



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 9 OF 2017**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA AND ENFORCEMENT AND INTERPRETATION OF THE  
CONSTITUTION, RULES 2013**

**AND**

**IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF: ARTICLES 1, 10, 22, 23, 47, 49, 73, 157 AND 265 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE ADMINISTRATION ACT, NO. 27 OF 2015**

**AND**

**IN THE MATTER OF: THE HIGH COURT (ORGANIZATION AND ADMINISTRATION) ACT, NO. 27 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: LEGITIMATE EXPECTATION**

**BETWEEN**

**ULRICH KRUEGER.....1<sup>ST</sup> PETITIONER/APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS – LAMU.....2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATE’S COURT AT LAMU.....3<sup>RD</sup> RESPONDENT**

**AND**

**ERIC NJIRI.....INTERESTED PARTY**

**JUDGEMENT**

1. The Petitioner, Ulrich Krueger, is a German citizen residing and working for gain in Kenya. He has brought his petition pursuant to Articles 1, 10, 22, 23, 47, 49, 73, 157 and 265 of the Constitution, the Fair Administrative Action Act, the High Court (Organization and Administration) Act and rules 4 and 1B of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. He prays for the following reliefs:

**“a) A declaration that the Petitioner’s fundamental rights and freedoms as enshrined under Articles 29, 35, 47, 49, 50 of the Constitution of Kenya 2010 have been contravened and infringed upon by the interested party on making and lodging allegations at the office of the 2<sup>nd</sup> Respondent that the Petitioner obtained money by false pretence from the interested party contrary to Section 313 of the Penal Code and by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in investigating and intending to arraign the Petitioner in Court and charge him with the offence of obtaining money by false pretenses contrary to Section 313 of the Penal Code and by instigating malicious prosecution and by purporting to place personal liability on the Petitioner arising from the faithful discharge and performance of his part in respect of the contract of sale dated 14<sup>th</sup> March, 2016.**

**b) A declaration that the contract of sale entered into between the Petitioner and the Interested Party herein dated 14<sup>th</sup> March, 2016 and the breach of the same by the Interested Party is a purely civil dispute and not criminal.**

**c) A declaration that the Interested Party is in breach of the contract of sale entered between the Petitioner and Interested Party herein dated 14<sup>th</sup> March, 2016.**

**d) An Order that the Interested Party be condemned to pay the Petitioner damages for breach of the contract dated 14<sup>th</sup> March, 2016.**

**e) An Order that the Petitioner do return to the Interested Party the amount received by the Petitioner as part of the purchase price of the boat less the expenses incurred by the Petitioner in repairing the boat, extraneous expenses, time wasted and the damages awarded to the Petitioner as prayed for in prayer (d) above.**

**f) A declaration that the 2<sup>nd</sup> contract for sale of the boat in question herein by the Petitioner to the 2<sup>nd</sup> buyer was proper and legal.**

**g) Costs of the Petition.”**

2. The Office of the Director of Public Prosecutions, the Directorate of Criminal Investigations – Lamu and the Principal Magistrate’s Court at Lamu are the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent respectively. Eric Njiiri is an Interested Party.

3. The facts that can be gleaned from the Petitioner’s pleadings disclose that on 14<sup>th</sup> March, 2016 the Petitioner and the Interested Party entered into an agreement in which the Petitioner was to sell to the Interested Party his 23 foot Yamaha type fibre glass speed boat for USD 9500 which was equivalent to Kshs. 950,000. Since the boat was under repair they agreed that the Petitioner would fix the boat before handing over the same to the Interested Party. No money changed hands at the time. Subsequently the Interested Party paid a deposit and promised to pay the balance of the purchase price by instalments.

4. The Petitioner’s case is that the Interested Party who was out of the country nominated his sister for purposes of test running the boat and completing the payment so that the boat could be handed over to her. The Petitioner’s averment is that whenever he made appointments with the Interested Party’s sister to have the boat tested and handed over to her she was not available.

5. In January, 2017 the Petitioner wrote to the Interested Party asking him to be available for the test run and completion of the transaction within 7 days or else he would sell the boat to a third party. The Interested Party wrote back to the Petitioner indicating that he could sell the boat but he must refund the purchase price paid, interest thereon and expenses incurred on purchase of spares within 24 hours. Things went quiet for a short while thereafter.

6. In March, 2017 the Interested Party wrote to the Petitioner asking for a test run so that the transaction could be completed. It was then that the Petitioner informed the Interested Party that he had sold the boat but was willing to refund the money he had received from him.

7. According to the Petitioner, the Interested Party became abusive and threatened him forcing him to lodge a complaint at Lamu Police Station. Upon hearing that the Petitioner had made a report to the police the Interested Party also lodged his complaint. Subsequently the Petitioner was summoned by a CID officer called Felician Maru. That is when he learnt that the said officer had obtained orders of the court authorizing access to his bank accounts. At the same time, he received a demand notice from the Interested Party’s advocate asking him to pay Kshs. 862,000 for breach of contract.

8. The Petitioner asserts that the respondents’ action breached various provisions of the Constitution. His view is that the respondents’ action breached Article 3 which mandates every person to uphold and defend the Constitution; Article 10 which requires all State officers to conform with the Constitution; Article 47 which provides for the right to be heard and reasons to be given for any decision made against a person; Article 50 which protects the right to a fair hearing; and Article 157 which mandates the Director of Public Prosecutions (DPP) to act within the confines of the Constitution.

9. It is the Petitioner’s case that he has brought this petition to enforce his rights and fundamental freedoms as per the provisions of Articles 22 and 23 of the Constitution. His position is that the charges labelled against him by the Interested Party and the intended prosecution by the 1<sup>st</sup> and 2<sup>nd</sup> respondents are baseless and not grounded upon any law or fact. He avers that the Interested Party is the one who breached the sale agreement and subjected him to suffer damages in terms of time wasted and extraneous expenses. Further, that this is purely a civil matter and the Interested Party and the 2<sup>nd</sup> Respondent are in collusion with a view to frustrating him.

10. The Petitioner asserts that this court has inherent and residual jurisdiction to ensure that the criminal justice system is not abused by the

prosecutor by commencing cases which lack foundational basis or are motivated by objectives and intents other than those for upholding the criminal law.

11. It is the Petitioner's conclusion that his rights have been breached and are being threatened with further breach hence the need to grant him the orders stated hereinabove.

12. The respondents' opposition is found in the replying affidavits sworn on 1<sup>st</sup> June, 2017 and 11<sup>th</sup> July, 2017 by Corporal Felician Maru of the Directorate of Criminal Investigations, Lamu West Sub-County. His averment is that on 21<sup>st</sup> March, 2017 one Catherine Wairimu Ndoria, acting on behalf of the Interested Party, lodged a complaint of obtaining by false pretence. His investigations revealed that the Petitioner had received the entire purchase price but had not handed over the boat to the Interested Party. He found that the Petitioner had instead sold the boat to another buyer in mysterious and unexplained circumstances.

13. According to the police officer, he telephoned the Petitioner on 23<sup>rd</sup> March, 2017 and asked him to go to the station so that he could shed light on the matter. The Petitioner did not turn up although he had promised to go to the station. On 24<sup>th</sup> March, 2017 the detective obtained orders from the court to investigate the Petitioner's bank accounts which had been used in the transaction. He served the orders on the relevant banks and obtained statements of the Petitioner's accounts.

14. Corporal Maru avers that on 30<sup>th</sup> March, 2017 upon receipt of the bank statements he telephoned the Petitioner and requested him to avail himself to record his statement. When the Petitioner turned up, he interrogated him and supplied him with the orders obtained to search his bank accounts and the statements obtained from the banks. As the Petitioner did not have his identification documents he compelled him, using a standard police form, to present the said documents the following day which he did and the documents were found to be in order.

15. During interrogation, the Petitioner disclosed that he had sold the boat for Kshs. 1.1 million and wanted to refund the Interested Party his money but did not know how much was owing. Corporal Maru avers that he then extended the notice to 6<sup>th</sup> April, 2017 to enable the parties discuss the refund. His position is that the Petitioner's claim that he had been harassed was false, scandalous, malicious and unfounded. The officer avers that he had in good faith advised the Petitioner to seek the services of an advocate to oversee the refund.

16. Corporal Maru also states that the orders issued by this court on 7<sup>th</sup> April, 2017 barring the office of the DCI Lamu from investigating the matter should be vacated in the interest of justice; that there was no intention to violate the rights of the Petitioner; and that the office of the DCI is mandated under Section 35(f) of the National Police Service Act to investigate all acts of a criminal nature and to apply the law and ensure equality before the law without discrimination.

17. The detective also holds the view that the alleged offence is criminal in nature and the Petitioner ought not to hide or shield himself using these proceedings against being fully investigated and being charged, if found culpable. Further, that unless malice is established, injuncting the office of the DCI from carrying out its constitutional and statutory mandate amounts to undue interference which can jeopardize its role in the criminal justice system. He concludes by pointing out that both criminal and civil proceedings can run concurrently without prejudice being occasioned.

18. The Interested Party's sister, Catherine Wairimu Ndoria, on the strength of a power of attorney, swore a replying affidavit dated 19<sup>th</sup> September, 2017. Her averment is that the Interested Party was always willing to make payments and never refused to do so and hence the claim by the Petitioner that the Interested Party was in a financial crisis is malicious. In her view, it is the Petitioner who kept pestering the Interested Party for cash via SMS, Whatsapp and email and burdening him with his domestic, immigration and other issues.

19. Ndoria avers that it was the Interested Party's desire to test run the boat to Pate Island as he had informed the Petitioner that he was acquiring the boat for purposes of accessing his farms at the island. In her opinion the few minutes the Petitioner had proposed for a test ride were unsatisfactory as it appeared that the Petitioner was in a hurry to close the deal leaving the Interested Party feeling suspicious and uncomfortable.

20. The Interested Party's position is that the Petitioner did not adhere to the agreed timelines such as the proposed handover in October, 2016 and is thus undeserving of any orders as he has come to equity with unclean hands. Further, that although the Interested Party was outside the country, the Petitioner kept pestering him on the balance necessitating the Interested Party to suggest that his sister does the testing of the boat.

21. Ndoria's averment is that the seven days notice issued by the Petitioner for the test run was in bad faith as he knew that the Interested Party was outside the country and she had no technical know-how on the workings and operations of speed boats. Further, that at the time of issuing the notice the Petitioner had also disclosed that he was offering the boat for sale to any other buyer.

22. The Interested Party's position is that given the delay in the handover and the disposal of the boat to another buyer a breach of contract is evident and this was unlawful, malicious, contemptuous and intended to cause him harm and loss. Further, that the Petitioner had not refunded the money he had received and neither had he responded to the demand made by his advocates.

23. Additionally, the Interested Party asserts that the stay order issued on 4<sup>th</sup> April, 2017 did not stop him from pursuing his claim in a civil suit and the attempt by the Petitioner to bar his investigation and prosecution should fail. According to the Interested Party, once a complaint is made to the police, investigations are carried out before a charge is preferred and what the Petitioner is doing through this petition is to block and pre-empt that legit course of action. The Interested Party avers that the office of the DPP is independent and not subject to directions or influence from the courts and it is improper for the court to look into a trial that has not commenced.

24. Finally, the Interested Party avers that the orders sought are unenforceable and if granted the same would curtail his efforts to recover his money.

25. The parties filed submissions in which they stressed the positions they have raised in their pleadings. I will take the submissions into account in determining this matter.
26. The question that seeks an answer in this case is whether the Petitioner has met the threshold for the grant of the orders sought.
27. The case that summarises the applicable law is the decision of the Court of Appeal in **Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR; Civil Appeal No. 56 of 2012 (Nairobi)** wherein it was stated that:

**“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.**

**By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution. See Githunguri V. Republic [1985] LLR 3090.**

**It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R.[2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR 69.”**

28. All the parties in the instant case agree that the issue between the Petitioner and the Interested Party is the breach of a sale agreement. The Petitioner blames the Interested Party for the breach of contract and the Interested Party in turn asserts that the Petitioner breached the agreement. All except one of the prayers the Petitioner seeks oscillate around the said agreement. Corporal Maru agrees that the issue was about the sale of the boat and he gave the parties time to agree on the refund of the purchase price.
29. The notice issued to the Petitioner by Corporal Maru shows that he was investigating a case of obtaining by false pretence contrary to Section 313 of the Penal Code. The ingredients of the offence of obtaining by false pretence were highlighted in the Botswana case of **Therego v the State 1991 BLR 292 (CA)** as follows:

**“The phrase “false pretences” is inherently tautologous as the word “pretence” connotes some falsity. Be that as it may, the relevant sections of the Penal Code are easily understood; the crime consists in the making of a representation by an accused which is false in a material respect with the intention of inducing another person to part voluntarily with some or other property belonging to that person which is capable of being stolen. Of course, a necessary ingredient of the crime is that the accused should have the requisite mens rea; that is the knowledge both that the representation is false and the intention to induce the other person to part with his or her property as a consequence of the misrepresentation.”**

30. From the facts placed before this court it is clear that the Petitioner had the boat and intended to sell it. How then will the prosecution establish that he had the knowledge that his representation was false and that he intended to induce the Interested Party to part with his money as a result of alleged false misrepresentation? What clearly emerges in this matter is that the Interested Party is using the 2<sup>nd</sup> Respondent to harass the Petitioner over a civil dispute. The 2<sup>nd</sup> Respondent is not a debt collector and should not allow the use of that office to collect debts for citizens. In my view, it has become very clear that the 2<sup>nd</sup> Respondent is acting outside the constitutional and statutory mandate of that office. The 2<sup>nd</sup> Respondent is not exercising the mandate of enforcing law and order as bestowed upon the police by the Constitution. The criminal justice system should not be used to settle civil disputes.
31. In the circumstances of this case I find that the Petitioner has met the conditions for the grant of an order barring the 2<sup>nd</sup> Respondent from investigating the contract entered between him and the Interested Party over the sale of his boat. That is the only order I grant. The other prayers sought by the Petitioner are in the realm of his civil dispute with the Interested Party. Those orders cannot be granted in this petition. He will have to pursue the procedures provided by the law for settling such disputes.
32. This being a matter that sought the enforcement of constitutional rights, I do not find it necessary to award costs to any party. Each party shall bear own costs of this petition.

**Dated, signed and delivered at Malindi this 18<sup>th</sup> day of October, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**