REPUBLIC OF KENYA

IN THE HIGH COURTOF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CONSTITUTIONAL PETITION NO. E3 OF 2020

RICHARD MUHINDI NZYOKA.....1ST APPLICANT/PETITIONER

SIMON MUTUKU.....2ND APPLICANT/PETITIONER

KIMATU MUTUKU.....3RD APPLICANT/PETITIONER

JOSEPH KIMEU MUENDO.....4TH APPLICANT/PETITIONER

VERSUS

DAVID K LANGAT.....1ST RESPONDENT

O.C.P.D ATHI RIVER POLICE STATION.....2ND RESPONDENT

D.C.I.O ATHI RIVER POLICE STATION.....3RD RESPONDENT

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND INTERESTED PARTY

FRANCIS KOOME.....3RD INTERESTED PARTY

INSPECTOR GENERAL OF POLICE.....4TH INTERESTED PARTY

RULING

1. The Petitioners herein filed a notice of motion application dated 15.10.2020 brought under Article 50 of the Constitution of Kenya, 2010, Section 1A, 1B,3A and 80 of the Civil Procedure Rules, 2010 seeking the following orders;

a. Spent.

b. This honourable court be pleased to review its ruling dated 13th day of October 2020 and that the orders therein be vacated and/set aside.

c. Costs be in the cause.

2. The application is supported by the grounds set out therein and by the affidavit of Mr Ndege learned counsel for the petitioners who averred inter alia; that the previous application dated 17th of September 2020 that was heard and determined by this court was dismissed on the premise that the petitioners/Applicants herein had already taken plea on the 21st day of September 2020 and thus the same had been overtaken by events; that the court made an erroneous assumption of the facts since it had already issued temporary stay orders of the

intended plea which had been served upon the subordinate court in Mavoko Criminal case number 505 of 2020; that the court did not consider its submissions filed on 25th of September 2020 when making the ruling as it only considered the 3rd interested party's submissions; that the petitioners were condemned unheard and thus not given their right to fair trial under Article 25 and 50 of the Constitution of Kenya, 2010; that there is an error apparent on the face of the record warranting an order for review.

3. Despite service of the application upon the Respondents and the interested parties, none of them has responded. The Applicants filed an affidavit of service dated 10th December 2020 which clearly indicated that the adverse parties had been duly served with the application. The application thus remains unopposed and would have been allowed as prayed save only that it seeks review of the court's orders in which case the court must determine the same.

4. Learned counsel for the petitioners Mr. Mutunga, opted to canvass the application by way of oral submissions. He submitted that the application dated 17.9.2020 was seeking to challenge the intended criminal prosecution of the Petitioners who were facing robbery with violence charges at Mavoko law courts in criminal case number 505 of 2020. He averred that the Petitioners are yet to take plea and thus the court made an error in its ruling in assuming that they already had taken the said plea. He submitted that the allegation of Constitutional violation of rights should merit a hearing of the petition. He submitted that the intended prosecution was being done in a discriminative manner. He referred to paragraph 8 of the petitioners' submissions dated 24.09.2020 where the case of Reuben Njuguna Gachukia & Another vs inspector General of the National Police Service and 4 others was cited. He submitted that if there is evidence that the prosecution is tainted with some ulterior motives then the court should intervene. He referred to the **Machakos Environment and Land court case number 1 of 2020** which the Petitioners had filed and which has some interim orders in force. He submitted that the 3rd interested party is the complainant in the criminal case. He pointed out that there are two groups of villagers who are fighting over the same piece of land. The petitioners are from group D where villagers were assaulted and that P3 forms and OB numbers were issued and that despite all this, no action has been taken by the police. He submitted that the petitioners are seeking protection of their constitutional rights by this court due to the arbitrary investigations and intended prosecution of the petitioners. He further submitted that Article 157 of the Constitution gives powers to the Director of Public Prosecutions to prefer charges but the same should be done with regard to Public interest and prevent abuse of the court process. He opined that the criminal case in Mavoko has been given the dimension of a criminal case despite being a civil one.

5. I have looked at the application that is the subject of this ruling and heard the Petitioners counsel's submissions on record and find that the only issue for determination is whether the ruling dated 13.10.2020 should be reviewed, varied and/or set aside.

6. The power to review orders is set out in section 80 of the Civil Procedure Act, cap 21 of the Laws of Kenya which provides as follows: -

> **80. Any person who considers himself aggrieved-**
>
> ***(a)*** **by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
>
> **(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit**.

7. Review is also provided for by the Civil Procedure Rules which are set out under Order 45 Rule 1 thereof as follows:-

> (1) Any person considering himself aggrieved-
>
> **a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
>
> **b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.**

8. In the case of **National Bank of Kenya Limited vs Ndungu Njau (1996)KLR 469 (CAK) at Page 381** the court pronounced itself on review as follows;

> **"the error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."**

9. On the principle of residual jurisdiction of the court to review its decisions, I refer to the Court of Appeal decision in the case of **Ushago Diani Investment Limited v Jabeen Manan Abdulwahab [2019] eKLR** where the court cited the case **of Benjoh Amalgamated Ltd vs. Kenya Commercial Bank Limited [2014] eKLR** where it was held that review should be invoked with circumspection".

10. The court went further to say that in the Benjoh case, the Court, after reviewing decisions from different jurisdictions on the question of review held as follows:

> ***"The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been*** st**atutorily conferred with the jurisdiction to reopen a decided**

matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).”

11. The rules on review provide three major grounds and the Petitioner has cited the second one as their main ground in support of the application namely, that there was an error apparent on the face of the record.

12. I have looked at the court record and note that at the time of writing the ruling dated 13.10.2020, the petitioner’s submissions were not on record. However, when perusing the record as I was preparing this ruling, I noted that there were some set of submissions on record that did not have a payment receipt nor stamp from the court and therefore the same might have been placed in the file long after the ruling had been delivered. Indeed, the court had given timelines to the parties within which to file their respective submissions.

13. In the case of **Mombasa Cement Limited vs Speaker, National Assembly & Another (2018)eKLR** the Court was faced with similar dilemma of non-payment of requisite court fees and its consequences aptly held that :-

“The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit incompetent because there is no competent suit filed before the Court. Whereas the Court has inherent powers to allow a party who has not paid fees in time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the Court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case. Consequently, I find and hold that failure to pay the requisite Court filing fees, which is a prerequisite for instituting suits renders this Petition incompetent.”

14. I also note that the current application has been filed without a single annexure though reference is made to certain documentation that would have aided the court in making its decision. The copy of the applicants’ submissions dated 24.9.2020 has a stamp of the Attorney General and department of justice dated 25.9.2020. There is no evidence that the same was duly filed in the court file as it is not stamped and accompanied by an official receipt. I therefore see no omission on the face of the record since the court dealt with the matter with the then available submissions.

15. Furthermore, the Petitioner alleges violation of his constitutional rights but the same has not been supported by any evidence besides verbal allegations.

16. In the case of ***Anarita Karimi Njeru v Republic No.1 (1979) I KLR, 54*** and which was echoed in the case of ***Mumo Matemo v Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) e KLR***: the court said:

“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.”

In **Mumo Matemo Case**, the Court said:

“…the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court… Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

17. The Petitioners have alluded to plea not being taken in Mavoko Criminal case number 505 of 2020 without attaching any evidence or proceeding from the court and as such without actual perusal of the file, I am unable to ascertain the true position of the matter. However, I note that the 2nd Respondent alluded to the fact that the Petitioners had taken plea on 21.09.2020 and even given bail/bond. I note that this matter also came before this court on the same day and that is when interim orders were given. The application dated 17.09.2020 was filed on the same day and when it came before the court, parties did not make any disclosure to the court about the matter.

18. In the instant application, the applicant refers to 19.09.2020 being a day when the matter was to come for directions but has not indicated to the court on what transpired then despite this matter coming up before this court thereafter. Even at this point, the Applicants do not deny having been granted bail on 21.09.2020.

19. The only way one would get bail in court is after plea has been taken. The court procedure in criminal cases is quite clear on this.

20. With regards to violation of Constitutional rights of the Petitioner and in reference to the Mumo Matemo case, the Petitioners have stated that the police and the 2nd Respondent have been discriminative in the manner in which their complaints have been handled. The Applicant cited Article 165 (3) (b), Article 165 (6), Article 157 (11) and the Office of the Director of Public Prosecutions Act, No. 2 of 2013. The parameters for issuance of orders directing the ODPP on how to handle the matters has already been discussed in the ruling of 13.10.2020. This court cannot descend to the criminal court and give it direction on how to handle its matters. The trial court is vested with powers to give the appropriate directions and that the petitioners will be accorded their due rights by the said court. Even though93 the petitioners

maintain that the dispute is more of civil and not criminal in nature, they are aware that under section 93A of the Criminal Procedure Code criminal proceedings can be instituted despite the pendency of civil proceedings.

21. The **Goddy Mwakio & Another v Republic [2011] eKLR** this Court stated that:

> **"An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances".**

22. The effect of setting aside the order dated 13.10.2020 is that the application dated 17.09.2020 will be resuscitated for hearing again yet the same had been heard on merit and determined. As it stands, there are no interim orders as the same lapsed when the application was dismissed. It is my view that the application seems to attack the ruling dated 13.10.2020 and which should have been an appeal but is now disguised as a review. I find that the applicants have not satisfied the threshold for an order of review or setting aside. Suffice here to add that the petitioners' previous application dated 17. 9. 2020 was not dismissed solely on the basis that a plea had been taken but on other grounds as well. Hence, the issue of whether or not plea had been taken is not material since the court has already determined that the petitioners' application dated 17. 10. 2020 lacked merit. The appropriate recourse for the applicants is to pursue an appeal. For avoidance of doubt, I reproduce paragraph 24 of the impugned ruling for clarity purposes and it was as follows:

> **"With regard to prayer 4 by dint of Article 245 of the Constitution, this court has no mandate to direct investigation and in any event the applicant ought to have approached the police directly. I believe that the National Police Service being an independent body has the mechanisms to handle rogue officers if it is satisfied that indeed wrongful actions have been done. It is plainly not possible for this court to descend into the arena of police operations and investigations and purport to decide which of the officers are suitable to investigate cases involving the petitioners since that responsibility falls under the mandate of the National Police Service Commission. It has also transpired that the petitioners have since been charged before Mavoko law courts where they have taken plea and been granted bond by the trial court. It would therefore seem that the application has been overtaken by events and that no prima facie case has been made up at this stage to justify the grant of conservatory orders. Clearly, the prayers sought in the application are not merited in the circumstances.''**

23. From the above, the issue of a plea having been taken was not the only factor for consideration as it was just a by the way with the court having found that the police are best placed to deal with issues of investigations of crimes and it was not the court's duty to decide which officer was suitable to investigate the petitioners. It matters not that plea has not been taken as the same is not a patent error on the record since the court has already found that the petitioners' rights had not been violated as the investigative bodies and the DPP ought to be allowed to carry out their duties and that the petitioners' rights will still be safeguarded in the trial court as they have the right to defend themselves and even lodge appeals where necessary. This court in the ruling covered all the areas in contention and hence there is no error apparent on the record. The only recourse is for the applicants to lodge an appeal to a higher court for redress if need be.

24. In the upshot, it is my finding that the petitioners' application dated 15.10. 2020 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF MARCH, 2021

D. K. KEMEI

JUDGE