



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 374 OF 2014

DAVID RATIK OLE KAYUNA1ST PETITIONER

MOSEKA OLE POTOT2ND PETITIONER

DAVID LEBOO OLE KILUSU3RD PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioners filed the present petition under certificate of urgency on 27th July 2014 seeking the following orders:

a) For judicial review and order prohibiting the respondent from arresting and charging the petitioners or any one of them.

b) For judicial review and order of mandamus compelling the 2nd respondent to forthwith surrender back to the petitioners their national identity cards

c) Any other of further orders as may seem meet to the honourable court.

d) Costs

2. In an application for conservatory orders filed simultaneously with the petition, the petitioners sought orders that

2. That the Honourable court be pleased to stay any other or further proceedings or actions against the petitioner by the respondents pending the hearing and determination of this application.

3. That the Honourable court be pleased to stay any further proceedings and charges as against the petitioner pending the hearing and determination of the petitioner herein.

4. That pending the hearing and determination of this application inter parties a conservatory order do issue restraining the respondents whatever by themselves their agents, officers or employees from interfering with the petitioners business in any manner whatsoever from arresting or preferring charges against the petitioners or any one of them.

5. That pending hearing and determination of this petition a conservatory order do issue restraining the respondents whatever by themselves their agents, officers or employees from interfering with the petitioners business in any manner whatsoever from arresting or preferring charges against the petitioners or any one of them.

3. When the matter came up before the Court, interim orders were issued restraining the arrest of the petitioners in connection with a complaint made by one Samuel Saris, and the Court directed that the said Mr. Saris be served with the petition. Thereafter, the petitioners indicated that they were involved in negotiations with the respondents with regard to the issues in dispute. No settlement was reached, however, and the parties opted to rely on their respective written submissions on the issues in dispute.

4. In his affidavit in support of the petitioner dated 25th July 2015, Mr. Paul Ole Kayuna, the 1st petitioner, avers that he and his co-petitioners are shareholders and directors in a company known as Okapi Estates Limited. He claims that on 22nd July 2014, at about 4.30 p.m. they held a business meeting at the Panari Sky Centre, Mombasa Road, Nairobi. As they were concluding the meeting at about 5.30 p.m. and were leaving the Panari Sky Centre premises, they were accosted by 3 people, led by one Ngetich, who informed them that they were police officers from the Criminal Investigations Department (Flying Squad Unit) Nairobi Area Police Headquarters.

5. The petitioners allege that they were taken to the Flying Squad Offices at Nairobi Area Police Headquarters. They contend that in the car that ferried them to the police station was a Samuel Saiyanka Saris, a civil servant who works with the National Intelligence Service, who is well known to them as he hails from their rural place.

6. Mr. Ole Kayuna avers that Mr. Saris had in or about December 2013, expressed an interest in joining their company, Okapi Estate Limited as a shareholder and director with a view to benefitting from a transaction that was impending between the company and other business associates. He had allegedly nominated one Alex Kamuyee as his nominee in the company, and was required to pay the sum of Ksh275,000/- for the shares to be allotted to him by the company. He did not, however, raise the amount.

7. The petitioners allege that they were kept under arrest at the Flying Squad offices up to about 10.20 p.m. They contend that they were not informed of the offence or offences they were charged with, save for various verbal allegations by the officers who had arrested them to the effect that they had fraudulently sold some unidentified land and received Ksh56,000,000 from Faulu Kenya Bank.

8. The petitioners claim that the officers demanded Ksh6,000,000 from them to pre-empt their being charged in court. They allege that they told the officers that they did not have the amount, but that they would look for it and deliver it to the officers if released. They contend that they were then released from custody but were compelled to leave their identity cards with the officers in order to ensure that they returned to deliver the said amount of Kshs6,000,000/-

9. It is the petitioners' case that they were never told who had lodged the allegation against them and in respect of what offence; that their identity cards were still being held by the police; that they believe that the police were acting at the behest of Samuel Saiyanka Saris who was unhappy for having been left out of their company; and that the police were being used to extort money from them.

10. The petitioners allege that they are legitimate business people; that they neither owe the police or the said Samuel Saiyanka Saris any money; that their intended arrest and criminal prosecution will be

actuated by malice or ulterior purpose, are calculated to extort money from them, as well as to embarrass and humiliate them. They also allege that they are in danger of being denied a fair hearing in breach of their fundamental rights enshrined in the Constitution.

11. In their written submissions, the petitioners begin by challenging the participation of the Attorney General in the petition. They contend that though the participation of the AG is justified on the basis that there was interference with the file of Okapi Estates Limited in the Companies Registry, a complaint should have been lodged with the Director of Public Prosecutions (DPP) for investigation.

12. On their substantive claim, the petitioners submit that it is undisputed that they had been arrested, that their national identity cards were taken away and were only returned on the orders of the court; that the respondents have failed to demonstrate what offences they were investigating and no documents were produced to document the arrest of the petitioners by the respondents. It is their submission that the 1st respondents was engaged in extorting money from the petitioners and has therefore abused his powers. They ask the court to grant prayer 1 in their petition.

13. The respondents have filed an affidavit in reply sworn on 31st July 2014 by Mr. Patrick Kathuni, a Police Officer with the National Police Service attached to the Directorate of Criminal Investigations at the Nairobi Area County Criminal Investigations Headquarters. Mr. Kathuni states that he is one of the investigating officers in an inquiry involving Okapi Estates Limited.

14. Mr Kathuni avers that investigations into this matter commenced on or around the 21st day of July 2011 following information from an informer that the company directors had been fraudulently altered in the records held by the Registrar General of Companies. He states further that the real directors and shareholders of the company had been fraudulently changed by the petitioners together with other persons under investigation after which the petitioners and a third party used a title to land belonging to the said company as collateral to secure a loan with Jamii Bora Bank Limited in Nairobi.

15. The respondents aver that the real directors were at all material times unaware of the fraudulent change of directors and the fact that land belonging to the company had been used as security to secure a loan; and that the petitioners were to get a share of the proceeds of the loan disbursed by Jamii Bora Bank Limited.

16. The respondents aver that investigations commenced and the petitioners were traced at Panari Hotel on 22nd July 2014 where Mr. Kathuni and a Corporal Emmanuel Ngetich proceeded and requested the petitioners to accompany them to Nairobi Area for interrogation.

17. The respondents state that the petitioners were not arrested; that they were questioned on their dealings and relationship with Okapi Estates Limited and the land which had been used as collateral for the loan from Jamii Bora; that they promised to bring all the documents pertaining to Okapi Estate Limited, the land in question and the loan secured using the said land as collateral, on Monday 28th July 2014. They were also requested to leave behind their national identity cards for further investigations and verification, which they were to collect on Monday 28th July 2014.

18. The respondents deny that any bribe was ever demanded from the petitioners; that the petitioners have raised the issue of a bribe to mislead the Court on the true facts of the case under investigations and paint a bad picture of the investigators who were discharging their mandate under the relevant enabling legislation.

19. It is the respondents' deposition that investigations are ongoing to establish the authenticity of the information received by the Directorate of Criminal Investigations with regard to the fraudulent dealings with Okapi Estate Limited. It is their submission therefore that the petition has been filed in bad faith, is misconceived, an abuse of the court process and meant to defeat the cause of justice.

20. The respondents further argue that the petitioners have not demonstrated that in undertaking

investigations into the information received by the National Police Service, either the DPP or any member of staff of the Office of the DPP or the National Police Service acted without or in excess of the powers conferred upon them by the law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe constitutional or legislative provisions with respect to their mandate. They pray that the petition be dismissed with costs.

21. In the submissions dated 2nd March 2015, the DPP terms the petition as devoid of merit and an abuse of the court process. While reiterating the factual situation set out above as it emerges from the affidavit of Mr. Kathuni, the DPP submits that orders of prohibition as sought by the petitioners cannot issue unless the acts complained of are tainted with illegality, irrationality or procedural improprieties, which is not the case with regard to the respondents' actions against the petitioners. The DPP relies on the decision of the **Court in High Court Misc. Civil Application No. 179 of 2012 - R vs Chief Magistrate, Milimani and 2 Others ex p. Tusker Mattress Ltd and 3 Others** and **Kenya National Exam Council v Republic ex p. Geoffrey Gathenji Njoroge & Others Nairobi Civil Appeal No. 266 of 1996 (Unreported)** with respect to the circumstances under which an order of prohibition may issue. The DPP urges the court to dismiss the petition, noting that the petitioner had not shown that any of their constitutional rights had been violated, and that in any event, Article 24 of the Constitution provides for the limitation of certain rights in certain circumstances.

22. In his submissions dated 21st November 2014, the AG submits that the petition does not raise any constitutional issues, is based on generalities and speculation, seeks to control or frustrate the police from conducting their constitutional mandate, and with the exception of the prayer for costs, all the other prayers sought in the petition are spent. The AG reiterates the constitutional and statutory powers of the DPP, and observes that even where there is a civil suit ongoing, nothing prevents the pursuit of criminal proceedings. The AG cites in this regard the provisions of section 193A of the Criminal Procedure Code.

23. The AG further observes that the petitioners have not lodged a complaint with regard to the alleged demand for a bribe either with the National Police Service or the Ethics and Anti-Corruption Commission. It is his case that the petitioners have not met the standard for constitutional petitions set in **Civil Appeal No. 290 of 2012 - Mumo Matemu –vs- Trusted Society of Human Rights and Others**. The AG agrees with the DPP that the petition should be dismissed with costs.

24. I have considered the respective pleadings of the parties, as well as their submissions in this matter. As will be noted from the Court record, the petitioners' identity cards, which were alleged to have been unlawfully retained by the respondents, were made available to them by the respondents early on in the proceedings. Indeed, the position of the respondents is that the petitioners' documents had been retained for the purposes of verification in connection with investigations that the respondents were carrying out.

25. Which then leaves the core issue as whether there was a violation or threat of violation of the petitioners' rights. In their submissions which I have set out above, the petitioners appear to want to shift the burden in this matter to the respondents: they submit that the respondents have failed to demonstrate the offence that they were investigating, or to produce any record regarding the petitioners' arrest. They are also unhappy with the participation of the AG in these proceedings.

26. It must be acknowledged that aside from the identity cards which the respondents conceded had been surrendered to the police, and which the petitioners were requested to collect from the respondents very early in these proceedings, nothing has been placed before the court to support the allegations of violation of rights.

27. Indeed, the petitioners, once they obtained interim orders restraining their arrest, seem to have had great difficulty proceeding with the petition. They have not, in prosecuting their petition, particularly in the written submissions filed on their behalf, made any attempt to demonstrate which of their rights have been violated, or how such violation has occurred, and neither can this Court discern it either from their pleadings and submissions.

28. It appears, and in this I must agree with the respondents, that this petition was filed primarily to derail

the ongoing investigations of the petitioners. It appears from the pleadings that even the allegation of extortion and a demand for a bribe may have been intended solely to show the police in a bad light. Certainly, the manner in which the petitioners proceeded with the petition demonstrates a singular lack of interest in prosecuting it.

29. This Court takes the view that while it has a duty to protect persons whose rights may be violated or threatened by wrongful acts of state agents, the work of the investigative and prosecutorial organs of the state should not be frustrated by individuals who want to use the court process to hide behind and conceal their acts from scrutiny by the authorities.

30. I find no merit in the present petition, and it is hereby dismissed. The respondents are at liberty to proceed with their investigations in respect of the alleged fraudulent acts of the petitioners.

31. With regard to costs, which are in the Court's discretion, it is my view that this petition was totally without merit and was an abuse of the court process. Consequently, I direct that the petitioners shall bear the respondents' costs.

Dated, Delivered and Signed at Nairobi this 27th day of May 2015.

MUMBI NGUGI

JUDGE

Mr. Oloo holding brief for Mr Owala instructed by the firm of Aloo H. E. & Associates Advocates for the petitioner

Ms. Spira instructed by the Director of Public Prosecution for the 1st respondent

Mr. Moimbo instructed by the State Law Office for the 2nd respondent