REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CONSTITUTIONAL PETITION NO. 34 OF 2016

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: ARTICLES 2, 3, 19, 20,22,23,24,25,28,29,31,49,50 157 AND 165(6) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 25, 49, 50 AND 157 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

LAZARUS MULI MUOKI……PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS….……...……..1ST RESPONDENT

CHIEF MAGISTRATES COURT AT MAKADARA…..…..…….2ND RESPONDENT

ATTORNEY GENERAL……..……...……3RD RESPONDENT

LAZARUS MULI MUOKI…….……..…….……..APPLICAN T

VERSUS

REPUBLIC…….……..RESPONDENT

RULING

The application for determination is a Notice of Motion brought under a Certificate of Urgency dated 2nd February, 2016. It is brought under **Articles 22 and 23 of the Constitution, Rules 13, 19, 23(1)(2) and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms)Practice and Procedure Rules of 2013)** and all other enabling powers and provisions of the Law.

The application was filed simultaneously with a Petition dated 2nd February, 2016 accompanied by an

affidavit in support of the Petition sworn by Lazarus Muli, the Applicant herein, on 2nd February, 2016. The main prayers in the application are that pending the hearing of the Petition, conservatory orders do issue staying the proceedings in **Makadara Criminal Case No. 329 of 2016, Republic vs Lazarus Muli**. A prayer for grant of bail to the Applicant was withdrawn at the hearing of the application as it had been overtaken by events. Consequent thereof, the Applicant prays that the bail granted be extended until the disposal of the Petition.

The main grounds on which the application is premised are that the Respondents are in utter violation of the Applicant's fundamental rights and freedoms enshrined under the Constitution by instituting **Makadara Criminal Case No. 329 of 2016** against him whereas, **Makadara Criminal Case No. 1857 of 2009** in which he was charged jointly with another was withdrawn under **Section 87(a) of the Criminal Procedure Code**. According to the Applicant, the Director of Public Prosecutions (DPP) in instituting **Criminal Case No. 329 of 2016**only reformulated the charges hitherto in **Criminal Case No. 1857 of 2009** by adding a charge of disobedience of lawful court order contrary to **Section 131 of the Penal Code**.

The application was further supported by an affidavit of the Applicant herein sworn on 2nd February, 2016. The gist of the Supporting Affidavit is that the reformulation of the charges in **Criminal Case No. 329 of 2016** is in total disregard of the interest of administration of justice and an abuse of the court process. In the event that the trial proceeded, it would prejudice the Applicant as the same is a nullity in the first instance.

Learned counsel for the Applicant Mr. O'kubasu submitted before the court that the previous case under which the Applicant was charged being, Makadara **Criminal Case No. 1857 of 2009** was withdrawn **under Section 87(a) of the Criminal Procedure Code**. He contended that the order of the magistrate allowing the withdrawal was not written in a prescribed manner. Counsel submitted that the same ought to have been constituted in a ruling. He referred the court to the case of **Peter Njuguna Burugu and 2 others vs Republic [2012]e KLR**. According to the counsel, it was now six years since the case was withdrawn and in instituting fresh charges, the Director of Public Prosecutions (DPP) disrergarded **Article 157 (11)** which provides that in exercising his prosecution powers, he shall have regard to, inter alia, the interests of the administration of justice. In any case, the mere fact that a warrant of arrest had been issued against the Applicant, and the case having been withdrawn, cannot form a basis for the reformulation of the charges. He submitted that in view of the foregoing, the Applicant had established a prima facie case and more importantly, demonstrated that there existed a real danger of abuse of his constitutional rights if conservatory orders are not granted. He referred the court to the case **Centre for Rights Education and Awareness (Creaw) and 7 others vs Attorney General[2011] e KLR).**

Learned state counsel for the 1st and 2nd Respondents opposed the application. She relied on the Grounds of Opposition filed by herself on 4th February, 2016. In brief, while reiterating the same Grounds of Opposition, she submitted that the prayers sought by the Applicant are unconstitutional as they seek to prevent the 1st Respondent from exercising his mandate of prosecution as provided in the Constitution. She submitted that **Criminal Case No. 1857** was withdrawn under **Section 87 (a) of Criminal Procedure Code** because the Applicant had absconded the trial. Under that provision, the state was at liberty to institute fresh investigations and charge the Applicant afresh. Furthermore, the merit of the current charges would be determined at the hearing thereof. In any case, there was no need to grant the conservatory orders as the hearing of the criminal case has been set for July 2016, by which time the Petition will have been disposed of.

I have accordingly considered the application and the respective submissions and I take the following view of the same. The Petitioner herein is a Director representing Eastern and North Eastern Region and the Vice Chair Person of the Music Copyright Society of Kenya (NSCS). Sometime in the year 2009, he was charged in Makadara Criminal Case No. 1857 of 2009 with the offence of stealing by servant contrary to Section 281 of the Penal Code. It was alleged that on diverse dates between 6th September, 2008 and 25th February, 2009 at Timboroa Hotel in Nairobi within Nairobi Area, being a servant to M/s. Eastern Music Association as the Chairman, stole from the said Eastern Music

Association cash Kshs. 77,900/= which came into his possession by virtue of his employment. He took Plea on 4th May, 2009. The trial was to substantially commence on 6th July, 2009. As PW1 took the stand to testify, the prosecution applied to amend the charge sheet with regard to the amount in question which application was allowed by the court. Unfortunately on this date, the Applicant's lawyer was not in court and the trial was adjourned. The next hearing date was set for 12th November, 2009. On this date, the Applicant was present. The prosecution had witnesses but the presiding prosecutor was not ready to proceed as he had not carried with him documentary exhibits. The matter was referred to court 1 for re-allocation. However, the Applicant did not appear before Court No. 1 presided over by the Chief Magistrate. Accordingly a warrant of arrest was issued and a mention fixed for 26th November, 2009. On 26th November, 2009, the file was mentioned before Hon. T. Ngugi. Court record does not indicate that the Applicant was present but the court nevertheless lifted the warrant of arrest and set the matter for further mention on 10th December, 2009. Again on this date, the Applicant was absent and a further mention was set for 21stJanuary, 2010. On this date, the Applicant did not also attend court and the court forfeited his cash bail and set the 29th January, 2010 as a further mention date. On the latter date, the prosecutor applied to withdraw the case under **Section 87(a) of the Criminal Procedure Code** and the court allowed the application. The proceedings of that day are recorded as follows:

> ***"29/01/10***
>
> ***Before Hon. T. Mwangi SRM***
>
> ***C/Prosecutor: IP Wanjohi***
>
> ***Court Clerk, Charity***
>
> ***Accused: under warrant of arrest***
>
> ***Prosecutor: Pray case be withdrawn under 87(a) CPC***
>
> ***Court: Case withdrawn under Section 87(a) CPC***
>
> ***Hon. D. Kinaro***
>
> ***SRM"***

It is the withdrawal of the criminal case that has prompted two arguments from the Applicant. One, that the withdrawal order was not in a prescribed manner. That is to say that it was not titled and did not contain the issues for determination and the analysis outlining how the court arrived at the verdict. Two, that the withdrawal was a culmination of the Applicant's non-attendance for the trial. It is the basis on which count II in the current criminal case was drafted. According to the Applicant, the case having been withdrawn under Section 87(a), the second count in the current charges being a charge of disobedience of a lawful court order contrary to **Section 131 of the Penal Code** is a nullity, an infringement of the Applicants constitutional right and an abuse of the court process. Flowing from the above, it is now the onus of the court to determine whether the conservatory orders sought are merited.

In the case of **Centre for Rights Education and Awareness (Creaw) and 7 others vs Attorney General [2011] e KLR, t**he then D. Musinga, J delivered himself thus:

> ***"….a party seeking a conservatory orders only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants a conservatory order there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."***

In the present case then, I grapple with two questions; One, does the Applicant have a prima facie case with a likelihood of success in the Petition? and, two, does he stand to suffer prejudice as result of the

alleged violation or any threatened violation of his constitutional rights if conservatory orders are not granted?

Under the first head, the Applicant contends that the initial case was withdrawn under **Section 87(a)** only to reemerge with re-formulated charges bearing an additional count. The latter are constituted in **Makadara Case No. 329 of 2016** which according to him comprises the reformulated charge sheet. I take the view that the charge under **Criminal Case No. 1857 of 2016** having been withdrawn under **Section 87(a)** does not, of itself, constitute a bar to the DPP instituting fresh and similar charges as had been withdrawn. Be that as it may, the omission or commission of acts leading to the withdrawal of the case cannot constitute an offence but can be relied on as a factor necessitating reinstitution of the charges. As such, I think that count II as drafted in **Criminal Case No. 329 of 2016** ought not to have comprised an offence charged. It follows then that if the Applicant were allowed to proceed with the trial, he will definitely be prejudiced and embarrassed to stand a trail for an offence which, in the first instance, ought not to have been filed.

This court re-affirms and recognizes the powers of the DPP under **Article 157 (6) of the Constitution** to institute and undertake criminal proceedings against any person before any court other than a Court Martial, to take over and continue any criminal proceedings commenced in any court other than the Court Martial and subject to **Sub-Articles (7) (8)** to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by him. But that is not to say that a party aggrieved by the exercise of the powers of the DPP provided therein cannot question the manner in which the DPP is exercising those powers. Hence, DPP cannot be allowed by the court to abuse his powers against the citizens in whose constitutional authority vests. The citizens have a right of questioning and challenging the manner in which the DPP is applying the powers conferred on him by the Constitution. That is why under **Sub-Article (11) of Article 157,** the Constitution provides that in exercising the powers conferred on the DPP by **Article 157**, the DPP must have regard to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process. Needless to say then, the overarching objective in the administration of justice is to administer justice to all and to do it faithfully governed by the rule of law in an impartial manner. This court cannot then pull aside and watch illegal charges being instituted against the Applicant. While an argument may be advanced that the DPP would be compelled to withdraw the second count, the fact is, if the trial commenced, it would definitely prejudice and embarrass the Applicant, as in the first instance he ought not to have been charged with the 2nd count. Effectively, it is the view of this court that the Applicant has demonstrated that he has a prima facie case with a possibility to succeed.

The other issue is that the order of the withdrawal of the **Criminal Case No. 1857 of 2009** under **Section 87(a) of Criminal Procedure Code** was not in a prescribed manner. In this case, the court was referred to the case of **Peter Njuguna Burugu and 2 others vs Republic [2012] @KLR**. In that case, was an application for revision pursuant to **Sections 362 and 364 of Criminal Procedure Code**. The Applicant one, Francis Mutuku Mutungi was challenging the withdrawal of the case under Section 87(a) of Criminal Procedure Code and the request before the Court was that the court directs that the matter proceeds from where it had reached since the withdrawal of the case was not based on evidence. The order given by the trial magistrate, it was requested, be substituted with an order that the charges facing the Applicant be dismissed and therefore acquit him. The court was then obligated to look into whether the trial magistrate properly directed her mind to the provisions of **Section 87(a) of the Criminal Procedure Code** in allowing the withdrawal of the case and the High Court so properly held that she had properly interpreted the law. It is not thus correct to say, as submitted by counsel for Applicant that the court addressed itself on how a ruling on a withdrawal of a case under Section 87(a) should be formatted. Be that as it may, I have not come across any law providing that a ruling under **Section 87(a) of Criminal Procedure Code** ought to have been in a prescribed manner. All that this court is required to address itself to is whether the court properly withdrew the case under **Section 87(a)**. However, that is not challenged by the Applicant herein. **Section 87 (a)** vested in the Public Prosecutor on instructions of the Attorney General or the DPP under the old Constitution the discretion to apply for withdrawal of a case under **Section 87(a)**. The court on such an application allows the same in a written form. A look at the proceedings in **Criminal Case No. 1857 of 2009** clearly shows that the trial magistrate recorded that the case had been withdrawn under Section 87(a). Therefore, *prima facie*, the argument advanced by the Applicant cannot be a basis against

which the Petition is premised to succeed.

On the second criteria, which is, what are the major violations of the Constitution complained of by the Applicant? My view is that this could be answered simply by addressing the issue of whether or not, if conservatory orders are not granted the Applicant will be occasioned an injustice. I need not belabor repeating the fact that the circumstances leading to the withdrawal of **Criminal Case No. 1857 of 2009** cannot constitute an offence. But it is important to emphasize that once the warrant was issued, the onus of executing it lay with the police. There is nowhere in the proceedings shown that the Applicant was confronted by the police and resisted arrest. For any purpose, the persons who ought to be answering a charge or offering an explanation for not arresting the Applicant are the Police themselves. Needless then to say is that if the charges as drafted in **Criminal Case No. 329 of 2016** were to commence, would amount to utter violation of the Applicant's constitutional right to a fair trial as he will be charged with an offence he never committed.

The upshot of the above observations is that, it is safe to conclude that if conservatory orders are not granted, the Petition would be rendered nugatory. Accordingly, the application before me must succeed with the following orders.

a. Conservatory orders be and are hereby issued staying proceedings in **Makadara Criminal Case No. 329 of 2016, Republic vs Razarus Muli**, until the hearing and disposal of the pending Petition.
b. Bail/bond granted to the Applicant by the magistrate in **Makadara Criminal Case No. 329 of 2016** is hereby extended until the disposal of the Petition.
c. The Petition dated 2nd February 2016 shall be heard on a priority basis and the same must be fixed for hearing and heard not later than within a period of three months from the date of the delivery of this ruling failing which the conservatory orders shall lapse.
d. The parties herein are directed to fix a date for hearing of the Petition within the next two weeks from the date of this ruling.
e. I give no orders of cost to this application.

It is so ordered.

DATED and **DELIVERED** this 15th day of March**, 2016**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. O'Kubasu for the Applicant.

2. Miss Nyauncho for the Respondents.