



**Nabulindo & 4 others v Office of the Director of Public Prosecution & 2 others  
(Constitutional Petition 12 of 2020) [2023] KEHC 21165 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21165 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CONSTITUTIONAL PETITION 12 OF 2020**

**SN MUTUKU, J**

**AUGUST 1, 2023**

**IN THE MATTER OF ARTICLES 10, 20(1)(2)(3), 23(1)(3), 25, 27,47 AND 48 OF THE  
CONSTITUTION OF KENYA 2010.AND IN THE MATTER OF ABUSE OF CRIMINAL  
JUSTICE SYSTEM AND PROCESS AND CONTRAVENING OF THE PETITIONERS RIGHT  
TO FAIR HEARING, RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION.**

**BETWEEN**

**SUSSAN VUSHA NABULINDO ..... 1<sup>ST</sup> PETITIONER**

**ROBERT GICHUKI GATHONDU ..... 2<sup>ND</sup> PETITIONER**

**GIDEON MWINZI MALUNDU ..... 3<sup>RD</sup> PETITIONER**

**LINET METHUSELA ..... 4<sup>TH</sup> PETITIONER**

**FRANSCISCA MBETI MAITHYA ..... 5<sup>TH</sup> PETITIONER**

**AND**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION .. 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioners were, at the time of the events giving rise to this Petition, working in the Kajiado North Lands Registry in various capacities as clearly stated in the Petition dated November 12, 2020. They were arrested by the officers of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and through the 1<sup>st</sup> respondent they were taken to court in Misc. Application No. E023 of 2020 which application sought to have the petitioners detained pending investigations. They were however admitted to bail pending investigations.



2. The 1<sup>st</sup> petitioner stated, further, that she was re-arrested by the 3<sup>rd</sup> respondent despite being admitted to bail. The petitioners have termed the arrest as malicious, witch-hunt and politically instigated. They argued further that the arrest was discriminatory and unjust and contravenes Article 49(1) of the Constitution of Kenya.
3. The petitioners have also claimed that they were arrested while performing their official duties at Ngong District Land Registry and that during that arrest, the police took their personal effects and original titles and transfer documents in respect of:
  - i. Nairobi Block 110/436, 549, 943, 226, 342, 482, 328, 432, 475, 594 and 194,
  - ii. Original certificates of title for IR No 221794,
  - iii. Original lease documents for LR No. 27/125, 209, 224, 211 and 225,
  - iv. Original deed plans No. 384074 for LR No 27/389,
  - v. Original deed plan No 264503 for LR No 13330/119, and
  - vi. Sale agreement for IR No.203173.
4. They are seeking the following orders:
  - i. An order of prohibition prohibiting the 2<sup>nd</sup> & 3<sup>rd</sup> respondents from further arresting the petitioners while they are admitted to Bond/Bail as ordered by the court in Ngong Misc. E023 of 2020.
  - ii. An order of Mandamus directed at the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to release to the petitioners their personal effects unlawfully confiscated from the petitioners without warrant of search.
  - iii. A declaration that the actions of the 3<sup>rd</sup> respondent of arresting the petitioner and in particular the 1<sup>st</sup> petitioner while they are out on bond is malicious and amounts to harassment, discrimination and intimidation.
  - iv. A declaration that the petitioners being Land Registrars cannot be held personally liable for actions done in the course of official duty as this is contrary to section 14 of the Land Registration Act.
  - v. A declaration that the petitioners only being suspects ought to be protected from further harassment by the 3<sup>rd</sup> respondent as long as they co-operate with the 3<sup>rd</sup> respondent as per the court's orders issued upon their admission on bond.
  - vi. Conservatory Order do issue barring the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to stop further arrests and intimidation of the petitioners who are out on bond while investigations are on-going.
  - vii. An order do issue that the petitioner's personal effects including phones and ATM cards seized by the respondents be returned back to the petitioners.
  - viii. That the petitioner be awarded the costs of these proceedings.
  - ix. Such other further orders as to this court may deem just.



5. This matter was initially filed in Nairobi and placed before Hon. Justice J.A Makau (Rtd), as he then was, on November 16, 2020. Directions were given to have the Application and the Petition served on respondents. The matter was thereafter transferred to Kajiado High Court for determination.
6. The respondents have not filed any documents despite the record showing that they had been served. On July 20, 2022 when I directed that the Petition be canvassed through written submissions, I had perused the court record and had satisfied myself that service to the respondents had been properly done. The affidavit of service filed in court on July 20, 2022 clearly indicated that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had been served through the Office of the Attorney General. The Mention Notice dated July 7, 2022 indicating the mention date as July 20, 2022 had been received by the Kenya Police Service on July 7, 2022, the Office of the Director of Public Prosecutions, Kajiado on July 8, 2022 and the Office of the Attorney General on July 7, 2022.
7. The respondents did not attend court on July 20, 2022. I gave directions to have the submissions filed. The respondents, in addition to not filing any pleadings in response to the Petition, have not filed submissions. This Petition, therefore, remains unchallenged by the respondents.

### **petitioners' submissions**

8. The petitioners filed their submissions on October 18, 2022. They have submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, without disclosing the offence to them, proceeded to arrest the petitioners on November 5, 2020; that they filed at the Ngong Law Courts Misc. Application E023 of 2020; that the prayers sought in that application were not granted and that instead, the court admitted the petitioners to bail pending investigations.
9. They have argued that this Honourable court should grant the orders sought as the respondents did not file a response to the Petition despite being given an opportunity to do so; that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have a personal vendetta against the petitioners and their continued harassment is unjustified and that respondents are using their power unfairly by confiscating the 1<sup>st</sup> petitioners' personal belongings as listed in the annexure marked "SVN-1" in the Supporting Affidavit.
10. It is the petitioner's submissions that they have not been charged in a court of law in connection with the listed items in the inventory; that section 14(15) of the *Registered Land Act* indemnifies the Land Registrar from any wrong doing while discharging their duties and that in lacking any valid ground as to why the respondents should continue holding the items described in annexure "SVN-1", and in the protection of constitutional rights and rule of law this honourable court should order for the release of the said items.
11. The petitioners relied on the case of *Mobamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)* [2018] eKLR.

### **Analysis and Determination**

12. In my considered view, the issue that pops out for determination is whether the petitioners' rights have been violated. That the petitioners were arrested is not in dispute. There is evidence to show that they through the documents attached to the Affidavit dated November 13, 2020 in support of the Petition, the petitioners have attached inventories of the items seized from them after the arrest and an application (Notice of Motion) seeking to be allowed by the court to detain the petitioners at Kajiado Police Station pending completion of investigations.



13. Among the items seized by the police are the documents listed under paragraph 3 of this judgment. These are sensitive documents whose owners may not be parties to this Petition. I did not get evidence as to whether the police preferred any charges against the petitioners or any of them. I do not have evidence as to the status of the arrest of the petitioners.
14. Article 49 of the *Constitution* guarantees arrested persons certain rights. The said Article embodies principles that have always been regarded as vital and fundamental for safeguarding personal liberty in almost all legal systems where the rule of law prevails. The said article provides:
- Rights of arrested persons
- (1) An arrested person has the right—
- (a) to be informed promptly, in language that the person understands, of
    - (i) the reason for the arrest;
    - (ii) the right to remain silent; and
    - (iii) the consequences of not remaining silent;
  - (b) to remain silent;
  - (c) to communicate with an advocate, and other persons whose assistance is necessary;
  - (d) not to be compelled to make any confession or admission that could be used in evidence against the person;
  - (e) to be held separately from persons who are serving a sentence;
  - (f) to be brought before a court as soon as reasonably possible, but not later than—
    - (i) twenty-four hours after being arrested; or
    - (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
  - (g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and
  - (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.
- (2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.
15. Article 9(1) of the *International Convention on Civil and Political Rights* (ICCPR) basically prohibits arbitrary arrest and detention and the use of the term, “arbitrary” simply covers unjustifiable deprivation of liberty rather than seeking to list exhaustively all permissible causes of deprivation of liberty.
16. The court in *Erastus Maina Karanja v Machakos County Government* [2021] eKLR, held that:



The petitioner herein alleges that his right was violated on the account of his arrest, detention and prosecution being unlawful. Wrongful arrest involves deprivation of a person's liberty; it consists of arresting and holding a person without legal justification. Thus, liability thereof is strict, and a party need not show that the person causing the arrest was at fault or that he was aware that the arrest was wrongful. It is one that falls under action injurium, and so proof of damage is not necessary to support the action. Even if no pecuniary damage has been suffered, the court will award a contemptuous figure for the infringement of the right to liberty.

As a general rule, an arrest of a suspect should not be made unless and until his or her case has been investigated with sufficient evidence requiring an answer on the complaint. The starting point for the investigating officer is not to depart from the enforcement of a right to a fair hearing and due process" (emphasis added).

17. Similarly, in the case of *Daniel Waweru Njoroge & 17 others v Attorney General* Civil Appeal No. 89 of 2010 [2015] eKLR the court held that:

"False arrest which is a civil wrong consists of an unlawful restraint of an individual's personal liberty or freedom of movement by another person purporting to act according to the law. The term false arrest is sometimes used interchangeably with the tort of false imprisonment, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetrated by one who asserts that he or she is acting pursuant to legal authority, whereas a false imprisonment is any unlawful confinement. Thus, where a police officer arrests a person without probable cause or reasonable basis, the officer is said to have committed a tort of false arrest and confinement. Thus, false imprisonment may be defined as an act of the defendant which causes the unlawful confinement of the plaintiff. False imprisonment is an intentional tort."

18. In our instant case, the petitioners have claimed that they were at work when they were arrested and taken to Isinya police station. The 1<sup>st</sup> petitioner who was not at work during the arrest was arrested in her house. They claim that they were not given a reason why they were arrested. That their personal effects were taken by the police. The 1<sup>st</sup> petitioner claims that she was re-arrested despite the fact that she had been released on bail. To them the arrest was malicious, discriminatory and unjust. From the provisions of the Law earlier stated and being guided by the authorities herein, it is my finding and I so hold, that the respondents did indeed violate the petitioners' constitutional rights by unlawfully arresting them and failing to explain to them the reason for that arrest. It therefore follows that the arrests were in contravention of article 29(1) which protects the petitioners from being deprived of their freedom without just cause.

19. As to whether the petitioners are entitled to the reliefs sought, I have stated, above, that the Petition is not opposed. No evidence has been placed before me to show that the petitioners had committed any crime or that they are being prosecuted for any crime.

20. The petitioners in this matter are seeking, among other reliefs, judicial review remedies. The court in the case of *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, a bench of five, held:

"In our considered view presently, judicial review in Kenya has Constitutional underpinning in articles 22 and 23 as read with article 47 of the *Constitution* and as operationalized through the provisions of the *Fair Administrative Action Act*. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review.



Order 53 of the Civil Procedure Act and rules is a procedure for applying for remedies under the common law and the Law Reform Act. These common law remedies are now part of the constitutional remedies that the High Court can grant under article 23(3)(c) and (f) of the Constitution.”

21. It was also held by the Supreme Court in *Judges and Magistrates Vetting Board v Centre for Human Rights and Democracy* [2014] eKLR that:

“When courts conduct judicial review, they are in essence ensuring that the decisions made by the relevant bodies are lawful. Consequently, should they find that the decision made is unlawful, courts can set aside that decision. Judicial review, therefore, can be said to safeguard the rule of law, and individual rights; and ensures that decision makers are not above the law, but have taken responsibility for making lawful decisions, in the knowledge that they are reviewable.”

22. The petitioners have also cited section 14 (5) of the Land Registration Act to the effect that “The Registrar shall not be held personally liable for lawful acts discharged by the Registrar under this Act in good faith.” I do not have evidence that the petitioners were not on official duty. However, where police are justified that an offence has been committed, the law is clear that the perpetrator must face the law, but due process must be followed.

23. While I find that the petitioners are entitled to reliefs sought, I need to qualify the orders this court will issue to guard against granting orders that may aid criminal activities where these exist. The orders I will grant in this Petition should not be taken as obstructing the police or any law enforcement officer, who has reason to believe that the petitioners have committed a crime and who has evidence to support that reason, from arresting the petitioners and following due process of the law in arraigning them in court to answer whatever charges are preferred. However, the powers granted to the law enforcement officers should not be used to breach the law and infringe on the constitutional rights of any of the petitioners without reasonable basis.

24. After careful consideration of this Petition, I allow this Petition and grant the following orders:

- i. An order of prohibition is hereby issued prohibiting the 2<sup>nd</sup> & 3<sup>rd</sup> respondents from further arresting the petitioners while they are admitted to Bond/Bail as ordered by the court in Ngong Misc. E023 of 2020.
- ii. An order of *Mandamus* directed at the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to release to the petitioners their personal effects unlawfully confiscated from the petitioners without warrant of search.
- iii. A declaration that the actions of the 3<sup>rd</sup> respondent of arresting the petitioner and in particular the 1<sup>st</sup> petitioner while they are out on bond is malicious and amounts to harassment, discrimination and intimidation.
- iv. A declaration that the petitioners only being suspects ought to be protected from further harassment by the 3<sup>rd</sup> respondent as long as they co-operate with the 3<sup>rd</sup> respondent as per the court’s orders issued upon their admission on bond.
- v. Conservatory Order do issue barring the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to stop further arrests and intimidation of the petitioners who are out on bond while investigations are on-going.



- vi. An order do issue that the petitioner's personal effects including phones and ATM cards seized by the respondents be returned back to the petitioners.
  - vii. That the petitioner be awarded the costs of these proceedings
25. I decline to grant prayer number 4 for reasons that section 14 (5) of *Land Registration Act* protects Registrars from personal liability while discharging their duty in good faith. I want to believe that where a crime is committed in the cause of that duty, this provision will not come to the aid of the perpetrator.
26. I wish to add a caution that the orders granted in this Petition do not grant the petitioners immunity against arrest by law enforcement agencies where a crime has been committed by them or by any of them and where law has been followed in the arrest and prosecution of the petitioners.
27. Orders shall issue accordingly.

**Dated, signed and delivered this 1<sup>st</sup> of August 2023.**

**S. N MUTUKU**

**JUDGE**

Judgment in Kajiado Constitutional Petition No. 12 of 2020	4
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