



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.589 OF 2017

IN THE MATTER OF ARTICLES 2(1), 2, 3(1), 27, 29, 243 and 245 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER ARTICLES 39(1) AND 20 2(a) OF THE

CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES

BETWEEN

SURJIT SINGH HUNJAN.....1ST PETITIONER/APPLICANT

BALRAJ SINGH HUNJAN.....2ND PETITIONER/APPLICANT

AND

NATIONAL POLICE SERVICE.....1ST RESPONDENT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

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

JUDGMENT

Petitioners Case

1. The petitioners through a petition brought pursuant to Articles 2(1) (2), 3(1), 27 (1) (2), 29, 39(1), 47, 156 and 258 of Constitution of Kenya 2010 seek the following orders:-

a) **THAT the Honourable Court be pleased to certify this application as urgent and dispense with service of the same upon the Respondents in the first instance.**

b) **THAT this Honourable Court be pleased to issue an order that a report be availed by the 2nd Respondent on;**

a) **Whether the evidence by the 1st Respondent can sustain the intended charge.**

b) Whether the evidence is enough to sustain the prosecution of the Petitioners;

Pending hearing and determination of this petition.

c) THAT pending the report by the 2nd Respondent in prayer (2) above, the Honourable court be pleased to issue orders temporarily restraining the 1st Respondent, its servants, agents or any one acting on his behalf from, arresting or harassing the Petitioners pending the hearing and determination of this Petition.

d) THAT this Honourable court be pleased to issue such further or other order(s) as it may deem just and expedient for the ends of justice.

e) THAT the costs of this petition be awarded to the Petitioners.

2. The petitioners challenge the constitutionality of the actions of the 1st Respondent, whose officers had made several calls to the petitioners with threats of arrest, alleging the petitioners had fraudulently sold motor vehicles seized under a chattel mortgage by SBM Bank formerly known as Fidelity Bank.

3. The 1st Respondent has however not availed any shred of evidence to support the allegations but continuously called and pestered the petitioners.

4. The Respondents have despite being served with the application together with the petition never entered appearance nor filed any response.

Respondents Response

5. The 3rd Respondent filed grounds of opposition being as follows:-

1. THAT the Petitioner has not demonstrated which law has been breached by any of the Respondent that would warrant the intervention of this court.

2. THAT the petition does not disclose any cause of action against the 3rd Respondent.

3. THAT the matter is criminal in nature and therefore does not fall within the ambit of the office of 3rd Respondent but that of the 2nd Respondent as spelled out in Article 157 of the Constitution of Kenya 2010.

4. THAT the issues brought before this court are already being determined in Mombasa Civil Suit 1006 of 2016.

5. THAT the Petition is malicious in that it is being used by the Petitioner to defeat the cause of justice by unconstitutionally seeking to discontinue the ongoing civil trial being Mombasa Civil Suit No. 1006 of 2016 without a lawful basis.

6. THAT the petition is misconceived, incompetent and bad in law.

7. THAT the instant application and the petition lack merit, the same are an abuse of the due process of the court and should be dismissed with costs.

Analysis and Determination

6. I have very carefully considered the petition, and the petitioners submissions as well as the 1st and 3rd Respondents submissions and from above, the issue arising for determination can be summed up as follows:-

a) Whether there are any constitutional violations by the Respondents?

b) Whether the actions of the 1st Respondent are within its mandate?

A) Whether there are any constitutional violations by the Respondents?

7. The petition is brought under Articles 22, 23 and 165 (3) (b) of the Constitution which grants the court the jurisdiction to determine the question whether a right of fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; and to have any question respecting the interpretation of the constitution, and any matter relating to constitutional powers of state organs determined.

8. The 1st Respondent herein is a state office established under Article 243 of the Constitution and its objections and functions are outlined under **Article 244 of the Constitution of Kenya 2010** as follows:-

"The National Police Service shall—

- (a) Strive for the highest standards of professionalism and discipline among its members;
- (b) Prevent corruption and promote and practice transparency and accountability;
- (c) Comply with constitutional standards of human rights and fundamental freedoms;
- (d) Train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
- (e) Foster and promote relationships with the broader society."

9. In dealing with constitutional violation, a person alleging a contravention or threat or contravention of a constitutional right must set out the rights infringed and particulars of such infringements or threat. The burden of proving the constitutional violations rests with the petitioner. (See **Anarita Karimi vs The Republic (1976) KLR 1272**) and **Meme vs Republic & Another (2014) eKLR**).

10. In the instant petition though the Respondent has not filed any response to the petition, in their written submissions, they have urged that the petition before this court does not meet the principle espoused in the above-mentioned authorities (see **Anarita Karimi Njeru vs the Republic (supra)**), I have perused the petition as filed and I am convinced that the same does not indicate with reasonable degree of as precision the constitutional violations complained of as the petition is in general terms and has failed to particularize the constitutional violation in precise manner. I find the same has no indication on the manner in which the alleged violations were committed and to what extent. The petitioners have not pleaded when and by whom the constitutional rights were violated nor have they stated to which police station they were summoned nor have they given the **OB** number if any.

11. From the above, I find the petitioners have not demonstrated which of their rights have been infringed by the 1st Respondent, that would warrant intervention by the Honourable Court. I find the petition is based on general mere allegation of a violation of the petitioners right under Article 22, 23 and 165 (3) (b) of the constitution.

B) Whether the actions of the 1st Respondent are within its mandate?

12. The petitioners contend they received calls from officers of the 1st Respondent based at Central Police Station claiming that they are to be arrested for allegedly selling motor vehicles. It is petitioners contention that the 1st Respondent has not shown evidence to support its allegations as the copies of log books presented by the petitioners "**SSH 1**" in supporting affidavit sworn by the 1st petitioner on 6th day of December 2017 clearly show that the motor vehicles are registered in both the name of the petitioners and the Bank. The petitioner contend as such the 1st Respondent is in violation of Article 29 of the constitution; that guarantees every person the right to freedom and security of person including the right not to be arbitrary deprived of freedom without just cause.

13. Under **Article 244 of the constitution** the function and objects of the National police service is clearly stated and includes the following:-

"The National Police Service shall—

- a) Strive for the highest standards of professionalism and discipline among its members;
- b) Prevent corruption and promote and practice transparency and accountability;
- c) Comply with constitutional standards of human rights and fundamental freedoms;
- d) Train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
- e) Foster and promote relationships with the broader society."

14. Article 157 of the Constitution of Kenya 2010 provides, that the Director of Public Prosecution shall have power to direct the Inspector General of the National Police Service to investigate any information and allegation of criminal conduct and the Inspector General shall comply with any such directions. I find that the 1st and 2nd Respondents are well within the law in calling the petitioners in connection with their investigation as their function involves powers to investigate any allegations of any criminal conduct; this is what the 1st Respondent is doing on the petitioners, and court cannot stop them from carrying out their function unless it is demonstrated, that they are in doing so, abusing their power or acting illegally or contrary to the constitution. (*Article 73(1) (a) of the Constitution which provides authority assigned to a state officer, is a public trust to be exercised in a manner that is considered with purposes and objects of the constitution, demonstrating respect for the people and to bring honour to the nation and dignity to the office and promote public confidence in the integrity of the office*). I find from all the above that the petitioners have failed to demonstrate that the Respondents actions are in violation of the constitution.

15. The upshot is that the petitioners petition is without merit and is dismissed with costs.

Dated, signed and delivered at Nairobi this 19th day of September, 2019.

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J .A. MAKAU

JUDGE