



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 486 OF 2019

EMMA WANGARI WANGUI.....APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS

(DCI-THIKA POLICE STATION).....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

EVANS MWANGI KARANJA.....4TH RESPONDENT

RULING

1. The Applicant has approached this court by way of an Amended Notice of Motion dated 7th May, 2019 brought under Articles 20, 27, 28, 48, 49(1), 50 and 165 (6) of the Constitution, Sections 4 and 86 of the Criminal Procedure Code and all other enabling provisions of the law. The main prayer is that this court issues restraining orders against the 1st to 3rd Respondents from arresting and /or preferring any charges against the Applicant or taking any statements from her. The application is supported an affidavit sworn by the Applicant on 7th May, 2019 and a Further Affidavit also sworn by the Applicant on 28th June, 2019.

2. It suffices to state that the application was initially filed at Kiambu High Court. On 7th October, 2019, the Resident Judge at the Court ordered the matter transferred to this court (Nairobi) because investigations had moved from Kiambu to Nairobi Insurance Fraud Unit.

3. The main battle is between the Applicant and the 4th Respondent who is her estranged husband. It is averred she is a suspect in Nairobi Criminal Case No. 1363 of 2019 for which she was released on a personal bond of Ksh. 500,000/-. The charges preferred against her are making a false document, namely a National identity card and presenting it to an insurance company in the pretense that the 4th Respondent had taken out an insurance policy for which she was the sole beneficiary. According to the Applicant, the charges were actuated by malice of the 4th Respondent because of their marital problems: currently represented by a separation cause.

4. The two parties have since their relationship became sour been running a cat and mouse game. According to counsel for the Applicant, Mr. Mwaura, both parties had made complaints at Murang'a Police Station on 8th March, 2019. In respect of the Applicant it was reported vide OB No. 55/8/3/2019; the complaint being the 4th Respondent had reported a kidnapping case with an ulterior motive. An inquiry file was opened but through the intervention of the DCI, Murang'a, the parties reconciled. They consequently signed a Memorandum of Understanding. The gist of the same was that the parties had reconciled and that no action was subsequently going to be taken against any of the parties whatsoever in fulfilment of the reconciliation.

5. According to the Applicant, he was surprised to see police officers from Upper Hill go to arrest her and subsequently charge her at Milimani Law Courts. According to her, she read mischief in the action because not only was the Respondents forum-shopping, but the 1st to 3rd Respondents were abusing their constitutional powers under **Article 157(1) of the Constitution**. Consequently, the Applicant wrote protest letters to the 1st to 3rd Respondents against the actions of the 4th Respondent. It is argued that actions of arresting and charging the Applicant were taken despite the fact that the Memorandum of Understanding had not been withdrawn. Furthermore, according to the Applicant, the charges had been trumped up. Court was referred to, amongst other authorities, the case of **Hassan Ali Joho vs IG, DPP and**

the AG Mombasa Constitutional Case No. 15 of 2017 in which the court underscored the need to uphold the Constitution.

6. The Applicant explained that the trumped up cases involved one of attempted murder against the 4th Respondent when they had jointly gone to purchase a parcel of land in Murang'a. The 2nd was that the Applicant had fraudulently taken out an insurance policy on behalf of the 4th Respondent without his consent and purported to be paid benefits of a dead person. That however, in the lower court, only one count was framed, of making a document without authority. It was explained that plea had not been taking pending hearing and determination of this application.

7. Learned counsel for the Applicant, Mr. Mwaura pleaded with the court to allow the application submitting that the complaints that were made at Murang'a Police Station were duplicated both at Thika and Muthaiga Police Stations respectively. He further submitted that the complaint at Murang'a was made before the Memorandum of Understanding was signed hence subsequent complaints at Thika and Muthaiga ought not to have been filed. That in any case, the DCIO at Thika released the Applicant on a cash bail of Kshs. 50,000/= upon learning that there existed a Memorandum of Understanding between the parties.

8. On behalf of 1st to 3rd Respondents was learned counsel, Ms. Chege who opposed the application whilst relying on the grounds of opposition filed by the office of Director of Public Prosecutions on 27th May, 2019. The said grounds are as follows:

a) The Inspector General of Police in carrying out his investigative mandate did not breach, infringe or violate any provision of the Constitution or any human and fundamental rights of the Applicant.

b) The Application lacks merit as it seeks to interfere with the mandate vested upon the Inspector General of Police yet no rights have been violated and it ought to be dismissed.

c) The Application is vague, an abuse of the Court process and as such it is not supported by evidence.

9. In brief highlighting, Ms. Chege submitted that the Applicant had not demonstrated how and why the constitutional mandate conferred on the 1st and 2nd Respondent by the Constitution should be interfered with. In contrast, her submission was that the 1st and 2nd Respondents were obligated to pursue the genuine complaint made by the 4th Respondent. She argued that the 4th Respondent made a complaint at Muthaiga Police Station after the police in Murang'a failed to pursue his concerns. Counsel conceded that a Memorandum of Understanding was signed between the warring parties. Nevertheless, subsequently, the 4th Respondent learnt that that Applicant had made non-disclosure of material facts which led him to make the subsequent complaints. This was with respect to having him murdered so that the Applicant could benefit from an insurance policy she had taken out in his name where she was the sole beneficiary. The policy cover had involved an identity card fraud the subject of the filed charges in the magistrate's court.

10. Counsel went on to state that DCI, Thika referred the matter to Insurance Fraud Unit in Nairobi after which the charges were preferred. Investigations disclosed that the person who was charged in **Cr. Case No. 1363 of 2019** had committed the identity card fraud. It was intended that the Applicant be enjoined in the charges. The submitted that the accused person had represented himself before the insurance company as the 4th Respondent whilst the Applicant was the sole beneficiary. In that case, the Respondent did not exercise their mandate out of malice but in pursuance of justice.

11. Ms. Chege argued that in any event, the Memorandum of Understanding signed between the parties was unenforceable and could not be used to estop the police from investigating a complaint or the DPP from charging the Applicant. In that case therefore, the issues being canvassed in this application ought to be argued in the trial. With respect to the cited case law, counsel argued that it was merely persuasive and not binding on this court. She urged the court to dismiss the application and order the Applicant to take plea.

12. Learned Counsel, Mr. Bore who represented the 4th Respondent entirely associated himself with the submissions made by Ms. Chege. His opposition was contained in a Replying Affidavit sworn by the 4th Respondent on 12th June, 2019. To emphasize the submissions, he stated that the Memorandum of Understanding (MOU) signed between the Applicant and the 4th Respondent failed to disclose that the attempted murder was perpetrated by the Applicant. The Applicant had also failed to disclose the existence of an insurance cover purportedly taken out by the Respondent in which she was the sole beneficiary. The said insurance policy is currently a subject of insurance fraud investigation. Thus, according to the counsel, the MOU was invalid and unenforceable.

13. He emphasized that the attempted murder was intended to validate the payment of the insurance benefits. He added that in any case, there was no evidence that he Applicant and the Respondent were a husband and wife and according to him they were merely friends.

14. Counsel added that the 4th Respondent believed that his life was in danger and is constantly living under fear. It was urged that the court dismisses the application so as to allow the Applicant take plea and if possible, be remanded in custody so that the 4th Respondent can live in peace.

15. In rejoinder, Mr. Mwaura submitted that this court had the mandate to interfere with the powers of the 1st to the 2nd Respondents where it was demonstrated that they were violating the rights of a dignified citizen. He hinged his submission in view of the MOU signed between the Applicant and the 4th Respondent.

16. On the submission that there was non-disclosure of material facts, counsel submitted that a full disclosure was made, which necessitated the signing of the MOU. That is the reason why both Muthaiga and Thika Police Stations failed to take action. According to the counsel, the charges are being pushed against the Applicant to settle scores and for vilification purposes. That in any case, the 4th Respondent failed to demonstrate that other complaints were made at Muthaiga and Thika Police Stations than that made at Murang'a Police Station.

17. Finally, counsel argued that the Applicant was unaware that she was a beneficiary of any insurance policy purportedly taken out by herself. That such allegations were intended to intimidate her due to her standing in societal welfare matters. Counsel prayed that the application be allowed.

Determination

18. I have accordingly considered the application, the respective rival submissions and the cited case law and I take the following view of the application.

19. The main prayer in the instant application is that the court orders a stay or restrains or prohibits the 2nd Respondent from effecting any arrests, charge and/or prosecution of the Applicant. It is also urged that the 2nd Respondent as well be restrained from summoning or taking any statements from the Applicant or in any way investigate the Applicant.

20. The law is settled that he who alleges a violation of constitutional rights must demonstrate the actual violation. In the present case, the Applicant argues that the police are harassing and intimidating her and intends to charge her on trumped up charges which are intended to settle a score against her by the 4th Respondent. This then drives me to the question of whether the 1st and 2nd Respondents are violating their constitutional mandate of investigating and prosecuting the Applicant.

21. The 2nd Respondent derives his mandate from Article 157 of the Constitution. Under Sub Article (6) the Director of Public Prosecutions shall exercise state powers of prosecution and may:

“(a)Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

b) Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

c) Subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of public prosecutions or taken over by the Director of Public Prosecutions under paragraph.”

22. The above stated powers are fettered under sub-Article (11) which provides that:

”In exercising the powers conferred by this article, the director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.”

23. I thus grapple with the question of whether the DPP in framing the charges against the Applicant is violating the Constitution thus executing his mandate against the interests of the administration of justice and the need to prevent and avoid abuse of legal process.

24. According to Mr. Mwaura for the Applicant, the 2nd Respondent by his intention to charge the Applicant was exercising his mandate in a manner that does not resonate with constitutional principles under Article 157(11) of the Constitution. Further that the police by arresting her were actuated by malice and influenced by the 4th Respondent who is settling a score with the Applicant.

25. There is no doubt that the Applicant and the 4th Respondent are currently entangled in some family dispute which has cascaded into matters touching on their relationship. It is also undisputed that complaints were filed at Murang’a, Thika and Muthaiga Police Stations. The one filed at Murang’a was withdrawn upon the signing of the MOU between the parties. The DCI in Thika on the other hand restrained from charging the Applicant upon learning that there existed an MOU. Police at Muthaiga on the other hand referred the matter for investigations by the Insurance Fraud Unit on account of the afore stated reasons. It is the Insurance Fraud Unit that discovered that a criminal offence had been committed, culminating into filing **Milimani Criminal Case No. 1368 of 2019**.

26. According to the Applicant, the Memorandum of Understanding (MOU) between the Applicant and the 4th Respondent in no uncertain terms estopped the 1st and 2nd Respondents from arresting the Applicant or in any way charging or investigating her for any offence relating to the complaint filed by the 4th Respondent.

27. My candid view is that notwithstanding the existence of the MOU, the police are still bound to conduct a genuine and honest investigation if the complainant (4th Respondent) pesters or insists on being aggrieved. In this case, the 4th Respondent insisted that the Applicant had to be investigated because she had not fully disclosed all facts to him when the MOU was signed. Pursuant therefore, and upon referral of the matter to the Insurance Fraud Unit, it was disclosed that indeed a fraud had been committed. Consequently, an accused person was charged in the said Milimani Cr. Case No. 1363 of 2019. The charge thereon relates to an identity card fraud where the accused represented herself as the 4th Respondent.

28. It is submitted by the 1st and 2nd Respondents that the fraud was committed in cohort with the Applicant because she was to be the sole beneficiary of the insurance policy that was taken out by the said accused person. The 4th Respondent on the other hand believes that the Applicant had a hand in an attempted murder during an occasion they had gone to view land in Murang’a which murder, if it had succeeded, would have enabled her to claim benefits from the insurance policy.

29. I think it would be unreasonable to trivialize such investigations. They are genuine complaints made by 4th Respondent. As to their

accuracy, correctness or truthfulness is a matter to be determined in the trial process. This court while determining this application is not seized with the evidence that the police hold against the Applicant. The only things in its possession are the various complaint letters the Applicant wrote to the police protesting her intended arrest and prosecution. That, by itself is not evidence. It neither can be concluded that by the mere fact of protest by the 4th Respondent, police are acting maliciously or are acting at the whim of the 4th Respondent who is settling a personal score with the Applicant. Further, if the 4th Respondent is pushing for the Applicant's prosecution to settle a score is a matter that shall be clearly disclosed and canvassed in the trial.

30. I totally concur with the Applicant's argument that his court has powers to interfere with the mandate of the 2nd Respondent if it is demonstrated that he is not acting in the interest of the administration of justice and the need to prevent and avoid the abuse of the legal process. Courts are guardians of the Constitution and must strive to uphold it at all costs. That is why this court will not hesitate to interfere with the mandate of the 1st and 2nd Respondents if it is demonstrated that they are violating the Constitution.

31. I am however, quick to put a rider that at the same time courts must respect the independent powers granted to the office of the DCI and the DPP so as not to unnecessarily interfere with the manner they carry out their mandate. This resonates with Article 157 (10) which states that the ***“Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”***

32. This was echoed in the case of ***Hassan Ali Joho vs IG and 3 others [2017] eKLR-Mombasa H.C Petition NO. 15 of 2017***. In that case, the court found that the DPP was acting in excess of his mandate, thus violating the Constitution, by amongst other things withdrawing the security of the Petitioner and intending to prosecute the Petitioner for allegedly forging a KCSE Examination result slip. This is a persuasive decision in which the court made its decision premised on the circumstances of the case.

33. Thus, each case must be determined by its own circumstances. I am not persuaded by the fact that merely because parties had reconciled by way of a Memorandum of Understanding the police should shut their eyes and fail to prosecute the Applicant when apparently an offence is disclosed and criminal culpability well demonstrated. The Applicant shall have her field day in court during the trial to offer a defence for the allegations leveled against her. If she is found not culpable the court shall vindicate her. It is not within the mandate of this court at this juncture to evaluate the evidence that DPP will present in the trial. Hence, the submission that the intended charge is trumped up lacks basis. This is not a case I am inclined to grant the prayers sought.

34. In the result, I find that the Applicant has failed to demonstrate how her constitutional rights shall be violated if she is arrested and charged. She has also failed to demonstrate that the 1st and 2nd Respondents are abusing their constitutional mandates by intending to arrest and charge her. I accordingly find this application devoid of any merit and I dismiss it. I order that the Applicant presents herself before the Chief Magistrate's Court at Milimani by 12th May, 2020 to take plea. It is so ordered.

Dated and Delivered at Nairobi this 5th Day of May, 2020

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant in person.
2. Miss Akunja for the 1st, 2nd, and 3rd Respondents.
3. N/A for Mr. Bore for the 4th Respondent.