



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
PETITION NO. 3 OF 2014

GEORGE GACHIMU GACHIHI & 4 OTHERS.....PETITIONERS

VERSUS

CABINET SECRETARY MINISTRY OF LAND, HOUSING

& URBAN DEVELOPMENT & 2 OTHERSRESPONDENTS

J U D G M E N T

1). The petitioners herein prays for the following reliefs:

1. **The honourable court be pleased to issue conservatory order directed to the 1st and 2nd respondents restraining them from interdicting the applicants from their current positions and place of work pending the hearing and determination of the Kisumu Chief Magistrate Court Criminal Case. No. 2 of 2004.**
2. **The honourable court do issue a declaration that the intended interdiction before the hearing and determination of Kisumu Chief Magistrate Court Criminal Case No. 2 of 2004 is a violation of the petitioners constitutional rights.**
3. **The respondent do pay the costs of this petition.**

2). From the evidence on record the applicants were and are still civil servants. They were suspected of various felonies and charged in court vide Kisumu Chief Magistrate Criminal Case No. 2 of 2004. While the criminal process was pending the Kisumu DCIO wrote to the Chief Registrar a letter dated 28-1-2014 notifying him of the criminal matter in court and consequently advising him to take the necessary administrative action. The said letter has provoked this petition.

3). Fundamentally it is the applicants' opinion that if the respondents take the precipitate action of interdiction then they would have breached Articles 50 and 25 (c) of the Constitution which guarantees the petitioners' right. They argue that it would be tantamount to prosecuting them before they are heard which runs contrary to Article 47 of the Constitution.

4). On the other hand the respondents through the replying affidavit of one Alice A. Otswala has opposed the application strenuously. They argue that no interdiction letter has been issued by the respondents to warrant this application and in any case the Public Service Commission Regulations states under section 23 that an employee facing such criminal charges ought to be interdicted for purposes of ensuring public interest. If they succeed in the matter facing them then they would proceed to be paid

their withheld half salary.

5). I have perused the application together with the parties submissions as well as the authorities relied upon. What is not in dispute is that all the applicants are public servants. They were charged with the following offences:

1. **Abuse of office contrary to section 101 (10) as read with section 102 of the Penal Code.**
2. **Permitting, falsification of register contrary to section 103 (1) (d) of the Land Register contrary to section 361 of the Penal Code.**
3. **Concealing documents from the register contrary to section 103 (1) (d) of the Land Registration Act No. 3 of 2012 Laws of Kenya.**
4. **Cancellation of the document in the Land Registrar contrary to section 103 (I) (II), of the Land Registration Act No. 3 of 2012 Laws of Kenya.**
5. **Knowingly making a false statement orally or writing in connection with a disposition of other transaction affecting land contrary to section 103 (I) (b) of the Land Registration Act No. 3 of 2012 Laws of Kenya.**
6. **Forging of documents of title to land contrary to section 350 (1) of the Penal Code chapter 63 Laws of Kenya.**
7. **Obtaining money by false pretense contrary to section 313 of the Penal Code law.**

6). What is evidently clear further is that no interdiction has been undertaken by the respondents as expected by the petitioners. However the issue here is whether or not the constitutional rights of the petitioners have been violated. The affidavit of Victor Baraza Wafula say as much. Even before looking at the portion of the constitution that its alleged to have been violated it is worthy to note that Regulation 23 of the Public Service Commission Act states as follows:

“If in any case an authorized officer is satisfied that the public interest requires that a public officer should ceased forthwith to exercise the powers and functions of his public office, he may interdict the public officer from those powers and functions, provided proceedings which may lead to his dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against him”. (underlining mine)

7). What is the purpose of this interdiction? The same was intended to allow the affected office to undertake the proceedings while outside office and to restore public confidence. If for instance an officer is facing criminal proceedings and at the same time holding office, the possibility of a right thinking member of society imagining that he or she may interfere with the proceedings is not far fetched. I think equally this provision is to restore public confidence in the institution as well as the officer especially if he comes out unscathed.

8). In the case at hand there is no evidence that the applicants have been interdicted or the respondents have acted on the letter by the DCIO. Reading through regulation 23 above, it is manifestly clear that the respondents are capable of interdicting any officer *suo moto* and without any prompting from the police or any other quarters.

9). Does this mean that their rights have been violated? In respect to Article 50 of the Constitution of Kenya 2010 (fair hearing) I do not think the applicants have any genuine complaint in respect to it. The respondents have nothing to do with the pending criminal trial but only on the question of interdiction. Interdiction if it is to take place does not necessarily mean that one has to be heard, but it is purely a precautionary measure undertaken by the employer pending the determination of the criminal proceedings or such other disciplinary process.

10). This also applies to Article 25 (c) of the Constitution. The applicants have not complained that they are undergoing an unfair trial. In any case that is not their beef herein. The petitioners have also pleaded Article 47 of the Constitution which states that every person shall have a right to a fair administrative action. It states:

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

expeditious

- 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.**
- 3. Parliament shall enact legislation to give effect to the right in clause (1) and that legislation shall:-**

(a) *Provide for the review of administrative action by a court or if appropriate, an independent and impartial tribunal' and*

(b) *Promote efficient administration”.*

11). Reading wholesomely this Article *viz a viz* the petition herein, I am

unable to find how the petitioners' right have been violated. The suspicion and being arraigned in a court of law is written the provisions of the Constitution. Secondly, they are not complaining that the prosecution process is unfair. The only fear is being interdicted. Article 47 (3) (b) talks of “efficient administration”. By interdicting the applicants, (which is yet to be done anyway) the respondents in no way shall be breaching the Constitutional rights of the petitioners. In any case to restore public confidence and faith and infact to insulate them from being seen in bad light it appears safe that they “step down” and go through the criminal process first. As is the requirement, they shall still be enjoying their half salary, with the assurance of the other half once they succeeded.

12). Without therefore going into the other issues raised I find that this application is premature and in any case I do not find the respondents having violated any constitutional provisions or at all. The application is dismissed with costs.

Dated, signed and delivered at Kisumu this 23rd day of July, 2014.

**H.K.
JUDGE**

CHEMITEI