



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CONSTITUTION PETITION CASE NUMBER. E003 OF 2021**

**IN THE MATTER OF: ARTICLES 19,20,21,22,23,26,27,29,31,35 AND**

**THE COSTITUTION OF KENYA**

**IN THE MATTER OF: THE ALLEGED CONTRAVENETION OF**

**ARTICLES 27,29,35,47 & 73 OF THE CONSTITUTION**

**OF KENYA**

**IN THE MATTER OF: FAILURE TO PROVIDE STATUTORY SERVICES**

**DERELECTION OF DUTY AND THREATS TO LIFE AND PROPERTY**

**BETWEEN**

**MUTUKU MWANZA.....PETITIONER**

**VERSUS**

**INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE.....1<sup>ST</sup> RESPONDENT**

**THE OFFICER COMMANDING STATION**

**KITUI POLICE STATION.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**WAZIR ABDI WAZIR.....4<sup>TH</sup> RESPONDENT**

**R U L I N G**

1. Before me is a Notice of Motion dated 4<sup>th</sup> August 2021, where Mutuku Mwanza, the applicant has moved this court under **Rules 3(4), 3(5) and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** commonly known as Mutunga Rules. The applicant is seeking the following order/ reliefs:

(i) Spent

(ii) Spent

(iii) That pending the d

(iv) That pending the determination of the petition herein, the Respondents themselves, their servants, agents and/or whosoever acting either independently or under the directions or command of the Respondents be and are restrained from arresting, detaining and/or apprehending the petitioner or in any other manner howsoever inhibiting the petitioner’s freedom.

(v) That pending the determination of the petitioner’s petition herein, the Respondents themselves, their agents, servants or

whosoever else acting either independently or under the directions or command of the Respondents be and are restrained from entering into any premises, building or any form of property held by and in the occupation and/or possession of the petitioner for any purpose.

(vi) Cost be provided.

2. Briefly the applicant has listed the following grounds.

(i) That he has filed a petition herein which has high chance of success.

(ii) That the applicant has suffered and continue to suffer and is likely to suffer great loss and damage that is not likely to be compensated by an award of damages.

(iii) That he is ready to abide by any condition including executing a bond so that his rights are not infringed during the pendency of petition.

(iv) That he is ready to present himself to any investigative agency.

(v) That balance of convenience tilts in his favour.

(vi) That it is in the interest of justice to grant him the prayers sought.

3. The applicant has in his supporting affidavit averred that he has suffered as a result of the 4<sup>th</sup> Respondents deeds and police officers from Kitui Police Station.

4. He claims that he raised issues in his petition which are weighty and seeks protection from this court. He faults the Respondents for harbouring ill motives and intentions against him. He claims that they have stormed his premises and harassed his workers.

5. The pleading filed reveals that the petitioner and 4<sup>th</sup> Respondents are neighbours who appear to be at cross-roads in regard to their respective boundaries.

6. The 4<sup>th</sup> Respondent has strongly opposed this application claiming that the applicant has wronged him. In a replying affidavit sworn on 22.10.21, the 4<sup>th</sup> Respondent avers that the applicant encroached onto his portion of the land and caused destruction by breaking his wall and stealing items from his property.

7. The 4<sup>th</sup> Respondent claims that the applicant has rushed to this court to block his imminent arrest.

8. He further claims that the applicant has defied the Physical Planning Department and survey and that he wants to perpetrate acts of impunity.

9. The 2<sup>nd</sup> Respondent through C.P. Linus Kimombi, the OCS Kitui Police Station has also opposed this application vide a replying affidavit sworn on 21.10.2021.

10. The Officer Commanding Station in brief avers that they received a complaint from the 4<sup>th</sup> Respondent about encroachment into his property and malicious damage to property valued at KShs. 976,923. It is further deposed that their investigation revealed that a crime had been committed and that the virtue of Section 24, 27 and 35 of the National Police Service Act the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have a duty to investigate offences, collect intelligence, effect arrests and maintain law and order.

11. They claim that they were within that mandate when they investigated the complaint and sought opinion from Office of the Director of Public Prosecution.

12. They claim that, the applicant has failed to show that their action was arbitrary, unlawful or unreasonable.

13. The application before me presents only one issue whether the applicant has demonstrated that any of his Constitutional rights have been infringed or are likely to be threatened.

14. The applicant is basically seeking to have the 1<sup>st</sup> and 2<sup>nd</sup> Respondent stopped from arresting him or entering his premises. The basis for relief of such enormity has however not been clearly demonstrated.

15. By dint of Article 245 (a) and (b) the Inspector General of Police is mandated to carry out investigations of any particular offence or offences and further enforce the law. In my view, unless it is shown that the I.G. has overstepped its mandate or acted ultra vires, irrationally or acted maliciously, it is not tenable to stop them from carrying out their statutory and constitutional mandate. Issuing orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from arresting or detaining the applicant or investigating the applicant or any other person for that matter is tantamount to interfering the work of the police thus offending the doctrine of separation of powers.

16. The office of the Inspector General is an independent office with the power to investigate any offence. The Constitution at Article 243

establishes the National Police Service and at **Article 245(1)** the office of the Inspector– General of the National Police Service is created. **Article 245(4) and (5)** are relevant to this petition. They provide as follows: -

**“(4) The Cabinet secretary responsible for police services may lawfully give a direction to the**

**Inspector- General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—**

**(a) the investigation of any particular offence or offences;**

**(b) the enforcement of the law against any particular person or persons; or**

**(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.**

**(5) Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.”**

17. The Office of the Director of Public Prosecution on the other hand is also an independent office created by the Constitution to prosecute Criminal cases in court.

**18. In Republic v Commissioner of Police & another Ex parte Michael Monari & another [2012] eKLR.**

**“Under Article 157(4) of the Constitution, the Director shall have power to direct police to investigate any information or allegation of a criminal conduct and it is mandatory for the police to comply with any directions or instructions given by the Director of Public Prosecution. Under article 157(10) the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person. It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.**

**It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct, which amounts to an offence and on that account is deserving punishment.”**

19. The Office of the Director of Public Prosecution is therefore created to check the excesses of executive arm in respect to prosecution of criminal cases.

The Police in this age and time cannot harass the applicant or anyone while carrying investigation and if they do so, the applicant will take action. The application has a pending petition where he claims harassment perhaps during trial, he will place evidence of harassment but for now this court has not found any evidence of harassment. The claims by the applicant are too general and lacks specificity. Other than stating that the Respondents entered his business premise, there is no evidence showing that the Police exceeded their mandate or breached the rules of natural justice or acted to achieve some collateral purpose other than interest of justice.

20. In case of Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR the court made reference to the case of Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others (2017) eKLR while setting out the law on conservatory orders. It held as follows:

**“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 case or Petition.”**

21. The applicant has not demonstrated that his rights as a suspect or arrested person under Article 49 have been violated or likely to be violated. For this court to intervene under Article 23 of the Constitution and grant the sort of reliefs being sought herein, the applicant is required to clearly demonstrate that there is a violation or threat of violation of any of his constitutional rights. He is required to show that they have been violated or likely to be violated.

Being arrested and being subjected to a lawful process on suspicion of crime is not a violation of Constitutional right in itself. This is because, the Constitution has checks and balances as I have above well stipulated under **Article 49 and 50 of the Constitution** to ensure that the rights of every suspect is protected. There are adequate remedies whenever breaches occur but the applicant in this application has not placed evidence showing that the police or any other respondent has violated or is likely to infringe any of his rights. He says that he is ready

to avail himself to the police for investigation and further action which I find surprising given that the police have not taken action despite receiving a letter from the Office of the Director of Public Prosecution dated 10<sup>th</sup> February 2021.

In sum this court finds no merit in the Notice of Motion dated 4<sup>th</sup> August 2021. The same is disallowed. Cost in cause.

**DATED, SIGNED, AND DELIVERED AT KITUI THIS 12TH DAY OF NOVEMBER 2021.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**