) of the Constitution gives the DPP authority to commence criminal proceedings against anybody and in exercising such authority the DPP shall not be under the direction or control of any person or authority. The 1<sup>st</sup> respondent herein did advise the 2<sup>nd</sup> and 3<sup>rd</sup> respondents even after withdrawing Kakamega CM Cr.Case No.1086 of 2014 under Section 87(a) of the Criminal Procedure Code which was against the petitioner to go ahead and charge the petitioner afresh.

20. Acting upon such advice, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have preferred fresh charges against the petitioner being criminal case number 781 of 2015. Petitioner has submitted that because of the fresh charges against him as aforesaid his rights under Article 50 (2) (i) were also violated as the respondents have not provided him with the new evidence they intend to use to prosecute him. The answer to this complaint can be found in the case of **DENNIS EDMOND APAA and OTHERS –VS- ETHICS and ANTI CORRUPTION COMMISSION NAIROBI PETITION NO.317 OF 2012 [2012] e KLR** which dealt with the issue of disclosure of documents under paragraph 26 of the judgment, the Court stated the following:- “The words of Article 50 (2) (j) that guarantee the right “to be informed in advance” cannot be read restrictively to mean in advance of the trial. The duty imposed on the Court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights that constitute the right to a fair trial. Article 50 (2) (c) guarantees the accused right to have adequate facilities to prepare a defence [27]. This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pretrial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence.....the obligation to disclose was a continuing one and was to be updated when additional information was received.” I am in full agreement with the above observations.

21. From the above and from the pleadings and submissions by the parties herein it is clear to this Court that the petitioner is yet to take plea which means there is no trial in Court yet, only that the charge sheet has been prepared and statements of witnesses have also been prepared.

22. The Director of Public Prosecutions and the Police are therefore not prevented from continuing investigations or even receiving new evidence once the accused has been charged and/or in the course of trial. The duty of the prosecutor is to bring the new information and evidence to the attention of the accused and for the Court to give the accused the opportunity to interrogate the evidence and adequate time to prepare for his defence.

23. Having said the above, I note that the Constitution does not set out the consequences of the discontinuance or withdrawal of a case under Section 87 (a) of the CPC. Article 157 (6) of the Constitution thrusts upon the DPP the responsibility to withdraw any criminal case subject to the permission of the Court see Article 157 (7) and (8) of the Constitution which provides that the Director of Public Prosecution may not discontinue a prosecution without the permission of the Court. Section 87 (a) of the CPC gives the trial Court broad discretion to accept or reject an application for withdrawal of charges presented by the prosecutor. In light of Article 157 (11) of the Constitution such discretion has to be exercised judiciously taking into account the facts of each case and in particular whether the application is brought in the public interest, the interest of the administration of justice and the need to prevent and avoid an abuse of legal process.

24. In the petitioner's case, the prosecution gave reasons for desiring to withdraw Kakamega CM Cr. Case No. 1086 of 2014 under Section 87 (a) of the CPC. It is my considered view that withdrawal of a case under Section 87 (a) of the CPC is not an abuse of the Court process when reasons are given for that withdrawal. It also means that a petitioner can be re-arrested and charged afresh if new evidence is found to support the intended fresh charge. That seems to be the position in this case.

25. Since there are fresh charges against the petitioner, the petitioner is bound to take plea and thereafter receive the documents and evidence he may require to prepare his defence as provided by law. This is the reason why the DCIO and the Police are searching for him in his house and at his work place. The searches are not illegal for the reason that plea has to be taken to start the process as provided for under Article 50 of the Constitution.

26. In the circumstance this Court finds no reason to interfere with the discretion of the learned Magistrate in discharging the petitioner under Section 87 (a) of the CPC. It is clear that the petitioner has been charged afresh on principally the same facts which eventuality is contemplated by the law and does not of itself constitute a violation of the petitioner's fundamental rights and freedoms in light of the circumstances of this case.

27. For the above reasons the petition is dismissed with no orders as to costs.

Ruling delivered, dated and signed in open Court at Kakamega this 17<sup>th</sup> day of March 2016.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Jamsumbah (present) For Petitioner

Mr. Mailanyi (present) For 1<sup>st</sup> Respondent

Mr. Tarus (absent) For 2<sup>nd</sup> and 3<sup>rd</sup> Respondent

Mr. Lagat (present) Court Assistant