



ELORY KRANEVELD.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

CHIEF MAGISTRATE, MAKADARA LAW COURTS.....3RD RESPONDENT

AND

VELISTER WANJIRU THUO.....1ST INTERESTED PARTY

FRLISTERS NJERI GITHUKA.....2ND INTERESTED PARTY

RULING

1. The Petition dated 13th April 2012 is premised on the provisions of **Articles 10, 25, 27, 28, 29, 35, 39, 40, 47, 48, 49 and 50, 150, 157, 159, 258 and 25** of the **Constitution** of Kenya, 2010 and the Petitioner's case is as follows;
2. That he was a Director of a Company known as Heurow BV registered on 15th April 2010 in the Netherlands and which was principally engaged in Floribusiness. The said company had certain dealings with Multigrow Investment Company Limited associated with the Interested Parties, Velister Wanjiru Thuo and Felisters Njeri Githuka and it is his contention that he did not know either of them (*the Interested Parties*) before he resigned as a Director of Fleurow BV Company on 25th March 2011.
3. His main complaint is that in spite of the above fact, on 30th March 2012, he was arrested at Jomo Kenyatta International Airport while exiting Kenya and on 2nd April 2012, he was arraigned before the Chief Magistrate, Makadara Law Courts where he was charged with the offence of obtaining money by false pretence contrary to **Section 313** of the **Penal Code**.
4. The particulars of offence were that he had allegedly obtained 38,720.60 Euros (Kshs.5,400,000/-) from Velister Wanjiru Thuo Rose Flowers by falsely pretending that he could pay for the Rose Flowers that were supplied to him by the said person. He was granted a cash bail of Kshs.3 million as a condition for his release and was also ordered to deposit his passport with the Court since he was a foreigner.
5. All the above action, he contends, were in breach of his right to a fair trial, equality and freedom from discrimination, access to information, right to fair administrative action, and right to fair administrative action, and right to access to justice.

6. He now seeks the following Orders;

(i) A declaration that his fundamental rights and freedoms to fair administrative action, presumption of innocence, right to bail, fair hearing and right to access of justice have been infringed by the actions of the Respondents.

(ii) An order prohibiting the Chief Magistrate's Court Makadara Law Courts from hearing and or continuing with Makadara Criminal Case No.1790 of 2012 as continued prosecution of the same is an abuse of Court process as from the statements and records therein any charges for the offence therein lie against a company and not the Petitioner.

AND/OR ALTERNATIVELY

An order directing the Chief Magistrate's Court, Makadara Law Courts to immediately review the cash bail terms in Makadara Criminal Case No.1790 of 2012 and/or that this honourable Court makes an Order for provision of reasonable bail terms for the Petitioner were it to order Makadara Criminal Case No.1790 of 2012 to continue.

(iii) General damages.

(iv) Costs.

(v) Any other relief.

7. There is no response to the Petition by either the 1st or 3rd Respondents but in a Replying Affidavit sworn on 11th May 2012, one P.C. No.70590 Moses Kung'u on behalf of the 2nd Respondent, has deponed that the Petition is without merit and should be dismissed for the following reasons;

(i) That upon a complaint being lodged by the Interested Parties, investigations were commenced and it was found that an offence had been disclosed on the part of the Petitioner.

(ii) He was thereafter charged with the said offence elsewhere disclosed above and any defence to it should be raised in the Trial Court.

(iii) Upon his arrest, the Petitioner was allowed access to his Counsel and one Mr. Yaacon Mainun who went to pick his Laptop, Ipad and Travelling Bag and so he was not held incommunicado.

(iv) That the cash bail imposed on him was reasonable and his liberty had not been unlawfully or unreasonably curtailed.

(v) That being a foreigner, the requirement that he deposits his passport in Court was necessary to ensure that he was able to attend Court when required to do so.

8. I have taken into account the Submissions by the advocates for the Petitioner and for the 2nd Respondent and I have read the following Authorities cited;

(a) Anarita Karimi vs. Republic [1979] KLR 261 – Trevelyan J. and Hancox J. inter-alia held that an argument founded on the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion but the Court must gather the spirit of the Constitution from the language of the Constitution. The learned judges were quoting the dictum of Das J. in the celebrated case of Republic vs. El Mann [1969] E.A 357 at 360.

(b) Mohamed & Anor vs. Haidara [1972] E.A. 166 – in this case, Spry V-P reading the decision of the majority of the Court of Appeal at Nairobi held that in an application for extension of a caveat claiming a purchaser's interest, "in view of lack of evidence filed by the Respondent, (original Plaintiff), the

extension of caveat should not have been granted.”

(c) Centre for Rights Education and Awareness & Anor vs. Attorney General [2011] eKLR – Musinga, J. granted certain interim conservatory orders in a bid to uphold the twin principles of Constitutionalism and the Rule of Law generally. The learned judge in doing so was guided by the decision in Tinyefuza vs. Attorney General of Uganda, Constitutional Appeal No.1 of 1997.

9. 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 in the instant case, the Petitioner has conveniently forgotten that the Constitution must be read wholistically for its real meaning and import to be discerned. Our judicial-Legal 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** which 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.”

10. 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.

11. If his actions are premature, how can he claim to have been denied a fair trial when the trial is yet to begin? How can he claim to have been denied access to justice when he is before a competent Court, and he is represented by an advocate of his choice?

12. I also see no basis at all for the claim that he was denied any information or that he was denied the right to fair administrative action.

13. I say so because save for the bare assertions that those rights were denied, the Petitioner has given no clear evidence in that regard. The mere assertion of breach of rights is not enough and a party ought to particularize the instances of breach and give clear evidence in that regard. To do otherwise would merely seek sympathy and not the wholesome interpretation of real violations.

14. Having so said, I ought to say something about the bond terms imposed on the Petitioner. I agree with the Petition that the right to bail is guaranteed by **Article 49(1)(h)** of the **Constitution** which provides that an arrested person shall be entitled to ***“release as bond or bail upon reasonable conditions pending a charge or trial ...”***.

15. It is admitted that the Petitioner upon arraignment in Court was indeed released on bail and it is conceded that bail is a discretionary matter and left to the trial Magistrate to determine.

16. The Petitioner paid Kshs.3,000,000/- as bail on 3rd April 2012 and was released from custody. He participated in proceedings before me as a free man and so the issue is really moot. But even if I were to revisit it, I am shy to take away the trial Court’s discretion when no reason has been advanced why I should do so. This Court cannot tamper with jurisdiction when the only reason advanced is that the Petitioner is unhappy with the way it was exercised. **It is alleged that the bail terms were discriminatory but where is the evidence to that effect?** It has not been shown that any of the provisions of **Article 27** which outlaw discrimination has been breached and it is not enough to state that the Petitioner was a foreigner and so he was discriminated against.

17. I have read the decision of Mnzavas, J. in Jaffer vs. Republic [1973] E.A 39. In that case, the trial

Magistrate remanded the Applicant for seven (7) days because it was alleged that he was an influential person in town; that there was a possibility that he would abscond; and that he may have interfered with witnesses if released.

18. In allowing the Applicant's Application to be released on bail, the learned judge in an *obiter dicta* stated partly that;

“The District Magistrate should know that it is not part of our Law to keep a man in gaol because he is not a citizen of Tanzania or for that matter a member of TANU. To do so would be going counter to the very principles enshrined by TANU as well as the Country's Constitution.”

19. It is obvious to me that in the instant case, the fact that the Petitioner was released on bail as soon as he was arraigned in Court shows that his foreign citizenship was not a factor at all. The fact that he was ordered to deposit his passport in Court cannot be a basis for a claim on discrimination because it was in furtherance of the cardinal principle that bail terms are given to ensure that the suspect appears in Court when and if required. One way of doing so, is that he is within the jurisdiction of the trial Court.

20. On the whole, I find that the Petitioner's case is weak and without merit. None of the grounds advanced would sway this Court's mind to make any Orders in his favour. He should face his trial and his accusers and tender his defence within known procedures and get his acquittal if he is innocent of the charges laid against him.

21. The Petition is dismissed but the nature of the case would necessitate that I should order each party to bear its own costs.

22. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 2nd DAY OF AUGUST, 2012

**ISAAC LENAOLA
JUDGE**

In the presence of:

Irene – court clerk

Mr. Kahonge for Petitioner

Miss Kiget hold brief for Mr. Kahoro for 2nd and 3rd Respondents

Order

Ruling duly delivered.

**ISAAC LENAOLA
JUDGE
2/8/2012**