



Prohibition of Police  
Investigations/Arrest  
/Prosecution

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**PETITION NO. 13 OF 2010**

**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 OF KENYA**

**BETWEEN**

**EDDAJ WANJIRU MBIYU.....PETITIONER**

**AND**

**THE COMMISSIONER OF POLICE.....1<sup>ST</sup> RESPONDENT**

**RULING**

Simultaneous with the petition, the petitioner (Eddah Wanjiru Mbiyu) has moved the court by way of chamber summons said to be brought pursuant to the provisions of **Chapter Four** of the **Constitution of Kenya** and **Sections 1A, 1B and 3A** of the **Civil Procedure Act** seeking several declaratory orders to the effect that:

- i) any arrest and detention of the petitioner by the 1<sup>st</sup> respondent (Commissioner of Police) without any or any sufficient evidence connecting her with the death of Moses Lesiamon Ole Mpoie (the deceased) amounts to an arbitrary detention without justifiable cause contrary to **Article 29** of the **Constitution**
  
- ii) any arrest, detention and charging of the petitioner in a court of law without any or any sufficient evidence connecting her with the death of the deceased, amounts to an abuse of the power vested upon the 2<sup>nd</sup> respondent (The Hon. the Attorney General) by the Constitution
  
- iii) any arrest, detention and charging of the petitioner in court of law without sufficient evidence connecting her with the death of the deceased is contrary to **Articles 38 and 39 of the Constitution**
  
- iv) the respondents can only detain and charge the petitioner if they have sufficient and compelling evidence connecting her with the death of the deceased which evidence ought to be produced before this court in order to satisfy itself that the respondents indeed have lawful cause to arrest, detain and charge the petitioner.

Upon making the foregoing declaratory orders, the court is asked to issue an order of prohibition against the respondents preventing them from arresting, detaining and charging the petitioner with any offence relating to and in connection with the death of the deceased. The court is further asked to issue conservatory orders to preserve the petitioner's constitutional rights under **Chapter Four** of the **Constitution** to ensure her personal liberty and safety.

The grounds upon which the application is made can be distilled as follows:

- i) that the petitioner, together with David Njunu Mbiyu, David Waiganjo Koinange and Margaret Njeri Mbiyu are the administrators of the estate of the late Mbiyu Koinange, which estate includes property known as L.R. No.8669/8 – Muthera Farm in Mau Narok (**Muthera Farm**)
  
- ii) that in 2008 they appointed the deceased as a Senior Supervisor of Muthera Farm

- iii) that due to disagreements, the appointment of the deceased was terminated but he continue to interfere with the management of the farm prompting the institution of Nakuru H.C.C.C. No.116 of 2010 in which the court restrained him from interfering with the management of Muthera Farm
  
- iv) that he did not comply with the restraining orders but instead mobilized his Maasai clansmen to invade Muthera Farm claiming it to be part of their ancestral land
  
- v) that the petitioner learnt of the murder of the deceased on or about 3<sup>rd</sup> or 4<sup>th</sup> December, 2010
  
- vi) that following the killing of the deceased, some employees of Muthera Farm were arrested and have been charged with the murder of the deceased
  
- vii) that counsel for one of the estate of the late Mbiyu Koinange has written to the Director of Public Prosecution complaining about arbitrary arrests
  
- viii) that the petitioner has been asked to go to the police station and she is apprehensive that the sole purpose of the summons is to have her arrested in connection with the death of the deceased
  
- ix) that the petitioner had lodged a complaint with the Provincial Police Officer regarding the conduct of the OCPD, Mr. Ipara with regard to the Muthera Farm management dispute
  
- x) that due to political/ethnic tension arising from the death of the deceased, the police may wish to arrest the petitioner to ease off the tension.

Responding to these averments on behalf of the respondents, the SP. Abdi Salat, the Divisional Criminal Investigations Officer (DCIO), Nakuru, who is also the investigating officer in this case, has deposed that the investigations are confined to the death of the deceased and not the family succession dispute; that SP. Salat has simply requested the petitioner to avail herself to record a statement in clarification of certain matter regarding the investigations; that the Attorney General being charged, for the time being, with prosecution of criminal cases is not under the direction or control of the police or any authority; that whether or not there is or there is no evidence against the petitioner is not for her to determine but for the court after considering evidence presented by the police.

I have very carefully considered the petitioner's application, the replying affidavit by S.P. Salat and the oral submissions by both counsel.

At the hearing of the application, learned counsel for the petitioner submitted that the application is premised on the provisions of **Articles 157(11), 22(1), 22(4), 23(1), 165(3b), 29(a), 29(d), 29(f), 39(1), 20(3)(b), 20(4)(a)(b) and 23(3)** of the Constitution.

No doubt the Bill of Rights as contained in **Chapter Four** of the **Constitution** is arguably the most progressive and probably the most liberal in the region and perhaps beyond. Unlike the repealed Constitution that limited rights to those related to political and civil liberties, the present Constitution extends to economic and social rights. Kenyans are now moving into an era where fundamental freedoms shall not be limited except by law and even then only to the extent that that limitation is reasonable and justifiable in an open democratic society based on human dignity and equality.

There will no longer be any requirement for court fees to commence proceedings to redress rights or fundamental freedoms. Kenyans will never again experience the human degradation and abuses witnessed in the past Governments under the old Constitution. But the Bill of Rights is not a mere collection of pious platitudes or hopeful aspirations. It is indeed the law - the supreme law. The realization of these fundamental rights poses the single most challenge to the judiciary as the protector of the Constitution and its values.

**Article 165(3)(b)** of the **Constitution** provides that:  
**“(3) Subject to clause (5), the High court shall have:-**

**(a)** .....

**(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened .....**”

**Article 22(1)** further stipulates as follows:

**“22(1) Every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.”**

But how does a person claiming that a right has been denied, violated infringed or threatened move the court?

It took decades under the repealed Constitution for the Chief Justice to make rules contemplated by **section 84(6)** of that **Constitution**. **Article 22(3)** of this **Constitution** in mandatory terms enjoins the Chief Justice to make rules, which rules ought to have been made by now considering that four (4) months have elapsed since the promulgation of the Constitution.

However, the absence of the rules does not limit the right to commence court proceedings based on the Bill of Rights. Further **paragraph 19** of the **Sixth Schedule Transitional and Consequential Provisions** allows for the application of the 2006 **Gicheru Rules** with the necessary alterations, adaptations, qualifications and exceptions to bring them into conformity with Article 22.

In applying a provision of the Bill of Rights, the court must:

**“(a) develop the law to the extent that it does not (sic) give effect to a right or fundamental freedom, and**

**(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”**

(See **Article 20(3)**)

The High Court is empowered by **Article 23(1)** to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and may grant such relief as:

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights;
- (e) an order for compensation; and
- (f) an order of judicial review.

Having thus set out the law, I now revert to the application before me. It is common ground that indeed the petitioner has been asked to go to the police station by S.P. Salat. According S.P. Salat, the petitioner is required only for the purpose of recording a statement. The petitioner on her part is apprehensive that, due to recent arrests of some of Muthera Farm employees in connection with the death of the deceased, she may be arrested, detained and charged. It is her contention that there is no evidence linking her with the death of the deceased. In view of this, the petitioner avers that her arrest would violate her rights and fundamental freedom guaranteed by the Constitution.

The court, as I have observed has wide powers and may grant any of the reliefs outlined in **Article 23(3)**. This application seeks conservatory orders to prohibit the respondents from arresting, detaining and charging the petitioner. The High Court has often granted an order of prohibition in respect of criminal cases pending in the magistrates' courts or criminal cases under investigations. The court's intervention in such cases can be categorized into three grounds namely: Constitutional grounds (like this one), on grounds of judicial review and finally on the ground of abuse of the process of the court.

The petitioner is asking this court to find that any impending arrest, detention or prosecution is unconstitutional. That is, indeed, a very difficult question. For instance on what basis can the court find that there is no or no sufficient evidence against the petitioner without embarking in a premature trial even before she has been charged? Can the court call for the statements of witnesses as was suggested to satisfy itself that infact there is no or no sufficient evidence against the petitioner? In doing so, is the court not involving itself in investigations of a crime? That procedure which was referred to as committal proceedings was done away with in 2003 when **Part VIII** of the **Criminal Procedure Code** was repealed by Act No.5 of 2003. That procedure permitted the magistrate to consider the statements of witnesses and

that of the accused person, the exhibits, any reports or photographs in a case triable by the High Court, before committing the accused person for trial by the High Court if the magistrate considered that there was sufficient evidence to support the charge. If the magistrate was of the view that the evidence was insufficient, the accused person would be discharged.

This court therefore has no procedure for determining whether or not there is sufficient evidence against the petitioner. Furthermore, SP. Salat has categorically stated in paragraphs 9 and 12 of his replying affidavit that the decision whether or not the petitioner will be charged can only be reached after she records her statement. The offence being investigated is murder, a cognizable offence where the police may arrest a suspect upon reasonable grounds without a warrant.

Although the High Court has inherent jurisdiction to prohibit arbitrary arrest, detention and prosecution, such interventions will be available only in clear cases of abuse of the process and only after it has been demonstrated to the satisfaction of the court that the impending arrest, detention and prosecution will violate the rights and fundamental freedom of the applicant as the court found in Githunguri Vs. Republic (1986) KLR 1. The jurisdiction to stay or prohibit criminal process or proceedings should be exercised very sparingly and only in exceptional circumstances.

See Tan Vs. Cameron (1992) 3 WLR 249 and the Attorney General's Reference No.1 of 1990 (1992) 9. McLachlin, J explained in the famous Canadian Supreme Court case of Republic Vs. Morin (1992) 1 SCR 771, why courts are slow in interfering with police investigations. He said:

**“On one hand stands the interest of society in bringing those accused of crimes to trial, of calling them to account before the law for their conduct. It is an understatement to say that this is a fundamental and important interest. Even the earliest and most primitive of societies insisted that the law bring to justice those accused of crimes. When those charged with criminal conduct are not called to account before the law, the administration of justice suffers. Victims will conclude that justice has not been done and the public feel apprehension that the law may not be adequately discharging the most fundamental of its tasks.”**

The law is not in favour of interruption by the High Courts of criminal investigations and prosecutions unless, of course it can be demonstrated that the investigations or the prosecution are an abuse of the legal or court process.

Matters of investigations are prosecution, by dint of **Article 157(4)(6)(9)(10) and (11)** as read with **Article 245(4)(a)**, of the **Constitution**, are within the exclusive province of the Director of Public Prosecutions (a function presently performed by the Attorney General) and the Inspector General (read the Commissioner of Police for the time being). Courts are not equipped or even mandated to direct the two as to how to conduct investigations. As Justice Louis Brandeis of the United States Supreme Court said in 1926 in the case of Myers Vs. United States (1926) 272 U.S. 52:

**“The doctrine of separation of powers was adopted .....not to promote efficiency but to preclude the exercise of arbitrary power.”**

This court will not exercise an arbitrary power.

Besides, an order of prohibition, as was stated in the case of **Kenya National Examination Council Vs. Republic Exparte Geoffrey Gathenji & others**, Civil Appeal No.266/1996:

**“..... is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the law of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.”**

Although based on a judicial review application, these principles apply to this matter.

For the reasons stated, I come to the conclusion that the petitioner has failed to demonstrate that the investigations will lead to her arrest, detention and/or prosecution. She has not shown that the investigations are an abuse of the legal process and further that her right and fundamental freedom has been or is being violated or that they are threatened.

The application fails and is accordingly dismissed.

**Dated, Delivered and Signed at Nakuru this 5<sup>th</sup> day of January, 2011.**

**W. OUKO**

**JUDGE**