



Akama v Director of Criminal Investigations & 4 others (Petition 1 of 2023) [2024] KEHC 3371 (KLR) (13 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3371 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
PETITION 1 OF 2023
JM CHIGITI, J
MARCH 13, 2024**

BETWEEN

JOHN S. AKAMA PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

PHERUS ARORI MONDA 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS (D.P.P) 3RD RESPONDENT

THE LAND FRAUD INVESTIGATIONS 4TH RESPONDENT

THE HON. ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. The Petitioner filed the instant petition on 19th day of January, 2023 seeks the following prayers: -
 - a. A declaration that the Petitioner is entitled to the benefit of and protection under *the Constitution* 2010 in the same manner as all other citizens of the Republic of Kenya in line with provisions of Article 20 (1) and (2) of *the Constitution*.
 - b. Declaration that summoning of the Petitioner for investigation by the 1st Respondent while ELC No. 92 of 2020 and ELC Appeal No. 16 of 2020 concerning LR. No. Kisii Municipality/Block I/596 are pending amounts to and/or constitutes violation of the Petitioner’s constitutional and fundamental rights as sanctioned in *the constitution*.
 - c. A declaration that any charges that may be preferred against the Petitioner are illegal, irregular, unconstitutional, unlawful, null and void.
 - d. Permanent injunction be issued restraining the Respondents from harassing, summoning and intimidating the Petitioner over their biased investigations.



- e. An order of judicial review in the nature of certiorari and prohibition whereby the summons issued against the Petitioner be prohibited forthwith and/or quashed as they are null and void.
- f. An order of injunction be issued against the Respondents from summoning, investigating, preferring charges and/or prosecuting the Petitioner over the matters related to LR. No. Kisii Municipality/Block I/596.
- g. Costs be borne by Respondents.

The Petitioner's Case

2. The 1st and 4th Respondents has issued numerous summons to the petitioner while intimidating the said Petitioner to submit to the issues that are being raised by the 2nd Respondent.
3. The 2nd Respondent had filed ELC Case No. 92 of 2020 and ELC Appeal No. 16 of 2020 at Kisii Law Courts.
4. The ELC suit at the Magistrate's Court was determined whereby the trial magistrate granted liberty to the Petitioner to continue with construction at LR. No. Kisii Municipality/Block 1/478.
5. The said 2nd Respondent filed ELC Appeal No. 16 of 2020. The said 2nd Respondent did not succeed in the said ELC Appeal No. 16 of 2020. After failing to succeed in the said ELC Case No. 92 of 2020 and ELC Appeal No. 16 of 2020, the 2nd Respondent decided to use the 1st Respondent and 4th Respondent who have summoned the Petitioner to investigate, prefer charges and eventual prosecution of the Petitioner on matters related to LR. No. Kisii Municipality/Block 1/478.
6. The 2nd Respondent is not even the registered proprietor over LR. KISII MUNICIPALITY/BLOCK 1/478. The 2nd Respondent is the registered proprietor of LR. No. Kisii Municipality/Block1/596.
7. The 2nd Respondent has refused to respect decisions made by the said courts and he has resorted to using security agencies to summon the Petitioner which amounts to violation of the fundamental rights of the Petitioner contrary to Articles 27 (1), 28, 29f) & 50 (4) of *the Constitution* of Kenya.
8. The Respondents have had the tendency of summoning the said Petitioner for purposes of investigating the said Petitioner when a court of law has already made a decision concerning questions over the suit property.
9. The Petitioner has rights which are protected in law and therefore, it shall not be prudent particularly for the 1st and 4th Respondents to continue summoning the Petitioner to their offices with the sole aim of investigating a matter which has been finalized by the Honourable Court.
10. The Petitioner wants the 1st and 4th Respondents to be restrained from summoning the him to their offices with an intention of investigating the Petitioner on matters related to a parcel of land which a court of law has already made a decision.
11. Reliance is placed in the High Court of Kenya at Nairobi Constitutional Petition No. E374 of 2021 Isaiah Luyara Odande and Another Versus Kenya Revenue Authority and Others (A. C. Mrima. J). The court said while commenting in the case of Invesco Assurance Co. Ltd versus MW (Minor suing through next friend and mother (HW) Civil Appeal No. 151 of 2011 that "a conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter."



12. He is also relying on the High Court of Kenya at Nairobi Petition No. E074 of 2022 Damour Florian Emmeric Versus Director Of Immigration Services (A. C. MRIMA. J). The court said while commenting in the case of Board of Management of Uhuru Secondary School versus City County Director of Education and 2 others (2015) where the court stated that conservatory orders should be issued so that the said Petitioner/Applicant does not suffer prejudice. According to the Petitioner herein has demonstrated to this court that he is likely to suffer prejudice in the event that interim conservatory orders are not granted.

1st, 3rd, 4th and 5th Respondents' Case

13. Vide the Petition dated 18th January, 2023 supported by the Petitioner's Affidavit sworn on even date, the Petitioner is seeking various reliefs against the Respondents jointly and severally for the alleged violation and/or infringement of his Constitutional rights.

14. The 1st, 3rd, 4th and 5th Respondents in response to and in opposition of the Petition filed Grounds of Opposition on 6th December, 2023.

15. The Petitioner claims that the 1st and 4th Respondents have issued Summonses to him following a complaint lodged by the 2nd Respondent regarding the parcel of land known as Kisii Municipality Block I/596 which in his view amounts to harassment and intimidation since the dispute over ownership of the said property is the subject of civil proceedings before the Chief Magistrate's Court at Kisii ELC No. 92 of 2020 and ELCA No. 16 of 2020 before the Environment and Land Court.

16. It is their case that the Petition does not meet the threshold of a Constitutional Petition as espoused in the celebrated case of Anarita Karimi Njeru V Republic (1979) eKLR quoted with authority by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR as follows:

“.....We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

17. It is their submission that the Petition has failed this crucial test since it does not disclose the Constitutional rights allegedly contravened by the 1st, 3rd, 4th and 5th Respondents respectively as well as their specific acts of omission and/or commission which constitute a violation of the Petitioner's rights.

18. The Petitioner contends that the civil dispute over the ownership of the parcel of land known as Kisii Municipality/Block I/596 between him and the 2nd Respondent herein is currently active vide Kisii ELC No. 92 of 2020 and ELCA No. 16 of 2020 whereby interlocutory Orders have already been issued against the 2nd Respondent.

19. The matter is still pending hearing and determination as the final judgment and decree is yet to be issued in the main suit.

20. The existence of pending civil proceedings between the parties does not bar the 1st and 4th Respondent from conducting investigations upon receipt of an official complaint especially in a dispute that attracts both civil and criminal liability.

21. Section 193A of the Criminal Procedure Code (Cap. 75, Laws of Kenya) provides as follows:



22. Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.
23. The Petitioner by the 1st and 4th Respondents were issued in good faith and in the exercise of their Statutory duties under section 52 (1) of the [National Police Service Act](#) (No. 11A of 2011).
24. The 1st and 4th Respondents' duty to conduct independent investigations under the command of the Inspector-General of the National Police Service is protected under Article 245 (4) (a) of [the Constitution](#) of Kenya, 2010 as read together with sections 34 (j) and 35 (h) of the [National Police Service Act](#)(No. 11A of 2011).
25. This investigative duty cannot be limited or interfered with except in exceptional circumstances to ensure the rule of law is upheld. Courts must however be keen to balance the rights of the complainant and the suspect depending on the circumstances of each case.
26. The Petition offends the Constitutional principles of precision and specificity set out in the case of Anarita Karimi Njeru (supra); that the Petition contravenes the mandatory provisions of section 193A of the Criminal Procedure Code, the express provisions of Article 245 (4) (a) of [the Constitution](#) as read together with sections 34 (j) and 35 (h) of the [National Police Service Act](#).

Analysis and determination:

27. I have looked at the Application, the grounds of opposition the submissions, the law applicable and the case law around the issues.
28. Section 35 of the [National Police Service Act](#) sets the duties out the Directorate of Criminal Investigations as below;

“To collect and provide criminal intelligence; undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber-crime among others; maintain law and order; detect and prevent crime; apprehend offenders; maintain criminal records; conduct forensic analysis; execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of [the Constitution](#); co-ordinate country Interpol Affairs; investigate any matter that may be referred to it by the Independent Police Oversight Authority; and perform any other function conferred on it by any other written law.”
29. In the case of Francis Matheka & 10 others v Director of Public Prosecutions & another (2015) eKLR. The Court held as follows:

“With respect to the applicants' innocence, that is an issue for the trial Court. To determine the same would amount to this Court on a judicial review application usurping the powers of the trial Court and that is not the jurisdiction conferred on this Court in these kinds of proceedings. It must be remembered that justice must be done to both the complainant and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case.”



30. This position was appreciated in Republic vs Commissioner of Police and Another ex parte Michael Monari & Another (2012) eKLR where it was held:
- “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 act in a reasonable manner, the High Court would be reluctant to intervene”.
31. The civil dispute over the ownership of the parcel of land known as Kisii Municipality/Block I/596 between him and the 2nd Respondent herein is currently active vide Kisii ELC No. 92 of 2020 and ELCA No. 16 of 2020 whereby interlocutory Orders have already been issued against the 2nd Respondent.
32. The matter is still pending hearing and determination as the final judgment and decree is yet to be issued in the main suit. The fact that there exists a civil suit is not a bar to any criminal proceedings or investigations.
33. Section 193A of the Criminal Procedure Code on this issue provides that,
- “notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”
34. This court is cognizant of the fact that there is need to uphold victims’ rights and this court is under a duty to promote access to justice which includes the rights of victims as highlighted under the [Victim Protection Act](#).
35. The 2nd Respondent’s complaint is still under active investigation by the 1st and 4th Respondents and the Petitioner has expressly refused to co-operate with the investigators by failing to honor the Summonses.
36. The Petitioner has not come to equity with clean hands and is seeking to enjoy the benefits of a Court of equity.
37. No charges can be preferred against the Petitioner for prosecution by the 3rd Respondent herein prior to the conclusion of investigations.
38. The Petitioner has not proven that the investigations are actuated by malice and/or bad faith. Section 9(2) (a) of the Victims Protection Act Provides that victims assist the courts to obtain a clear picture of what happened (to them) and how they suffered as a result of the offenders conduct or omission.
39. Victim participation should meaningfully contribute to the justice process. Article 50 of [the constitution](#) provides for the right to fair hearing. Victims of crime are entitled to the right to fair hearing and they do precipitate in proceedings. This was settled by the Supreme Court in the case of Joseph Lendrix Waswa v Republic [2020] eKLR.
40. The victims of an offense lodged a complaint with the police who initiated investigations.
41. The power to investigate crime is an important component of the rule of law it is no wonder the police are under a duty under the National Police Act, to investigate crimes whenever they reported.



To stop the police from investigating crimes would usher in anarchy. That would appear to be what the Applicant seeks to do.

42. The Petitioner will have his day in court in the event the Director of Public prosecution decides to charge him with the appropriate offences once the investigations are over. The Petitioner has also failed to tender any evidence nor produce a charge sheet that would have informed the court on whether the Petitioner will be charged. The Petitioner has put the cart before the horse.

Disposition:

43. The suit is premature and misconceived and the petitioner has failed to prove his case.

Order:

44. The Petition dated 19th day of January, 2023 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MARCH 2024

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J. CHIGITI (SC)

JUDGE

