



Lukalo & another v National Police Service; Lukalo (Interested Party) (Constitutional Petition 3 of 2022) [2023] KEHC 21135 (KLR) (25 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION 3 OF 2022**

JN KAMAU, J

JULY 25, 2023

**IN THE MATTER OF THE ABUSE OF THE INVESTIGATIVE POWERS OF
THE POLICE AND DIRECTORATE OF CRIMINAL INVESTIGATIONS
IN AN ONGOING SUCCESSION MATTER PENDING COURT**

AND

**IN THE MATTER OF THE PRINCIPLES OF NATIONAL SECURITY
UNDER ARTICLE 238 OF THE CONSTITUTION AND ARTICLES 245, 247**

AND

IN THE MATTER OF SECTION 28 AND 35 OF THE NATIONAL POLICE ACT

BETWEEN

BEATRICE LUKALO 1ST PETITIONER

MARGARET OSOLIKA 2ND PETITIONER

AND

NATIONAL POLICE SERVICE RESPONDENT

AND

TOM LUKALO INTERESTED PARTY

JUDGMENT

Introduction

1. In their Petition dated 19th August 2022 and filed on 25th August 2022, the Petitioners herein sought the following orders:-



- a. A declaration that the acts of the Respondent of investigating, compelling and summoning them for investigations and/or taking signatures in the matter of the late Ezekiel Lukalo Aluda when the same matters were pending in the High Court and Court of Appeal then the same was contrary to Articles 50, 238 and 239 of *the Constitution*.
 - b. An order of certiorari quashing investigations in relation to the Petitioners arising in the matter of the late Ezekiel Lukalo Aluda when the same matters were pending in the High Court and the Court of Appeal.
 - c. Costs.
2. They had also sought for conservatory orders under Certificate of Urgency, barring the Respondent from arresting, summoning or otherwise interrogating them on issues arising from Kakamega High Court Succession Case No 408 of 1998 and the resultant appeal Kisumu Civil Appeal No E167 of 2022 and on 26th August 2022 this court granted the same as an interim order which was since extended up to 25th July 2023 when the determination of the Petition herein would be rendered.
 3. The Petitioner's undated Written Submissions were filed on 15th December 2022 while those of the Respondent were dated and filed on 20th December 2022. When the matter came up for mention on 14th March 2023, the Interested Party indicated to court that he would not be filing any Written Submissions as he would solely rely on his Replying Affidavit. The Judgment herein is therefore based on the said Petitioners' and the Respondent's Written Submissions.

The Petitioners' Case

4. The 1st Petitioner swore an Affidavit on her behalf and that of the 2nd Petitioner in support of the Petition on 19th August 2022.
5. The Petitioners' case was that they had petitioned for Letters of Administration Intestate in the estate of their late father Ezekiel Lukalo Aluda in Kakamega Succession Cause No 408 of 1998 which were confirmed on 29th October 1999. They stated that the Interested Party being their step brother objected the said Grant and sought for its revocation which application was dismissed on 15th October 2009. Being aggrieved by the said decision, the Interested Party lodged an appeal at the Court of Appeal which directed that the matter be heard again and a fresh distribution be done.
6. They contended that the suit was heard and a judgment delivered and that they had appealed against the same which appeal was pending at Kisumu Court of Appeal in CA No E167 of 2022 Beatrice Lukalo & Another vs Tom Lukalo. They asserted that it was during the pendency of the aforesaid appeal that the Respondent and specifically the DCI in Sabatia sought to compel them to attend their office for the collection of specimen signatures in an investigation on alleged forgeries in court pleadings in the aforesaid Succession Cause.
7. They pointed out that the Respondent's application Hamisi PMCC Misc App No 005 of 2022 seeking to compel them to appear at the DCI Sabatia for the collection of specimen signatures was declined vide a Ruling that was delivered on 22nd June 2022.
8. It was their contention that in disregard of the said Ruling the Respondent stormed the 2nd Petitioner's home on 29th and 30th July 2022 with the intention to arrest and compel her to appear for the collection of her signature for investigation purposes. They stated that the actions of the Respondent to run a parallel investigation was a violation of Articles 50, 238 and 239 of *the Constitution* of Kenya, 2010. They asserted that they had a right to be heard and the Succession Causes heard on merit.



The Respondent's Case

9. The Respondent opposed the Petition herein vide a Replying Affidavit that was sworn by No 217859 James Tali, a Police Officer based at the Sub County Criminal Investigation Office Sabatia on 16th December 2022. The same was filed on 20th December 2022.
10. It was the Respondent's case that in exercise of powers conferred to it under Article 238, 239, 243(1), 244, 247, Section 28 of the National Police Act and Section 35 of the National Police Service Act and in carrying out its mandate under the same laws, the DCI through the Sub County Office Sabatia made a decision to carry out investigations into a case of forgery pursuant to complaint reported vide OB 322/07/2021. It asserted that the investigations would involve forensic analysis of handwriting and signatures specimens and as such, the DCI sought orders to compel the Petitioners to appear before the DCI for purposes of collecting handwritten specimens through an application Hamisi PMCC Misc App No 005 of 2022.
11. It stated that although the court disallowed to grant the said orders it ruled that it was at liberty to investigate the matter within the confines of the law. It asserted that the Petitioners had mis-interpreted the said Ruling which did not seek to bar it from its constitutional mandate but only emphasised that it should do so within the confines of the law. It was categorical that the Petitioners sought to restrict its investigative powers which included the powers to summon and compel attendance of witnesses/ persons of interest, carry out search warrants, interrogate suspects/ persons of interest under caution, arrest suspects with or without warrants.
12. It contended that the Petitioners had not demonstrated how their rights under Article 50 of the Constitution had been infringed upon as they were not accused persons within the definitions of the law as investigations were not complete and no charges had been preferred against them by the Office of Public Prosecutions. It added that the Petitioners had also not demonstrated that it had contravened Article 238 of the Constitution by being biased against them or acting on ill will against them by simply carrying out investigations with regards to a complaint made before them.
13. It was emphatic that an existent of a civil case did not bar it from investigating a complaint with regards to a criminal conduct and that the existence of civil proceedings in any court in Kenya did not bar institution of criminal proceedings against a person as provided for in Section 193A of the Criminal Procedure Code. It added that the Petitioners' argument that the Court of Appeal was investigating the complaint of forgery was flawed in law and fact as the constitutional role of courts was to adjudicate matters and not to carry out investigations which fall under its mandate.
14. It was its contention that granting the orders sought herein would be tantamount to restraining it from its constitutional functions under the aforesaid provisions of law. It urged the court to decline the orders sought as the Petitioners had not demonstrated any violation of the constitution and that it had laid out sufficient grounds for dismissal of the Petition herein.

Interested Party's Case

15. The Interested Party was enjoined in the proceedings herein vide an order of 19th October 2022 by P.J. Otieno J. In opposition of the Petition herein, the Interested Party swore a Replying Affidavit on 19th December 2022. The same was filed on even date.
16. He stated that he was not aware of this Petition until 15th December 2022 when he was served with it together with a court order that was issued on 21st October 2022 and the Petitioners' Submissions that were filed on 15th December 2022. He asserted that it followed that the Petitioners had absolutely



- no intention of involving him in this Petition which sought to quash a process he initiated as a complainant.
17. He further stated that Petitioners had secretly filed the Succession cause in Nairobi without involving other family members and that he discovered that through the Kenya Gazette and transferred it from Nairobi to Kakamega. It was his contention that the Petition was incompetent, frivolous and vexing as it amounted to an abuse of the court's process.
 18. He stated that he made a genuine complaint against the Petitioners which complaint was still under investigations and that it arose from Kakamega Succession Cause No 408 of 1998 with regard to the estate of their late father Ezekiel Lukalo Aluda in which they were Petitioners and he was the Objector. He contended that he was his first born son from the 1st house whereas the Petitioners were his step sisters from the 2nd house.
 19. He averred the Petitioners had secretly filed the Succession Cause in Nairobi without involving other family members and that he discovered that the same through the Kenya Gazette whereupon the said Succession Cause was transferred from Nairobi to Kakamega.
 20. He pointed out that the said dispute had been to the Court of Appeal, back to High Court and was currently at the Court of Appeal. He was categorical that his complaint was about forgery as he discovered that the Petitioner's signatures on some of the documents that were filed in the Succession Cause were not the same with signatures on other documents. He asserted that he had intended to cross examine the 1st Petitioner on the same but she refused to testify in the succession cause.
 21. He further contended that he reported the suspected forgery case to the DCI Sabatia Sub County Office vide OB No 32/30/07/2021 and that he was present when the DCI called the Petitioners for clarification of the issues that he had raised but they refused to come alleging that the matter was still pending in court. He averred that that was what prompted the DCI to move the court seeking to compel them to cooperate in the investigations. He reiterated the Respondent's position that although the court declined to issue the orders that the DCI had sought, it stated that the DCI was at liberty to investigate the matter within the confines of the law.
 22. It was his contention that the Petition herein was based on false allegations and misunderstanding of law and court orders issued by the court and that the alleged violations of Article 50, 238 and 239 of *the Constitution* were mere figment of the Petitioners' fertile imaginations. He stated that the Petitioners were not above the law and could therefore not bar investigations if at all they were innocent as they want it believed and that the facts in the case Republic vs Chief Magistrate's Court at Mombasa ex-parte Ganijee & Ano (2005) 2 KLR 70 quoted by the Petitioners were completely at variance with the facts of this case.
 23. He was categorical that he was not attempting to use the criminal court to settle score with the Petitioners but to seek justice in the criminal court following a genuine complaint of forgery. He averred that the Petitioners had not demonstrated how their rights had been violated and urged this court to dismiss their Petition with costs.

Legal Analysis

24. Having considered the Petition, the affidavit evidence and the Petitioners' and the Respondent's Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-
 - a. Whether or not the Petitioners' constitutional rights had been infringed upon and if so, what reliefs were they entitled to; and



- b. Who was to bear the costs of this Petition
25. The court therefore deemed it prudent to address the aforesaid issues under the following distinct and separate heads.

I. Constitutional Rights & Fundamental Freedoms

26. Right from the onset, this court noted that the Petitioners Written Submissions were incomplete as it appeared that some pages were left out at the time of filing. It therefore found it prudent to urge advocates to be vigilant in their duty as officers of court and file documents in a proper manner. Be that as it may, the court still considered their filed incomplete Written Submissions as it was able to discern their case from the documentation that had been placed before it.
27. The Petitioners invoked Article 50 of *the Constitution* and argued that the right to fair trial was a non-derogable right under Article 25 of *the Constitution* of Kenya, 2010. They placed reliance on the case of Evans Odhiambo Kidero & 4 Others vs Ferdinand Ndugu Waititu & 4 Others [2014] eKLR where it was held that fair hearing in principle incorporated the rules of natural justice.
28. They contended that as a tenet of the right to fair trial each case had to be considered and decided on its own. They asserted that the Respondent had sought an order to compel them to attend a signature specimen collection exercise in the alleged investigation of forgeries which application was dismissed and it was barred from any such exercise unless it complied with the due process. It was therefore their contention that the Respondent disregarded the said court orders by seeking to carry out the very same action that they sought leave to from the court whereas the same was denied.
29. On its part, the Respondent submitted that Petitioners had not demonstrated how its investigations into a complaint of forgery was likely to infringe on their constitutional right to a fair trial. It asserted that the law with regards to petitions was clear as the Petitioners were not only required to cite the provisions of *the constitution* that had been violated but they were also required to demonstrate the manner in which they had been violated as was held in the case of Trusted Society of Human Rights Alliance vs AG & Others Petition 229 of 2012 (eKLR citation not given).
30. It was their submission that the Petitioners had misinterpreted the Ruling of the Trial Court at Hamisi and advertently misled this court by stating that there was an order barring it from carrying out its constitutional mandate. It added that the Trial Court was very clear in the last paragraph of the Ruling in the application MISC No 005 of 2022 when it observed that it was at liberty to investigate the matter within the confines of the law.
31. It invoked Article 50(1) of *the Constitution* and argued that it was a not a court of law and had no powers to hear and determine disputes and could therefore not infringe on the Petitioners' rights to a fair trial which was conducted by courts and other quasi judicial organs and that each case was to be heard and determined on its own merits. It was emphatic that it was not a party in any civil case relating to the Petitioners.
32. It was categorical that the Petitioners had not been charged for the offence of forgery in relation to the estate of the late Ezekiel Lukalo Aluda and that their status in relations to investigations into the complaint of forgery was that they were persons of interest as investigations were still ongoing. It added that should the Petitioner be arrested, then they would be entitled to the safeguards of Article 49 and 50 of *the Constitution*.
33. It further submitted that by carrying out investigations into a complaint of forgery, it was simply performing its constitutional mandate and harboured no ill motive, malice or interest against the



- Petitioners. It pointed out that it was established under Article 243(1) of *the Constitution* of Kenya and that pursuant to Article 247 of *the Constitution* the parliament of Kenya enacted the *National Police Service Act* whose objective was to give effect to the provisions of Article 238, 239, 243, 244, and 247 of *the Constitution*.
34. It asserted that Section 28 of the National Police Act established the Directorate of Criminal Investigations to be under the direction, control and supervision of the Inspector General. It pointed out that issuing of summons to persons of interest or suspects was part of its investigative mandate as that would aid in determining whether or not an offence had been committed. It added that Section 52 of the *National Police Service Act* empowered the Police to summon anyone to attend the police station.
 35. It submitted that the police could arrest a person on reasonable grounds that they had either committed or that they were about to commit a cognisable offence. It added that the existence of a Succession Cause did not in any way bar it from carrying out criminal investigations into a complaint. In this regard, it cited Section 193A of the Criminal Procedure Code.
 36. It asserted that the Petitioners had sought to frustrate investigations into a complaint of forgery which they are persons of interests through court orders.
 37. The court is under a duty to go to the lengths and breadths of *the Constitution* of Kenya, 2010 to protect the rights and fundamental freedoms of persons where there is a violation and/or possible violation of constitutional rights that are guaranteed in *the Constitution* of Kenya.
 38. Article 22(1) of *the Constitution* of Kenya provides that every person has a right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed or was threatened.
 39. The threshold of a constitutional petition was clearly formulated in the case of Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272. It should be noted that the aforesaid case has been relied upon from time and time again to demonstrate the said threshold.
 40. A petitioner was required to set out the constitutional provisions which he or she believed to have been violated or threatened and the manner in which the respondent had violated the same. It was not enough for the petitioner to cite the provisions without demonstrating how his or her rights had been infringed upon.
 41. In the same breathe, the court is under a duty to go to the lengths and breadths of *the Constitution* of Kenya not to curtail the other organs of state from carrying out their constitutional mandate.
 42. In the case of Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Limited & 3 Others [2013] eKLR the court held that courts must in such circumstances take care not to trespass into the jurisdiction of the investigators or the court which may eventually be called upon to determine the issues and that the High Court ought not to interfere with the investigative process conferred upon the police or the Director of Public Prosecutions unless cogent reasons are given for doing so.
 43. The Petitioners had claimed that their rights under Articles 50, 238 and 239 of *the Constitution* of Kenya had been infringed upon. The issue that was therefore before this court for determination was whether or not they had demonstrated that their rights were under threat of infringement, violation or denial and/or were actually violated as contemplated by Article 22 of *the Constitution* of Kenya.
 44. Article 50(1) provides that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body. Articles 238 and 239 of *the Constitution* of Kenya provide for the principles



of national security and establishment of the National Police Service as a national security organ respectively.

45. Article 238 of *the Constitution* of Kenya provides as follows:-
1. The national security of Kenya shall be promoted and guaranteed in accordance with the following principles—
 - a. national security is subject to the authority of this Constitution and Parliament;
 - b. national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;
 1. Further, Article 239 (3) (a) of *the Constitution* of Kenya stipulates that:-

“In performing their functions and exercising their powers, the national security organs and every member of the national security organs shall not act in a partisan manner.”
47. Notably, the Petitioners had contended that the Respondent stormed the 2nd Petitioner’s home and compelled her to appear before the DCI Sabatia for collection of signature for purposes of investigation. They had also argued that the Respondent was restrained from carrying investigations by the Ruling of Hon Manyura RM that was delivered on 22nd June 2022.
48. In her said Ruling, the Learned Magistrate rendered herself as follows:-

“The court notes that under Article 157(10) of *the Constitution* gives the DPP authority to commence criminal proceedings against anybody and in exercising such authority the DD shall not be under the direction or control of any person or authority. It is this court’s view that the DCI together with the ODPP are within their mandate as far as making the application is concerned....This court finds in a bid to meet the ends of justice disallows the application by the applicant to have the respondents appear at DCI Sabatia for collection of specimen signatures to be taken to a government examiner in Nairobi following investigations of alleged forgery of signatures by the respondents on succession cause no 1859 of 1996 (sic) as this will be an infringement to (sic) the respondents’ rights... On the issue of res judicata, this court does not agree with the respondents’ argument that the issue was heard and finally determined. This is because this is a criminal matter as was pointed out by the applicants and will not amount to double jeopardy looked at the equivalent criminal proceedings. Thus, the DCI is at liberty to investigate the matter within the confines of the law.”
49. This court was not able to decipher the reasoning of the Learned Magistrate for the following reasons:-
- a. She correctly found that the DCI and the ODPP were within their mandate to make the application that was before her;
 - b. She correctly determined that criminal proceedings and succession causes were separate proceedings and hence the issue of investigations by the DCI was not res judicata;
50. This court found and held that she, however, misapplied the law and/or misdirected herself by disallowing the application on the ground that the Petitioners’ rights would be infringed upon without explaining how this had come about as there was no such reasoning and arguments by the Petitioners



- in that regard in her said Ruling. She erred in law by merely stating that she had declined the said application to meet the ends of justice without giving reasons why she had arrived at the said decision.
51. She also misdirected herself by dismissing the application while at the same time giving the DCI greenlight to investigate the matter within the confines of the law without explaining how the DCI had flouted the law in the first instance.
 52. Having said so, there was no order that had barred the DCI from carrying out investigations starting from the lower court up to the Court of Appeal. The Respondent therefore acted within its mandate to conduct its investigations as it mandated is protected by law.
 53. The National Police Service is a creature of *the Constitution* of Kenya. Article 239 (1) (a), (b) and (c) of *the Constitution* of Kenya provides that:-

“The national security organs are the Kenya Defence Forces, the National Intelligence Service and the National Police Service.”
 54. Section 28 of the *National Police Service Act* No 11 of 2011 stipulates that:-

“There is established the Directorate of Criminal Investigations which shall be under the direction, command and control of the Inspector-General.”
 55. Article 245(2) (b) of *the Constitution* of Kenya further provides that:-

“The Inspector-General shall exercise independent command (emphasis court) over the National Police Service, and perform any other functions prescribed by national legislation.”
 56. Notably, investigations are a mandate of the National Police Service (NPS). They are legal processes aimed at fact finding of commission of crime in our justice system and do not amount to infringement on the rights or fundamental freedoms of any person who is under investigations per se. It is an independent function that is to be carried out by the Inspector- General without direction from any other person.
 57. This court could also not purport to direct the Respondent on how to carry out investigations or where to institute criminal proceedings. Doing so was tantamount to infringing on their mandate that was well set out in *the Constitution* of Kenya. Merely feeling inconvenienced by investigations is not sufficient reason for the court to interfere with the powers of NPS. There must be clear cut violations to give the court an opportunity to jump in to avert any violations, breaches and/or infringements of *the Constitution* of Kenya.
 58. As long as investigations are carried out in accordance with the law and rules, the processes thereto must be allowed to run their course for proper administration of justice. Proof of violation, infringement or threat or contravention of a person’s right under *the Constitution* of Kenya is required.
 59. Accordingly, having the circumstances in this case, this court was unable to find that the Petitioners’ rights were violated and/or infringed as far as the above-mentioned Articles were concerned as they were summoned to appear before the DCI but they failed to do so. They did not demonstrate how their fundamental rights had been breached or denied or that there was a threat of them being infringed, contravened and/or violated warranting protection from this court.
 60. Indeed, charges were yet to be preferred against them as no criminal proceedings had been instituted nor a hearing conducted for them to claim that their rights were actually violated. It was not sufficient



to cite provisions of *the Constitution* of Kenya without demonstrating how the same had been violated and/or breached.

61. This court came to the firm conclusion that the Petitioners were seeking to restrain the Respondent from carrying out its investigative duties that had been donated to it by *the Constitution* of Kenya and hence this court could not act ultra vires *the Constitution* of Kenya and were hence not entitled to the reliefs that they had sought in their Petition herein.

II. Costs

62. As both parties had prayed for costs herein, this court had due regard to the case of Consumers Federation of Kenya (COFEK) vs Nakumatt Holdings Limited & 4 others [2018] eKLR where the court stated that courts have been reluctant to award costs in constitutional petitions as costs may be a barrier to potential litigants in public interest litigation but that there were instances where courts have held an award of costs would be justified such as where the litigation was frivolous or vexatious or where the conduct of the litigant attracted censure by the court. In this case, the Petitioners had not done anything to warrant such censure by the court.
63. In any case, this court found that it would not fair to award a government entity costs against citizens who were merely seeking protection of the court from what they had assumed were violations but which this court not to have been.

Disposition

64. For the foregoing reasons, the upshot of this court's decision was that the Petitioners' Petition dated 19th August 2022 and filed on 25th August 2022 was not merited and the same be and is hereby dismissed. There will be no order as to costs.
65. For the avoidance of doubt, the interim orders that were issued herein be and are hereby discharged, vacated and/or set aside.
66. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF JULY 2023

J. KAMAU

JUDGE

