



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 3 OF 2019

MOSES NAMAYI ANYANGU.....PETITIONER

VERSUS

THE OCS, BUTERE POLICE STATION.....1ST RESPONDENT

THE DCIO, BUTERE POLICE STATION.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

ERNEST WAKA OJANGO4TH RESPONDENT

AND

MOLYN CREDIT LIMITED.....1ST INTERESTED PARTY

STANLEY SHIHUNDU AMUKAYA.....2ND INTERESTED PARTY

JUDGMENT

1. The petition herein, dated 7th January 2019 was brought by Moses Namayi Anyangu, to be known hereafter as the petitioner, citing several constitutional violations of his rights. He has brought the suit principally against the 1st respondent, who is the officer commanding the Butere Police Station. The 2nd respondent is the officer in charge of criminal investigations within the same police station, while the 3rd respondent is the constitutional office mandated, by Article 157 of the Constitution, to carry out all public prosecutions in Kenya, and the 4th respondent is an adult of sound mind. The interested parties are not described in the petition.

2. The legal and constitutional foundations of the petition are set out in the petition, to be Articles 1, 3, 20, 23, 27, 28, 29(a) and 43 of the Constitution of Kenya; relating to sovereignty of the people, the obligation to respect uphold and defend the Constitution, the Bill of Rights being of application to all laws and binding all state organs and persons, the jurisdiction of the High Court to handle applications relating to redress of denial violation or infringement of or threat to a right under the Bill of Rights, the right to equal protection and benefit of the law, the right to inherent dignity and protection of that right, rights and freedoms not being deprived arbitrarily and without just cause, and the right to economic and social rights.

3. The factual background, that he gives in the petition, is that he is a director of the 1st interested party, which is a limited liability company, providing credit facilities. On 4th February 2012, the 1st interested party advanced to the 4th respondent, a sum of Kshs. 200, 000.00, to be repaid in ten monthly instalments. The 4th respondent offered Marama/Shisiala/1850 as security, liable to be sold by public auction in event of default. The 4th respondent defaulted in paying the instalments due, whereupon the 1st interested party instructed its advocates to initiate the process of recovering the money. When Marama/Shisiala/1850 was advertised for sale in that process of recovery, the 4th respondent filed a formal complaint with the 2nd respondent against the 1st interested party, alleging that the entity was conspiring with others to dispose of his property unlawfully. The 1st interested party raised the issue with the Inspector-General of Police, who allegedly advised that the matter was purely commercial, and the 4th respondent was said to be better of initiating a civil action. After that the 1st interested party caused the property to be re-advertised, and it was sold by public auction to the 2nd interested party, and the title was transferred to his name. The 4th respondent reacted to that by filing another complaint with the 1st and 2nd respondents, alleging that the two interested parties had conspired to dispose of his property. Following up on that complaint, the petitioner and the 2nd interested party were arrested on 25th December 2018, and detained at the Butere Police Station, and they were later released on cash bail.

4. The petitioner complains that the actions of the respondents, taken or threatened, were unconstitutional, unlawful, illegal and without basis in law. He contends that his arrest and intended prosecution, with respect to a commercial transaction, was a gross abuse of the criminal justice system, police powers and public prosecution functions, and constituted a manifest violation and contravention of his constitutional rights and freedoms.

5. He contends that his right to freedom and his right not to be deprived of such freedom arbitrarily and just cause, as per Article 29(a), was violated. He avers that he was not the seller of the subject property, he never participated in the said sale as a person to warrant his being arrested and charged with any offence relating to the transaction.

6. With respect to Article 28, the petitioner contends that his right to inherent dignity and the right to have that dignity respected and protected, under Article 28, were violated, to the extent that that he was arrested and confined on the Christmas Day of 2018, without first being summoned to explain himself with respect to the impugned sale, and the acts of the respondents were, therefore, malicious and an affront to his dignity and right to personal respect..

7. On Article 43, the petitioner avers that his right to enjoy his economic rights, including the right to derive benefit from lawful business and commercial undertakings, as carried out within the law, was infringed.

8. On the right to equal protection and equal benefit of the law, under Article 27, the petitioner contends that the 4th respondent has maliciously used the 1st, 2nd and 3rd respondents to enforce a commercial transaction using police and public prosecution powers without affording him the benefit of the law that provides for sale of a charged property in exercise of a borrower's statutory power of sale.

9. On Article 50, the right to fair hearing, he avers that the underlying dispute in the matter was subject to another suit, between the 4th respondent and the 1st interested party, pending before the Environment and Land Court at Kakamega, being ELC NO. 296 of 2017, submitting that it was unfair and unconstitutional to arrest and charge him with respect to a commercial dispute that was pending adjudication by a court of competent jurisdiction.

10. The petitioner, therefore, seeks the following reliefs:

(1) a declaration that the 1st and 2nd respondents actions of arresting him and confining him with respect to a pure commercial transaction undertaken by the 1st interested party under the relevant land legislation was unlawful, unfair, illegal and unconstitutional;

(2) a prohibitory order to bar the respondents, whether jointly or severally, from re-arresting him and detaining him in custody, charging him in court and prosecuting him on the basis of the said sale ;

(3) an award of damages as compensation for violation of his constitutional rights under Articles 27, 28, 43 and 50 of the Constitution; and

(4) costs of the application.

11. The petition is supported by an affidavit sworn by the petitioner on 7th January 2019. He reiterates that he was a director of the 1st interested party, and that on 4th February 2012, the 4th respondent had sought credit facilities from the 1st interested party, for Kshs. 200, 000.00, which were granted, repayable by ten monthly instalments, and which were secured by Marama/Shisiala/1850. The 4th respondent executed a charge over Marama/Shisiala/1850 in favour of the 1st interested party, on express terms that in event of default the said property was liable to disposal by way of public auction. The 4th respondent defaulted in his repayments, and the process of realization of the security commenced. When the property was advertised for sale, the 4th respondent made a report to the 2nd respondent against the 1st interested party, accusing it of conspiracy to dispose of his property. The 1st interested party raised the issue with the Inspector-General of Police, who allegedly advised that the matter was wholly commercial and counselled that the 4th respondent seeks civil remedies through the court. The 1st interested party then resumed the process of releasing the security, and sold the property to the 2nd interested party. The 4th respondent made a fresh complaint against the petitioner and the 2nd interested party, accusing them of conspiring to dispose of his property, whereupon they were arrested and detained, before being released on bond, pending arraignment in court. It is these actions by the respondents that the petitioner argues violated his constitutional rights.

12. To support his case, the petitioner has attached several documents to his affidavit. There is a copy of the charge, that was executed on 25th February 2012, between the 4th respondent and the 1st interested party, over Marama/Shisiala/1850, to secure the loan of Kshs. 200, 000.00. There is a copy of a credit application form filled by the 4th respondent on 4th February 2012, when he sought the loan. There is a copy of a statement of account from the 1st interested party, indicating that the 4th respondent had fallen behind in his loan obligations. There is a letter from the 1st interested party to its advocates, instructing them to commence the process of realizing the security, following default by the 4th respondent. Then there are copies of several documents exhibiting the steps the advocates took in furtherance of their effort to realize the security. There is copy a notice to the 4th respondent, a letter instructing an auctioneer, a notification of sale by the auction, and a newspaper advertisement of the proposed sale by the auctioneers. Then there is a letter from the 2nd respondent to the 1st interested party, informing the 1st interested party that the 4th respondent had complained to the police about having deposited a title deed with the 1st interested party to secure a loan, which loan he had since paid, but the 1st interested party, nevertheless, continued to detain the title. There were also allegations relating to making of documents without authority and forgery. The letter from the 2nd respondent was responded to by the advocates for the 1st interested party, who explained to the 2nd respondent the background to the matter. There is a letter from Inspector General of Police, essentially saying the 1st and 2nd respondents had acted properly. There are documents relating to the renewed process of

sale, culminating in the property being transferred to the name of the 2nd interested party, as evidenced by the title deed issued in his name. The last documents are a cash bail receipt and the plaint filed in Kakamega ELC No. 296 of 2017.

13. The respondents reacted to the petition, through an affidavit, that was sworn on 25th April 2019, by Benson Hinzano, the police officer investigating the matter. He avers that the 4th respondent had complained to the police that although he had fully repaid the loan, that he had obtained from the 1st interested party, the property he had offered as security was, nevertheless, sold at a public auction and transferred to the 2nd interested party. He avers that when he contacted the 2nd interested party over the matter, he offered to cause the property transferred back to the name of the 4th respondent, which the 2nd interested party never did. He states that the 2nd respondent explained to the 2nd interested party that the property in question was matrimonial, and the documents executed by the 4th respondent did not include the signature of his spouse as required by the relevant land law. The 2nd respondent was also said to have had requested for a court order from the 2nd interested party, ostensibly authorizing the public auction, but the 2nd interested party did not avail any such order. When the 2nd interested party failed to produce the court order, he and the petitioner were arrested and charged with conspiracy to commit a felony and obtain registration by false pretenses. They were subsequently released on bond, after pleading that they would prove that the 4th respondent had serviced his loan. When they were due to report back to him, he was served with court orders barring him from arresting and charging the petitioner until further orders.

14. To support the respondents' case, the deponent has attached documents to his affidavit. There is a statement of accounts from Safaricom MPesa Service to show that the 4th respondent was servicing his loan through that platform. There is also a copy of the credit application, dated 4th February 2012, filled by the 4th respondent when applying for the loan, as evidence that he had applied for the loan in question. There is an investigation diary, dated 27th June 2013, concerning the report the 4th respondent made to the police. It indicates that the 4th respondent applied for and was advanced a loan of Kshs. 200, 000.00, by the 1st interested party, sometime in February 2012. He was required to repay to the 1st interested party a sum of Kshs. 328, 000.50, together with interest. It is indicated that he offered his property, Marama/Shisiala/1850, as security. It is stated that he cleared the loan and interest on 17th June 2013. He then approached the 1st interested party for return of his title deed, where he was informed that there were still some outstanding amounts, and that the 1st interested party would not return the title document yet. It was on that basis that he had approached the police for assistance to recover his title deed. Then there is a letter that the 4th respondent wrote to the 1st interested party, saying that he had settled the debt in full, and asking for his title deed. There is also copy of an official search certificate showing that the property had been transferred to the 2nd interested party. There is also a copy of an investigation diary concerning the transfer of the property to the 2nd interested party. He has also attached that letter from the Inspector-General of Police that the petitioner had referred to, and copies of the receipt issued upon payment of cash bail that the petitioner and the 2nd interested party had posted.

15. The interested parties also responded to the petition. The response by the 1st interested party is through an affidavit sworn by Lydia N. Wanjau, on 23rd January 2019. She is a director of the 1st interested party, which she describes as a limited liability company, and she has attached copies of its certificate of incorporation and its memorandum and articles of association. She explains that the 1st interested party was not a bank regulated by the Central Bank of Kenya. She goes on to give details of how the 4th respondent approached the 1st interested party for a loan, his application was granted, and he was advanced a sum of Kshs. 200, 000.00, secured by the property in question, which was liable to be sold upon default in the repayment of the loan. A charge was created over the property. The 4th respondent defaulted in his obligations to the 1st interested party, and the right to foreclose under the charge accrued. The property was offered for sale through the usual process of disposal of mortgaged property under the relevant land legislation, and was bought at a public auction by the 2nd interested party. She avers that the necessary processes were followed in the realization of the security. She mentions that the 4th respondent filed a suit, being Kakamega ELC No. 296 of 2017, to challenge the sale, and that suit was still pending.

16. The 2nd interested party swore his affidavit on 2nd January 2019. He avers that he was a victim of circumstances, and of evil machinations of the 1st, 2nd and 4th respondents, who plan to take away the subject from him. He asserts that they plan to do so by intimidating by using the police in a matter that is purely civil. He affirms that on 2nd October 2015 he saw a newspaper notice concerning a disposal of the said property at a public auction, scheduled for 26th October 2015. He contacted the auctioneer who had put up the advertisement, and he was informed that the sale was at the instance of the 1st interested party in exercise of its statutory power of sale. Being satisfied with that explanation, he attended the public auction, placed his bid, and emerged the highest bidder. He paid the amount, and was handed the original title deed, a transfer document was signed by the 1st interested party, and a discharge of charge and application for consent of the Land Control Board, to facilitate transfer of the property to his name. He had the property transferred to his name, whereupon he asked the 4th respondent to give him vacant possession, and eventually filed a suit in Busia ELC No. 51 of 2017, seeking orders for eviction of the 4th respondent from the property. The 4th respondent also filed his own suit, Kakamega ELC No. 296 of 2017, seeking nullification of the title deed issued in his favour. He states that he was surprised when he and the petitioner were arrested on 25th December 2018, on allegations of obtaining the suit property by false pretenses. He avers that he was released on bond after he explained how he had bought the property at a public auction, instigated by the 1st interested party, upon default by the 4th respondent of his obligations to it. The police gave him time to avail documents on how he acquired the property, which he did. He states that he also relies on the 1st interested party to avail documents on what had transpired before the property was placed on auction. In the interim, the petitioner moved the court in this matter, and obtained orders restraining his arrest. Whereupon, the 2nd respondent informed him, following these developments, that the only way he could avoid arrest and being charged was if he surrendered the property to the 4th respondent. He asserts that he was not agreeable to surrender the property to the 4th respondent, as he had lawfully bought it at a public auction and fully paid for it, and there were suits pending between him and the 4th respondent challenging the sale. He argues that the act of the 4th respondent, of reporting the to the police to settle scores, amounted to abuse of power by the police. He expresses fear that he may be arrested should he not comply with the demands by the police to surrender the land to the 4th respondent. He pleads that the 1st and 2nd respondents are abusing their authority as the issue was purely commercial and civil in nature. He asserts that their acts amounted to gross abuse of the criminal justice system. He avers that if the 1st, 2nd and 3rd respondents were not restrained they would violate his constitutional rights, and that should require intervention by the court. He expresses full support for the petition.

17. He has attached several documents to his affidavit to support his averments. There is a copy of the *Star* newspaper of Friday, 2nd October 2015, showing notice by the auctioneers of the sale of the subject property, an acknowledgement of receipt of the sale price of Kshs. 300, 000.00, issued by the 1st interested party, a certificate of sale issued by the auctioneer, a memorandum of sale, the title deed issued in his name, dated 9th December 2015, application for consent of the Land Control Board, the consent given by the Land Control Board, a document from the Kenya Revenue Authority of payment of the relevant transfer taxes, there is a letter informing the 4th respondent of the sale and advising that the money realized was not sufficient to settle the entire debt, and, finally, there are copies of the pleadings relating to Busia ELC No. 51 of 2017 and Kakamega ELC No. 296 of 2017, and the court order made in this cause on 11th January 2019.

18. Directions were given on 17th September 2019, to the effect that the petition be disposed of by way of written submissions. The 4th respondent, who has not filed any response to the petition, stated that he would not file written submissions, but would rely on those to be filed by the 3rd respondent. There was some compliance. There are written submissions on record by the petitioner and the 2nd interested party.

19. The petitioner submits on three points:

(a) That the matter was purely a commercial transaction carried out by the 1st interested party under the provisions of the Land Act, No. 6 of 2012, and the act of the respondents of arresting the petitioner on a purely commercial transaction was unlawful and illegal;

(b) That the arrest and the threatened arrest were unconstitutional, unlawful and illegal without any basis; and

(c) That the petitioner was entitled to damages for violation of his constitutional rights, under Articles 27, 28, 43 and 50 of the Constitution, by the respondents.

20. On the first issue, he submits that the 4th respondent had borrowed money from the 1st interested party and offered his own property as security, to be sold, in the event of default, and a charge was created over the property. He submits that there was default on the part of the 4th respondent, as a result of which the statutory power of sale accrued, and the property was sold in pursuance of that right. He argues that the said right was a creature of the Land Act, and cites sections 96(1) (2), 97(2) and 98 of that Act. He submits that the 1st interested party acted in accordance with those provisions, and, therefore, the sale was conducted within the law. After the sale, the 4th respondent moved the court in Kakamega ELC No. 296 of 2017 to challenge the validity and propriety of the sale, and that that suit was still pending. However, despite there being a right to statutory sale and the pendency of Kakamega ELC No. 296 of 2017, the 1st and 2nd respondents went ahead to arrest the petitioner. He submits that that arrest was unlawful, since it was based on a commercial transaction, which was carried out on the basis of the law applicable to such transactions, and, therefore, the arrest was a gross abuse of the criminal justice system, police powers and functions, and public prosecution functions. He cites the decision in *Francis Kirima M'Ikunyua & 2 others (suing as the Chairman, Secretary and Treasurer on behalf of Zimman Settlement Scheme Society) vs. Director of Public Prosecutions & 4 others* [2017] eKLR, where the court found that the criminal justice system was, in that case, being used to settle what was otherwise a civil dispute which had been the subject of several court cases. He also relies on *Investments & Mortgagees Bank Limited (I&M) vs. Commissioner of Police and the Director of Criminal Investigations Department & DPP, & 2 others* [2013] eKLR, where the court asserted its duty to ensure that its processes are not abused or otherwise used to perpetuate injustice or for improper motives. *Lalchand Fulchand Shah vs. Investments & Mortgagees Bank Limited & 5 others* [2018] eKLR, is the other decision that he has cited, the court noted that the validity or otherwise of the charge was an issue that was directly in issue in a pending civil suit, and that the criminal process sought to investigate possible fraud in connection with the same charge. The court concluded that the criminal process was a roundabout way of the civil matter being determined in another forum, and that the court had a duty to stop the move in its tracks.

21. On the second issue, he submits that he was not the seller of the property, neither did he participate in any way in the transaction. He further submits that the 1st interested party, in exercising its statutory right, acted within the law and, therefore, the act of the 1st and 2nd respondent of arresting him over the transaction, carried out by the 1st interested party, constituted a manifest violation and contravention of his constitutional rights and freedoms as enshrined in the Constitution. He submits that there was still a threat of a future arrest, and argues that such future arrest would be in abuse of court process in circumstances where there are pending civil proceedings in court between the same parties. He submits that in the circumstances, the criminal proceedings ought to be halted so that the parties' grievances are dealt with expeditiously and conclusively in the civil matter. He cites the decision in *Kenya Commercial Bank Limited and 2 others vs. Commissioner of Police and another*, where the court had held that although the matter before it was one where criminal proceedings had not been commenced, it was one where such proceedings hang over the heads of the petitioners. The court recognized that there was even power under section 193A of the Criminal Procedure Code, Cap 75, Laws of Kenya, for the High Court to stop proceedings, actual or contemplated, where they were oppressive, vexatious or an abuse of court process and a breach of fundamental rights. With regard to the instant case, he submits that the court should move to protect his fundamental rights, since he was not the seller of the subject property, neither did he participate in the sale. He finally cites *Peter George Antony D'Costa vs. Attorney General & another* [2013] eKLR, where the court stated that where there are threats of abuse of court process, there would be breach of the petitioner's fundamental rights, as the petitioner would not receive a fair trial, and it would be the duty of the court to stop such abuse of the justice system.

22. On the third issue, with respect to compensation in damages for violation of his rights, under Articles 27, 28, 43 and 50 of the Constitution, he submits that his arrest on Christmas Day violated his right to freedom, freedom to inherent dignity and protection of that dignity, freedom to economic rights, equal protection of the law and a fair hearing. He urges the court to find that he was not the seller of the subject property and, therefore, he was not the proper person to arrest, which meant that his freedom was needlessly curtailed. Secondly, his arrest on Christmas Day, without first being summoned to explain himself on the background of the impugned transaction, was malicious and an affront to his dignity and right to personal respect. As a director of the 1st interested party, he was entitled to derive economic benefit from lawful business and commercial undertakings conducted as provided by law. He argues that the 4th respondent was using the police to settle a civil dispute, without affording the petitioner the benefit of the law, which allowed ventilation of disputes over commercial transactions in civil proceedings. He submits that fair hearing meant that the dispute ought to be handled through the suit filed by the 4th

respondent in Kakamega ELC No. 296 of 2017. He cites the decisions in *Gitobu Imanyara & 2 others vs. Attorney-General* [2016] eKLR, *Daniel Waweru Njoroge & 17 others vs. Attorney-General* [2015] and *Mohamed Feisal & 19 others vs. Henry Kandie, Chief Inspector of Police, OCS, Rongai Police Station & 7 others; and National Police Service Commission & another (Interested Party)* [2018] eKLR.

23. The written submissions by the 2nd interested party are an analysis of the facts of the case, and they make no legal arguments. No statutory provisions are cited, and only one decision is cited, *Giella vs. Cassman Brown Limited* [1973] EA 358, which is, however, of no application. The principles stated in *Giella vs. Cassman Brown Limited* are for the purposes of an interlocutory matter, and are of no application in a final determination of the dispute, as is the case here.

24. Before I evaluate the merits of the Constitutional petition, I should, first of all, assess whether it qualifies for one. I have a duty to consider the responsibility that is placed upon a party who comes to court on a constitutional petition, alleging a violation of constitutional provisions, and who seeks redress from the court in respect of the violations alleged, to determine whether the petitioner herein has discharged that responsibility.

25. The High Court is established under Article 165 of the Constitution, 2010, and is conferred with jurisdiction, over, among other things, constitutional matters. The relevant provisions for the purpose of these proceedings are in Article 165(3)(b), which states as follows:

“(3) Subject to clause (5), the High Court shall have—

(a) ...

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) ...

(d) ...”

26. The matter before me is no doubt anchored on Article 165(3) (b).

27. Then there is Article 258 of the Constitution, which deals with enforcement of the Constitution, and states the right of every person, to institute court proceedings, claiming that the Constitution has been contravened or is likely to be contravened. The provision states as follows:

“258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) ...”

28. Article 165(6) of the Constitution is also relevant. It confers supervisory jurisdiction on the High Court over subordinate courts, and other bodies or persons or entities, that exercise a judicial or quasi-judicial function. The 1st, 2nd and 3rd respondents are one such persons, bodies or entities, and the quasi-judicial decisions of such persons, bodies or entities should be amenable to the supervisory jurisdiction of the High Court. Traditionally, the High Court exercised that supervisory jurisdiction through the judicial review process provided for under sections 8 and 9 the Law Reform Act, Cap 26, Laws of Kenya, and Order 53 of the Civil Procedure Rules, and occasionally under the inherent powers of the court saved under section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. For avoidance of doubt, Article 165(6) states:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

29. The petitioner herein, no doubt, has a right to move the High Court under Articles 22, 165(3) (b) (6) and 258 of the Constitution for the remedies set out in Article 23 of the Constitution, among others. The petition herein is, therefore, properly before me.

30. What I am required to determine at this stage is whether there is material, in the petition, upon which I can exercise the discretion given to me by the Constitution, to redress its violations or contraventions.

31. Case law has it that a person who seeks redress under the Constitution must state his or her claim with precision, and demonstrate the provisions of the Constitution that he alleges to have been violated or infringed, and the manner of the alleged violation. That position was first articulated in *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154, where the court stated:

“We would however again stress that 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 reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

32. In *Meme vs. Republic* [2004] eKLR, the Court of Appeal said:

“Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalised complaint without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants.”

33. Under the new Constitution, the Court of Appeal in *Trusted Society of Human Rights Alliance vs. AG. & 2 others* [2012] eKLR said:

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.”

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

34. The effect of the principles, stated in the above cases, is that a party moving the High Court, by way of a constitutional petition, for relief, arising from an alleged contravention or violation of the Constitution, must state their case in such terms as would assist the court fashion a relief suitable to the facts and circumstances of the case.

35. Has the petition in the instant cause met that test? The petitioner herein has given a fair amount of facts in both the petition and the affidavit, sworn in support. The facts are clear as to what transpired, which the petitioner alleges amounted to a violation or contravention of his constitutional rights. The petition also clearly identifies the provisions of the Constitution that the petitioner alleges were violated, as well as fashioning a clear prayer in respect of the remedies that he seeks from the court. I am satisfied, therefore, that I have before me a case which meets the test set out in *Anarita Karimi Njeru vs. Attorney General* (supra)

36. I have considered the petition and the affidavits filed by the parties, their respective submissions, and the authorities that they rely on. The petitioner alleges violation of his constitutional rights under the provisions of Articles 27, 28, 29 and 50 of the Constitution, and contends that the charges against him arise from a legitimate commercial transaction, and argues that it was unfair and unconstitutional to arrest and charge him with respect to a commercial dispute that was pending adjudication by a court of competent jurisdiction. The respondents counter that the charges have foundation.

37. As a basis for considering the legality of the actions by the first three respondents, I should examine the constitutional and statutory foundation of what they are accused of doing.

38. The first two are police entities. The police draw their authority from the National Police Service Act, No. 11A of 2011. Section 52(1) of that Act empowers the police to summon any person believed to have information, which may assist in an investigation, to appear before the police in a police station. The exact words used in that provision are:

“A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides for the time being is.”

39. Whether or not to charge or institute criminal proceedings is a decision that the police make based on the evidence that they have collected or gathered in a matter. Ideally, a charge would be laid if the investigations establish reasonable suspicion that a person committed a crime. After that the matter would rest with the courts, as was observed in *Republic vs. Commissioner of Police and another ex parte Michael Monari & Another* [2012] eKLR, where it was said:

“... the police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court ... 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.”

40. The authority of the 3rd respondent to conduct criminal prosecutions emanates from the Constitution, and specifically at Article 157. The office of the 3rd respondent is established as an independent agent, that cannot be subject to any other body or entity or agent or authority in exercise of the powers of its office. The only restraint or limitation to the exercise of those powers is that set out in Article 157(11), which states:

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

41. The picture emerging, therefore, is that the 3rd respondent is an independent office, with clear defined roles and function. Under the Constitution, it should be allowed to operate without interference. The principle, therefore, should be that the court should not interfere with the functions of such an independent office. However, there is a little window for intervention by the court through Article 157(11) of the Constitution, where it is shown that the 3rd respondent has violated the Constitution. Whereas under the Constitution there is a duty by the

court to protect the functional administrative and operational independence of the 3rd respondent, there is also a corresponding duty to protect citizens against exercise of functions by state agencies in a manner that violates the Constitution, and in the context of the present cause, to ensure that the 3rd respondent exercises its functions with due regard to public interest, the interest of public administration of justice and the need to prevent and avoid abuse of the legal process.

42. The orders sought seek to restrain the first three respondents from exercising their constitutional and statutory powers, specifically to stop arrest and prosecution of the petitioner, for the alleged offence under investigation. The question then that I face is whether or not I should stop the said arrest and prosecution. What I have to consider is whether, as a general rule, it would be in public interest to stop the first three respondents from investigating, arresting and charging the petitioner, based on the investigations that the 2nd respondent has been conducting, on the basis that such investigation or arrest or charges, are a threat to fundamental rights and freedoms.

43. With respect to arrest or threat of arrest, it was observed in *Hassan Ali Joho vs. Inspector General of Police & 3 others* [2017] eKLR, that a threat of arrest or of violation of fundamental rights and freedoms *per se*, is not reason enough to stop the 3rd respondent carrying out his functions, and that what the law seeks to prevent is arbitrary arrest without probable cause. Articles 49 and 50 of the Constitution anticipate arrests of individuals, and it is with that in mind that it makes provision for rights of arrested persons. A threat of arrest *per se* is not unconditional, so long as due process is followed and the constitutional rights of the arrested person are observed. What the court needs to consider is whether the rights of the petitioner were observed. Specifically, the court will need to consider whether the investigations and the charges preferred against him abuse the criminal process, or are unfair to him, or are against public interest. The allegation herein is that 1st and 2nd respondents were carrying out investigations, which led to the arrest of the petitioner, with respect to a transaction that was purely commercial, which was subject to ongoing civil proceedings, and in respect of which the petitioner did not participate in as a person. It is argued that the criminal process was being resorted to to serve a collateral purpose and for ulterior motive.

44. The courts have had occasion to address themselves to these issues in a number of cases. In *Republic vs. Chief Magistrate's Court at Mombasa ex parte Ganijee & Another* [2002] 2 KLR 703, the court stated:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth. When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court. In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by blandishing the sword of punishment under criminal law, than in any genuine desire to punish on behalf of the public the crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in.”

45. In *Kuria & 3 others vs. Attorney General* [2002] eKLR, the court held:

“The court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that why the system was even formed to perform. A stay (by order of prohibition) should not be granted where compelling an accused person to stand trial would violate the fundamental principles of justice which underlie the society's sense of fair play and decency and/or where the proceedings are oppressive or vexatious. The machinery of criminal justice is not to be allowed to become a pawn in personal feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its independence (the court's) independence and impartiality ... the invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer ... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely to the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would a travesty of justice, a sad day for justice should the processes of court be allowed to be manipulated, abused and/or misused, in all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of one of them because there is nothing in terms of decisions to prohibit ...”

46. In *Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and others* [2013] eKLR, it was said:

”While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith ... It is not in the public interest or in the interest of administrative justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court.”

47. Section 193A of the Criminal Procedure Code has been mentioned severally in some of the decisions cited above. It is relevant to these proceedings, to the extent that they relate to a scenario or a circumstance where there are civil proceedings that are pending and the police are in the process of initiating seemingly parallel criminal proceedings relating to the same set of facts as are before the civil court. The said provision states as follows:

“193A. Concurrent criminal and civil proceedings

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

48. From the material on record, it is clear that the transaction, the subject of these proceedings, was commercial in nature. There is evidence that the 1st interested party initiated a process for foreclosure of the charged property, which led up to the same being sold to the 2nd interested party. There are two civil suits arising from the said sale as between the 4th respondent and the 2nd interested party. The 4th respondent’s case is that he had paid his debt in full, while the 1st interested party’s position is that there was no full settlement of the debt hence the sale of the secured property by public auction. However, I have noted that there is no suit between the 4th respondent and the 1st interested party, on the matter of the accounts and the exercise of the power of sale by the 1st interested party. It is, however, within the rights of the 4th respondent to place a report with the police of any activity affecting him which he believes has criminal elements, and it is within the mandate of the police, once such a report is received by them, to carry out investigations to evaluate whether or not there are any criminal elements in the activity complained of. The mere fact that the subject activity is of a commercial nature does not mean that it cannot be tainted with criminality, and should not be subjected to criminal investigations and prosecution.

49. The law is that there is nothing that prevents concurrent civil and criminal proceedings arising from the same facts. Consequently, the court, as a general principle, ought not to stop the criminal proceedings merely on account of the pendency of the civil proceedings. Neither should it be concluded, purely on account of the pendency of the civil proceedings, that criminal proceedings were being initiated for a collateral purpose or ulterior motive.

50. I have read through the affidavit of the PC Hinzano, which details the steps that the 2nd respondent took during investigations. He obtained documents from Safaricom Ltd, which he has attached, being MPesa statements showing that the 4th respondent had paid the money advanced in full. I note that the 1st interested party has not filed a response to these allegations. It is also clear that there was an effort to get the auctioneers to avail a court order which authorised the sale, and to have the 2nd interested party have the property transferred back to the 4th respondent. It would appear that it upon failure to be furnished with the court order and the re-transfer to the 4th respondent that the 2nd respondent appears to have decided to arrest the petitioner and the interested party and to charge them.

51. The law relating to charges does not require that a chargee obtains a court order to facilitate disposal of a charged property through public sale. Court orders or court warrants would be required where a decree has been given by a court, and the decree holder is seeking to enforce it. Secondly, where a person has acquired property at a public auction there are safeguards that are given under the applicable land legislation, even where the alleged sale had challenges. It would, therefore, not be the responsibility of the police to have the property reverted to the original owner without following the due process set out in land legislation.

52. The petitioner has argued that he was not the seller of the property, and, therefore, he was not the proper person to arrest in the circumstances. It is not clear what he exactly means by saying that he was not the seller of the subject property, but I understand him to mean that the transaction was not between him as a person and the 2nd interested party, but rather between the 1st interested party, a limited liability company, in which he is a director, and the 2nd interested party. His submission appears to me to be that if there is criminal liability with respect to the transaction, the same should not attach to him as an individual but to the 1st interested party. In simple language, he appears to be saying that he should not be made to bear any criminal liability accruing to the 1st interested party.

53. Criminal liability for corporations was summarised by the High Court in *Clay City Developers Limited vs. Chief Magistrate’s Court at Nairobi & 2 others* [2014] eKLR, in the following terms:

“The law relating to corporations is well known. A company may in many ways be linked to the human body. It has a brain and nerve centre, which controls what it does. It also has hands, which hold the tools and act in accordance with the direction of the centre. Some of the people in the company are mere servants or agents who are nothing more than hands to do the work. Others are directors and managers who represent the mind of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. However, a corporation is an abstract. It has no mind of its own; its active mind and directing will must consequently be sought in the persons of somebody who for some purpose may be called an agent and will of the corporation in such a case as the present one that the fault or privity of somebody who is merely a servant or agent for whom the company is liable for the footing respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself.”

54. Similarly, it was said in *Michael Muasa Kilonzo vs. Republic* [2017] eKLR, again by the High Court, that:

“Limited liability companies, although legal personalities, are inanimate: they can only act through directors who incorporated them. Criminal liability attaches to the directors acting through the veil of incorporation of the company...”

55. The position stated in the two decisions essentially summarises the statutory criminal law position that with respect to companies, corporations, associations, societies and like entities, with some artificial personality, criminal liability does attach upon the artificial entities,

but for the purpose of criminal proceedings, it is the natural personalities behind the said artificial entities who are charged in court as representatives of the artificial entities. This is what section 23 of the Penal Code, Cap 63 , Laws of Kenya, provides with respect to the same:

“Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in the control or management of the affairs or activities of such a company, body corporate, or society, association or body of persons shall be guilty of that offence and is liable to be punished accordingly unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed or that he took all reasonable steps to prevent its commission.”

56. The petitioner herein has pleaded that he is one of the directors of the 1st interested party. In classic company law, the directors are responsible for the management of the affairs of the company, which responsibility is often delegated to or carried out through managers or management. The buck, as it were, however, always stops with the directors. When criminal proceedings have to be initiated against the company with respect to its activities, it would usually be the company and its directors being charged in court therefor. Going by the above, there is, therefore, nothing unusual about a director of a company being arrested and charged with respect to the activities of the company, which have a criminal element or border on criminality or amount to criminality.

57. That was the subject in *Patrick Paddy Ooko vs. Republic* [1995] eKLR, where the applicant had been arrested and charged before the Chief Magistrate’s Court on various counts of obtaining money by false pretences contrary to section 313 of the Penal Code. He claimed that the money was received by a limited liability company of which he was one of the directors. He complained that the charges against him were wrongful and contravened the fundamental provisions of the Constitution. The Court of Appeal said, with regard to that:

“... there is nothing unconstitutional about a subscriber of a company being charged with an offence allegedly committed by him when the subscriber is responsible for the management of the company. Any person so charged is at liberty to put forward his defences before the trial court.”

58. The police have a mandate to investigate commission of crimes, once a report is filed with them. The court should be wary of venturing to direct how the police should execute that mandate. There is nothing in law which prevents a criminal case and a civil case, founded on the same facts, proceeding simultaneously. However, it would be imprudent to have the two processes run parallel to each other, to avoid the possibility of the two courts arriving at different outcomes on the same set of facts. Such an eventuality would embarrass both courts. It would be prudent that one of the processes should be allowed to run its course, and then the second process can be embarked upon thereafter. In the instant cause, the civil court is already seized of the matter, while the criminal process is just beginning, and is at investigation stage. There should be a balance between public interest in having possible crimes investigated, and the need to have private interests protected. The police should be free to conduct their investigations, but let the petitioner and the 2nd interested party not be charged of any offence before the pending civil cases are finally disposed of, to avoid the possibility of the conflict that I have mentioned above arising, where the civil court and the criminal court handling the separate processes could arrive at conflicting conclusions on the same set of facts. Such an eventuality would present an embarrassing scenario for administration of justice.

59. Consequently, the orders that I shall make in the circumstances are as follows:

- (a) **That the 1st and 2nd respondents are at liberty to continue with their mandate to carry out investigations, on the petitioner and the interested parties, with respect to the report made to them by 4th respondent;**
- (b) **That the 1st, 2nd and 3rd respondents are hereby prohibited from arresting and or charging the petitioner and the 2nd interested party with any offence that may be disclosed from or by the investigations the subject of order (a) above, pending final disposal of the civil proceedings pending in Busia ELC No. 51 of 2017 and Kakamega ELC No. 296 of 2017;**
- (c) **That each party shall bear their own costs; and**
- (d) **That any party aggrieved by these orders has twenty eight days to challenge the same at the Court of Appeal.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF MAY, 2020

W. MUSYOKA

JUDGE