



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 2 OF 2019

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 25, 27, 28, 30, 40, 43, 50, 159, 117, 258 AND 259 OF THE
CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: THE PROVISIONS OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

PENAL CODE, CHAPTER 63 OF THE LAWS OF KENYA

BETWEEN

GEORGE KITHI.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION..... RESPONDENT

FRED TSOFA MWENI.....1ST INTERESTED PARTY

YEHUDA SULAMI.....2ND INTERESTED PARTY

CORAM: Hon. Justice R. Nyakundi

Ms. M. N. Mwanyale for the Petitioner

Ms. Otieno B. N. for the 1st Interested Party

Ms. Munyithya for the 2nd Interested Party

RULING

The petitioner on 15.1.2019 filed a petition in terms **ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 25, 27, 28, 30, 40, 43, 50, 159, 117, 258 AND 259** of the Constitution against the Respondents seeking the following orders:

a) That this application be certified as urgent by its very nature and be placed before the duty judge for hearing exparte in the first instance and issuance of the interim orders sought herein.

b) That pending hearing and determination of this application interpartes, this Honorable Court be pleased to issue an order of stay, staying any arrest and arraignment in Court, charging or prosecuting the Applicant in respect to any charges related herewith and in effect issue an order prohibiting the respondent or any person acting on its instruction howsoever from arresting or ordering the arrest of the petitioner, confining the person of the petitioner or any relations hereto in any way, producing or arraigning the petitioner before Court for plea taking, charging the petitioner or preferring or continuing to prefer charges in this matter or against the petitioner in matters related to the issues herein, prosecuting or continuing with prosecution in the matter or against the petitioner in matters relating to this dispute hereof and to do or cause any harm intended to prejudice the petitioner in any way howsoever.

c) That pending hearing of this application inter partes, the honorable Court be pleased to issue an order of injunction against the respondent either by itself or its servants or agents or any person howsoever working under its instruction prohibiting or restraining them from arresting or ordering the arrest of the petitioner, confining the person of the petitioner in any way, producing or arraigning the petitioner before court for plea taking, charging the petitioner or preferring or continuing to prefer charges in this matter or against the petitioner in matters related to the issues herein, prosecuting or continuing with prosecution of the petitioner in matters relating to this dispute hereof and to do or cause any harm intended to prejudice the petitioner in any way.

d) That pending hearing and determination of this application and petition, this honorable Court be pleased to issue an order of stay, staying the arrest and arraignment in Court, charging or prosecuting the applicant in respect to any charges related herewith and in effect issue an order prohibiting the respondent or any person acting on its instruction howsoever from arresting or ordering the arrest of the petitioner, confining the person of the petitioner in any way, producing or arraigning the petitioner before Court for plea taking, charging the petitioner or preferring or continuing to prefer charges in the matter or against the petitioner in matters related to the issues herein, prosecuting or continuing with prosecution of the petitioner in matters relating to this dispute hereof and to do or cause any harm intended to prejudice the petitioner in any way.

e) That pending hearing and determination of this application and petition, this honorable Court be pleased to issue an order of injunction against the respondent either by itself or its servants or agents or any person howsoever working under its instruction prohibiting or restraining them from arresting or ordering the arrest of the petitioner, confining the person of the petitioner in any way, producing or arraigning the petitioner before Court for plea taking, charging the petitioner or preferring or continuing to prefer charges in the matter or against the petitioner in matters related to the issues herein, prosecuting or continuing with prosecution of the petitioner in matters relating to this dispute hereof and to do or cause any harm intended to prejudice the petitioner in any way.

f) Costs of this application be provided for.

In support of the application is an affidavit grounded on a number of reasons why the court should exercise discretion to grant the interim interdict of a conservatory nature pending the determination of the petition.

The respondent reply to the notice of motion was by way of a replying affidavit through one **PC Sammy Oyaro** of DCIO, Kilifi who was tasked with the investigations the petitioner on allegation of conspiracy to defraud contrary to Section 317 of the Penal Code. The 1st interested party **Fred Mueni** joined the litigation as an interested party alleging that he had been adversely mentioned by the petitioner consequently necessitating a response to the facts to set the record straight. These averments are as deponed in the replying affidavit filed in court on 22.2.2019.

On 8.3.2019, the 2nd interested party added his voice to the notice of motion by the by the petitioner through a replying affidavit deposing the reasons why the motion should not be granted by this court while the 2nd interested party outlined the genesis of the transactions with the petitioner and the indictment before Shanzu Law Court.

In the same breadth, Learned counsel **Mr. Muniyithya** also filed a replying affidavit and grounds of opposition to the petition by the petitioner to the extent that the critical issues on legal representation and conflict of interest raised by the petitioner are far from the truth.

Submissions by the petitioner

In the submissions counsel, **Mr. Mwanyale** argued that the petitioner was under retainer to offer professional legal services to the 2nd interested party involving a commercial funding agreement for USD 300,000. He further submitted that the transaction was secured by a parcel of land **Kilifi/Mtwapa/1058** belonging to the 1st interested party **Mr. Fred Tsofa Mweni**. The terms of contract were clearly set out in the commercial funding agreement between the 1st and 2nd interested party. Counsel further submitted that proper invoicing towards fulfilment and obligations of the parties to the contract including payments of the initial deposit was executed by the petitioner. Counsel further submitted that pursuant to an undertaking, an amount of equivalent to Kshs.10,000,000/= was disbursed by the financier under the authority and instructions of the 2nd interested party. It was counsel's contention that the compliance with instructions under the agreement were hampered based on the repudiation by the 2nd interested party to fulfil his part of the bargain to release the entire initial deposit.

Further, counsel submitted that in an unfortunate turn of events the 2nd interested party lodged a complaint with the Director of Investigations with regard to the commercial funding agreement that a criminal act has been committed. Counsel further argued and submitted the sense of a criminal nature as perceived by the respondent and subsequent decision taken to charge the petitioner with the offence of conspiracy to defraud was therefore unconstitutional.

The petitioners counsel further in his submissions challenged the validity of the charge which he contends was instituted for an improper purpose and an abuse of the court process.

Counsel's contention was that the 2nd interested party complaint was better dealt with at the commercial court. As a consequence, submitted counsel, these criminal proceedings were really collateral challenge to the issues raised in the commercial agreement between the parties.

That the respondents and 2nd interested party are seeking a second bite of the cherry and this court should not permit it as it would prejudice and disadvantage the petitioner. Counsel cited and relied on the following authorities for orders of conservatory and prohibitory that the petitioner has a strong case at the trial on the merits. **R v Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001, R v Joram Mwenda Guatai v Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2EA 170, R v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703, Stanley Munga Githunguri v Republic Criminal**

Application No. 271 of 1985, Commissioner of Police and Director of Criminal Investigations Department vs Kenya Commercial Bank and others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR.

Based on the principles in the cited authorities, counsel urged the court to find that the prosecution is an abuse of the process of the court and intended for ulterior motive than to achieve the interest of justice.

The 1st interested party Learned counsel relied on the replying affidavit of **Mr. Mweni**; where he deposed on oath that as the registered owner of the suit property **LR Kilifi Mtwapa/1058** he did not consent nor guarantee the 2nd interested party in respect to the commercial funding agreement for a loan of USD 300,000.

Counsel submitted that any purported action taken by the petitioner in conjunction with the 2nd interested party was illegal, irregular and unlawful. Learned counsel focused heavily on the character and legality of the commercial venture referred to by the petitioner to apply for conservatory orders pending determination of the petition. Counsel claimed that in all the circumstances and as a party who has the inside information to the transactions the respondent has sufficient evidence to effectively direct a prosecution against the petitioner.

In any event, counsel submits that the principle of granting injunctive orders goes beyond dictating the other organs of the constitution on how to execute their mandates. According to counsel, subject to the constitution, the respondent is at liberty to exercise its prosecution power trite to Article 157 of the constitution.

Learned counsel submitted that in light of the following principles in the following cases and the circumstances justifying an arrest and indictment of the petitioner, the grant of the conservatory orders will not be in conformity with the constitution.

The other feature of this interlocutory application was the notice of motion dated 29.3.2019 seeking leave of the court to bar the firm of **Munyithya, Mutugi, Umara & Muzna Co. Advocates** to join the proceedings as an interested party. The more significant limit argues the petitioners counsel is that the firm of Munyithya & Co. Advocates under Advocate-Client relationship is privy to confidential information sourced from the 2nd interested party which will create a conflict of interest for the fair administration of justice.

I have considered the length affidavits by the petitioner filed on diverse dates to support the two notice of motion dated 15.1.2019 and 29.3.2019, one against the respondent conservatory orders while the later is to restrain the firm of **Munyithya, Mutugi, Umara & Muzna Co. Advocates** as interested party in the pending petition.

The submissions made by the respective parties cover to some greater degree on the following key issues:

- a). On the first issue is whether, the investigations, arrest and prosecution of the petitioner for a charge of conspiracy to defraud contrary to Section 317 of the penal code constitutes an abuse of the legal and constitutional process.*
- b). The second respect concerns the challenge as to whether it would be prejudicial for the firm of Munyithya, Mutugi, Umara & Muzna & Co. Advocates to be enjoined as an interested party to the petition.*
- c). Whether as a whole the petitioner has satisfied and discharged the burden of proof for grant of conservatory orders against the respondent pending the outcome of the petition.*

Analysis

At the heart of the petitioners petition is the claim that the respondents in exercise of his constitutional mandate has infringed his substantive right to due process without proper cause or justification. The violation alleges the petitioners infringes his fundamental rights to equality and founder firm discoveries under Article 27, right to human dignity in Article 28, protection of right to property on Article 40, right to economic and social rights in Article 43, right to a fair administration act under Article 47 and Article 50 on the right to fair trial rights.

The petitioner in his submissions to challenge the scope of the respondent power relied on the following cases **R v Attorney General Exparte Kipngeno Arap Ngeny [2003] eKLR** and the Court of Appeal decision in **Joram Mwenda Guantai (supra)**, **R v Chief Magistrate Court Mombasa Exparte Ganijee (supra)** which sheds light on the constitutional mandate of the National Police Service under Article 244 and the office of the Director of Public Prosecution in Article 157 (6), (7), (8), (9) and (10) of the constitution.

The only question that must be considered in this petition with respect to the National Police Service and office of the Director of Prosecution is whether their action was arbitrary and in total disregard to public interest and or fair administration of justice. I am nevertheless mindful that the full scope of fair pretrial and trial rights of a suspect who is presumed innocent until the contrary is proved in succinctly provided for under Article 49 and 50 of the constitution.

In framing the petition for infringement, the petitioner has attributed the particulars of information as drafted by the respondent falls squarely within the civil law dispute and not any breach of criminal law.

In addressing the issues in the notice of motion, the following principles comes into sharper focus in exercise of discretion whether the respondent initiated the criminal proceedings maliciously or for a collateral purpose.

In the matter of case of **Githunguri v Attorney General [1986] KLR** the salient factors that a court can take into account in invalidating the decision by office of the Director of Public Prosecution under Article 157 (10) of the constitution is when an applicant proves the action to prosecute was against public interest vexatious, scandalous, malafides, an abuse of the court premises or for an improper motive and or

prejudice or put in another way to intimidate, persecute or harass the applicant.

On that basis the applicant may be said to have discharged the burden of proof of a prima facie case for grant of conservatory orders. Whether on a balance of probabilities such a claim has been established on the facts presented The Court of Appeal in the case of **Joram Mwenda Guantai vs The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170**, held that:

“It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings Equally so, 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 an 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.”

The importance of the constitutional organs like the respondent to exercise independent and impartial decisions in accordance with the constitution to give life to justice is without doubt as safeguard against violation of fundamental rights and freedom in our constitution. To that extend the legitimacy of the impugned conduct as to be considered within the same constitutional framework. In this respect I am guided by the principles in the persuasive case **State (McCormack) v Curran [1987] ILRM 225** where the Supreme Court held:

“In regard to the DPP I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reaches a decision mala fide or influenced by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the contention again made on behalf of this respondent that his decisions were not as a matter of public policy ever reviewable by a court. In the instant case, however, I am satisfied that no prima facie case of mala fides has been made out against either of the respondents with regard to this matter. Secondly, I am satisfied that the facts appearing from the affidavit and documents do not exclude the reasonable possibility of a proper and valid decision by the DPP not to prosecute the appellant within this jurisdiction and that being so he cannot be called upon to explain his decision or to give the reasons for it nor the sources of the information upon which it was based.”

Given this background the question is whether the petitioner’s legitimate expectation to a fair trial as laid down by the constitution has been violated by virtue of being charged with a criminal offence. If the respondent acted in excess of jurisdiction or with an improper motive the court has an obligation to grant conservatory orders. To grant such an appropriate relief on an appropriate case, the Court of Appeal in the case of **Judicial Service Commission vs Speaker of the National Assembly & Another [2013] eKLR**

“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 persona. 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.”

The Court further in the case of **Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others [2014] eKLR**:

“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 injunction linked to such private-party issues on 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.”

With the foregoing principles in mind the petition was filed on allegations that alleged conspiracy to defraud was on the basis of a commercial venture with no criminal element as purported in the charge sheet. It is submitted by the petitioner that the matter in actual controversy was a pending fulfilment of contractual terms. Similarly, the respondent submitted and argued that it fulfilled its obligations under Article 157 of the constitution to determine matters relating to initiate and prosecute the petitioner.

The general grounds for grant of conservatory orders must be construed in accordance with the principles in the **Gatirau Peter Munya (supra), Judicial Service Commission (supra)**.

There can be no doubt that the application by the petitioner if granted is meant to secure a prohibition order against the decision by the respondent to prefer a charge of conspiracy to defraud. With regard to the alleged violation the petitioner submits that the criminal proceedings should not proceed as filed because the circumstances are of a civil nature which can be dealt at the civil dispute forum. Whilst the petitioner has developed lengthy arguments contained in his affidavit evidence I am of considered view he raises no serious issues for this court to exercise discretion to appropriately make a conservatory order against the respondent.

The court in considering an application for conservatory orders it is conscious of the fact that is not concerned with the merits of the petition or claim given the fact that the determination is normally made from contested material in the affidavit evidence. Having scrutinized the affidavits by the petitioner and submissions thereon, further evaluation of the affidavits by the respondent and the interested party it is noted

whether the subject matter is purely a civil claim or criminal are factual issues to be ventilated before the trial court. This court found a valuable principle of persuasion in the Canadian case of **R v Cameron 2017 ABQB 217 (CanLII)** where **“It was stated that the exercise of assessing evidence involves considering the ‘whole tapestry’ (or the ‘whole scope and nature’) of the evidence.”**

Thus in a sequence of events commenced by the respondent the question whether to prohibit or recall any further criminal process has not been proved at this interlocutory stage to be tainted with illegality or irregularity giving rise to a breach of a constitutional right to stop any subsequent infringement by way of a conservatory order.

In the instant petition, whether the proceedings are vexatious or an abuse of the court process by the respondent in initiating a prosecution against the petitioner the tentative assessment of the material presented by the petitioner has not established that no serious question or arguable case for this court to intervene and stop it.

The tenet of our constitution under Article 50 (2) (a) is the right that every accused person is presumed innocent unless the contrary is proved and further the petitioner could rest in the believe is guaranteed rights to a fair trial.

With regard to the to the application dated 29.3.2019 by the petitioner seeking to disqualify the firm of **Munyithya, Mutungi, Umara and Muzna Advocates** from making any representation to the petition. The court finds inspiration in the test laid down in **Delphis Bank Ltd vs Channan Singh Chatthe & Others [2005] 1KLR**

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this court is whether real mischief or real prejudice will in all human probability result.”

In **Halsbury’s Laws of England 4ED (Reissue) 1989 Vol 3** the learned authors stated as follows:

“133 Solicitor acting for opposing interests. A solicitor who is or has been retained by a client is under an obligation not to disclose confidential information which has come his knowledge as solicitor for the client, and like any other agent but in a higher degree because of his position as an officer of the court and the privileges which the law allows to legal professional confidence, he is bound to observe the utmost good faith towards his client. The court will grant an injunction to prevent any breach of these obligations and will award damages for an actual breach, but an injunction will not be granted unless mischief will probably flow from the acts which it is sought to restrain. There is, however, no general rule prohibiting a solicitor who has acted in a particular matter for one of the parties from acting subsequently in the same matter for the opposite party, although where a solicitor owes a duty to someone other than a particular client which conflicts with his duty to that client, he is not thereby relieved of any duties to the client.”

Applying the above principles in response to the petitioner’s objection to the replying affidavit by the 2nd Interested party, touching on the petition on the criminal case at **Shanzu Law Court**, I make the following observations:

First, the question of admissibility of evidence to a fact in issue in the case is a matter to be decided by a trial Judge. Secondly, under Article 50 (4) the court may exclude evidence where having regard to all the circumstances where the evidence was obtained illegally, improperly or unfairly which would have such an adverse effect on a right of fair hearing on accused person. Thirdly, the objection to the production of specific material of evidence asserting it was confidential in nature and was made only for the purpose of the advocate-client privilege is to be decided on a case to case basis based on the content of the communication. Fourthly, while it may be presumed that a bona fide conflict of interest between the firm of **Munyithya, Mutungi, Umara and Muzna Advocates** and the petitioner may have arisen out of the commercial funding agreement, it is not a fact to preclude him in filing an affidavit when the conservatory order was sought by the petitioner. There is ample evidence that suggests the contention in this petition on the untested affidavit the firm of Munyithya & Co. Advocates had some knowledge on the impugned contract which places the matter position of conflict. Even accepting the conditions were as alleged in the affidavit of the petitioner I find that they did not establish strong grounds to disqualify them as an interested party. If such action was to be taken it will be disproportionate in the circumstances of this notice of motion.

I am mindful of the pleadings before me at this stage and the proceedings in the question and I find nothing to demonstrate that the 1st and 2nd interested party are busybodies whose primary focus will be to distress the fair trial of the petitioner.

Practically speaking any fears that the petitioner may have that certain communication may become producible in the course of the trial is to be raised and determined by the trier of the issues in the criminal court. This court is not one such forum. Ultimately, the notice of motion dated 19.3.2019 on the request by the petitioner claiming all communications with the legal counsel **Joseph Munyithya** was protected by advocate-client privilege to deny right of joinder under Order 1 (8) (9) of the Civil Procedure Rules it is without merit. Further, no suit shall be defeated by reason of misjoinder or non-joinder of parties.

For the foregoing reasons I find that the applicant/petitioner has not satisfied the conditions for this court to exercise discretion for grant of interim conservatory orders. The application is accordingly dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER, 2019.

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R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Mwanja for Mwanyale for the Petitioner
2. Ms. Mathangani for the AG also holding brief for Ms. Sombo for the DPP.