



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.112 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 50 OF THE CONSTITUTION RELATING TO RIGHT TO FAIR TRIAL AND ARTICLES 22 AND 23 OF THE CONSTITUTION RELATING TO ENFORCEMENT PROCEEDINGS CONCERNING FUNDAMENTAL RIGHTS AND FREEDOM, ARTICLE 27 RELATING TO EQUALITY AND FREEDOM FROM DISCRIMINATION

AND

IN THE MATTER OF ARTICLE 245(4 & 5) OF THE CONSTITUTION RELATING TO THE INDEPENDENCE OF THE INSPECTOR GENERAL OF POLICE IN MATTERS OF INVESTIGATIONS

AND

IN THE MATTER OF NATIONAL POLICE SERVICE ACT CAP 11A OF 2011

AND

IN THE MATTER OF AN INVESTIGATION LAUNCHED AGAINST BISHOP KARIUKI NGARI ALSO KNOWN AS GAKUYO BY THE DIRECTOR OF CRIMINAL INVESTIGATIONS

DAVID KARIUKI NGARI.....PETITIONER

VERSUS

DR. FRED MATIANG'I CABINET SECRETARY MINISTRY OF INTERIOR

AND COORDINATION OF NATIONAL SECURITY.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

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

HON. ATTORNEY GENERAL FOR KENYA.....4TH RESPONDENT

RULING

1. The petitioner through a Notice of Motion brought pursuant to Constitution of Kenya Protection of Right and Fundamental Freedoms Practice and Procedure Rules 2013, Rules 4,5,10 and 23, Articles 22 and 23(3) of the Constitution of Kenya, the inherent jurisdiction of the High Court and all other enabling provisions of the law seeks the following orders:-

a. This Honourable Court be pleased to issue a conservatory Order, that pending the hearing and determination of this Petition or until further orders of this court, a conservatory order be and is hereby issued prohibiting the 1st and 2nd Respondents herein whether

by themselves and or their officers, agents, servants or anybody acting under them or through them from investigating, or recording witness Statements or arresting, maintenance and continuance of any criminal charges against the Petitioner/Applicant herein and or the juridical persons associated with him namely Ekeza Savings and Credit Co-operative Society, Gakuyo Real Estate Ltd and Gakuyo Investments Club and from instituting any such fresh investigations, or charges based on the management by the Petitioner or officers under him of the aforementioned bodies.

b. That costs of this application be provided for.

2. The application is premised on grounds numbering from No. 1 – 9 on the face of the application and is further supported by an affidavit by the Applicant.

3. The 1st and 2nd Respondents are opposed to the application and in doing so filed a Replying affidavit sworn by No.236117 inspector Paul Waweru.

4. The 1st and 4th Respondents filed grounds of opposition dated 24th April 2019.

5. I have considered the application, grounds on the face of the application, affidavit in support; the Replying affidavit by 1st and 2nd Respondents; the grounds of opposition; counsel rival submissions and authorities in support, as well as counsel oral submissions and the issue arising thereto for consideration, is as follows:-

a. Whether the Applicant has met me the threshold for a conservatory order to issue prohibiting the Respondents from investigating, recording witness statements, arresting, maintenance and continuance of any criminal charge?

6. The Applicant/Petition, is a Chairman of the Board of Directors of Ekeza Savings and Credit Co-operative Society Ltd and Chairman Gakuyo Estate Ltd and an Overseer Bishop and Founder of Calvary Chosen Center Church and a politician who contested for Gubernatorialship of Kiambu County urges, that on 6th March 2019, the 1st Respondent, who is the Cabinet Secretary in charge of police during an address to police officers, members of savings and credit Society Ltd at police Sacco Plaza, during the Annual Delegates meeting directed the Inspector General, who was present at the meeting to investigate the Applicant and other Officials of Ekeza Sacco and Charge them before a magistrate's court allegedly for stealing Sacco money.

7. It is the Applicant's contention, the direction by **C.S Matiang'i**, the 1st Respondent, is a gross violation of the constitution and specific prohibition set out under Article 245(4) thereof against directing the Inspector General of police to investigate any particular offence or offences or the enforcement of the law against any particular person.

8. It is the Applicants contention the direction by Hon. **C.S. Matiang'i**, was widely reported in the local media both on Television and Newspaper and had been subject of intense discussion in the social media. That the Applicant being extremely worried rendered himself forthwith to the office of the Director of Criminal Investigation at Mazingira Building along Kiambu Road on 7th March 2019 in company of his Advocate but was surprised when the Head of Criminal investigations, Mr. R.J. Kariuki told him and his Advocate, that police were not looking for him since no complaint had been made against him save a report, that was received thereby from the Cabinet Secretary of Industry; Trade and Co-operations, that was addressed to **C.S Matiang'i**, the 1st Respondent herein.

9. It is further contended, that on 14th March 2019, the Director of Criminal Investigations sent out a public Appeal through the media requesting those who had complains about the petitioner and his company to report to him on 18th March 2019 with all documents.

10. The Applicant contends the manner in which the 2nd Respondent is conducting the investigation suggest, that he lacks independence and therefore impartiality, that evidence being sought publicly by **DCI** by public appeal will prejudice the petitioner and is in contravention of the Bill of Rights as expressly provided by Article 50(4) of the Constitution.

11. The Applicant further avers, that the investigation commenced by the 2nd Respondent must demonstrate, that he is acting independently with the intention of pursuing criminal justice and is not witch-hunting or acting under public pressure or at the instance of the Cabinet Secretary in charge of security or any other person no matter how highly placed that person may be.

12. The 1st and 2nd Respondents, in their Replying affidavit by No. 236117 Inspector Paul Waweru, an investigator, attached to Director of Criminal Investigations Headquarters, averred the complains against the petitioner has been raised through a letter from the Cabinet Secretary Ministry of Industry, Trade and Co-operative, after getting an inquiry report on Ekeza Sacco, conducted by the Commissioner of Co-operatives dated February 2019 and received by the **DCI** on 7/3/2019 and that other complaints have been received by **DCI** individually from the affected victims and other collectively from their legal representatives. That numerous complaints were received on 18/3/2019 when complainants from Nairobi and Kiambu Region were summoned at **DCI** to register their complains.

13. It is further deponed, that the petitioner voluntarily presented himself at **DCI** on the 7/3/2019 on the day the first complain was received by **DCI** from **C.S** Ministry of Industry, Trade and Co-operative, following which the investigation commenced indicating, that the first complain was received at **DCI** and not when the 1st Respondent addressed members of police Sacco. That the investigations are based purely on the allegation raised by numerous complaints and not as directed by the 1st Respondent or the 2nd Respondent.

14. It is further deponed the investigations are ongoing and covers a wide area across the country where Ekeza Sacco had 42 branches in 8 Counties across the Country. It is further urged the **DCI** which is an arm of the National Police Service is mandated under National Police Act under Section 24 to investigate serious offences which include fraud. It is further deponed that the investigation conducted by **DCI** in

this matter is independent and 3rd Respondent will only get involved when investigation are complete to give directions. The DCI did not admit to receiving any directions from C.S, the 1st Respondent in writing or any complaint from him.

15. The petitioner is aggrieved by ongoing investigation against him and others. He is yet to be arrested and charged as the investigation is incomplete. **Article 24(1) of the Constitution** provides;

"1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

16. I have considered the nature of the investigation, inquiries being made in respect to the petitioner, being a chairman of Board of Directors of Ekeza Savings and Credit Co-operative Ltd and the Chairman of Gakuyo Estate Limited, and note the law under section 24 of the National Police Service Act, allows a police officer to investigate and make any such inquiries as it may warrant where a cognizable offence has been committed. I find as the investigation is on going and the 3rd Respondent has not received the report and decided to charge or not to charge the petitioner, the petitioner is not prejudiced by the ongoing investigation. The petitioner other than stating his rights has been violated, he has not demonstrated specifically how his rights has been violated by the Respondents, when the 2nd Respondent is acting on a complaint, that was brought to him by affected victims and other persons collectively by their legal representatives. The failure by the 2nd Respondent to investigate the victims complaints would amount to a violation of the Respondents statutory functions as provided under **Section 24 of the National Police Act** which provides;

The functions of the Kenya Police Service shall be the-

"(a) Provision of assistance to the public when in need;

(b) Maintenance of law and order;

(c) Preservation of peace;

(d) Protection of life and property;

(e) Investigation of crimes;

(f) Collection of criminal intelligence;

(g) Prevention and detection of crime;

(h) Apprehension of offenders;

(i) Enforcement of all laws and regulations with which it is charged; and

(j) Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time."

17. The conservatory order sought if granted, prohibiting the 2nd Respondent from investigating the petitioner on complaints already lodged with the 2nd Respondent, I find the court interference with the exercise to investigate would amount to violation of the Respondents jurisdiction as provided under section 24 of the National Police Act, unless it is demonstrated, that the petitioner is a victim of oppression and the investigation amount to an abuse of police power to investigate, and that the process of investigation is illegal and malicious the court should not prohibition the investigation.

18. In **Njuguna S. Ndungu vs Ethics & Anti-Corruption Commission [EACC] & 3 Others [2014] eKLR** at paragraph 76 cited the case of **Joram Mwenda Guantai vs The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170** where the Court of Appeal held;

".....the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

19. The allegation that 1st Respondent has interfered with the investigation is not supported by any tangible evidence, it is misplaced and unfounded as the applicant admitted the police told him they had not received any complain from the 1st Respondent, as such I find that the Applicant has failed to demonstrate how the 1st Respondent is interfering with the ongoing investigation. That the 1st Respondent, who the petitioner contend is a powerful C.S in the country, if the C.S was interfering as alleged, the Applicant would have been arrested on 7th March 2019, when he presented himself before the **DCI**, a day after the alleged giving of directions.

20. Article 157 of the Constitution establishes an office of Director of Public Prosecution and enjoins the office in executing its mandate to be impartial, have regard to public interest, the interest of the admiration of justice and need to prevent and avoid abuse of the legal process. **Article 243 of the Constitution** establishes National Police Service whose objectives are specified under **Article 244**, which enjoins police to prevent corruption and promote and practice transparency and accountability. The investigation undertaken by Respondents relates to fraud which is a public interest matter which the Respondents are mandated to investigate and establish whether the complaints and allegations made against the Applicant discloses a crime or not.

21. It is trite law, that for the court to prohibit the investigation against a petitioner, the Applicant/Petitioner is required to establish, that the Respondents have either acted oppressively; vexatiously or illegally with intent to abuse the court process. That the Applicant has not established or met the test for conservatory orders and is only seeking to muzzle the Respondents institutions, which are mandated by the constitution with investigation and prosecution respectively from undertaking their duties. That if the orders sought are granted, it would amount to interfering with functional independence of the two institutions. As regards the Applicant's right to fair hearing and other issues related to the investigation, I find the Applicant shall not be prejudiced as he shall be at liberty to raise the issues, if charged, before the trial court.

22. It is my finding, that the Applicant has not met the threshold for a conservatory orders to be granted as sought in the notice of motion dated 21st March 2019.

23. The upshot is that the Notice of Motion dated 21st March 2019 is dismissed with costs.

Dated, signed and delivered at Nairobi this 13th day of June, 2019.

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J .A. MAKAU

JUDGE