



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 79 OF 2012

FRANCIS MBUGUA KINYANJUI.....1ST
PETITIONER

VERSUS

THE COMMISISONER OF POLICE.....1ST
RESPONDENT

THE DIRECTOR CRIMINAL INVESTIGATION DEPARTMENT2ND
RESPONDENT

THE HONOURABLE ATTORNEY
GENERAL.....3RD RESPONDENT

AND

ROBINSON MAINA KABUGI.....1ST INTERESTED
PARTY

TRUSTEES OF UMOJA CATHOLIC CHURCH SELF HELP GROUP....2ND INTERESTED
PARTY

JUDGMENT

1. The Petitioner in this case is an Advocate of the High Court of Kenya with over two decades experience. He acted as the advocate for the Vendors in the sale transaction of two parcels of land being **L.R. No. 20728/24** and **L.R. Ndonyo Sabuk/Komarock Block 1/22587** (hereinafter “the land parcels”) in which the 1st and 2nd Interested Parties were the purchasers.

2. The deal for sale of the land parcels turned ‘sour’ and the sale contract could not be completed in both cases as it turned out that the vendors were imposters. The Interested Parties then reported the matter to the CID Headquarters and the Petitioner is aggrieved by the Respondents' intention to arrest him as disclosed to him by unnamed CID officers who have apparently also formed an intention to prosecute him, jointly with the vendors or alone, for the offence of obtaining money by false pretences

in case they failed to get the vendors.

3. In anticipation of his arrest, the Petitioner therefore moved to Court by way of a Petition dated the 13th March, 2012 supported by his own affidavit seeking the following Orders ;

(a) *A declaration that the Applicant's arbitrary deprivation of his freedom without just cause as provided under **Section 29(a)** of the Constitution is likely to be contravened at the instance of the Respondents acting upon a complaint lodged by the Interested Parties concerning to or in relation to an alleged offence of obtaining money by false pretences*

(b) *A declaration that the Commissioner of Police and the Director of Criminal Investigation Department are obliged by law to act lawfully, fairly and reasonably in the exercise of their statutory mandate under the Police Act, Chapter 84 of the Laws of Kenya*

(c) *A declaration that the Respondents are likely to violate the Petitioner's fundamental freedoms by acting on complaints lodged by the Interested Parties touching on theft by servant/agent*

(d) *A declaration that the Respondents are likely to violate the Petitioner's fundamental freedoms by in any way arresting or apprehending the Petitioner for questioning, detention or otherwise on an alleged complaint lodged by the Interested Parties of obtaining money by false pretences.*

(e) *A declaration that the Respondents are likely to violate the Petitioner's rights of freedoms by arriving at a decision that the Interested Parties complaints discloses the offence of obtaining by false pretences ,contrary Section 313 of the Penal Code on the part of Petitioner.*

4. The Petitioner fears that if the reliefs sought above are not granted, he will be compelled to face trial without due process and the requisite protection of the law.

5. He claims that he has co-operated and continues to co-operate with the Police in the investigation of the conduct of the alleged vendors who are said to have been rogue and who have gone 'underground' after receipt of the sale amounts for the land parcels in question.

6. It is the Petitioner's contention that he duly acted diligently and properly so, in his role as the advocate for the vendors in the respective transactions and that the intention of the Respondents to arrest him was an affront on his fundamental rights and freedoms. The Petitioner further contends that the Interested Parties appear well connected with the Police and are bent on having him prosecuted for the alleged offence.

7. It is the Petitioner's case that his fundamental rights as protected under **Articles 22(1)** and **29** of the **Constitution** are under threat of violation for the reasons that the Interested Parties sought his arrest and prosecution without reasonable suspicion and without proper investigation which action would in the ultimate besmirch his name as a suspect. He contends that the Respondents are obliged by law to act fairly and observe the rules of natural justice in exercise of their mandate and maintains that the decision by the Interested Parties to seek his arrest and prosecution without reasonable suspicion and without proper investigation is a subversion of the due process and protection of the law.

8. There is no response to the Petition by the Respondents and the 1st Interested Party but the 2nd Interested Party; *Umoja Catholic Self Help Group* (suing through its trustees) however filed a Replying Affidavit dated 26th June, 2012 sworn by one **Joseph Peter Muranga**, a member of the Groups and it also filed written submissions on 10th October 2012.

9. In its Affidavit, the 2nd Interested Party deponed that the Petition is without merit and should be dismissed. It contends that the Petitioner failed to act with due diligence as a result of which the 2nd Interested Party lost huge sums of money i.e. Kenya Shillings Two Million Four Hundred Thousand (Kshs.2,400,000.00) deposited with the Petitioner's law firm.

10. It was further deponed that the Petitioner failed to discharge his duty of care owed to the Interested Parties and took no tangible steps to mitigate the loss when he was informed of the fraud. It is its case that the loss by the two Interested Parties revealed a pattern that could not be merely coincidental but a planned scheme of fraud in which the Petitioner was an active participant.

11. The 2nd Interested Party further denied the Petitioner's allegations that it had any influence or control over the conduction of the investigations stating that the Police acted independently and argued that the Petitioner was using the court process to shield himself from prosecution and his Petition should be dismissed with costs.

Determination

12. I have taken into account the pleadings and submissions before me. The Petitioner is apprehensive of his arrest and he is asking this Court to give a red light by intervening and interfering with the lawful discharge of the Respondents' duties; to wit, the duty and discretion to investigate crime and prefer charges against suspects. I say so because the Petitioner has not demonstrated the violation or threatened violation of his fundamental rights save for alleging that the Respondents intend to exercise their mandate to arrest him without reasonable suspicion.

13. **Article 157(4) of the Constitution** provides as follows:

“(1)....
(2)....
(3)...

(4) The Director of Public Prosecutions shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.”

14. **Section 14 of the Police Act, Chapter 84 of the Laws of Kenya(now repealed)** gives the functions of the Police Force as being “.. *the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.*”

15. In doing so, needless to say, the relevant officers (both Police and DPP) are bound by constitutional provisions including the values and principles of governance enunciated under **Article 10** of our Constitution. Furthermore, under other provisions of the Constitution, particularly **Articles 49** and **50**, a person arrested and charged is entitled to all the constitutional protections enumerated therein including a fair hearing. These protections are enforceable under **Article 22** and remedies for any breaches are granted by Article 23 thereof.

16. Prosecution of the Petitioner is thus not of itself an unlawful process and cannot be said to be prejudicial to him. The Petitioner is presumed innocent until proved guilty and there are constitutional safeguards underpinned by various statutes which will ensure that the Petitioner is accorded a fair trial. I think it is in public interest and it is an embodiment of the rule of law that those reasonably suspected of having committed an offence be prosecuted. In any case, arrest and prosecution is no guarantee that a person may be convicted and even if convicted, the Petitioner still has a right of appeal. In this case, the Petitioner has the presumption of innocence in his favour and should charges be preferred against him, he has an opportunity to tender evidence, such as is being canvassed herein, before the trial court to absolve himself of the accusations that may be levelled against him.

17. I therefore see no reason as to why anticipated arrest or investigation on suspicion of commission of a crime should raise this court's eyebrows, unless of course it can be demonstrated that any law has been contravened in the process and I have not been shown such evidence in this case.

18. In **Elory Kraneveld v the Attorney General & 2 Others, Nairobi Petition No. 153 of 2012; at**

Para 9, 10 I stated thus;

“Whereas every person has a right to the protection of the Constitution, it is not in all cases that Orders as prayed should be granted. I say so because the Petitioner has conveniently forgotten that the Constitution must be read wholistically for its real meaning and import to be discerned. Our judicial system is not one where a judge is granted such powers as to investigate criminal complaints. That power lies in Article 157(4) of the Constitution...Further, whether or not the investigations leading to the Petitioner’s arrest disclosed an offence is not for this court to determine as I am not seized of the evidence to be presented against him. The Petitioner has literally jumped the gun because he has presented his defence of innocence not before the trial Court but this Court. His actions are premature.” [Emphasis added]. I reiterate those words as applicable to this case.

19. I am also inclined to adopt the sentiments of Majanja J in **Hon. Chirau Ali Mwakwere v Robert M Maberu & 4 others, Nairobi Petition No. 6 of 2012** where the learned Judge observed thus;

“The DPP is constitutionally mandated under Article 157 to order investigations on any information or allegation of criminal conduct and institute criminal proceedings against any person before any court. The office of the DPP is an independent office and this court would not ordinarily interfere in the running of that office and the exercise of its discretion provided it is within the Constitution and the law. The office of DPP is subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution. In the case at hand, a complaint has merely been forwarded by the NCIC, there is no evidence that a decision has been cannot interfere with the ordinary duties of the DPP unless it is shown that there is a breach of the petitioner’s fundamental rights and freedoms or that there is a breach of the Constitution.”

I agree completely with those words and I have nothing useful to add.

20. On the whole, therefore, I find that the Petitioner’s case is weak and without merit. None of the grounds advanced would sway this Court’s mind to allow the reliefs sought. This court will not stand in the way of the normal discharge of functions of other State Organs in the absence of any violations of the Constitution or any other law. This is what the separation of powers calls for. This is what respect for the rule of law demands.

21. This is one Petition that calls for dismissal and it is hereby dismissed.

22. For the avoidance of doubt, the conservatory orders I granted on 14th March, 2012 are hereby discharged.

23. Each Party to bear its own costs.

24. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF JANUARY, 2013

**ISAAC LENAOLA
JUDGE**

In the presence of:
Irene – Court clerk

Mr. Mbugua holding brief for Mr. Nja for Respondent

No appearance for Petitioner

Order

Judgment duly delivered.

ISAAC LENAOLA
JUDGE