



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAKURU**

**Petition 1 of 2012**

**IN THE MATTER OF CHAPTER FOUR (THE BILL OF RIGHTS) OF THE CONSTITUTION  
OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 24 AND 25 OF THE CONSTITUTION OF  
KENYA**

**AND**

**IN THE MATTER OF THE THREATENED CONTRAVENTION OF THE FUNDAMENTAL  
RIGHTS AND FREEDOMS GUARANTEED**

**UNDER ARTICLES 29, 31, 39, 49 AND 50 OF THE CONSTITUTION**

**BETWEEN**

**JOHN MUTHAMA**

**GACHEHA.....PETITI  
ONER**

**AND**

**THE COMMISSIONER OF**

**POLICE.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS**

**DEPARTMENT.....2<sup>ND</sup> RESPONDENT**

**RULING**

The petitioner, John Muthama Gacheha, has petitioned this court under **Articles 19, 20, 26 and 29** of the **Constitution** alleging that the Provincial Criminal Investigations Officer (PCIO), Mr. Francis M. Njiru, has threatened to execute him, as a result of which he is living in fear and apprehension that the threats may be carried out. He seeks, in the petition, the protection of the state against the PCIO and an order directing the Commissioner of Police and the Director of Criminal Investigations Department (the 1st and 2<sup>nd</sup> respondents) to investigate the threats.

In the meantime, the petitioner in the instant chamber summons, dated 27<sup>th</sup> January 2012, seeks the same

orders as those in the petition, which would in effect dispose of the petition at this stage. Clearly, this cannot be the intention of the petitioner. It is also noted that the application is not supported by affidavit.

In opposition to the petitioner's application, the Rift Valley Provincial Criminal Investigations Officer, against whom the application was instituted, Francis M. Njiru, has denied all the allegations leveled against him and instead has contended that had the applicant's allegations been genuine he would have proceeded to any police station or police headquarters or CID headquarters to record a statement for the matter to be fully investigated, that the applicant having failed to do so, is clearly looking for ways of stopping the investigations that are ongoing in respect of the offence he is alleged to have committed or which he was about to commit.

The applicant has not filed a supplementary affidavit to rebut these averments; that the applicant never reported the alleged threats to the police for the same to be investigated and the allegation that the allegations are malicious and calculated at stopping genuine investigations against him remain uncontroverted.

Under **Section 107** of the **Evidence Act, chapter 80 Laws of Kenya**, he who alleges has a duty to prove. In this application, the applicant alleges that he has been threatened with execution by the deponent of the replying affidavit. He, however, has not provided any proof of such threat which may be in the form of a report to any police station or a letter to the respondents. This is so, despite the serious allegations he has made in this application.

The rules of procedure made under **section 84 (6)** of the former **Constitution** with regard to enforcement of fundamental rights and freedoms commonly known as the Gicheru Rules, apply for the time being to the new Constitution by dint of **Section 19** of the **Sixth Schedule**.

By these rules an application for conservatory or interim orders is brought by chamber summons supported by an affidavit.

The instant application, as I have noted, is not supported by an affidavit. Likewise it does not seek any interim or conservatory orders but the substantive orders which can only be granted by a bench of an uneven number of judges being not less than three appointed by the Chief Justice pursuant to **Article 165 (4)** of the **Constitution**. Secondly and more importantly, although the Constitution in the Bill of Rights provides comprehensive rights and fundamental freedoms of the individual, those rights and freedoms are sacrosanct and must be invoked in very serious and exceptional situations bearing in mind the rest of the provisions of the Constitution.

For instance, the same Constitution the applicant seeks protection under, gives the police the power to independently investigate the commission of crime.

For these reasons I find no merit in the chamber summons dated 27<sup>th</sup> January, 2012 and dismiss it.

**Dated, Signed and Delivered at Nakuru this. 3<sup>rd</sup> day of August, 2012.**

**W. OUKO**  
**JUDGE**