



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**PETITION NO. 14 OF 2019**

**IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND**

**FREEDOMS UNDER ARTICLES 27, 40 AND 47 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**JAMES KIMATHI.....PETITIONER**

**VERSUS**

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

**THARAKA NITHI COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT POLICE OVERSIGHT AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**NATIONAL TRANSPORT & SAFETY AUTHORITY.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. This is a ruling in respect of the Motions on Notice dated 19/09/2019 and 27/11/2019, respectively. The Motion of 19/09/2019 is by the petitioner and was made pursuant to ***Rule 17 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules.***

2. In that Motion, the petitioner sought temporary orders of injunction to restrain the 1<sup>st</sup> respondent from arresting, detaining and/or otherwise interfering with his right to property and freedom of movement; and to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents from arresting, detaining and/or otherwise hindering movement of motor vehicle registration No. KCU 046M (“the subject vehicle”) pending the hearing and determination of the Petition.

3. The grounds upon which the application was grounded were set out in the body of the Motion and in the supporting affidavit of James Kimathi sworn on 19/09/2019.

4. It was the petitioner’s case that, he had acquired and enrolled the subject vehicle with Meru Shuttle Sacco Ltd to be operating as a public service vehicle. On 9/09/2019 in Embu town near DEB Primary School, officers from Embu Police Station and specifically the deputy OCS Embu stopped the subject vehicle for routine check. The said officer then shot two gun shots at the driver’s door when the vehicle had already stopped thereby injuring the driver, one **Martin Kaburu Thurairira**.

5. The petitioner contended that the use of excess force by the said police officer has crippled his business irreparably. That the officer was working in cahoots with the petitioner’s business rivals to undermine his business. That his life and that of his immediate family is in danger and wishes for state protection and compensation.

6. The application was opposed by the 2<sup>nd</sup> respondent through the affidavit of Peter Kimathi, the Chief Officer Trade in the County

Government of Tharaka Nithi, filed on 22/11/2019. He deponed that the 2<sup>nd</sup> respondent is a stranger to the alleged bad blood between the officers of the 1<sup>st</sup> respondent and the petitioner. That the petitioner has not pleaded any wrongdoing by the 2<sup>nd</sup> respondent and or its officers.

7. In the premises, the 2<sup>nd</sup> respondent contended that the prayer against the 2<sup>nd</sup> respondent lacks factual or evidential basis. Besides, the petitioner has failed to set with some level of particularity which of his specific rights have been violated and how. To the 2<sup>nd</sup> respondent, this makes the petition bad in law and the orders in force should be vacated.

8. The 3<sup>rd</sup> respondent opposed the application vide their grounds of opposition dated 11/12/2019. They stated that they were wrongly enjoined to the application and petition as the petitioner had not demonstrated how his fundamental rights and freedoms had been infringed by them.

9. It would seem that the 1<sup>st</sup> respondent was never served with both the petition and the application. The affidavit of service on record shows that the Attorney General was only served with a mention notice. In the premises, the 1<sup>st</sup> respondent did not participate in the proceedings. No orders can be made against that respondent.

10. The application matter was canvassed by way of written submissions. The petitioner submitted that despite having made many complaints to the 3<sup>rd</sup> respondent, the 3<sup>rd</sup> respondent had done nothing. That the 2<sup>nd</sup> respondent owes a duty to the petitioner to clear him of all barriers in his operations as he had cleared all the requisite trade fees. That although he had paid all the fees required by the 2<sup>nd</sup> respondent, the latter was working with the police to infringe upon his right to property and freedom of movement.

11. The 2<sup>nd</sup> respondent submitted that it is not a proper party as there was no nexus that had been established between the alleged violations and the 2<sup>nd</sup> respondent. That the orders sought in the application were unwarranted as it was difficult to comprehend the alleged violation of the petitioner's rights by the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent relied, *inter alia*, in the Court of Appeal decision in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** for that proposition.

12. The 3<sup>rd</sup> respondent submitted that the petitioner has not raised any reasonable cause of action against them for he had not pointed out the action or omission committed by them against him. In this regard, they ought not to have been enjoined as a respondent in the petition. Some of the authorities they relied on to support their claim include: **Investment and Mortgages Bank Limited v Nancy Thumari & 3 others [2015] eKLR** and **S W M v G M K [2012] eKLR**

13. The orders sought by the petitioner, although injunctive in nature, are conservatory. To be able to succeed, the petitioner must show that there is a serious arguable issue to be canvassed at the trial of the petition. That if the conservatory orders sought are not granted, he stands to suffer grave loss or irreparable damage.

14. The petition and the application arises out of the incident that took place on 11/09/2019 whereby the subject vehicle was shot at by the police while it was stationary. According to the petitioner, this was as a result of competition and it was meant to stifle his business in favour of his competitors. That no one is willing to drive the subject vehicle because of fear of being accosted by the police.

15. The first prayer is to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents from arresting, detaining and or/otherwise hindering movement of the subject vehicle on the designated route that is Maua – Meru – Nairobi. The petitioner swore that the subject vehicle had been released on 11/9/2019 after the DCI officers had cleared it from any wrong doing. That being the case, the injunction sought by the petitioner is for preemptive arrest and detainment.

16. In **Abdi Abdullahi Somo v Ben Chikamai & 2 others [2016] Eklr**, Gikonyo J held: -

***“In this case, there is no evidence which was tendered by the Applicant to show that there have been serious breaches of his rights by the police or any state organs. He has made serious allegations that unless the court grants him the orders sought he will be arrested and tortured by the police. Look at the submissions by the Applicant in which he reiterated the contents of his supporting affidavit and the major allegation are twofold; (1) that the nature of the dispute between him and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was purely of a civil nature and that he had been called by people who were claiming to be police officers; and (2) that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had not denied that they were using police officers to threaten and put pressure on the Applicant to settle the debt between them. More and cogent details on the particular officers who were being used were needed if these allegations are to become potent in establishing a proper case for granting the prayers sought or for the DPP to effectively defend the application. The allegations are not based on anything tangible on which I can act. The apprehensions herein were left at very high level of generalization and conjecture. On this one I am content to cite a work by Achode J in the case of KELVIN OKORE OTIENO vs. REPUBLIC NAIROBI HIGH COURT CRIMINAL REVISION NO. 207 OF 2013 that:***

***“Furthermore, if the matters in question are still under investigation the outcome of those investigations cannot be pre-empted by the applicant or by this court. Should the investigations culminate in the arrest of the applicant, arrest and arraignment are known processes of our legal system and perse, do not amount to infringement on the fundamental rights and freedoms of the applicant. In any case he will be entitled to bail as provided for by the constitution. To my mind, the apprehension by the applicant does not meet the threshold of serious breach of his rights by a state organ.”***

17. In the present case, the petitioner made serious allegations against the 1<sup>st</sup> respondent's officer, the deputy OCS of Embu. He however, failed to serve the 1<sup>st</sup> respondent or the said officer with the pleadings in this matter.

18. The petition as it stands is on shaky grounds. It has not satisfied the requirements of the *Anarita Case*. This is because, it has failed to specifically set out his fundamental rights that have been or are threatened to be violated, the specific *Articles of the Constitution* that grant such rights and how they have been violated or threatened to be violated.

19. All that the petition has done is to give generalized allegations against officers of the 1<sup>st</sup> respondent without any specifics at all. Indeed, there are no specific allegations that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent had infringed or threatened to violate his rights, and if so, which of such rights.

20. On the second prayer, the petitioner sought an injunction to restrain the 1<sup>st</sup> respondent from arresting, detaining and or otherwise interfering with his right to property and freedom of movement.

21. Apart from the failure to properly serve the pleadings upon the 1<sup>st</sup> respondent, I can do no better but reiterate the sentiments of Warsame J (as he then was) in the case of Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR wherein he delivered himself thus: -

***“It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. Indeed 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 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”.***

22. This court has the duty to ensure that it maintains the integrity of the administration of justice. It may not interfere with the jurisdiction placed upon the 1<sup>st</sup> respondent unless there is glaring abuse of power. There is no evidence that the one off incidence complained of is likely to be repeated.

23. Accordingly, in view of the foregoing, I find the application to be without merit and I dismiss the same with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent.

24. The second Motion dated 27/11/2019 is by the 3<sup>rd</sup> respondent. It sought an order for the name of the 3<sup>rd</sup> respondent to be struck out of these proceedings. It was alleged that there was no allegation that had been made against the 3<sup>rd</sup> respondent or any substantive relief sought against it.

25. That application was not opposed by the petitioner. I have carefully considered the petition. It is clear that no allegation whatsoever was made therein of any violation or attempted infringement of the petitioner’s rights by the 3<sup>rd</sup> respondent. No substantive relief whatsoever was sought in the petition against the 3<sup>rd</sup> respondent.

26. That being the case, dragging the 3<sup>rd</sup> respondent in these proceedings is not only annoying to the said party but also an abuse of the Court process.

27. Accordingly, the said application is meritorious and it is allowed as prayed.

**DATED** and **DELIVERED** at Meru this 14<sup>th</sup> day of April, 2020.

**A.MABEYA**

**JUDGE**