



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.231 OF 2019

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF REPUBLIC OF KENYA ARTICLES 1, 10, 19,20,22,27 AND 47 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA**

AND

IN THE MATTER OF PHYSICAL PLANNING ACT, CAP 286 LAWS OF KENYA

AND

**IN THE MATTER OF CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE
1,3,10,19,20,73 AND 47 OF THE CONSTITUTION OF KENYA**

BETWEEN

PRISCA WAMBUA.....PETITIONER

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

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

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Petitioner's Case

1. The petitioner through a petition dated 13th June 2019 against the respondents herein seeks a declaration to issue, that investigations on the petitioner by DCI and treating the petitioner as the "main suspect" in alleged criminal acts over and relating to the role the petitioner undertook in the conveyance of the **L.R. No. 1870/11/200 I R 65800** violates the petitioner's constitution rights, is an abuse of the powers of DCI and therefore unlawful, null and void ab initio. The petitioner further seeks prohibition orders to issue against the Respondents from carrying out investigation, recommending prosecution or commencing any prosecution of the petitioner or harassing or victimizing the petitioner in respect of her role in the conveyance of **L.R. No. 1870/11/200 I R 65800**.

2. By Notice of Motion dated 13th June 2019 filed simultaneously with the petition under certificate of urgency the petitioner pending hearing and determination of the petition herein, prays for issuance of conservatory orders directed at the Respondents, their servants, agents or any other person acting on their behalf restraining them from arresting, charging, intimidating, unreasonable interference with Petitioner/Applicant's legal practice by seizure of any tools of trade or accounts of the Petitioner's law firm or in any way unreasonably interfering with the liberty of the Petitioner/Applicant herein on account of performance of her duties as an Advocate of the High Court of

Kenya in the conveyance of property Land Reference **Number 1870/II/200 IR 65800.**

3. The application is premised on the several grounds on the face of the application running from No. 1 – 35 as enumerated in the application.

4. The petitioner contend, that she is an advocate of the High Court of Kenya practicing under the name and style of Wambua & Maseno LLP Advocates, which firm undertakes various legal activities and work, including but not limited to conveyance transactions on behalf of clients. That sometime in April 2018, the petitioner received formal instruction from a client, being a legal owner of property **L.R. No. 1870/11/200 IR 65800** to convey the property on its own behalf, which conveyance was prepared with utmost professionalism and as per the laws, regulation and practice governing conveyance in Kenya.

5. It is petitioner's contention, that she carried out very thorough due diligence process in the transaction and upon satisfaction about the existence of the property, the existence of ownership of the vendor and identities of the Directors/Shareholders from the relevant government institutions, the petitioner agreed to act for the vendor and intended purchaser in the conveyance transaction. That subsequently the transfer was registered at the Land Title Registry, Nairobi and the same was endorsed on Grant and purchaser granted vacant possession; whereupon the purchaser commenced the process of development of the property.

6. While the petitioner was in the process of releasing the balance of purchase price covered by a professional undertaking the petitioner issued to the vendor on behalf of the purchaser, the purchaser received a letter of the Chief Registrar notifying her that a complaint had been lodged in respect of the property and invited parties to a hearing. That as the Chief Registrar was dealing with the matter the **DCI** purported to commence investigation into the property and demanded the purchaser and complainant to submit their title documents for investigations.

7. The petitioner avers, that the 2nd Respondent was conducting a skewed biased and partial investigation by seeking to link the Applicant's client with an allegation of fraud and by tampering with evidence to justify a pre-determined narrative the petitioner wrote to the 3rd Respondent to set the record straight on her and her client's role in the transaction.

8. The petitioner contend, that for the first time she became aware through journalists when by being questioned on Misc. Application No. 2339 of 2019 filed on 3/6/2019, that she had been declared a "*main suspect*" by 2nd Respondent under prayer 2 (iv) in the aforesaid miscellaneous application, notwithstanding absence of any factual or legal foundation and as such threatens to violate the petitioner's constitutional rights and freedoms guaranteed in the constitution.

Respondent's Response

9. The 1st, 2nd and 3rd Respondents response to the application is through a Replying affidavit by No. 80936 Detective Corporal Nicolaus Osuri dated 19th June 2019; who avers, that he is the investigating officer in a matter of conspiracy to defraud contrary to Section 317 of the Penal Code, forgery contrary to section 345 as read with section 349 of the Penal Code; obtaining registration by false pretence contrary to section 320 of the Penal code, uttering a forged document contrary to section 353 as read with section 349 of the Penal Code, obtaining money by false pretence contrary to section 312 as read with section 312 of the Penal Code and conspiracy to defeat justice contrary to section 117 of the Penal Code which was reported by M/s Taibjee and Bhalla Advocates LLP.

10. It is deponed that the 2nd Respondent is investigating the above subject matter and has established, that the authenticity of Grant title and ownership of the parcel of land has come into question and parties to the matter consented to the dispute being referred to **DCI** for investigation hence the **DCI** has commenced investigation into the complaint which investigations are ongoing within the provisions of sections 10, 24, 34 and 35 of the National Police Service Act No. 11A of 2011 and as of this time no decision has been made as to the guilt or innocence of any party and all involved are considered to be suspects until final decision is made by **DCI**.

11. The Respondents contend the petitioner has not met the threshold for grant of conservatory orders sought and that her consideration as a suspect in the matter do not amount to a breach of her constitutional rights.

Analysis and Determination

12. I have very carefully perused the petitioner's Notice of Motion, the Respondents Replying Affidavit, the counsel rival oral submissions and the issue arising for consideration is as follows:-

a) Whether the Petitioner/Applicant has met the threshold to warrant granting of the conservatory orders?

13. The petitioner in her Notice of Motion dated 13th June 2019 prays for conservatory orders to the effect, that pending hearing and determination of the petition herein, the honourable court be pleased to issue conservatory orders directed against the Respondents and their servants, agents or other person acting on their behalf to be restrained from arresting, charging, intimidating, unreasonably interfering with petitioner's legal practice by seizure of any tools of trade or accounts of petitioner's law firm or in any way unreasonably interfering with the liberty of the petitioner herein on account of performance of her duties as an Advocate of the High Court of Kenya in the conveyance of property land Reference **No. 1870/11/200 L R 65800.**

14. There is no dispute that the petitioner herein is an Advocate of the High Court of Kenya, practicing law and by virtue of her professional standing undertakes various legal activities in which her works include conveyance transactions on behalf of her clients. In her application she averred to have exercised due diligence before transfer of the questioned property from the vendor to the complainant. She averred that she carried out an official search of the property to confirm the actual ownership; existence of vendor and identify of Directors/Shareholders of the vendor, as well as making formal inquiries to the Director of National Registration at the National Registration Bureau and submitted the identification Documents of the Directors of vendor for verification on their authenticity.

15. The Petitioner/Applicant in her affidavit under paragraph 32 has deponed as follows:-

"That the actions of the 2nd and 3rd Respondents clearly is an abuse of power and discretion and are equally oppressive to the Petitioner who has been christened as 'main suspect' with an ulterior motive to commence malicious prosecution of the Petitioner at any time and the intended and threatened prosecution has the effect of violation of the constitutional rights of the Petitioner."

16. I am alive to the fact, that the publication of any matter in the media does not amount to a breach of any one's constitutional rights in such a manner as to restrain the respondent's from their mandate. However in this case the situation is different in, that the journalist were not publishing the matters complaint of but were seeking petitioners response to a copy of an application (**annexture "PW7"**) where the 2nd Respondent had classified the petitioner as the "main suspect" in the Notice of Motion filed by the 2nd Respondent on 3rd June 2019. The 2nd Respondent has not responded to the contents of the petitioner's affidavit. It therefore appears a decision has been made by **DCI** to take petitioner as the "*main suspect*"; notwithstanding No. 80936 Detective Corporal Nicolaus Osuri averment in his affidavit dated 19th June 2019 under paragraph 9 being as follows:-

"That while the said investigations are now at an advanced stage, no decision has been made as to the guilt or innocence of any party and all involved are considered to be suspects until a final decision is made by the DCI."

17. **Article 50(1) (2) (a) of the constitution of Kenya 2010** is clear that everyone is presumed innocent until the contrary is proved. By classifying the petitioner as the "*main suspect*" when the Respondents investigation is ongoing and incomplete and when no decision has been made as to the guilt or innocence of any party and without giving the suspects an opportunity to make a response is totally contrary to the provisions of the constitution herein above-mentioned.

18. **Article 157 (6) of the constitution** provides:-

"(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) Subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)."

In the instant petition, the **DCI's** decision to decide to charge or not to charge is yet to be made as the investigation is still on going. The Respondents while still investigating on the matter and having decided on the "*main suspect*" without full investigation are with all due respect acting against their functions as a decision to charge is already made without full investigation. The petitioner is not seeking to interfere with the jurisdiction of the Respondents as regards investigation and subsequent decision but is concerned with Respondents acting against their functions.

19. The Respondents in their response urged they are not acting in a manner that would interfere with the practice of the petitioner.

20. Having considered all affidavits on record and submissions, I am satisfied that the decision to charge the petitioner or decision having been made that she is the "*main suspect*" when the investigation is incomplete raises real issues or serious question of law and fact which raises a triable issue to warrant court to issue conservatory orders sought. The petition on the other hand does not contain mere allegations against the Respondents which can be termed as generic, vague and ambiguous. They are specific and worth consideration by the honourable court. I do not in view of the above find and agree that the notice of motion herein is an abuse of the court process as urged by the Respondents. I do not find further, that application seeks to control and subject constitutional power of the Respondents as long as the functions or mandate are exercised constitutionally.

21. I have in considering the Notice of Motion filed by the petitioner and Respondents' Replying affidavit, found that the petitioner has sufficiently placed before this court sufficient materials demonstrating, that by making a decision to charge before completion of the investigation and by filing an application referring to the petitioner as "*main suspect*", she has demonstrated, that her fundamental rights and freedoms have been threatened to be breached by the respondents and that there is a real danger existing to warrant this court to grant conservatory orders sought. I find further as the Respondents have not been restrained from carrying out their investigation by granting conservatory orders no prejudiced would be suffered by granting of interim conservatory orders to the petitioner.

22. The upshot is that the notice of motion dated 13th June 2019 is meritorious. The same is granted in the following terms:-

a) An order be and is HEREBY issued that pending the hearing and determination of the petition herein, this honourable court be pleased to issue conservatory orders directed at the Respondents, their servants, agents or any other person acting on their behalf restraining them from arresting, charging, intimidating, unreasonably interfering with Petitioner/Applicant's legal practice by seizure of any tools of trade or accounts of the Petitioner's law firm or in any way unreasonably interfering with the liberty of the Petitioner/Applicant herein on account of performance of her duties as an Advocate of the High Court of Kenya in the conveyance of property Land Reference Number 1870/II/200 IR 65800.

b) Costs of the application be in cause.

Dated, signed and delivered at Nairobi this 9th day of October, 2019.

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J .A. MAKAU

JUDGE