



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 52 OF 2011

BETWEEN

JOSES NTWIGA..... PETITIONER

AND

THE COMMISSIONER OF POLICE 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATION DEPARTMENT... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

AND

HENRY KARANJA NGUGI 1ST INTERESTED PARTY

STEPHEN NJIHIA 2ND INTERESTED PARTY

ANTHONY IKONYA..... 3RD INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner Joses Ntwiga is the Chief of Ruiru Location. He describes himself as being diligent, pious, team leader and as having won accolades among his friends and peers. His Petition seeks the following reliefs;

(a) A Declaration that the applicants right against arbitrary deprivation of his freedom without just cause as provided under Article 29(a) of the Constitution is likely to be contravened at the instance of the Respondents acting upon a complaint lodged by the Interested Parties concerning to or in relation to an alleged offence of obtaining by false pretences.

(b)A Declaration that the Commissioner of Police and the Director of Criminal Investigation Department are obliged by law to act lawfully, fairly and reasonably in the exercise of their statutory mandate under the Police Act Chapter 84 of the Law of Kenya. (c) A Declaration that the Respondents are likely to

violate the Petitioner's fundamental freedoms by acting, in any material particular, a complaint lodged by the Interested Parties touching upon or concerning the sale, transfer, acquisition and ownership of motor vehicle registration number KBH 193X Nissan Station Wagon.

(d) A Declaration that the Respondents are likely to violate the Petitioner's fundamental freedoms by in any way arresting or apprehending the Petitioner for questioning, detention or otherwise on an alleged complaint lodged by the Interested Parties touching upon or concerning the sale, transfer, acquisition and ownership of motor vehicle Registration Number KBH 193X Nissan Station Wagon.

(e) A Declaration that the Respondents are likely to violate the Petitioner's fundamental rights of freedoms by arriving at a decision that the Interested Parties anticipated and discloses the offence of obtaining by false pretences Contract Section 313 of the Penal code.

2. The Petition seeks the enforcement of the Petitioner's rights under Article 29(a) of the Constitution which provides, ***“Every person has the right and freedom and security of the person, which includes the right not to be (a) deprived of freedom arbitrarily or without just cause”***.

Petitioner's Case

3. According to his Supporting Affidavit sworn on 28th March 2011, the Petitioner states that he purchased motor vehicle registration Number KBH 193X Nissan Station Wagon (“the vehicle”) from Margaret Wachuka Njenga by a sale agreement dated 15th July 2010. According to the sale agreement Margaret received the sum of Kshs.1,300,000/= through Henry Ngugi Karanja. On 27th September, 2010 he states that the motor vehicle was transferred to him. He thereafter applied for and was issued with a logbook by the Kenya Revenue Authority.

4. After taking possession of the vehicle, he enjoyed use of it until the respondents in conjunction with persons unknown to him caused his arrest for allegedly obtaining the vehicle by false pretence. In order to protect his interest in the vehicle he filed Thika CMCC No. 1109 of 2010 against Henry Karanja Ngugi, Stephen Njihia, Anthony Ikonya and Mwau Njau, the interested parties herein, on 22nd October, 2010. On the same day he obtained an ex-parte injunction restraining the defendants from harassing or threatening him and also restraining them from interfering with his use of the motor vehicle.

5. On 23rd March, 2011, the Petitioner also applied for and obtained orders against the Provincial Criminal Investigations Officer (PCIO), Nairobi directing him to ensure full compliance with the order issued by the Court on 22nd October, 2010 and ordering the release of the subject motor vehicle to the Petitioner. In compliance with that order, the Police released the motor vehicle to him.

6. The Petitioner also avers that the interested parties have been issuing threats to him via mobile phone and spreading malicious rumours and tarnishing his name. He states that he has reported these threats to Ruiru Police Station.

7. The Petitioner avers is that his fundamental rights under Article 29(a) of the Constitution are under threat of violation as the respondents have not complied with the law regarding the investigation of complaints and alleged offences; the Director of the Criminal Investigations Department and the Police Commissioner have not acted fairly and reasonably; His right to secure protection of the law is likely to be contravened as he was not given notice of the alleged offences; the police is obliged to observe the rules of natural justice in exercise of its mandate under the Police Act (Cap 84) and this has not been observed; the Interested Parties seek his arrest without reasonable suspicion and without proper investigation and with intent to besmirch his name; the arrest and intended prosecution is without reasonable suspicion and without proper investigation; the charges are not based on open and legal investigation and are intended to cover-up a breach of contract.

Respondent's Case

8. The petition is opposed by the Respondent's on whose behalf a Replying Affidavit has been filed and sworn by Police Constable Makoko. PC Makoko states that he commenced investigations following a complaint lodged by the Petitioner and the Interested Party in relation to the subject vehicle and an inquiry file opened.

9. The motor vehicle was purchased by the Interested Parties operating as Super Micro Venture Self Help Group from one Margaret Wachuka Njenga for the sum of Kshs.1,300,000/=. The Petitioner was given the use of the vehicle to facilitate his movement in the area for the purpose of assisting the Group acquire land.

10. According to PC Makoko, the vehicle documents including the original logbook, photocopies of Ms Njenga's identity card, PIN number certificate and the duly filled and executed transfer forms were handed over to the Interested Party on 21st July 2010.

11. Investigations revealed that the Petitioner filed a report on 22nd September, 2010 at Ruiru Police Station stating that the motor vehicle logbook was lost. A police abstract was issued whereupon the Petitioner proceeded to apply for the logbook under his name. On 26th September, the Petitioner called Ms Njenga to request her assistance as the documents she gave him were lost. On 27th September, 2011 the Petitioner registered the vehicle in his name and received a new logbook.

12. PC Makoko is of the view that the Police conducted thorough investigations, recorded statements from the Petitioner, Interested Parties, the seller of the vehicle and other persons with relevant information. Based on the evidence, it was decided that the Petitioner should be charged with the offence of, "***Obtaining Registration by False Pretence Contrary to Section 320 of the Penal Code***" A charge sheet was prepared but because of existing court orders in this case, the Petitioner has not been charged.

Interested Parties Case

13. The Interested Parties, Henry Karanja Ngugi; Stephen Njihia, Anthony Ikonya and Mwau Njau opposed the Petition on the basis of the Replying Affidavit sworn on their behalf by Henry Karanja Ngugi sworn on 12th April 2011.

14. According to Henry Njau, the Chairman of Super Micro Ventures Self Help Group, the motor vehicle was purchased by the Group from Ms Njenga at a price of Kshs.1.3 million. Upon payment of the deposit of Kshs.300,000/= in cash and payment of Kshs.1,000,000/= in her account, Ms Njenga released to Henry Njau the original Logbook, duly completed transfer form and PIN Certificate. He contends that these documents have never left his custody though the vehicle was released to the Petitioner to assist the Group in sourcing land.

15. Henry Njau also depones there is no way Ms Njenga could have executed the Sale Agreement for the vehicle given that the Self Help Group is the one which bought the vehicle and paid the purchase price as is evidenced by the deposit slip.

16. The Interested Parties confirm that they have been sued by the petitioner in Thika CMCC No. 1109 of 2010 but they have also filed a counterclaim in which they seek orders compelling the Petitioner to release the motor vehicle to them and to meet the costs. The suit is still pending hearing and determination.

The Submissions

17. Dr. Khaminwa submitted on behalf of the Petitioners that the facts of this case disclose a civil rather than a criminal matter. In his view the pending prosecution should be seen as nothing other than an abuse

of the court process. The proceedings, he urges me to find, amount to harassment of a law abiding citizen and are oppressive hence they violate the Constitution.

18. Dr. Khaminwa relied on the case of **George Karanja Karangu v The Commissioner of Police and AG** Nairobi Misc. Appl. No. 289 of 2008 (Unreported) (eKLR) and **Republic v Chief Magistrate, Nairobi and Metro Petroleum Limited** Nairobi Misc. Appl. 1544 of 2004 (Unreported) (eKLR) where in both cases the court stopped a criminal prosecution to prevent an abuse of the court process to oppress the applicants.

19. Mr. Obiri submitted there was no violation of the Petitioner's rights. In his view, a lawful complaint was lodged by the Complainant and Interested Party, investigated and the result was a basis upon which the charges were preferred against the Petitioner. The Police, he stated, have a mandate to investigate crime and what they did was within the law and as such the petition lacks merit and should be dismissed.

20. The Interested Parties were not represented at the hearing though the hearing date was taken by consent.

The Constitution

21. It is trite law, that an applicant who wishes to enforce his rights under the Constitution must identify the right protected and demonstrate how it is violated (See **Njeru v Republic** [1979] KLR 154). I would hasten to add that an application under Article 23 is not one for determination of matters unrelated to enforcement of guaranteed rights and freedoms under the Constitution.

22. In my view, the only issue for consideration is whether the Petitioner's right to freedom and Security under Article 29 (a) including the right not to be deprived of freedom arbitrarily or without just cause has been violated or threatened with violation.

23. The broad components of Article 29(a) were considered by the Constitutional Court of South Africa which was construing section 12 of the South Africa Constitution which is *pari materia* with the Kenyan one. Justice O'Regan, in **S v Coetzee** 1997 (3) (CC) 557 at para. 159 stated as follows;

[there are] two different aspects of freedom; the first is concerned particularly with the reasons for which the state may deprive someone of freedom (substantive component); and the second is concerned with the manner whereby a person is deprived of freedom (procedural component) ... Our Constitution recognises that both aspects are important in democracy; the state may not deprive its citizens of liberty for reasons that are not acceptable, nor when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.

24. Article 29(a) therefore guarantees a person substantive protection in that there must be a good reason for depriving someone of their freedom. In other words there must be a rational connection between the denial of liberty and the purpose of curtailment.

25. The procedural component deals with the manner in which the decision to deprive the person of liberty is made. There must be an element of fair procedure. The fairness will of course depend on the circumstances of the particular case. In most cases the substantive and procedural elements will overlap and the duty of the court will be to scrutinise the facts to determine whether indeed Article 29(a) has been violated.

26. In the case before me, it is not doubted that the Petitioner will lose his freedom as he will be arrested and charged. The Respondents have the charge drawn up but for existence of conservatory orders. Thus, the freedom of the Petitioner is threatened. If so, is such threat contrary to Article 29(a) of the Constitution to the extent that it is arbitrary and without just cause.

27. The central complaint of the Petitioner is that his intended arrest and charging is an abuse of the Court process, intended to harass and intimidate him and enforce, to his prejudice, what is essentially a civil

claim in favour of the Interested Parties.

28. A set of facts may disclose both a civil and criminal claim. Liability for a person in respect of criminal law and civil law may be co-extensive but it must be remembered that the purpose of civil law is to vindicate private interests and criminal law to protect the public interest. Indeed Section 193(A) of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) allows civil and criminal proceedings on the same subject matter to proceed contemporaneously.

29. What the court is against is the use of the criminal law and process to harass, intimidate or coerce a person for personal gain, ulterior motives or for purposes totally unrelated to the protection of public interest. Indeed, our courts have made it quite clear that the coercive machinery of the state cannot be used for such purposes and if they are, the court has inherent jurisdiction to prevent an abuse of the process. (See *Emmanuel Kuria Gathoni and Another v The Attorney General* Nairobi Criminal App. No. 1384 of 2001 (Unreported). This principle, I hold, is captured in the rubric of Article 29(a) of the Constitution relied upon by the Petitioner.

Findings

30. The state has an interest to prosecute crime wherever there is reasonable suspicion that an offence known to law has been committed. The charge to be preferred against the Petitioner is as follows;

JOSES NTWIGA on divers dates between September, 2010 and 1st day of October 2010 at Kenya Revenue Authority Times Tower within Nairobi County, wilfully and falsely transferred the ownership of motor vehicle registration number KBH 193X Nissan Extrail Maroon in Colour from Margaret Wachuka Njenga to Joses Ntwiga a fact he knew to be false

31. I am satisfied, on the basis of the evidence before me, that there is sufficient and reasonable evidence to sustain the proposed charge. I am aware that I am not required to make a definitive finding on the facts as this would prejudice the pending civil and criminal case. I wish only to point to two facts that lead me to this conclusion. First, the Petitioner reported that the logbook for the vehicle was missing when in fact it was with Henry Ngugi. Second, the sale agreement between Margaret Wachira Njenga and the Petitioner dated 15th July, 2010 acknowledges receipt of the sum of Kshs.1,300,000.00 on that date yet the interested parties deposited the sum of Kshs.1,000,000/00 cash in Ms. Njenga's account on 21st July, 2010 as evidenced by the deposit slip.

32. The facts may be contested but nothing has been placed before me to show that the Petitioner will not have a fair trial consistent with the provisions of Article 50 of the Constitution. The state will have to prove its case beyond reasonable doubt.

33. The charge to be preferred against the Petitioner is not one intended to coerce the Petitioner into settling a civil claim. On the contrary, it is one that reflects the state's interest in maintaining the integrity of the motor vehicle registry. The lodging of false documents is a matter that devalues any system of registration and lessens public trust in it. It is in the public interest that a prosecution for false registration of documents be undertaken.

34. According to PC Maroko, both the Petitioner and the Respondent lodged complaints. The police opened an inquiry file and investigated the matter. Upon conclusion of the inquiry a charge was preferred against the Petitioner. This can hardly be termed as "**arbitrary**" as the police were only carrying out what it is mandated by the law to do.

35. I also do not find any evidence of harassment, intimidation bad faith or ulterior motives that would enable me invoke the court's inherent jurisdiction. Obviously the relationship between the Petitioner and the Interested Party turned sour but that is a matter to be resolved by the civil court.

36. It is therefore my finding that the actions taken by the Respondents in investigating and preferring a charge against the Petitioner in relation to motor vehicle registration No. KBH 193X do not breach

Article 29(a) of the Constitution. The Petitioner is being subjected to lawful process which must now take its course.

The Proposed Charge

37. I would be remiss, if I did not deal with the matter raised by Dr. Khaminwa, that the proposed charge is defective and ought to be quashed. He submitted that the charge sheet by reference to “**Christian Name**” breaches Article 8 and 32 of the Constitution by preferring one religion over another. The reference to the “**Nationality**” of the Petitioner as “**MERU**” was also in breach of the Constitution and its values. Finally, reference to “**Sentence**” on the charge sheet negates the presumption of innocence under Article 50 of the Constitution. These matters Dr. Khaminwa submitted, entitle me to quash the charge and stop any further proceedings against the Petitioners.

38. Mr. Obiri submitted that the purpose of the charge was to identify the accused and to provide all necessary details as would enable him be identified. A charge is also intended to enable the accused sufficiently defend himself. Moreover, he submitted, the charge sheet is a record which contains details of the court case and in the event the accused is sentenced, the relevant information will be filled in the charge sheet.

39. The issue raised by Dr. Khaminwa was not pleaded and since the accused has not been charged in court, it would be improper for me to make observations on what remains a draft charge sheet. The Court before which the petitioner will appear has the jurisdiction to determine the validity or otherwise of the charge before it. I decline to usurp that jurisdiction.

Conclusion

40. Having considered the matter, I find that there has been no contravention of Article 29(a) by the Respondents. The Petition is therefore dismissed. In view of the fact that this is an application to enforce fundamental rights, I will not condemn the Petitioner to pay costs.

DATED and **DELIVERED** at **NAIROBI** this 4th day of November 2011.

D. S. MAJANJA
JUDGE

Dr. Khaminwa instructed by Khaminwa & Khaminwa Advocates for the Petitioner.
Mr. Obiri instructed by the Director of Public Prosecutions for the Respondent.
Mr. Kinyanjui instructed by Kinyanjui and Njau Advocates for the Interested Parties.