



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 35 of 2013

BILL KIPSANG ROTICH PETITIONER

AND

THE INSPECTOR GENERAL

NATIONAL POLICE SERVICEST RESPONDENT

THE DIRECTOR OF

CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The petitioner has moved this court by petition dated 28th January 2013 seeking, inter alia, the following orders;

(a) That the respondent, whether by themselves, or by their servants, agents or any other persons whatsoever be restrained and prohibited by an injunction from summoning or harassing, intimidating, arresting, charging or initiating criminal proceedings or taking any other step infringing on the liberty of the petitioner in relation to matters the subject-matter of the instant petition, to wit an inquiry into the petitioner's alleged forgery of judicial documents;

(b) *An order of prohibition and or injunction restraining the respondents from interfering with the liberties of the petitioner in respect of any and all matters relating to the inquiry into the petitioner's alleged forgery of judicial documents.*

(c) *A declaration that the petitioner's right to fair administrative action under Article 47 of the Constitution of Kenya has been denied, violated and or infringed.*

(d) *An order of prohibition directed at the respondents by themselves or through any police station or police officer serving under the National Police Service or otherwise, from arresting, taking statements, investigating and or interrogating the petitioner in regard all matters related to an inquiry into the petitioner's alleged forgery of judicial documents.*

(e) *Damages for contravention of the fundamental rights and freedoms of the petitioner.*

2. According to the affidavit in support of the petition, the petitioner has been involved in a form of dispute with one Pankaj Somaia concerning the control of Metro Petroleum Limited. It is his case that the said Pankaj has used the police to continuously harass and intimidate him and there are even threats to charge him with criminal offences in order force him to relinquish his claims or interests in the company.

3. At any rate, it is not disputed, that the petitioner filed another ***Nairobi Petition No. 230 of 2012*** in which he sought orders preventing the respondents from initiating Criminal proceedings in matter related to Metro Petroleum Limited. The petition was heard and determined by a judgment delivered on 23rd May 2013. In dismissing the petition, Justice Mumbi Ngugi concluded that, *"The respondents are at liberty to carry out investigations and prosecution as the DPP seems necessary in accordance with this mandate under Article 157 of the Constitution."*

4. The petitioner alleges that Pankaj also sent him abusive texts for which he was charged in ***Milimani Chief Magistrate's Criminal Case No. 30 of 2013*** for *"Sending Abusive Text Message contrary to section 29(A) of The Kenya Information and Communications Act Cap 411A."* The petitioner is a witness in that case which is still pending.

5. The petitioner avers that during the pendency of the criminal case against Pankaj, an officer from CID, Corporal Kitalia started calling the petitioner and requesting him to record statement in relation to what the petitioner stated is an unspecified complaint motivated by Pankaj. He states that he could not get Cpl Kitalia to inform him the nature of the complaint he was investigating.

6. The gravamen of the petition is that the police are being used by Pankaj to persecute him and despite request and demand by his advocate for the police to disclose the nature of the complaint against him the police have declined to do so. The petitioner advocate detailed these complaints in a letter dated 18th January 2013 alleging breaches of **Article 35** and **Article 47** of the Constitution. The letter stated in part that, “*We wish to know the purpose for which the calls are being made by Mr Kitalia to our client, allegedly on instructions from Mr Kariuki. We require an extremely expeditious response to these queries in order to advise our client accordingly and take the necessary steps to bring this matter to a speedy conclusion.*”

7. The respondents opposed the petition on the basis of the replying affidavit of Corporal Kitalia sworn on 23rd May 2013. He deposes that his inquiries were prompted by complaint received by Pankaj that a court order referring to a case filed against him had been forged allegedly by the petitioner. The alleged forgery of pleadings and orders in ***Tononoka Children Case No. 3340 of 2012*** was indeed confirmed by the Magistrate in a letter dated 17th December 2012 to the CID.

8. In all these circumstances, it is the respondent’s case that there was reasonable evidence for investigating the complaint and as a result summons were issued under **section 52** of the ***National Police Service Act*** to the petitioner to attend the CID offices to record a statement in regard to the office of forgery contrary to **section 251** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***.

9. The issue of determination is whether I should intervene in stopping the actions of the respondents on the basis of the facts set out in the petition. The principles upon which the High Court acts in such cases are well known and the spring from the independence of the offices of the Director of Public Prosecutions and Inspector General. Several cases have defined the nature, tenor and scope of the courts responsibility in this respect.

10. The office of the Director of Public Prosecutions established under **Article 157** is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what the constitutional dictates. One such dictate is that in the exercise of their powers, it is to “***have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.***” **Article 244** enjoins the National Police Service to amongst other things “***comply with constitutional standards of human rights and fundamental freedoms.***” As I stated in a similar case in ***Kenya Commercial Bank Ltd and 2 Others v Commissioner of Police and Another, Nairobi Petition No. 218 of 2011 (Unreported)*** “[25] The Office of the director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are 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.”[Emphasis added] (See also ***Koinange v Attorney General and Others*** [2007] 2 EA 256, ***Hon. Chirau Ali Mwakwere v Robert Mabera and Others, Nairobi Petition No. 6 of 2012 (Unreported)***, ***William S. K. Ruto and Another v Attorney General and Another Nairobi HCCC No. 1192 of 2004 (Unreported)*** [2010] eKLR, ***Bryan Yongo v Attorney General Nairobi HCCC No. 61 and 196 of 2006 (Unreported)***, ***Elory Kranveld v Attorney***

General Nairobi Petition No. 153 of 2012 (Unreported).

11. The petitioner complains that he was not furnished with information contrary to **Article 35**. While not commenting on whether **Article 35** applies in these circumstances, I would only state that the summons issued to him was sufficient to notify him of the nature of the inquiry. If any violation was apprehended by the failure to provide information, I hold it has now been cured by the fact that the replying affidavit of Cpl Kitalia sets out the facts and circumstances surrounding the inquiry. The petitioner now has knowledge of the matters at hand to enable him respond to any issues if he wishes.

12. The issue of the petitioner and respondent and any disputes relating to Metro Petroleum Limited were the subject of the judgment by Justice Ngugi in **Petition 230 of 2012**. She considered the effect of the existence of civil claims and or proceedings. It is enough to state that the petition was dismissed and I will go no further.

13. I find and hold that the respondents have satisfied the threshold that there is reasonable evidence upon which an investigation into an alleged forgery of court documents may be continued. Such an investigation may absolve or implicate the petitioner. No decision has been made to charge the petitioner as it is apparent that the investigations are incomplete. The petitioner has not proved that even he is subjected to a trial, such a trial will not meet the constitutional standards set out in **Article 50**.

14. On the whole the petitioner has not demonstrated that there is breach of his fundamental rights and freedoms or that the investigation is an abuse of the process or is instigated by malice, caprice or bad faith. It is time that the respondents were allowed to proceed with their constitutional duties.

15. The petition is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 31st May 2013

D.S. MAJANJA

JUDGE

Ms Kerubo instructed by Ogetto, Otachi and Company Advocates for the petitioner.

Ms Kahoro, Litigation Counsel, instructed by the Directorate of Public Prosecutions for the 1st, 2nd and 3rd respondents.

Mr Kanjama instructed by Muma and Kanjama Advocates for the interested party.