



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

Coram: D. K. Kemei - J

**CONSTITUTIONAL PETITION NO. E3 OF 2020**

**RICHARD MUHINDI NZYOKA.....1<sup>ST</sup> APPLICANT/PETITIONER**

**SIMON MUTUKU.....2<sup>ND</sup> APPLICANT/PETITIONER**

**KIMATU MUTUKU.....3<sup>RD</sup> APPLICANT/PETITIONER**

**JOSEPH KIMEU MUENDO.....4<sup>TH</sup> APPLICANT/PETITIONER**

**VERSUS**

**DAVID K LANGAT.....1<sup>ST</sup> RESPONDENT**

**OCPD ATHI RIVER POLICE STATION.....2<sup>ND</sup> RESPONDENT**

**DCIO ATHI RIVER POLICE STATION.....3<sup>RD</sup> RESPONDENT**

**AND**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....1<sup>ST</sup> INTERESTED PARTY**

**THE DIRECTOR OF PUBLIC PROSECUTIONS....2<sup>ND</sup> INTERESTED PARTY**

**FRANCIS KOOME.....3<sup>RD</sup> INTERESTED PARTY**

**INSPECTOR GENERAL OF POLICE.....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

1. This ruling is in respect an application filed by the petitioners vide notice of motion dated 17.9.2020 that is brought under Order 40 Rule 1a & b, 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1a, 3a of the Civil Procedure Act, The constitution of Kenya, the inherent powers of the court and all other enabling provisions of the law.
2. What provoked these proceedings was the criminal proceedings instituted against the 1<sup>st</sup> to 3<sup>rd</sup> petitioners at Mavoko; **Criminal Case No. 505 of 2020 Republic v Richard Nzioka Muindi, Simon Mutuku, Kimatu Mutuku** and **Criminal Case 851 of 2019 Republic v Richard Nzioka** (hereinafter referred to as the criminal case).
3. Aggrieved by the vagaries surrounding the criminal case, the Petitioners herein filed the instant petition in which they seek various orders which in principle seek to have the criminal proceedings stayed.
4. On their part the applicants/petitioners seek the following orders:
  - a. Spent.

b. That this court do issue an order in favour of the petitioners/applicants to stay the intended plea taking in file No 505/20 Cr Mavoko Law Courts pending the final hearing and determination of this application/petition .

c. That in alternative to order No 1 above(sic) this court to invoke its inherent jurisdiction and admit the 1<sup>st</sup> to 4<sup>th</sup> petitioners herein to personal surety or bond terms that are lenient and favourable pending the final hearing and determination of the file No 505/20 Cr Mavoko Law Courts;

d. That this honorable court be pleased to direct the 1<sup>st</sup> and 3<sup>rd</sup> interested parties herein to assign, appoint, delegate a new agent, servant, officer of the specified rank to investigate, inquire on the matters surrounding the Criminal charges aforementioned herein and all the pending OB numbers, complaints of the petitioners that are pending at the offices of the respondents herein pending the final hearing and determination of this petition and application.

e. That the costs for this application be in the cause

5. In support of the application was an affidavit deponed by Richard Nzioka Muindi on 17.9.2020; he is stated to be an official of the Village D Self Help Group and with authority from other members and other petitioners to file this application and depone the affidavit. It was averred that the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners and the deponent are currently detained at Athi River Police station through the deferring of plea on 21.9.2020 in criminal file 5050 of 2020 while the 4<sup>th</sup> petitioner, the grandson of the 1<sup>st</sup> petitioner had been compelled to appear before the 1<sup>st</sup> respondents to be produced in court and be charged with the same offence on the 18.9.2020. It was averred that the 1<sup>st</sup> to 3<sup>rd</sup> respondents arrested the 1<sup>st</sup> to 3<sup>rd</sup> petitioners after a complaint from the 3<sup>rd</sup> interested party and have refused to issue P3 forms to the petitioners. It was pointed out that there is a land feud between Kimwa Hill view Association that is a faction of the 3<sup>rd</sup> interested party and Village D Self Help Group that had brought about enmity between the petitioners and the 3<sup>rd</sup> interested party while the respondents had taken sides. It was averred that the 3<sup>rd</sup> interested party continued acts of demolition on the land known as D and that the 2<sup>nd</sup> interested party are championing selective prosecution hence acting in abuse of office.

6. The 2<sup>nd</sup> interested party opposed the application vide grounds of opposition filed on 21.9.2020 by prosecution counsel. It was stated that the instant application was frivolous, vexatious and an abuse of the court process; that Article 157(6) of the Constitution mandates the DPP to undertake prosecutions independently without the consent or authority of anybody; that the instant application is premature and speculative as the DPP has not made a decision whether or not the 4<sup>th</sup> applicant is going to be charged; that the petitioners have not demonstrated any issues for the court to determine as investigations were done professionally and that the 2<sup>nd</sup> interested party perused the file and made an independent decision that did not overstep its mandate; that this court cannot assign an investigator to investigate a case as this is the preserve of the National Police Service by dint of section 24 of the National Police Service Act; that the 1<sup>st</sup> to 3<sup>rd</sup> applicants had not demonstrated how they will suffer injustice if charged and that under section 193A of the CPC, civil and criminal cases can go hand in hand.

7. There is no indication of any other response to the application.

8. Directions were taken to the effect that the application be canvassed vide written submissions. It is only the 3<sup>rd</sup> interested party's submissions that are on record. Learned counsel submitted that the affidavit that was served on them did not have the annexures RNM1 to 7 in support. Counsel submitted that the 3<sup>rd</sup> interested party made a complaint of robbery with violence and after investigations were conducted, the police found that there was sufficient evidence to support the charge hence the 1<sup>st</sup> applicant's allegations had no basis. It was submitted that it was the work of the police to investigate complaints and the police could not be directed on how they could carry out investigations. It was pointed out that the 1<sup>st</sup> applicant took plea on 21.9.2020 hence the orders sought are in vain. It was further pointed out that the applicants were granted bond terms and that the prayer had been overtaken by events. The court was urged to dismiss the application with costs.

9. I have considered the application the subject of this ruling, the single response thereto and the submissions made on behalf of the 3<sup>rd</sup> interested party.

10. The office of the DPP is established by Article 157 of the constitution with a mandate to be in charge of all criminal prosecutions save for those in the court martial. Article 157(11) of the 1995 constitution is to the effect that;

“In exercising his or her powers under this Article, the DPP shall have regard to the Public interest, the interest of administration of justice and the need to prevent abuse of legal process”

Article 157(10) of the Constitution is to the effect that;

In exercise of the functions conferred on him/her by this Article, the DPP shall not be subject to the direction or control by any person or authority.

11. Article 245 establishes the command of the National Police Service and states that

“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

12. Nevertheless Article 23 grants the High Court power to uphold and enforce the bill of rights. A public authority will be found to have acted unlawfully and or unconstitutionally if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness).

13. The applicants/petitioners in this case are principally asking the court to interfere with the authority of the DPP's office and the Police Officers office on grounds that they have propagated the petitioners being charged and have alleged that their actions have prejudiced the petitioners.

14. The issue for determination is whether the orders sought should be granted. From the outset it should be noted that a Constitutional court has been warned against challenging criminal proceedings in a civil court. This court being a civil court cannot delve into propriety of criminal proceedings in a criminal court or whether the evidence is sufficient to sustain the charges brought against the applicant. There is an appeal system in criminal trial systems through which the applicant can challenge the proceedings in the criminal court. The House of Lords held in **Imperial Tobacco Ltd v Att. Gen. [1981] A.C 718** that "where criminal proceedings have been properly instituted and are not vexatious or an abuse of the court process, it is not a proper exercise of the court's discretion to grant a declaration to the defendant in those proceedings that the facts alleged by the prosecution do not in law prove the offence charged."

15. In the case of **Republic v Director of Public Prosecutions & Another Ex Parte Chamanlal Vraijal Kamani & 2 Others (2015) eKLR**, it was observed that "It would be upon the prosecution to show at the trial that the defences which the applicants have alluded to are not available to them. In these proceedings however, the rules are reversed and it is upon the applicants to show that there possibly cannot be any prosecutable case against them, a burden which is no doubt heavy as it has the result if determined in favour of the applicants, of barring the Respondent from executing its constitutional and statutory mandate."

16. This would mean that the petitioner would have to satisfy the court that they meet the requirements for grant of the orders sought which are primarily conservatory orders.

17. The circumstances under which conservatory orders may be granted were discussed in **Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR**, thus:

"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

18. This position was reinforced by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Ors (2014) eKLR** where the Supreme court held:

"Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted."

19. The first condition the applicant is required to establish is a prima facie case with a likelihood of success. From the evidence on record, there is a petition that has been filed and is yet to be heard. There is also a pending criminal trial. Without preempting the outcome of the petition, the issues which the petitioners intend to canvass at the hearing of the petitions are the contention that the respondents are selectively prosecuting and harassing the petitioners and acting in breach of rights as listed in the petition. My view is that it is up to the petitioners to satisfy that they fall within the provisions of the law to warrant the grant of conservatory orders and at this stage this would not in any way be prejudiced by the criminal trial that this court does not have the benefit of knowing what took place or is taking place therein. According to the evidence relayed via the affidavit in support of the application, I am not satisfied that there is a prima facie case with

likelihood of success; *a priori* that the continuation of the criminal proceedings will infringe any rights of the applicants. The criminal trial has its standard that is to be met and the handling of the same is a different ball game that is not within this court.

20. The 2<sup>nd</sup> element to consider is if the order is not granted then the intended petition will be relegated to an academic exercise. I am of the view that the petition and the criminal trial have their different standards of proof. In the criminal trial, it is upon the prosecution to prove beyond reasonable doubt that the offences alleged to have been committed were committed, whereas in the petition, the petitioners ought to prove that the actions of the respondents and the interested parties have on a balance of probabilities infringed on their constitutional rights. I do not see how the petition will be rendered nugatory if the orders sought are not granted.

21. In the result I decline to grant conservatory orders in terms of prayer 2 of the application.

22. In respect of prayer 3, the applicant seeks to invoke the inherent jurisdiction of the court to give bail and bond terms. **Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 — ), vol. 37, at para. 14** it is stated:

“In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

23. The inherent jurisdiction of the court most readily deals with issues concerning the court's own processes. It is used to fill gaps where the legislature has not provided an answer and the aspect of bail and bond are powers that the trial court handling the criminal matter is clothed with hence prayer 3 would be better handled by the trial court.

24. With regard to prayer 4 by dint of Article 245 of the Constitution, this court has no mandate to direct investigation and in any event the applicant ought to have approached the police directly. I believe that the National Police Service being an independent body has mechanisms to handle rogue officers if it is satisfied that indeed wrongful actions have been done. It is plainly not possible for this court to descend into the arena of police operations and investigations and purport to decide which of the officers are suitable to investigate cases involving the petitioners since that responsibility falls under the mandate of the National Police Service Commission. It has also transpired that the petitioners have since been arraigned before Mavoko law courts where they have taken plea and been granted bond by the trial court. It would therefore seem that the application has been overtaken by events and that no prima facie case has been made up at this stage to justify the grant of conservatory orders. Clearly, the prayers sought in the application are not merited in the circumstances.

25. The upshot of the foregoing is that the petitioners' application dated 17.9.2020 lacks merit. The same is dismissed.

It is so ordered.

**Dated and delivered at Machakos this 13<sup>th</sup> day of October, 2020.**

**D. K. Kemei**

**Judge**