



REPUBLIC OF KENYA

IN THE HIGH COURT OF AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E252 OF 2020

**IN THE MATTER OF ARTICLES 35(1) (A), (B), 50(2) (J), 1, 2, (4), 10, 21,
22, 23, 35, 47, 48, 50, 157, 159, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE 1ST RESPONDENT'S DECISION TO CHARGE THE
PETITIONER IN KIBERA CHIEF MAGISTRAE'S COURT CRIMINAL CASE NO. 486 OF 2020**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 35 (1) (A), (B) AND 50(2) (J) OF THE CONSTITUTION, 2010**

AND

IN THE MATTER OF THE PENAL CODE CHAPTER 63 LAWS OF KENYA

AND

IN THE MATTER OF THE POLICE ACT, NATIONAL

POLICE ACT & THE DIRECTOR OF PUBLIC PROSECUTIONS ACT

BETWEEN

MERCY NYAWIRA KABURU.....PETITIONER

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE CHIEF MAGISTRATES' COURT-KIBERA.....3RD RESPONDENT

AND

MEGASCOPE HEALTH CARE LIMITED.....INTERESTED PARTY

RULING

APPLICATION

1. The Applicant/Petitioner through a Notice of Motion dated 18th August 2020 seek the following orders;-

a) Spent.

b) That pending the hearing and determination of this application, a conservatory order be issued to stay the proceedings in Kibera Chief Magistrate's Court Criminal Case No. 486 of 2020, Republic vs. George Ng'ang'a & 7 others and the consequential orders made therein.

c) That pending the hearing and determination of the Petition. A conservatory order be issued to stay the proceedings in Kibera Chief Magistrate's Court Criminal Case No. 486 of 2020, Republic vs. George Nganga & 7 others and the consequential orders made therein.

d) That costs of this Application be provided for.

2. The Application is premised on several grounds on the face of the application and supported by Applicant's Supporting Affidavit.

THE RESPONDENTS' RESPONSE

3. The Respondent did not file any response as per Court record.

INTERESTED PARTY'S RESPONSE

4. The Interested Party filed Replying Affidavit sworn by Richard Ngatia Waweru dated 27th October 2020 in opposition to the Applicants Application.

APPLICANT'S CASE

5. The Applicant contend that on 23rd April 2020 she was going to the bank to forward a list of cheques for payments that had been approved by the Managing Director of the Interested Party one Mr. Richard Ngaita and to process a bankers cheque to Pharmacy and Poisons Board which, one Morgan Kamau, who is a colleague at the Interested Party, and give her to deposit, cheque number 989 from Standard Chartered Bank with instructions that the Petitioner should bank the said cheque at Co-operative Bank, Lavington Mall Branch in the account of the Interested Party. The Petitioner duly deposited the said cheque and later gave the cheque deposit slip to the said Morgan Kamau.

6. That on 12th May, 2020 the Petitioner was called by her boss Richard Ngatia who informed her that the bank had called him and told him that there was a cheque that was deposited from Karen Hospital that was fake. It was cheque no. 994 banked on the same day, 12th May, 2020. On the said date the said Mr. Richard Ngatia directed the Petitioner to go to the bank to ascertain on the said issue. Immediately before the Petitioner went to the bank; the Petitioner indicated that there were two other cheques of Kshs.671,434/= each from DTB bank that had been dropped at the reception and one Lucy Gichinga was handling them. The Petitioner thereafter went to the bank and met the teller who referred her to the operations manager who confirmed that the said cheque no. 994 was a fake and was actually not from Karen Hospital.

7. Ongoing back to the office the Petitioner informed her colleagues Morgan Kamau and Margaret Kabui that she had confirmed with the bank that the said cheque no. 994 was fake. Not knowing that all the previous cheques had been unpaid due to the same reason, the Petitioner tried to call the said Karen Hospital using the numbers on the L.P.O. and requested to speak to the Chief Accountant Stephen Anyenda to inquire on why they issued a fake cheque.

8. The Respondent by a phone call informed the Petitioner that the said Stephen Anyenda was in a meeting and will call back. That is when the Petitioner decided to call the bank to confirm if the previous cheques nos. 989, 990, 991, 992 & 993 had been paid. The bank confirmed they had all bounced due to the same reason of being fake cheques. At this point the Petitioner informed her boss Mr. Richard Ngaita of the information she was given by the bank. This is when it occurred to everyone that some fraudsters purporting to be from The Karen Hospital had placed orders through fake LPOs. The LPOs were processed through reception, procurement, sales, accounts and stores departments until the goods were released to the fraudsters on the consideration of the fake cheques. The Petitioner contended that she absolutely had no knowledge of the said fraud and the Petitioner never participated at all in the sale or delivery of any goods relating to the said fraudulent transactions.

9. That on 21st May, 2020 the Petitioner was summoned to appear at Nairobi Area Police Station whereby she recorded her statement regarding the aforesaid fraud against the Interested Party. The Petitioner states following the events that had been going on, the Petitioner indicated that she experienced a lot of stress at the office and could no longer continue working at the interested party's office. The Petitioner was also instructed to relieve herself of the accounting duties as she was being investigated. The Petitioner, having been too stressed and psychologically tortured and pressurized decided, on 28th May 2020, to tender her resignation letter.

10. The Petitioner/Applicant averred that 1st Respondent violated **Article 49 (f) of the Constitution of Kenya, 2010** by arresting the Petitioner on 5th June, 2020 and taking her in Court on 15th June, 2020 yet the said Constitution provides that the Petitioner should have been arraigned in Court not later than twenty-four hours from the date of arrest. In the Petitioner's case, it ought to have been on 8th June, 2020 since 5th June, 2020 the actual date of arrest, was on a Friday.

11. The Petitioner/Applicant contend that from the conduct of the Interested Party, the charges which have been preferred against her are

only justifying the Interested Party from paying the Petitioner her terminal benefits. It is further contended that after investigations and recording of her statement, it is clear that she was only banking the cheques in her line of employment as an accountant.

RESPONDENTS RESPONSE

12. The Petitioner/Applicant was an employee of the Interested Party having been employed as accounts assistant from the 15th June 2015 as is reflected in her letter of appointment dated 15th June 2015 and marked JK-1. In the course of her duties she together with others, between the 20th April 2020 and 7th May 2020 did conspire to and did obtain goods belonging to the Interested Party by false pretence. This they did by raising false LPO's in the name of Karen Hospital and using the same to procure goods from the Interested Party thereafter paying of the same using fake cheques as is reflected in exhibits marked JK2 to JK6 attached to the affidavit of James Kariuki.

13. The matter was reported to the 1st Respondent who is mandated by law to carry out investigation and upon the 1st Respondent concluding investigations the evidence was reviewed by the 2nd who preferred various charges and arraigned the culpable individuals before the Chief Magistrate's Court sitting in Kibera law Courts in CR 535/2020. It is worth noting that it is indeed the Petitioner who authorized the release of the goods in question, goods which were worth Kenya Shillings Four Million, Seven Hundred and Fifty Two Thousand, Eight Hundred and Twenty Six (Kshs.4,752,826.00) only.

14. On the issue of violation of **Article 49(f) of the Constitution of Kenya** by the 1st Respondent against the Petitioner, it is urged that the Petitioner was arrested on the 5th of June 2020 and was released on cash bail on the same day and was subsequently charged on the 15th June 2020. It is stated that the Petitioner was not detained for more than 24 hours as it is stipulated under **Article 49(f) of the Constitution of Kenya 2010**.

15. That the investigation file was forwarded to the 2nd Respondent who after evaluating the evidence preferred the charges against the Petitioner. This function was formed pursuant to **Article 157 of the Constitution of Kenya 2010**.

16. On the issue of identity of the individual who signed the Charge sheet that was used to charge the Petitioner, the charge is said to have been sized by an officer of the 2nd Respondent (Mr. Geoffrey Obiri) as is stipulated in the provisions of **Article 157(a) of the Constitution of Kenya 2010**.

17. On issue of the Petitioner not being supplied with witness statements, it is averred that the criminal trial in question has not taken off and would not take off unless all the material evidence the prosecution intends to rely on is supplied to the Petitioner and thus this prayer is premature and that the Petitioner should raise this issue in the trial Court before the start of witness testimony.

INTERESTED PARTY'S RESPONSE

18. The Interested Party's case is that in April 2020 it lost Kshs.4,752,826/55 through a fraudulent scheme of theft and stealing involving criminals masquandering as officials of the Karen Hospital in collusion with some of the company's staff.

19. The fraud was executed using fake local purchase order (LPOs) which were presented to the company and processed by complicit staffers and who then released products to the fraudsters on the basis of fake cheques. The entire process by its nature and profile involved the sales department, accounts, stores, procurement and other relevant personnel who conspired and schemed together leading to the very substantial loss to the company of goods and products worth over Kshs.4.7 million.

20. The matter was reported to Kenya Police at the Kilimani Police station and where investigations were carried out by way of recording statements, interrogating persons of interest relevant to the matter, evaluating CCTV recordings and even communication between the various persons suspected of involvement in the matter.

21. The Interested Party contended that after investigation the police arrested and charged the various persons for the offences of conspiracy to commit a felony contrary to **Section 393 of the Penal Code**, obtaining goods by false presences contrary to **Section 313 of the Penal Code** and making a document without authority contrary to **Section 357 of the Penal Code**. These persons are;

i. *John Ogol Orimba*

ii. *Rachel Muthomi Mwaura*

iii. *Mercy Nyawira Kaburu (the Petitioner)*

iv. *Ian Adams Owino*

v. *Geoffrey Muhandale Anzeze.*

vi. *Wycliffe Mugwusi Ashema*

22. The above-persons were charged with various offences including the Petitioner herein and the honourable trial Court is seized of all the issues raised and shall upon hearing make an appropriate determination thereof. The Petitioner herein has been admitted to suitable bond terms upon taking plea by the trial court and has not suggested or demonstrated any breach of process by the Chief Magistrate's Court.

23. The Interested Party further states the Petition herein is an attempt to challenge the merits and substance of the criminal case presently before the Chief Magistrate's Court, in this Court and thereby pre-empt the trial of the substantive matters before the court seized of the matter. This is a clear instance of abuse of Court process that should be resisted by this honourable Court and the matters raised deferred to the trial Court for hearing and determination.

ANALYSIS AND DETERMINATION

24. Upon consideration of the application, the responses and submissions, only one issue arises for consideration being as follows:-

a) Whether the Petitioner/Applicant has met the threshold to warrant granting of conservatory orders sought.

25. It is trite that for conservatory orders to be granted in a Constitutional Petition, the Applicant is required to demonstrate a prima facie case with likelihood of success and that unless the Court grants such orders there is real danger that the Applicant will be prejudiced by refusal to grant the orders sought.

26. The guiding principles upon which this Court can grant conservatory orders are well settled within the framework of **Article 23 of the Constitution** where the Courts are called upon to uphold and enforce the Bill of Rights.

27. The Court at the stage of considering an Application for issuance of conservatory orders is not called upon to make a definite finding on facts or the law but instead is required to evaluate the material placed before it and decide whether the Applicant has made a prima facie case with likelihood of success and further whether declining to grant the conservatory orders is prejudicial to the Applicant.

28. To buttress the aforesaid proposition reliance is placed in the case of **Centre for Rights of Education and Awareness (CREAW) & 7 others vs. Attorney General Nairobi High Court Petition NO. 16 of 2011, (2011) eKLR**, where Justice Musinga, as he then was, stated:-

"It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner's application and not the Petition. I will not therefore delve into a detailed analysis of facts and law. At this state, a party seeking a conservatory order only requires to 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."
(Emphasis added)

29. Further reliance is placed in the decision of the Supreme Court where the importance and scope of a conservatory order in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** was stated as follows:-

"[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."

30. I now proceed from the aforesaid to consider whether the Applicant has established a prima facie case. In the Court of Appeal in case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** the Court proceeded to define a prima facie case as follows:-

"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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." (Emphasis added)

31. The Petitioner/Applicant is currently facing criminal case in Kibera Magistrate Court in which this Court granted interim orders on 29th October 2020 pending interpartes hearing and determination of this application. In case the instant application is dismissed at this stage it would mean the Petition herein would be rendered nugatory. I am alive to the fact that the Petition herein raises questions of violation of the Petitioner's Bill of Rights and that this Court jealously and dearly guards personal liberty as enshrined in the Constitution. I find that by allowing the criminal case to proceed pending hearing and determination of this Petition, that would result in disregarding the Petitioner's/Applicants personal liberty as enshrined in the Constitution and render the Petition nugatory.

32. I am alive to the fact that it is the duty of the Court, so far as possible, to ensure that a matter pending before it is not rendered nugatory as the ultimate end of all judicial proceedings is to ensure justice is done to all parties who approach the seat of justice. I further find that the Courts in exercising their discretion, they should apply the principle of restraint where possible to ensure substantive justice is done in all matters.

33. The Respondents and Interested Party contend that the Petitioner/Applicant has not satisfied the conditions warranting granting of conservatory orders as the applicant has not shown that the Petition has a likelihood of success and has further not specifically proved the Constitutional rights that have been infringed by the continuation of the criminal proceedings. It is further contended that the Petition and criminal proceedings can both be heard concurrently. Further it is urged the Petition will not be rendered nugatory as the Petitioner shall be afforded sufficient opportunity and time to address the issues raised in the Petition. The Interested Party urge the Petitioner/Applicant has failed to prove even on a prima facie basis that the Respondents acted in an unconstitutional manner in exercise of their constitutional mandate to warrant the interference of the Court.

34. The Petitioner/Applicant in her Application has in detail explained the circumstances leading to her arrest, charging and filing of the instant Petition. It is contended by the Petitioner/Applicant that the Respondents violated her constitutional rights. I am alive to the fact that a prima facie case is not confined to a “*genuine and arguable case.*” It is a case 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. It does not mean in my view, that the Applicant has to succeed in the Petition but it is sufficient to demonstrate an arguable case with probability of success and there has to exist a right which apparently has been infringed or threatened to be infringed by the opposite party.

35. Considering the facts of the case herein, I am satisfied that he Petitioner/Applicant has demonstrated that she has a prima facie case with likelihood of success. On issue of the prejudice there is no doubt that if the orders are declined the Petitioner/Applicant will face prosecution promptly and before hearing and determination of the Petition herein. The substratum of the Petition, would not be preserved if the application is not granted and the Petition would be rendered totally nugatory, and would be of only academic purpose, which would be an affront to requirement that justice should not only be done but should be seen to have been done in all cases. It is further noted that the issues raised in the Petition relate to alleged serious violation of Petitioner’s/Applicant’s constitutional rights by the Respondents and Interested Party and the same should be considered and a decision made before hearing of the criminal case. I find denial of conservatory orders as sought would prejudice the Petitioner/Applicant as this would result in the Petitioner/Applicant undergoing prosecution before determination of the Petition and that would not only render the Petition nugatory but would prejudice the Petitioner.

36. **The upshot is that the application dated 18th August 2020 is allowed in the following terms:-**

*a) Pending hearing and determination of the Petition herein, conservatory order be and is **HEREBY** issued staying the proceedings in Kibera Chief Magistrate’s Court Criminal Case No. 486 of 2020 Republic vs. George Ng’ang’a & 7 others and the consequential orders made therein.*

b) The costs shall abide the outcome of the Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF OCTOBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA