



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

**PETITION NO 148 OF 2015**

**MOLYN CREDIT LIMITED .....1<sup>ST</sup> PETITIONER**

**MOSES N. ANYANGU..... 2<sup>ND</sup> PETITIONER**

**LYDIA N ANAYANGU..... 3<sup>RD</sup> PETITIONER**

**VERSUS**

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

**POLICE OFFICER, ADAN HASSAN CID HQS ..... 2<sup>ND</sup> RESPONDENT**

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

**DIRECTOR OF PUBLIC PROSECUTION ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. In their petition dated 20<sup>th</sup> April 2015 and supported by the affidavit of the 2<sup>nd</sup> petitioner, the petitioners seek the following orders:

***a) A declaration that the respondents have breached the petitioner's fundamental rights and freedoms.***

***b) Permanent injunction be issued restraining the respondents whether by themselves, servants and/ or their agents or whomsoever is acting on their behalf from arresting, harassing, charging or in any manner compelling the petitioners to settle a disputed civil debt to the office of the president arising from loan advances the 1st petitioner gave out to staff at the office of the president.***

***c) General damages of Kshs50,000,000/- as a result of the harassment and intimidations.***

***d) Any other or further order this Honourable court may deem fit to grant in the circumstances.***

*e) Cost of the suit.*

2. The respondents oppose the petition. The 3<sup>rd</sup> respondent has filed grounds of opposition dated 6<sup>th</sup> May 2015 while the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents have filed an affidavit in reply sworn by No. 51713 CPL Joseph Ngila Ndambuki on 28<sup>th</sup> April 2015. All the parties filed written submissions which they highlighted at the hearing of this matter.

**The Petitioners' Case**

3. The basic premise behind the petitioners' case is that the dispute the subject of this petition is a civil dispute. Consequently, they should not be subjected to the criminal justice system as to do so is a violation of their rights under the Constitution.
4. In his affidavit in support of the petition, the 2<sup>nd</sup> petitioner, who describes himself as the Finance Director of the 1<sup>st</sup> petitioner deposes that the 1<sup>st</sup> petitioner, a micro finance institution which lends money to the public, thrives on goodwill, trust, positive publicity and honesty, and any connection with any criminal activity, however remote, will occasion untold suffering to it.
5. He avers further that the 1<sup>st</sup> petitioner has lent out various amounts of monies to civil servants in partnership with line ministries or departments. In the course of these transactions, it had an understanding with the office of the President under which employees of the office of the President, specifically the Provincial Administration Police and Kenya Police would apply for loan facilities. The 2<sup>nd</sup> petitioner avers that these loans were sourced from the "1<sup>st</sup> Defendant" and the "1<sup>st</sup> Defendant" would then advance the loans to the applicants. It is not clear to whom the term "1<sup>st</sup> defendant" refers to, though it may be assumed from the context that the 2<sup>nd</sup> petitioner is erroneously referring to the 1<sup>st</sup> petitioner as the 1<sup>st</sup> defendant.
6. It is further deposed on behalf of the petitioners that the Office of the President and its line ministries would deduct and recover the relevant monthly repayments from the relevant employees and remit to the 1<sup>st</sup> petitioner.
7. According to the petitioners, whereas deductions from borrowers were supposed to be remitted promptly, there were often delays on the part of the Office of the President and line ministries in making the remissions, and at times no remissions were made. On many occasions, the office of the President and line ministries delayed in remission of the dues, or did not remit at all. At other times, it took as many as 10 months for the recoveries to reach the 1<sup>st</sup> petitioner's account; at other times remittances would be made to its bank accounts but send the by product or list of recoveries to the petitioner at a later date to enable the 1<sup>st</sup> petitioner update the accounts of individual borrowers. The petitioners further aver that where the amounts recovered were delayed or not remitted at all, the terms of the loans were that such outstanding amounts would continue to accrue interest at the contractual rates.
8. The petitioners allege that the basis of this petition is that sometime in 2007, it had advanced loan facilities to (persons) under the office of the President. It avers that this was a normal ordinary business which "has been in existence from 2009 to date".
9. The 2<sup>nd</sup> petitioner avers that around 2010, and after various attempts to have regular recoveries and repayments, the 1<sup>st</sup> petitioner wrote a complaint letter on 12<sup>th</sup> May 2010 to the Permanent Secretary, Office of the President, raising the issue of less recoveries, failure to recover from the borrowers' accounts and non-remittance to the 1<sup>st</sup> petitioner. It is further deposed that it did not receive a response to the letter of complaint. On 3<sup>rd</sup> November 2010, the 1<sup>st</sup> petitioner wrote to the then Commissioner of Police complaining that the loan installments repayments were not being properly captured and gave a list of borrowers whose repayments were drastically reduced

from the contracted amounts.

10. The petitioners aver that the 1<sup>st</sup> petitioner made its own inquiries and established that some of the borrowers had borrowed monies from other financial institutions, thus affecting the recoveries from their monthly salaries. However, the Office of the President did not inform the 1<sup>st</sup> petitioner the cause of reduced recoveries and late repayments, and the amounts underpaid and/or unpaid continued to accrue interest in terms of the contract. The petitioners allege that the amount outstanding is Kshs4,095,906, and that they have availed to the office of the President the list of employees who were in default.
11. The petitioners allege that while the 1<sup>st</sup> petitioner did not get a response from the office of the President even though it kept pursuing its claim, it was surprised when, around 29<sup>th</sup> November 2011, instead of receiving the outstanding payments, it received a letter from the office of the President which alleged that the 1<sup>st</sup> petitioner had been overpaid in the sum of Kshs2810,551/-. It responded to this claim, which it terms ridiculous, untrue and unfounded, by its letter dated 5<sup>th</sup> December 2011.
12. It is further averred that on 5<sup>th</sup> January 2012, the office of the President wrote to the 1<sup>st</sup> petitioner indicating that the amount overpaid was Ksh3,157,676/-. It did not give any explanation for the change in the amount. The petitioners allege that the 1<sup>st</sup> petitioner then wrote to the office of the President on 20<sup>th</sup> January 2012 explaining that it was owed money. However, instead of the office of the President settling the amount it owed, it wrote yet another letter to the 1<sup>st</sup> petitioner on 18<sup>th</sup> October 2012 demanding another revised figure without any reason. A series of correspondence, according to the petitioners, then ensued, with no resolution.
13. The petitioners allege that the 1<sup>st</sup> petitioner requested the office of the President to cooperate and allow for reconciliation of accounts to ascertain who owes the other, but all efforts to reconcile the amounts have not been fruitful. The petitioners allege that the staff of the office of the President have always taken a defensive approach to the matter and in an effort to harass and intimidate the petitioners have occasionally summoned the petitioners to Criminal Investigations Department (CID) Headquarters to discuss the matter.
14. The petitioners further allege that on 18<sup>th</sup> October 2012, the Office of the President, in a brazen attempt to intimidate them, threatened that it may terminate further remittances of staff loans to the petitioners unless the petitioners succumbed to their unjust demand, despite the fact that the office of the President has a contractual obligation to remit staff loan deduction to the petitioners. The petitioners therefore allege that their attempted prosecution is geared towards achieving this end. They further allege that the respondents have hatched a plan to stage manage a charge of a criminal nature so that the petitioners can forego their claim and pay an amount of money whose basis is unexplained.
15. They thus allege a violation of their right to equal protection of the law and allege that the 2<sup>nd</sup> respondent had summoned them on 17<sup>th</sup> April 2015 to appear before him on Saturday 18<sup>th</sup> April 2015 with the intention of detaining them over the weekend in order to exert pressure on them to drop their claim.
16. The petitioners aver that they have been threatened with arrest and incarceration if they do not pay the amount demanded to the office of the President. They allege violation of their right to protection of the law under Article 27. They also allege that the 2<sup>nd</sup> respondent is abusing his powers and authority over the petitioners.
17. In their submissions which were highlighted by their Learned Counsel, Mr. Ilako, the petitioners maintain that the dispute between them and the office of the President arises out of a contractual agreement between the office of the President and the petitioners to provide loans to staff.

Counsel reiterated the averments in the affidavit in support of the petition and the contention that the petitioners' rights under Article 27 were threatened, and that the petitioners were being threatened with incarceration for a civil debt that they do not owe. Mr. Ilako further submitted that the office of the President was not going after the Provincial Administration, which he alleged was double standards. He conceded that there were no pending civil proceedings between the parties.

### **The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondent's Case**

18. The office of the Director of Public Prosecutions (DPP), in opposing the petition, relied on the affidavit in opposition sworn by Cpl. Ndambuki and submissions dated 22<sup>nd</sup> June 2015.
19. In the said affidavit, Cpl. Ndambuki, an investigating officer attached to the CID Headquarters, Nairobi, avers that a complaint was made on 21<sup>st</sup> March 2013 by the Principal Secretary in the Ministry of Provincial Administration and Internal Security. The complaint was to the effect that in the period between December 2009 and May 2011, the 1<sup>st</sup> petitioner had been receiving irregular payments (overpayments) of approximately Kshs3,184,774.50 in excess of the sums due. The complaint was made pursuant to an internal audit undertaken in respect of payments made to the 1<sup>st</sup> petitioner.
20. Cpl Ndambuki makes further averments in respect of the audit, inter alia that it revealed that the 1<sup>st</sup> petitioner granted credit/loans to officers attached to the Ministry; that the agreed mode of payment was by way of monthly instalments deducted from salaries of officers who had taken the loans from the 1<sup>st</sup> petitioner; that the sums due to the 1<sup>st</sup> petitioner were at all times paid out without fail, and in the event of a delay in payment, the amounts were at all times credited to the 1<sup>st</sup> petitioner's bank, namely NIC Bank. The information disclosed further that payment vouchers prepared for remittance of monthly payroll deduction were in amounts more than the amounts actually deducted; and it was established that approximately Kshs3,184,776.50 was erroneously and fraudulently remitted to the 1<sup>st</sup> petitioner company.
21. Cpl Ndambuki avers further that efforts to obtain an explanation from the 1<sup>st</sup> petitioner with regard to the circumstances under which the overpayments were made were unsuccessful hence the matter being referred to the CID to institute independent investigations.
22. According to Cpl. Ndambuki, investigations revealed, among other things, that the 1<sup>st</sup> petitioner is a micro-finance firm that grants loans to, among others, members of staff of the Ministry of Provincial Administration and Internal Security on the basis of agreements entered into between the 1<sup>st</sup> petitioner and the staff members; that the Ministry deducts the agreed sums from the officers and remits the amount to the 1<sup>st</sup> petitioner; and that in this respect the Ministry generates a payroll deductions posting list called an IPPD which shows the amounts payable to respective financial institutions.
23. The respondents aver that a perusal of the posting list for the period December 2009 – May 2011 indicated, in respect of the 1<sup>st</sup> petitioner, deductions in excess of the amounts due to it. The said amounts had been received by the 1<sup>st</sup> petitioner and were reflected in its account with NIC bank.
24. The respondents aver that despite communication between the complainant ministry and the 2<sup>nd</sup> and 3<sup>rd</sup> petitioner on behalf of the 1<sup>st</sup> petitioner in respect of the irregular payments made to the 1<sup>st</sup> petitioner by the complainant ministry, attempts by the Ministry to resolve the matter with the petitioners were unsuccessful as the petitioners alleged that the overpayments were in respect of monies previously owed by the Ministry.
25. The respondents maintain that investigations entailed requesting the attendance of the petitioners to the Criminal Investigations Department to enable the investigating officer conclusively finalize

the investigations. They deny that they have harassed or threatened the petitioners in any way.

26. CPL Ndambuki further avers that his investigations also revealed that the documents attached to the voucher payments processed to authenticate the overpayment to the 1<sup>st</sup> petitioner by a Mr. John Muchiri, an officer in the complainant Ministry, were missing. As a result, and taking into account the conduct of the petitioners with respect to the overpayment, an allusion could be made that there were elements of the criminal offence of conspiracy to defraud contrary to section 317 of the Penal Code, the offence with respect to which the said John Muchiri was charged in court on 21<sup>st</sup> April 2015.
27. In her submissions on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, Ms. Kithikii observed that while the petitioners had alleged violation of their rights under Articles 19, 20, 23, 27, 29 and 47 of the Constitution, they had failed to demonstrate with particularity how the rights have been infringed and the damage suffered, and had therefore not met the test established in the case of **Anarita Karimi Njeru vs R (1976-80) 1 KLR 1272**. The petitioners also had the burden, in accordance with sections 107 and 109 of the Evidence Act, to prove their allegations, a burden that they had not met.
28. It was also the respondents' submission that the rights in the Constitution are not unlimited and can be limited as provided under Article 24. According to the respondents, the facts set out in the respondents' affidavit in reply, while having elements of a civil claim, also alluded to the commission of a criminal offence under the Penal Code. Ms. Kithikii relied on the provisions of section 193A of the Criminal Procedure Code to submit that there was no bar to criminal and civil proceedings on the same subject matter. In the respondent's view, the petitioners had brought their defence before this Court, and this Court was not a trial court and its role was not to analyse the sufficiency of the evidence or the merits or demerits of the facts, but to consider and determine whether there have been constitutional violations. The respondents prayed that the petition be dismissed, noting that they had acted within the confines of the law.

### **The 3<sup>rd</sup> Respondent's Case**

29. Mr Kamunya presented the case for the Attorney General (AG). He relied on the grounds of opposition dated 6<sup>th</sup> May 2015 and the written submissions dated 8<sup>th</sup> June 2015 as well as the list of authorities.
30. In the grounds of opposition, the 3<sup>rd</sup> respondent argues that the petition offends the provisions of Article 236 of the Constitution, and that the petitioners have misinterpreted or misapplied the provisions of Articles 22(1) and 23(1) of the constitution.
31. The AG opposes the petition further on the grounds that the petition is an attempt to use the Court to unreasonably and unjustifiably interfere with the mandate of the DPP conferred under Article 157 of the Constitution.
32. The AG further argues that the arrest or prosecution of a person with respect to the commission of an offence is part of the criminal justice system and is therefore lawful. He agrees with the DPP that no clear breach of the petitioners' fundamental rights and freedoms have been made out, and that the petitioner has failed to cite with precision the provisions of the Constitution allegedly contravened, nor have they provided particulars of their complaints or the manner in which their rights have been infringed.

### **Determination**

33. Having considered the pleadings of the parties and their respective submissions in this matter, I believe that one issue arises for determination. This is whether the petitioners have demonstrated a violation or threat of violation of any of their rights under Article 19, 20, 23, 27, 29 and 47 of the

Constitution.

34. Articles 19, 20 and 23 contain general provisions with respect to the Bill of Rights, and the application thereof. At Article 23, the Constitution sets out the powers of the Court and the reliefs that it can grant when determining a petition brought under Article 22 where a party alleges violation of the fundamental rights and freedoms guaranteed under the Bill of Rights.

35. Article 27 of the Constitution contains the non-discrimination provisions of the Constitution which, so far as is relevant for present purposes, are as follows:

**27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**(2)....**

**(3) ....**

**(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth**

36. Article 29 guarantees to all freedom and security of the person in the following terms:

**29. Every person has the right to freedom and security of the person, which includes the right not to be—**

**(a) deprived of freedom arbitrarily or without just cause;**

**(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;**

**(c) subjected to any form of violence from either public or private sources;**

**(d) subjected to torture in any manner, whether physical or psychological;**

**(e) subjected to corporal punishment; or**

**(f) treated or punished in a cruel, inhuman or degrading manner.**

37. Finally, Article 47 guarantees fair administrative action to all by providing as follows:

**47.(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

38. With respect to the burden imposed on a person who alleges violation of constitutional rights and lodges a petition for redress under Article 22, I need not repeat the well-worn dicta in **Anarita Karimi Njeru vs Republic (supra)**, and its further exposition in the case of **Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012**.

39. The question in this petition is whether the petitioners have set out, with a reasonable degree of precision, and demonstrated, the manner in which the respondents have violated their rights under

Articles 27 and 47 of the Constitution.

40. From the evidence before me, the petitioners have not been arrested, nor have they been prosecuted. They have, however, been summoned to the Criminal Investigations Department in connection with the overpayment to them of sums of money in respect of deductions towards repayment of loans which the 1<sup>st</sup> petitioner had advanced to members of staff at the Office of the President. The petitioners are aggrieved by the summons. They did not heed the summons, and instead filed the present petition. They allege that the dispute between them and the office of the President is civil in nature, and that they are owed certain monies by the Office of the President. There is no civil claim pending between them and the Office of the President.
41. From the averments by Cpl Ndambuki in opposition to the petition, it appears that there may have been a criminal offence committed, the offence of conspiracy to defraud contrary to section 317 of the Penal Code. An officer from the office of the President, Mr. John Muchiri, according to Cpl. Ndambuki, was charged with the offence on 21<sup>st</sup> April 2015.
42. The question is whether summoning the directors of the 1<sup>st</sup> petitioner, the 2<sup>nd</sup> and 3<sup>rd</sup> petitioner, in connection with the alleged overpayment, which suggests to the respondents a conspiracy to defraud, amounts to a violation of their rights under Articles 27, 29 and 47.
43. The petitioners have relied on various authorities in support of their case, among them the decisions in **Isaac Ngugi vs Nairobi Hospital & 3 Others Petition No 407 of 2012**, **Rose Wangui Mambo and Others vs Limuru Country Club Petition No. 160 of 2013 [2014] eKLR** and **Rosemary Wanja Mwangiru & 2 Others vs AG High Court Misc. Case No. 165 of 2011**. I agree with the general exposition of the law in these decisions. That the personal liberty of an individual should be safeguarded, as Majanja J held in the case of **Isaac Ngugi vs Nairobi Hospital** (supra), which involved the detention of a patient in hospital; and that the Constitution has both vertical and horizontal application and applies to both public and private entities as held in the case of **Rose Wangui Mambo** (supra) cannot be disputed.
44. However, to require that a party or parties in the position of the petitioners heeds summons from the bodies constitutionally mandated to investigate whether or not offences have been committed does not, in my view, amount to a violation of either Article 27, 29 or 47 of the Constitution.
45. As I held in the case of **Peter Nyaki Njagi vs Officer Commanding Station (OCS) Kasarani Police Station & Others High Court Petition No. 169 of 2012**:

*[12] “...an investigation into the alleged commission of an offence does not amount to violation of a constitutional right. Indeed, neither does arrest and prosecution, for these are all part of the criminal justice system which is sanctioned by the Constitution.”*

46. I am also persuaded by the words of Nyamu J (as he then was) in **Francis Mburu Mungai vs the Director of CID and Another High Court Misc App. No 615 of 2005** where he observed as follows:

*“In this case it is alleged that the criminal process is being used in a manner that is civil but it is clear to the court that investigations have not been finalised and any alleged abuse at this stage appears to the court to be speculative. Under our Constitution pre-hearing investigations cannot be unconstitutional unless they purport to obtain evidence in an unlawful manner or they infringe on the rule against self-incrimination or violate the right of silence or because of the manner they have been conducted they seriously erode the presumption of innocence if and when the suspect is charged.”*

47. The petitioners have gone to a great deal of detail, both in their pleadings and submissions, with

respect to the facts and circumstances leading to the present petition. I have set out some of the averments by both parties earlier in the judgment. I must observe, however, that it is not the role of this Court to delve into the facts to determine whether the respondents are justified in asking the petitioners to appear before the police with respect to the investigations. As observed in the **Francis Mburu Mungai** case cited above, the conduct of investigations is not unconstitutional, unless such investigations purport to obtain evidence in an unlawful manner.

48. Once the investigations are done and a decision is made, should it be that the decision is to charge the petitioners, it is again not the role of this Court to delve into an analysis of the facts to establish its sufficiency or otherwise. Once the Director of Public Prosecutions has properly exercised his mandate under Article 157, it is the trial court which enters into an analysis of the evidence before it and determines whether the evidence discloses the commission of an offence.

49. The words of Warsame J (as he then was) in **Michael Monari & Another vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011** succinctly set out the position in our jurisdiction on this point:

*"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."*

50. Finally, the petitioners have argued at length and sought to show that the dispute between them and the Office of the President is civil in nature. Perhaps. However, it was recognised that facts that form the basis of a civil dispute may also give rise to criminal liability. For this reason, section 193A of the Criminal Procedure Code was enacted, and it 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."*

51. In the circumstances, I am unable to find that the petitioners have made out a case of violation or threat of violation of their rights under the Constitution. What they seem intent on doing, by seeking not to appear before the investigators of the matters at issue, and to obtain orders restraining their being summoned, is to pre-empt such investigations, which in my view is not a proper use of the powers of this Court in exercise of its constitutional jurisdiction.

52. I therefore find no merit in the petition, and it is hereby dismissed with costs.

**Dated Delivered and Signed at Nairobi this 13<sup>th</sup> day of November 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr. Ilako instructed by the firm of Koceyo & Co. Advocate for the petitioner.**

**Mr. Kithiki instructed by the Director of Public Prosecution Office for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondent.**

**Mr. Kemunya instructed by the State Law Office for the 3<sup>rd</sup> respondent.**