



Waiti v Inspector General of Police & 3 others (Criminal Petition E006 of 2021) [2024] KEHC 250 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E006 OF 2021**

RN NYAKUNDI, J

JANUARY 24, 2024

**N THE MATTER OF ARTICLES 22(1), 23(1) OF THE CONSTITUTION
OF KENYA 2010**

**IN THE MATTER OF ALLEGED VIOLATION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLE 49 (1), A (I), (G), (H),
ARTICLE 50 (1), 2(B)(C), (F), (J), (K), (I), (N), (4).**

**ARTICLE 41(2)(B), ARTICLE 36 (1), ARTICLE 35(1) (A)(B), ARTICLE
28, ARTICLE 27(1), 2 AND ARTICLE 25 (A)**

BETWEEN

KATAMO WAITI PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

**THE OFFICER COMMANDING STATION (OCS) KIPKAREN 2ND
RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

PHILIP WACHIYA 4TH RESPONDENT

RULING

1. By and an Amended Notice of Motion dated 17/12/2021, the Applicant seeks the following orders: -
 1. Spent.
 2. Spent.



3. That this Court be pleased to issue a permanent order of injunction against the 1st and 2nd Respondents, their agents, servants and or representatives and or any other person acting on their behalf restraining them jointly and severally from arresting, harassing, prosecuting, detaining or preferring any criminal charges against the Petitioner/Applicant
 4. That this Honourable Court be pleased to issue such other orders as the Court may deem fit.
 5. That costs of this application be in the cause.
2. The application is premised on the grounds therein and it is further supported by the Affidavit sworn by the Applicant on 17/12 /2021.

The Applicants case

3. The Applicant deposed that on or about December, 2016 he entered into a mutual land sale agreement with the 3rd Respondent in which he agreed to sell land parcel Chepsaita Plot 22at an agreed price of Kshs.510,000/=. The Applicant further deposed that the 3rd Respondent did pay Kshs.270,000/= and was to pay the balance of Kshs.240,000/= by February, 2017.
4. The Applicant maintains that the 3rd Respondent breached the said agreement and never paid the balance of the purchase price to date .
5. The Applicant further deposed that he has been patient with 3rd Respondent over time holding that he would do good the balance of the agreed purchase price but he has not made any effort to date. The Applicant maintains that having been frustrated by the said breach by the 3rd Respondent, he decided to refund him his money because after the said agreement he had given him vacant possession of the suit property and which he was hugely benefitting from having harvested sugarcane twice from the suit land.
6. The Applicant further deposed that he visited the Chief of Chepsaita location with a view of refunding the 3rd Respondent his money as he had already breached the agreement but the 3rd Respondent declined to take his money.
7. The Applicant added that due to the constrained by effects of Covid- 19 and having tried by all means to get the balance of the purchase price and or refund from the 3rd Respondent he decided to repossess his land from the 3rd Respondent. The Applicant further alleges that the 3rd Respondent a former uniformed officer has now resorted to intimidatory means against him, threatening to institute criminal proceedings against him using the police to make several calls to him with the intention of arresting him yet the dispute herein is civil in nature.
8. The Applicant further deposed that the 3rd Respondent in collaboration with 1st and 2nd Respondents' officers at Kipkaren police have arrested the witnesses to the said agreement threatening with dire consequences in an attempt to intimidate him. The Applicant further contends that the said officer at Kipkaren together with the 3rd Respondent have joined efforts and are harassing and intimidating him. The Applicant maintains that he as been called by the 1st and 2nd Respondents' officers threatening to arrest him over an agreement that was breached by the 3rd Respondent which us against his constitutional rights and fundamental freedoms to be forced to admit that he is the one in breach. The Applicant is apprehensive and suspect that the OCS Kipkaren Police Station, the officer attached and the senior police officers have a well-orchestrated scheme to have him arrested in an attempt to defeat justice.



9. The Applicant maintains that unless the orders sought are granted, his constitutional rights and freedoms shall be violated and that it is in the interest of justice that the orders sought should be granted.
10. According to the Applicant, if there is any complaint touching on the said agreement then the 3rd Respondent should seek redress in a Civil Court.
11. The Applicant is apprehensive that he is thus likely to be arrested, harassed and detained, arraigned in Court and/or charged. The Applicant deposed that he is a senior employee of the judiciary and approaching retirement and such actions by the Respondents shall be against his rights as well as demeaning.
12. According to the Applicant the actions by the 1st and 2nd Respondents officers and or agents are against his rights and fundamental freedoms hence unconstitutional because; they seek to curtail his freedom and/or security contrary to Article 29 (a) of the *Constitution*, his rights and freedoms contrary to Article 39 (1) of the *Constitution* and his right to administrative action that is lawful and procedurally fair contrary to Article 47 (1) of the *Constitution*.
13. The Applicant maintains that it therefore clear that the above intended action by the officers and/or agents of the 1st and 2nd Respondents would; constitute an abuse of the process, lead to unfair trial against him and have an effect of undermining the integrity of the Criminal Justice System.
14. The Applicant further deposed that his fundamental rights and freedoms are entitled to be protected under the Bill of rights.
15. The application is opposed.

The 3rd Respondent's Case

16. The 3rd Respondent opposed the application vide his Replying Affidavit dated 21/1/2022. The 3rd Respondent deposed that by the Applicants own admission he sold him Plot Chepsaita No. 22 at the price of Kshs.510,000/= where he received Kshs.270,000/= and remained with a balance of Kshs.240,000/=.
17. The 3rd Respondent admits that he never paid the Applicant the said balance of Kshs.240,000/= for reasons that he received information that the plot the Applicant sold to him belonged to one Murumula Waiti and which he later discovered to true and thus the said sale was fraudulent.
18. The 3rd Respondent denies the allegations that the Applicant herein wanted to refund him the money had received from him.
19. The 3rd Respondent urged that the Applicant herein be ordered to deposit to this Court being the sum that he received from him through the fraudulent sale of land of Kshs.270,000/=.
20. The 3rd Respondent also wants the applicant to pay him interest at bank rates of 13% on the principal of Kshs.270,000/= computed thus; $270,000 (1+13)^5 = \text{Kshs.}497,457.50$ an amount of Kshs.767,457.50 for 5 years since December 2016 to date.
21. According to the 3rd Respondent, the Applicant's many applications are only meant to delay justice and therefore this Court should be pleased to help him recover his principal and interest herein of Kshs.767,457.50/=.
22. The Applicant filed a Further Affidavit sworn on 28/2/2022 in further support of the Application wherein the Applicant stated that contrary to the 3rd Respondent's averment that the land he sold



him belonged to one Murumula Waiti. The Applicant deposed that he sold the said land to the 3rd Respondent on 26/12/2016 having purchased it from one Diana Chemei Misoi on 16/4/2006. The Applicant maintained that the said Murumula Waiti also purchased a separate piece of land from the same vendor on 25/9/2010 long after he had purchased his. The Applicant denied allegations that he sold the 3rd Respondent land belonging to one Murumula Waiti. The Applicant further contended that the 3rd Respondent has not annexed any evidence confirming that indeed the sale transaction between himself and him was fraudulent as alleged. The Applicant maintains that this is not the right forum for the 3rd Respondent to seek the recovery of Kshs.767,457/=.

Analysis and Determination

23. I have read and considered the Application herein together with the Replying Affidavit filed in response to the aforementioned Application and I find that the primary issue for determination by this Court is whether the Application dated 17/12/2021 has merit.
24. In the present application the Applicant seeks a permanent injunction restraining the 1st and 2nd Respondents from arresting, harassing, prosecuting, detaining and or preferring any criminal charges against him. A temporary injunction was issued against the subsequent arrest of the Applicant pending the inter partes hearing of the Application herein. The aforementioned order was issued on 29/6/2021 by Hon. Justice W. M. Musyoka.
25. The office of the Inspector General is an independent office with the power to investigate any offence. the Constitution at Article 243 establishes the National Police Service and at Article 245(1) the office of the Inspector- General of the National Police Service is created. Article 245(4) and (5) are relevant to this petition. They provide as follows:-
 - “(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector- General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
 - (a) the investigation of any particular offence or offences;
 - (b) the enforcement of the law against any particular person or persons; or
 - (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
 - (5) Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.”
26. Section 51 of the *National Police Service Act*, Cap. 84 provides the powers of a police officer as follows:-
 - “51. Obedience to orders and warrants and detection of crimes, etc.
 - (1) A police officer shall—
 - (a) obey and execute all lawful orders in respect of the execution of the duties of office which he may



from time to time receive from his superiors in the Service;

- (b) obey and execute all orders and warrants lawfully issued;
- (c) provide assistance to members of the public when they are in need;
- (d) maintain law and order;
- (e) protect life and property;
- (f) preserve and maintain public peace and safety;
- (g) collect and communicate intelligence affecting law and order;
- (h) take all steps necessary to prevent the commission of offences and public nuisance;
- (i) detect offenders and bring them to justice;
- (j) investigate crime; and
- (k) apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists.”

27. In *Republic v Commissioner of Police and Another Ex Parte Michael Monari & Another* [2012] eKLR, it was observed thus:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge or act in a reasonable manner, the High Court would be reluctant to intervene.”

28. The powers of the police to investigate crime were outlined by Warsame, J (as he then was) in *Ex-parte Michael Monari* (supra) as follows:-

“Under Article 157(4) of the Constitution, the Director shall have power to direct police to investigate any information or allegation of a criminal conduct and it is mandatory for the police to comply with any directions or instructions given by the Director of Public Prosecution. Under article 157(10) the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person. It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and



those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct, which amounts to an offence and on that account is deserving punishment.”

29. Being arrested and being subjected to a lawful process on suspicion of crime is not a violation of Constitutional right in itself. This is because, the Constitution has checks and balances well stipulated under Article 49 and 50 of the [Constitution](#) to ensure that the rights of every suspect is protected. There are adequate remedies whenever breaches occur.
30. It is noteworthy to mention that the Applicant herein admits that he entered into an agreement with the 3rd Respondent for sale of land which he received part payment for. However, before he received the second instalment from the 3rd Respondent dispute arose as to the ownership of the said land requiring that the matter be investigated due to allegations of fraud.
31. As stated by the Court of Appeal in [Gordon Ngatia Muriuki -V- DPP & 2 Others](#) eKLR,
“.....Courts are reluctant to freeze proceedings before a court of law that has jurisdiction to try criminal cases; only in instances where there trumped up charges that cannot be founded in law) or the prosecution is not undertaken according to law, or it is actuated by malice and meant to harass the appellant, having no basis at all in law and fact....”

The Court further rendered that:

“State organs, state officers and public officers serve the larger public. They must at all times resist the temptation of being used to settle personal vendetta between private individuals or entities.....”

32. The Applicant in this application has not placed evidence showing that the police or any other Respondent has violated or is likely to infringe any of his rights. The Applicant save for highlighting that his fundamental rights and freedoms are likely to be infringed has not furnished this Court with evidence to demonstrate how his rights under Article 29 (a), 39 (1) and 47 (1) of the [Constitution](#) have been breached or are likely to be breached.
33. It is trite that the administration of criminal justice in Kenya is a shared responsibility between the executive, legislature, and the judiciary which tries to strike a balance between the search for truth and the fairness of the process. On such tool is the doctrine of presumption of innocence until proven guilty under Article 50 (2) (a) of the [Constitution](#). This is a constitutional principle under our legal policy framework and requires the police to investigate crimes and from the evidence recommend to the Director Public Prosecution under Article 157 (6) & (7) of the [Constitution](#) to initiate and indictment to prove each element constituting the crime in question. The criminal justice Administration in Kenya does vest the burden bearer upon the state herein through the agency of the Director of



Public Prosecution to prove the elements of the offence beyond reasonable doubt. Therefore, the allocation of burden of proof in Kenya is a matter of constitutionality based on the presumption of innocence until the contrary is proved. From the crime cognisance perspective, the Constitution embodies provisions in Articles 244, 157, (6) & (7) 159, to deal with the detection, apprehension, prosecution, and punishment of offenders charged of various crimes to promote Public and State security. In the same breadth, the same constitution has provisions that restricts or limits the rights of the suspect or the accused person for that matter.

34. In considering an application for review or as a petition the Constitution is clear in its value choice and it balances the interests of the public and of the individual in the administration of the criminal justice. In whatever form the investigation against the suspect or accused is presented to a court of law the ideal scenario is the application of Article 50 of the Constitution on the right to a fair hearing. Interestingly, there is an agitation by the public to involve the constitutional provisions to curtail the constitutional mandate donated to the police and the Director of Public Prosecution on grounds of a violation to the fundamental rights and freedoms by virtue of the purposive approach to ensure the rule of law reigns essentially within our democratic ideals. Article 10 on National Values and Principles of Governance of the Constitution are among the provisions that promotes the rule of law. The purpose of certiorari and prohibition are meant for the preservation of order in the legal system by preventing excess and abuse of power rather than the final determination of individual rights. For this jurisdiction to apply in favour of the Applicant there should be relevant and credible evidence to show some form of ultra-vires. In analysing the facts of this case it is still not clear that the express powers donated by the Constitution to the respondents have been used to infringe or violate the rights of the petitioner. What is duly done by the respondents under statutory authority is lawful action of which no citizen or any person within our borders is entitled to complain to the courts. There is no evidence that the respondents acted in a way to make a decision to investigate or prosecute the petitioner which is incompatible with the fundamental rights that is some of the rights derived from the Constitution. Judicial review is a legal tool under Article 165, (6) & (7) as read with Article 23 which is a useful mechanism for the High Court to determine whether the law or policy has been properly understood by a public body who assume responsibility by virtue of their position in the governance structure of the county. Lord Diplock the Council of Civil Service Union v Minister for the Civil Service (1985) A.C 374 at 411. Had this to say:

“ the reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another, a balance exercise which judges by the their upbringing and experience are ill-qualified to perform.”

35. The truth of the matter is, from the evidence and submissions made by the petitioner and a rejoinder by the respondents persuades me to make a finding of a petition not proved on a balance of probabilities for the judicial remedies in public law to be granted by this court. For that matter the best option is to order that the petition lacks merit and would therefore be dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 24TH DAY OF JANUARY, 2024.

.....
R. NYAKUNDI
JUDGE



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