Kimokoti v Makale & 4 others (Constitutional Petition 2 of 2020) [2024] KEHC 5970 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5970 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CONSTITUTIONAL PETITION 2 OF 2020

JN NJAGI, J

MAY 23, 2024

BETWEEN

FRED WALUSE KIMOKOTI ..... PETITIONER

AND

TOM MAKALE ..... 1ST RESPONDENT

DCIO NANYUKI ..... 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 4TH RESPONDENT

THE ATTORNEY GENERAL ..... 5TH RESPONDENT

RULING

1. The Petitioner herein has filed a Notice of Motion application dated 14th February 2020 seeking for the following orders;

   (1) Spent

   (2) Spent

   (3) Pending the hearing and determination of this petition an order issue from this court restraining the Respondents from arresting, charging, detaining or in any way interfering or harassing the Petitioner in regards to his previous engagement as an employee at Unique Loo Limited and/or engagement with Mr. Tom Makale, the 1st Respondent herein.

   (4) Costs be awarded to the Petitioner.

2. The application is supported by the affidavit of the Petitioner sworn on the 14th February 2020 wherein he deposes that he is a former employee of the 1st Respondent's company known as Unique Loo

Limited. That the 1st Respondent fired him from the employment of the said company in the year 2018. That after being fired he pulled away most of his clients from the 1st Respondent`s company, one of which was the British Army Training Unit in Kenya, BATUK, as a result of which the business dealings between the 1st Respondent and BATUK ended.

3. The Petitioner averred that the 1st Respondent was unhappy with the loss of business and embarked on a mud-slinging campaign against the Petitioner and issuing threats to him. That the 1st Respondent approached the police through the DCI Nanyuki, specifically Mr. Mureithi, to harass him. That the 1st Respondent made a complaint to the DCI that the Petitioner had mismanaged his company`s funds in the year 2017. That the police have on several occasions threatened to arrest him and charge him over the matter. That he sought to appear at the police station with his advocates but the said Mr. Mureithi insisted on meeting the Petitioner in person.

4. The 1st Petitioner avers that the 1st Respondent is a friend to the DCIO, Mr. Mureithi. That he is a man with deep pockets and he is using his money and connections to scare the Petitioner to abandon his business relations with BATUK. That the 1st Respondent has openly bragged that he will teach the Petitioner a lesson of a lifetime for having locked him out of the contract with BATUK. That Mr. Mureithi has severally called him through his mobile phone number o72874416 threatening to arrest him over the 1st Respondent`s complaint.

5. The petitioner avers that he is apprehensive that he will not receive a fair process as the police are not interested to hear his side of the case. That if he is arraigned in court it will amount to the improper and illegitimate use of police power to maliciously scuttle a contract that the petitioner has with BATUK. He avers that there is no probable cause for his intended arrest and prosecution.

6. The Petitioner further averred that the 1st Respondent is his relative and that their respective families tried to discuss the matter but the 1st Respondent failed to turn up for the meeting.

Responses

7. The application was opposed by the 1st Respondent vide grounds of opposition dated 26/11/2020. His position is that the application does not raise any cause of action against him since he is not mandated to carry out any arrests, to detain, to investigate and to prosecute any criminal acts. That the petitioner is seeking to stop investigations of allegations made against him and he is using the court to settle his personal vendetta against the 1st Respondent since he had lodged a complaint against him. Further that the petitioner has failed to state any of his constitutional rights the 1st Respondent has violated or is likely to violate.

8. The application was opposed by the 2nd and 4th Respondents through the replying affidavit of the DCIO, Nanyuki, Chief Inspector Jacob Muriithi. It was the averment of the said officer that the 1st Respondent made a report to the police vide OB No. 14/12/10/2019 that the Petitioner while in the employment of the 1st Respondent`s company was sent a sum of Ksh.681,500/- by the company but when summoned by the company to account for the same he failed to turn up. That he had stolen the company`s toilets. That the Petitioner was summoned to appear before the police for interrogation but declined to avail himself. That investigations have not commenced as the Petitioner and the 1st Respondent opted to discuss the matter with their families. The officer denied that he has been threatening the Petitioner.

9. It was the contention of the 2nd and 4th respondents that the allegations by the Petitioner have no basis. That the court cannot restrict the police from interrogating and arresting a suspect and neither can the court issue any injunction restraining the 4th Respondent from discharging its constitutional

duties where investigations reveal that the Petitioner has committed an offence known by law. It was their contention that the petitioner has not demonstrated that the 2nd and 4th Respondents actions in the matter would be a violation of the petitioner`s rights. It was their contention that the petition is premature and should be dismissed with costs.

10. The 3rd and the 5th Respondents did not file responses to the application.

Submissions

11. The application was canvassed by way of written submissions by counsels for the petitioner, the 1st respondent and the 2nd and 4th Respondents. The submissions of the Assistant Director of Public Prosecutions who was appearing for the 4th Respondent indicated that his submissions were in respect of the 2nd, 3rd and 4th respondents. The 5th Respondent did not participate in the proceedings.

Petitioner`s Submissions

12. The Petitioner submitted that he has demonstrated that the respondents have failed to observe, promote and fulfil the petitioner`s fundamental freedoms in the Bill of Rights in that the petitioner sought to appear before the police through his advocates but the police insisted on meeting the petitioner in person. That they have infringed on the rights of the petitioner under article 27(1) of the *Constitution* that provides for equal protection before the law in that the 2nd respondent jumped into summoning the petitioner to the police station before recording a statement from the 1st respondent or getting sufficient evidence in support of the 1st respondent`s complaint. More so that the 1st respondent is using his status in society by influencing the police to intimidate the petitioner thereby infringing on the petitioner`s right to dignity under article 28 0f the *Constitution*.

13. It was submitted that the 2nd and 3rd respondents in summoning the petitioner to the police station wanted to compel him to make a confession or admission that could be used in evidence against him which is a clear violation of the provisions of article 49(1) (d) of the *Constitution*.

14. It was submitted that the 2nd respondent has failed to furnish the petitioner with a recorded statement by the complainant. That though the petitioner is alleged to have stolen money from the 1st respondent there were no documents presented to the police in support of the 1st respondent`s complaint. That no documents were presented to the police to prove ownership of the toilets the petitioner is alleged to have stolen.

15. The petitioner submitted that he is entitled to the prayers sought in his application and urged the court to grant the same.

1st Respondent`s submissions

16. The 1st Respondent submitted that he only filed a complaint with the police against the applicant on behalf of the company that was his previous employer. That he has no power to arrest, detain investigate or charge the applicant which mandate falls under the police and DPP. That the petitioner has failed to demonstrate that the complaint made against him by the 1st respondent has violated or infringed on his rights. The 1st respondent relied on the case of *Albert Mokono Ondieki v DPP & 2 others* (2016) eKLR where Lenaola J. (as he then was) held that:

> I have stated that what the 3rd Respondent required of the Petitioner was lawful and within his mandate. I have also stated that the question whether a prosecution would be mounted against him is purely speculative. How then does article 47 apply? It is not the role of this Court to enter into the realm of police investigations and superintend such an investigation

unless it can be shown that contrary to Article 244(c) of the *Constitution*, the National Police Service in its investigations is not complying "with constitutional standards of human rights and fundamental freedoms". It has not been shown that this is true in the Petitioner's circumstances.

17. It was submitted that the application lacks merit and should be dismissed with costs.

2nd, 3rd and 4th Respondents` submissions

18. The above-mentioned respondents submitted that the petitioner is asking the court to suspend the constituted authority of the police and the Director of Public Prosecutions by seeking to restrain them from doing their constitutional duties as enshrined in the *Constitution* of Kenya, 2010. That to issue the orders sought would be to clothe the petitioner with prosecutorial immunity in total disregard of the constitutional authority of the 2nd and 4th respondents to ensure that persons alleged to have committed offences should be brought to justice if there is evidence of criminal culpability on their part.

19. It was submitted that the police have powers under section 52(1) of the *National Police Service Act* to summon anybody to assist in carrying out investigations. That it is in the public interest that any complaint brought to the police be investigated and determined whether there is substantial evidence or not. That there is no evidence in this matter that the police are acting without cause. That the court can only stop investigations if it is demonstrated that they are being done for ulterior motives or there is gross abuse of the process of the court.

20. It was submitted that the powers of the DPP under article 157 of the *Constitution* is to institute criminal proceedings and to direct the Director of Criminal Investigations to commence investigations. That the petition herein does not disclose a case against the 4th respondent since investigations in this matter have not commenced and no recommendations have been made by the police to the DPP to charge the petitioner. That the application and the petition are only speculative and the court cannot make speculative orders. That once investigation commences and complete, the DPP will peruse the same and make an independent decision. Therefore, the Petitioner has not demonstrated that he will not get a fair hearing under article 50 of the *Constitution* in case he is charged.

21. It was submitted that this petition is not a trial whereby the respondents would be required to furnish the court with all the evidence they intend to rely on hence the submission that the 2nd respondent has failed to furnish the petitioner with a recorded statement by the complainant is misplaced.

Analysis and Determination

22. I have considered the grounds in support of the application, the grounds in opposition thereto and the rival submissions by the respective advocates for the parties.

23. The Petitioner alleges violation of his rights under article 21(1), 27(1), 28, 39, 40, 47 and 49(1) (d) of the *Constitution*. It is clear from the pleadings that what the Petitioner herein is seeking is conservatory orders geared towards restraining the 2nd to 5th Respondents from arresting, charging and, prosecuting him pending hearing and determination of the petition herein.

24. The meaning and purpose of a conservatory order was stated in the case of *Invesco Assurance Co v MW (Minor suing thro' next friend and mother (HW)* [2016] eKLR to be as follows:

> " 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."

25. The principles that guide courts in determining whether to grant conservatory orders are now well settled. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR stated as follows on the issue:

> (86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.
>
> (87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:
>
> (i) the appeal or intended appeal is arguable and not frivolous; and that
>
> (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
>
> (88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the *Constitution* of Kenya, 2010, a third condition may be added, namely:
>
> (iii) that it is in the public interest that the order of stay be granted.
>
> (89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the *Constitution*..."

26. It is the duty of an applicant for conservative orders to show that his/her rights are under threat. The Court in the case of *Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* [2017] eKLR held that:

> " A party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition...
>
> A conservatory order would normally issue where there is real impending danger to violation of the *Constitution* or fundamental rights and freedoms with a consequence that a

petitioner or the public at large would suffer prejudice unless the court intervenes and grants Conservatory orders. In such a situation, the Court would issue a conservatory order for purposes of preserving the subject matter of the dispute."

27. As to what real danger entails, the court in *Martin Nyaga Wambora vs Speaker of The County Assembly of Embu & 3 others* Petition No. 7 of 2014 was of the view that;

> " To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention".

28. The principles to be taken into account in deciding whether an applicant is deserving of a conservatory order were summarized in *Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another* [2016] eKLR as follows:

> " 25. It therefore follows that an applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is:

a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*;

b. Whether if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

c. The public interest must be considered before grant of a conservatory order."

29. What constitutes a *prima facie* case in civil cases was defined in *Mrao Ltd v First American Bank Ltd & 2 others* [2003] KLR 125 as follows:

> " So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

30. In *Kevin K. Mwiti & others -vs- Kenya School of Law*, it was observed that:

> ... A prima facie case, it has been held is not one which must succeed at the hearing of the main case. However, it is a case which discloses arguable issues and in this case arguable constitutional issues.

31. In Board of Management of *Uhuru Secondary School v City County Director of Education & 2 others* [2015] eKLR the Court posited that:

> " 26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but

rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis..."

32. The court must however be careful not to grant final orders at interim stage. In the case of *Okiya Omtatah Okoiti vs Attorney General & 2 others* (2011) eKLR, it was stated that:

> The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

33. The first test is whether the petitioner has established a prima facie case with a likelihood of success. The Petitioner's contention is that he was summoned by the 2nd Respondent and he sought to appear accompanied by his counsel but the police insisted that he should go in person. That he fears that if he appears in person, the 2nd Respondent through the influence of the 1st Respondent who is a friend to the police, he will be arbitrarily detained and that he will not receive a fair process.

34. The 2nd Respondent stated that a complaint was lodged against the petitioner herein by the 1st Respondent. That he summoned the Petitioner to record a statement but he declined to do so. That investigations did not proceed since the 1st Respondent and the Petitioner decided to settle their dispute through their families, a contention that the Petitioner herein acknowledged in his application.

35. Section 52 of the *National Police Service Act* empowers the police to summon anybody to assist in investigations. It is clear that the 2nd Respondent acted upon a report that was made as evidenced by the copy of the OB Report attached to the Respondents' replying affidavit.

36. It is to be noted that it is not a violation of one`s right for a police officer to arrest a person where there is lawful cause to do so. In *Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others* [2016] eKLR the court held that;

> Is threat of arrest or arrest with reasons given a violation or threatened violation of fundamental rights and freedoms? We think not. What the law seeks to prevent is arbitrary arrest without probable cause. An objective justification must be shown to validate arrest of any individual. The Kenya Constitution recognizes that if a criminal offence is committed, investigation arrest and prosecution might ensue. In this context, the *Constitution* anticipates arrest of individuals and that is why articles 49 and 50 (2) make provision for the rights of arrested persons. In our view, a threat of arrest or any arrest per se is not unconstitutional so long as due process of law is followed and the rights of the arrested person are observed.

37. The petitioner herein has not established that the summons were issued out of malice as he alleged. The 2nd Respondent was therefore right to summons the petitioner in view of the fact that a complaint had been lodged against him.

38. The petitioner alleged that the police have usurped the powers of the DPP and have decided to charge him as a tool to fraudulently terminate the petitioner`s contract with BTUK. The petitioner has however not put forward any evidence to support these allegations. More so, there is no evidence that

the 4th Respondent, the DPP, has taken or threatened to take any action against the petitioner. The allegations being made against the police and the 4th Respondent are therefore only speculative.

39. From the pleadings placed before the court, the petitioner has not established that he has a *prima facie* case with a likelihood of success and neither has he shown that there is imminent danger of arrest. In my view the submission that the rights of the petitioner will be violated through employment of a procedure that he has not yet even been subject to is indeed merely speculative and premature.

40. It is clear to me that if this Court were to grant the conservatory orders sought by the applicant, the Court would be imposing a restriction on the constitutional powers of the independent offices to investigate, arrest, and prosecute. It is in the public interest that those who have committed crimes be taken through the due process of the law. The petitioner has not established that it is in the public interest that the orders sought be issued. Neither has he shown that if the orders are not issued, the suit will be rendered nugatory.

41. The power to issue conservatory orders at interim stage can only be exercised in clear cases backed with evidence. It follows therefore that this court can only intervene if there are cogent allegations of violation of constitutional rights; or threat to violation of the rights; or in clear circumstances where it is evident that the accused will not be afforded a fair trial; or where the prosecution is commenced without a factual basis. The allegations cited by the Petitioner does not pass this threshold.

42. Consequently, I find that the Petitioner has failed to satisfy the tests for granting the conservatory orders sought. The upshot is that the Petitioner's application dated February 14, 2020 is unmerited and the same is dismissed with costs to the 1st, 2nd, 3rd and 4th Respondents.

Written and signed by:

J. N. NJAGI

JUDGE

DELIVERED, DATED AND SIGNED AT NANYUKI THIS 23RD DAY OF MAY 2024

By:

A K NDUNGU

JUDGE

In the presence of:

.....for Applicant

.....for Respondent

Court Assistant - .....