



Karime v Director of Public Prosecution & 2 others (Constitutional Petition E004 of 2023) [2024] KEHC 8936 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8936 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CONSTITUTIONAL PETITION E004 OF 2023**

SM GITHINJI, J

JULY 23, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMNTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20, 21, 22, 23, 25, 28, 31, 47 AND 50 OF THE CONSTITUTION AND RULE 11 (C) & 12 OF THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF PRACTICE AND PROCEDURE RULES AND ALL OTHER RELEVANT ENABLING POWER & PROVISIONS OF THE LAWS OF KENYA

BETWEEN

LOICE WANGUI KARIME PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

THE INSPECTOR GENERAL OF NATIONAL POLICE SERVICE 2ND RESPONDENT

THE OFFICE OF THE GOVERNOR, DIRECTOR OF CRIMINAL INVESTIGATION 3RD RESPONDENT

RULING

1. The Petitioner herein filed a Notice of Motion application dated 5/6/2023 seeking for the following orders;
 - a. Spent.
 - b. Spent.
 - c. Spent.



- d. That a conservatory order be and is hereby issued against the 2nd and 3rd Respondents from arresting, harassing, intimidating the Petitioner/applicant in regards to all that parcel of land referred to as LAPSET in Hindi, Kililana Mokowe pending the hearing and determination of the Petition herein.
 - e. That a conservatory order be and is hereby issued against the Respondents from arresting or charging the Petitioner/applicant pending the hearing and determination of the Petition herein.
 - f. That costs of this application be provided for.
2. The application is supported by the affidavit of the Petitioner sworn on 5/6/2023 wherein she deposed that she is a land rights activist within Lamu County. That on 11/3/2023, the Respondents arrested her on an allegation of causing disturbance, and later released her on 13/3/2023 without preferring any charges. That the Respondents have continued to threaten, harass and intimidate her with the aim of stopping her from agitating for land rights in favour of the residents of Lamu County. As a result, so she stated, her free movement within Lamu County has been curtailed.
 3. While the 2nd and 3rd Respondents indicated in their submissions that they had filed a replying affidavit sworn by one Inspector Fred Simiyu, I have thoroughly perused the court record and I find no such document.
 4. The application was canvassed by way of written submissions filed by counsel for the Petitioner and state counsel, for the 2nd and 3rd Respondents.

The Petitioner's Submissions

5. Counsel submitted that the jurisdiction of this court to address such a claim for redress of a violation, denial, infringement or threat thereof to a right or fundamental freedom flows from *the Constitution* of Kenya, particularly Article 23, 165 and 259 therein.
6. According to counsel, the Petitioner's rights under Article 28, 29, 39, 49 and 50 have been clearly violated by the Respondents hence the need for this court's intervention.
7. Counsel argued that freedom from arbitrary arrest is the cornerstone of a just society where individual liberties are safeguarded against the capricious exercise of power. Placing reliance on the case of *Erastus Maina Karanja v Machakos County Government* [2021] eKLR and section 29 and 36 of the *Criminal Procedure Code* and section 58 of the *National Police Service Act*, counsel submitted that arrests must be conducted lawfully with proper adherence to due process and respect for individual rights. To counsel the Respondents had no evidence that the Petitioner acted in a manner so as to warrant the limitation of her freedom of movement guaranteed under article 39.

The 2nd and 3rd Respondent's Submissions

8. Mr. Munga, state counsel, identified two issues for determination; firstly, whether the 2nd and 3rd Respondents have violated any of the Petitioner's rights and secondly, whether the Petitioner is entitled to conservatory orders.
9. In relation to the first issues, counsel submitted that there is no evidence in support of the claims of arrest on 11/3/2023 and that there is no record of her arrest and detention as pleaded.
10. Counsel further submitted that the law on issuance of conservatory orders was pronounced by the Supreme Court in *Gatirau Peter Munya =versus= Dickson Mwenda Kithinji & 2 others* [2014] eKLR and by this court in *Centre for Rights Education and Awareness (CREAW) & 7 others =versus= AG*.



That from the foregoing cases, the first question is to determine whether an applicant has established a prima facie case with probability of success, as was defined in the case of *Mrao =versus= First American Bank of Kenya & 2 others* [2003] KLR 125. Counsel argued that having failed to demonstrate infringement of her rights, the Petitioner could not argue that she has a prima facie case to warrant the orders sought.

Analysis and Determination

11. 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.
12. The Petitioner alleges violation of her rights under Article 25, 28, 31, 39, 47, 49 and 50 of *the Constitution*. It is clear from the pleadings that what the Petitioner seeks is conservatory orders restraining the Respondents from arresting, harassing, intimidating, charging and, prosecuting her pending hearing and determination of the petition herein.
13. It is the duty of an applicant for conservatory 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.”

14. Further, the court in *Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 Others Petition No. 7 of 2014* explained as follows as to what entails real danger: -

“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”.

15. The principles to be considered in deciding whether an applicant is deserving of a conservatory order were summarized in *Wilson Kaberia Nkunja =versus= 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.”

16. As rightly submitted by the Respondents, what constitutes a prima facie case was established in the Mrao Case[supra] 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.”

17. Similarly, in Board of Management of Uburu Secondary School =versus= City County Director of Education & 2 others [2015] eKLR the Court held 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...”

18. It follows therefore that the first test herein is whether the petitioner has established a prima facie case with a likelihood of success. The Petitioner’s contention is that she was arrested on 11/3/2023 on dubious grounds and released on 13/3/2023 without being arraigned before any court to answer any charges.

19. The Petitioner however has not availed any evidence, save for mere allegation, to demonstrate that she was arrested as alleged. It is clear to me from the pleadings placed before the court, that the Petitioner has not established she has a prima facie case with a likelihood of success and neither has she shown that there is an imminent danger of her arrest.

20. It is trite that the power to issue conservatory orders at this 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 those rights. The allegations cited by the Petitioner fall short of this threshold and her application must fail.

21. The upshot is that the application dated 5/6/2023 is unmerited. It is hereby dismissed with no order as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23RD DAY OF JULY, 2024.

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S.M. GITHINJI



JUDGE

In the Presence of: -

Mr Shililu for the Petitioner

Respondent absent

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S.M. GITHINJI

JUDGE

23/7/2024

