



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MISCELLANEOUS APPLICATION NO 2 OF 2013

PETER NJUGUNA MWANGIPETITIONER

VERSUS

THE WITNESS PROTECTION AGENCYRESPONDENT

JUDGMENT

1. This petition relates to the operation of the Witness Protection Programme and the circumstances under which the court can be called upon to issue a witness protection order in favour of a party. The petitioner, Peter Njuguna Mwangi, asks the Court to grant him such an order under the provisions of section 16(b) of the Witness Protection Act 2006(The Act). The petition was argued before me on 29th May 2013 and judgment reserved for 17th July 2013. The petitioner was in person while the respondent was represented by Mrs. Obuo, Learned State Counsel.

The Petition

2. In his petition dated 3rd January 2013, the petitioner seeks the following orders:
- a. *That this petition be certified as very urgent and the same be heard ex parte in the first instance.*
 - b. *That this honourable court be pleased to grant the petitioner a witness protection order in pursuance and/ or under the provisions of section 16(b) of the Witness Protection Act 2006.*
 - c. *That the respondent be ordered to forthwith prepare and sign a memorandum of understanding with the petitioner which memorandum shall consist aspects of the provision of section 7(2)(a) and (i) of the Witness Protection Act 2006.*
 - d. *That the respondent be ordered to pay all debts the petitioner has incurred while in hiding at Mugumo-ini Bar & Restaurant since the 30th of November 2010 to the 1st of January 2013 and other debts the petitioner has incurred during all that period.*

- e. *That the cost of this petition be borne by the respondent.*
- f. *That the honourable court be pleased to declare that the petitioner is entitled to protection and settling of his lawful obligations.*

The Petitioner's Case

3. The basis of the petitioner's complaint as contained in his affidavit in support of his petition, his further affidavit sworn on 23rd April 2013, and his written submissions dated 10th May 2013 is that the respondent has declined to offer him witness protection and to enter into a Memorandum, of Understanding with him in accordance with the provision of section 7(2)(a)(i) of the Act. He believes that he is entitled to witness protection as he has filed a civil suit in the High Court, **High Court Civil Case No 49 of 2012**, against public officers whom he alleges have used their positions to steal public land. He asserts that as a result of filing the case, he received death threats on 21st November 2010 which forced him to go into hiding and live on credit from 30th November 2010 to the time of filing this petition. He contends that as a result he has incurred a debt of Kshs 428,520 which he seeks to recover from the respondent.
4. The petitioner also submits that he is entitled to protection as he was also a witness in HCCC No. 313 of 2000 in which he gave evidence of the commission of an offence against sections 3, 5 and 58 of the Environmental Management and Coordination Act, 1999
5. The petitioner, who states that he was a former elected councillor in the Limuru Municipal Council, contends that he had reported the alleged irregular and/or unlawful alienation of public utility parcels of land in the former L.R. No 237/10 East of Limuru Town to the Kenya Anti-corruption Commission; that the Commission opened a case file on the matter; that on 21st November 2010, he found a life threatening note with regard to his report to the Anti-Corruption Commission as a result of which he went into hiding; that he reported the alleged threats to his life at Njabini Police Station but no action has ever been taken. It is as a consequence of this that he seeks orders to give him witness protection. He asserts that the respondent is enjoined by Article 27(5) of the Constitution not to discriminate against him and that he is entitled to equal benefit of the law.

The Respondent's Case

6. The respondent opposes the petition and has filed an affidavit in reply sworn by Dennis Emoit on 10th April 2013 and written submissions dated 20th May 2013. Its position on the matter as presented by Mrs. Obuo is that in order to qualify for witness protection, one must be a crucial witness in criminal proceedings as provided under section 3 of the Act. It states that the petitioner is not a witness as there are no criminal proceedings on-going; that the Ethics and Anti-corruption Commission has confirmed in writing that the petitioner has never recorded a statement with it; and that there are no on-going investigations on any matter touching on the petitioner.
7. The respondent also asserts that for one to qualify for placement under the Act, one must be a crucial witness in a criminal prosecution who is at risk. It asserts that its officers have carried out an assessment with regard to the petitioner's claim for protection and found no risk to the petitioner.
8. The respondent also submits that before granting protection, it must be satisfied, as required under the provisions of section 6 of the Act, that there is no other means of protecting the witness, and that witness protection should be the last resort.
9. Finally, the respondent points out that before the High Court grants witness protection under powers vested in it by section 16 of the Act, certain criteria set out in the said section must be satisfied. It submits that such criteria have not been met in the case of the petitioner to merit the

orders that he seeks from the Court.

10. With regard to the petitioner's claim that the respondent should pay the debt that he incurred while he was allegedly in hiding, it is the respondent's contention that it cannot be made to pay the petitioner's debts under Regulation 9 of the Witness Protection Regulations, 2011 as this regulation applies only to witnesses already admitted to the programme. Mrs. Obuo therefore asked the court to dismiss the petition with costs.

Determination

11. This being a constitutional petition, the issue for determination is whether the respondent has violated the petitioner's constitutional rights by declining to place him on the Witness Protection Programme established under the Act.

12. The petitioner claims that the respondent has violated his constitutional rights by refusing to place him on the programme yet he is at risk as a result of having filed a civil case in relation to illegal alienation of public land. To succeed, he must show that he has a right to witness protection; that he has met the criteria set out in the Act, and that the respondent has granted witness protection to others similarly situated but has refused to grant him similar protection.

13. I have considered the petitioner's averments and the documents in support thereof, as well as his submissions in writing and at the hearing of this matter. He alleges that he has filed High Court Civil Case No. 49 of 2012 against public officers whose acts of ***'commission or omission have caused the irregular and/or unlawful alienation of public utility parcels of land in the former LR No 237/10 East of Limuru town.'*** He maintains that he is deserving of placement on the Witness Protection Programme because he is under a threat; that he has recorded a statement with officers of the Anti-corruption Commission over the irregular and unlawful alienation of public utility parcels of land in the former LR No 237/10 East of Limuru Township.

14. He calls in aid an affidavit sworn by one **John Mang'uru Kabiri** on 20th April 2012 to corroborate his averments, to the effect that the petitioner, Mr. Kabiri and another recorded statements with the Kenya Anti-corruption Commission and that the Anti-corruption Commission opened an investigation file No. **4977/2005** on the alleged irregular alienation of land in the former LR No 237/10 East of Limuru Town.

15. According to the petitioner, after he received threats in November 2010, he reported the alleged threats at Njabini Police Station vide OB No 10/21/2010; that he made a request for protection to the respondent on 1st December 2010 and sent a reminder on 10th March 2011.

16. The starting point in a determination of this matter is to consider the provisions of the Witness Protection Act and the circumstances under which the respondent is under a legal obligation to provide witness protection. The second critical point to consider is under what circumstances the court can make a witness protection order under section 16 of the Act.

17. Section 3 of the Act defines a witness as follows:

3. (1) For the purposes of this Act, a witness is a person who needs protection from a threat or risk which exists on account of his being a crucial witness, who -

(a) has given or agreed to give, evidence on behalf of the State in —

(i) proceedings for an offence; or

(ii) hearings or proceedings before an authority which is declared by the Minister by Order published in the Gazette to be an authority to which this paragraph applies;

(b) has given or agreed to give evidence, otherwise than as mentioned in paragraph (a), in relation to the commission or possible commission of an offence against a law of Kenya;

(c) has made a statement to —

(i) the Commissioner of Police or a member of the Police Force; or

(ii) a law enforcement agency, in relation to an offence against a law of Kenya;

(d) is required to give evidence in a prosecution or inquiry held before a court, commission or tribunal outside Kenya -

(i) for the purposes of any treaty or agreement to which Kenya is a party; or

(ii) in circumstances prescribed by regulations made under this Act.

(2) A person shall be a protected person for the purpose of this Act if that person qualifies for protection -

(a) by virtue of being related to a witness; or

(b) on account of a testimony given by a witness; or

(c) for any other reason which the Director may consider sufficient.

18. The respondent has annexed a letter dated 26th March 2013 (DE3) which states that the petitioner never recorded a statement with the Anti-Corruption Commission and there are no investigations pending. In the affidavit of Jacksons Mue annexed to the affidavit of Dennis Eمويت (DE4) sworn on 24th April 2013, the respondents have contended, and this has not been controverted by the petitioner, that there are no criminal proceedings pending. In addition, according to the Risk Assessment Report annexed to the affidavit of Dennis Eمويت, though the petitioner reported the alleged threat to him to the police at Njabini Police Station, he did not go back to record a statement with regard thereto, and so no investigations of the alleged threat were ever undertaken. The petitioner has did not controvert these averments by the respondent.

19. The intent behind witness protection is to offer security to a person who is going to offer evidence in criminal or other proceedings as provided in section 3 above. If there are no pending criminal proceedings or any other proceedings as contemplated under section 3 in respect of which the petitioner's evidence would be required, and the only proceedings are the petitioner's own civil case which he instituted in 2012, it appears to me that there is no merit in the claim that there is a risk that entitles the petitioner to witness protection.

20. I have also considered the petitioner's pleadings in HCCC No. 49 of 2012 in which he seeks orders against several offices, including the Ethics and Anti-corruption Commission, the Municipal Council of Limuru and the Land Control Boards in Kiambu and Limuru. He also seeks witness protection orders in that matter.

21. From his pleadings, the petitioner appears to have gone on a crusade to personally recover public land which he alleges has been irregularly alienated, and for this, he believes that the public should give him protection and meet his expenses. He has deposed at paragraph 12 of his affidavit sworn on 3rd January 2013 as follows:

'THAT I have stuck out my head and neck to protect public utility land and has reason to believe that the same public should provide me with the necessary security and resources to enable me accomplish my mission of being instrumental in the repossession of the public utility lands in the former L.R 237/10 East of Limuru Township.'

22. His personal zeal is doubtless commendable, but it would be to abuse the intention behind the Witness Protection Programme were it to be used as the petitioner contemplates; that an individual would set out on a personal crusade and then demand that the public rewards him for it, without the authorities in whom is vested powers under the Act being satisfied that the requirements of the Act have been met.

23. The discretion to grant witness protection under the Act is vested in the Director of the respondent under section 5 of the Act, while section 6 contains the matters and circumstances under which protection will be granted. These sections provide, in part, as follows:

5. (1) The decision to admit into or exclude any person from the programme, shall be the responsibility of the Director.

(2) A person may be included in the programme only if-

(a) the Director has decided that the witness be so included;

(b) the person agrees to be included; and

(c) a memorandum of understanding in accordance with section 7 is signed by the witness....

(3) Where a person has not been offered protection under the programme, a written request for his inclusion in the programme may be made to the Director by-

(a) the witness;

(b)..... (Emphasis added)

24. Section 5(7) of the Act is instructive:

'The inclusion of a witness or protected person in the programme shall not be treated as a reward or a means of persuading or encouraging the witness to give evidence or to make a statement.'

25. Section 6 of the Act sets out what is required in order for one to be admitted to the programme as a witness meriting protection. It provides as follows:

6. (1) In deciding whether to include a witness in the programme, the Director

shall have regard to-

(a) the seriousness of the offence to which any relevant evidence or statement relates;

(b) the nature and importance of any relevant evidence or statement;

(c) the nature of the perceived danger to the witness;

(d) the nature of the witness's relationship to other witnesses being assessed for inclusion in the programme;

(2) The Director shall not include a witness in the programme if the Director does not, in his opinion, have enough information to assess the matters referred to in this section in relation to the witness.

26. The Act contemplates clearly that the decision whether or not to admit a person to the Witness Protection Programme is at the discretion of the respondent's director. It is not open to a party to institute civil proceedings and then demand inclusion in the programme, regardless of the respondent's assessment of the situation on the basis of the law which I have set out above.

27. From the evidence before me, I can find nothing that would justify the grant of the orders sought by the petitioner. He bases his claim on the fact that he recorded a statement with the Kenya Anti-Corruption Commission, and that a file was opened with regard to his statement. He also claims that he is entitled to protection as he received death threats in connection with his report to the Kenya Anti-corruption Commission. From his own evidence as contained in his affidavit in support of the petition, such complaint as he made was made in 2005 as evidenced from the file allegedly opened, investigation file No. **4977/2005**. He also relies on the fact that he was a witness in High Court Civil case No 313 of 2000- **Peter Kinuthia Mwaniki & Others -vs-Peter Njuguna Gicheha & Others** which was heard and judgment rendered by Aluoch, J (as she then was) on 9th June 2006.

28. It is not clear whether the petitioner did make a report to the Anti-Corruption Commission or its successor, the Ethics and Anti-Corruption Commission, with regard to the alleged irregular allocation of government land in Limuru Town. Even if such statement was made, however, on the material before me, it is clear that there is no offence being investigated or prosecuted; the petitioner is not required as a witness in any proceedings, and no threat to him has been demonstrated to warrant grant of witness protection. As submitted by Mrs. Obuo for the respondent, the Witness Protection Agency must consider the urgency or relevance of the evidence, and the perceived danger to a crucial witness before it can grant witness protection to any person. I note from the report annexed to the affidavit of Mr. Eمويت that its risk assessment established that there is no risk or threat to the petitioner.

29. Invoking the power of the court under section 16 of the Act will not be of assistance to the petitioner. The section gives the court power to make a protection order by providing as follows:

16. The High Court may make a witness protection order if it is satisfied that-

(a) the person named in the application as a witness-

(i) was a witness to or has knowledge of an offence and is or has been a witness in criminal proceedings relating to the offence; or

(ii) is a person who, because of his relationship to or association with a person to whom subparagraph (i) applies, may require protection or other assistance under this Act;

(b) the life or safety of the person may be endangered as a result of his being a witness;

(c) a memorandum of understanding has been entered into by the witness in accordance with section 7; and

(d) the person is likely to comply with the memorandum of understanding.

30. From the evidence before me, there is no basis for making the orders sought by the petitioner. None of the conditions set out under section 16 reproduced above have been met with regard to him. The respondent, which has the mandate of assessing and determining whether or not a witness protection order is merited, has done so and found no basis in the case of the petitioner.

31. Neither can I find a basis for making an order that the respondent meets the petitioner's debts allegedly incurred while he was in hiding. Regulation 9 of the Witness Protection Regulations 2011, Legal Notice No. 99 of 2011, clearly contemplates that only a person or a relation of a person who has been included in the witness protection programme is entitled to allowances and support for the period of inclusion in the programme. The petitioner has not been included in the witness protection programme, and was not so included, when he allegedly incurred the debts that he wants to recover from the respondent.

32. Taken in its totality, the petition before me is, effectively, asking the court, not so much to exercise its powers under section 16 of the Act, but to interfere with the decision of the respondent not to place the petitioner on the witness protection programme. I can find no basis for interfering with the said decision which in my view was arrived at properly in exercise of the respondent's discretion.

33. For the above reasons, this petition is dismissed with no order as to costs.

Dated Delivered and Signed at Nairobi this 31st day of July 2013

MUMBI NGUGI

JUDGE

Peter Njuguna Mwangi, petitioner, in person

Mrs. Lilian Obuo, Litigation Counsel, instructed by the State Law Office for the Respondent.