



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL, JUDICIAL REVIEW AND LAND DIVISION

CONSTITUTIONAL PETITION NO. 84 OF 2012

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUALS AS PROVIDED FOR UNDER ARTICLE 22(1) (2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL SECURED UNDER ARTICLES 31(C) & (d), AND 50(4) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL SECURED UNDER ARTICLES 31(C) & (d), 47(1) AS READ WITH 50(1) AND 50(4) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL (SUPERVISORY JURISDICTION) PRACTICE AND PROCEDURE RULES, 2006: ARTICLE 23(1) AND PART 5 RULE 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF GARSEN RMCC NO. 61 OF 2010 VERONICA MTINDI NZUKI VERSUS MWANDA MARTIN & 2 OTHERS; GARSEN RMCC NO. 56 OF 2010 EVALYNE CHEPCHUMBA KIPRUTO V. MWANDA MARTIN & ORS; GARSEN RMCC NO. 8 OF 2011 ELIJAH MOBEGI OMARI V. MWANDA MARTIN & 2 ORS; GARSEN RMCC NO. 16 OF 2011 AMINA ADEN DAWATA V. MWANDA MARTIN & 2 ORS; GARSEN RMCC NO. 9 OF 2011 ISMAEL ISAACK METI V. MWANDA MARTIN & 2 ORS; GARSEN RMCC NO. 10 OF 2011 ISMEL HUSSEIN ABDI V. MWANDA MARTIN & 2 ORS; GARSEN RMCC NO.15 OF 2011 HASSAN JELE MAALIM V. MWANDA MARTIN & 2 ORS

AND

IN GARSEN RMCC NO. 11 OF 2011 VERONICA MTINDI NZUKI V. DIRECTLINE ASSURANCE COMPANY LIMITED; GARSEN RMCC NO. 12 OF 2011 EVALYNE CHEPCHUMBA KIPRUTO V. DIRECTLINE ASSURANCE COMPANY LIMITED; GARSEN RMCC NO. 8 OF 2011 ELIJAH MOBEGI OMARI V. DIRECTLINE ASSURANCE COMPANY LIMITED; GARSEN RMCC NO.16 OF 2011 AMINA ADEN DAWATA V. DIRECTLINE ASSURANCE COMPANY LIMITED; GARSEN RMCC NO. 9 OF 2011 ISMAEL ISAACK METI V. DIRECTLINE ASSURANCE COMPANY LIMITED; GARSEN RMCC NO. 10 OF 2011 ISMAEL HUSSEIN ABDI V. DIRECTLINE ASSURANCE COMPANY LIMITED; GARSEN RMCC NO. 15 OF 2011 HASSAN JELE MAALIM V. DIRECTLINE ASSURANCE COMPANY LIMITED

AND

IN THE MATTER OF MALINDI HIGH COURT CIVIL APPEAL NUMBER 48 OF 2011 DIRECTLINE ASSURANCE COMPANY LIMITED V. EVALYNE CHEPCHUMBA KIPRUTO; MALINDI HIGH COURT CIVIL APPEAL NO. 49 OF 2011 DIRECTLINE ASSURANCE COMPANY LIMITED V. ELIJAH MOBEGI OMARI; MALINDI HIGH COURT CIVIL APPEAL NO.53 OF 2011 DIRECTLINE ASSURANCE COMPANY LIMITED V. ISMAEL ISSACK METI; MALINDI HIGH COURT CIVIL APPEAL NO.52 OF 2011 DIRECTLINE ASSURANCE COMPANY LIMITED V. VERONICA MTINDI NZUKI; MALINDI HIGH COURT CIVIL APPEAL NO.50 OF 2011 DIRECTLINE ASSURANCE COMPANY LIMITED V. AMINA ADEN DAWADA; MALINDI HIGH COURT CIVIL APPEAL NO.54 OF 2011 DIRECTLINE ASSURANCE COMPANY

AND

IN THE MATTER OF THE EVIDENCE ACT CHAPTER 80 AND THE ADVOCATES ACT CHAPTER 16 OF THE LAWS OF KENYA

BETWEEN

WAMBUA KILONZO T/A WAMBUA KILONZO

& COMPANY ADVOCATES.....PETITIONER

AND

1. THE COMMISSIONER OF POLICE.....1ST RESPONDENT

2. THE DIRECTOR OF THE CRIMINAL

INVESTIGATION DEPARTMENT.....2ND RESPONDENT

3. THE ATTORNEY GENERAL3RD RESPONDENT

4. DIRECTLINE ASSURANCE LIMITED.....4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioner is an advocate of the High Court of Kenya practising in the firm of Wambua Kilonzo & Company Advocates. He was instructed to file suits and pursue a claim in tort. This claim arose out of injuries sustained in a motor vehicle accident that occurred along the Bura-Hola Road on 12/5/2008. The police abstract showed that the 4th respondent was the insurer of the said motor vehicle.

The Petition

2. The petitioner informed the 4th respondent of his intention to claim special and general damages. He filed the following suits:

- a. Garsen RMCC NO. 61 of 2010 Veronicah Mtindi Nzuki v. Mwanda Martin & 2 others.
- b. Garsen RMCC NO 56 of 2010 Evalyne Chepchumba Kipruto v. Mwanda Martin & 2 others.
- c. Garsen RMCC NO. 8 of 2011 Elijah Mobegi Omari v. Mwanda Martin & 2 others.
- d. Garsen RMCC NO. 16 of 2011 Amina Aden Dawata v. Mwanda Martin & 2 others
- e. Garsen RMCC NO. 9 of 2011 Ismael Isaack Meli v. Mwanda Martin & 2 others.
- f. Garsen RMCC NO. 9 of 2011 Ismael Hussein Abdi Vernus Mwanda Martin & 2 others.
- g. Garsen RMCC NO. 10 of 2011 Hassan Sele Maalim v. Mwanda Martin & 2 others.

Upon failure by the defendants' failure to enter appearance and defence, default judgment was entered and decrees issued. Upon default in payment of the decretal amount a declaratory suit for each of the above claims was filed. The 4th respondent then entered appearance denying that they were the insurers of the said motor vehicle. The 4th respondent failed to file defence within the stipulated time and a default judgment was entered on 1/11/2011.

3. The 4th respondent filed an application to stay the execution of the decree pending the hearing and determination of the declaratory suits which was granted on condition that they deposit a sum of Ksh. 1,385,079/=. Upon full hearing, the application was dismissed with costs and the said money was released and the petitioner paid his clients who acknowledged receipt of the same. The 4th Respondent further filed appeal in the High Court seeking stay of execution and an order that the petitioner be required to return the monies released to him by the Garsen court.

The petitioner's case

4. The petitioner's case was that the 4th respondent interviewed and recorded statements from the petitioner's clients and used the same against him to pursue civil matters as criminal matters in violation of Article 50(4) of the Constitution of Kenya.

5. It is further his averment that the 4th Respondent obtained the petitioner's law firms Bank statement without his knowledge or consent which is on breach of his right to privacy as provided under Article 31 (c) and 31 (d) of the Constitution. The 1st and 2nd respondents may take a criminal action without affording the petitioner a fair administrative action and fair hearing as enshrined in Article 47 and 50 of the Constitution.

6. Consequently, the petitioner sought the following specific reliefs:

a. A declaration that investigating the petitioner for any alleged role in any alleged offence arising out of the Direct-line Assurance Company Limited Insurance Policy Number 0008469 for motor vehicle Registration No. KAX 085 J shall infringe upon the petitioner's rights as secured under Article 31 (c) and 31 (d) of the Constitution of Kenya.

b. A declaration that the 1st and 2nd respondents intention to investigate the petitioner in relation to Direct-line Assurance Company Limited Insurance Policy number 0008469 for motor vehicle Registration NO. KAX 085 J shall threaten and violate the petitioner's rights as secured under Article 31 (c) and 31 (d) of the Constitution of Kenya.

c. A declaration that the 1st and 2nd respondents intention to investigate the petitioner in relation to fresh complaints made by the petitioner's former clients in relation to claims against the petitioner for monies allegedly unpaid in settlement of petitioner of compensation awards in Garsen RMCC NO. 11 of 2011 Veronica M Mtindi Nzuki v. Direct-line Assurance Company Limited; Garsen RMCC NO. 12 of 2011 Evalyne Chepchumba Kipruto v. Direct-line Assurance Company Limited; Garsen RMCC NO. 8 of 2011 Elijah Mobegi Omari v. Direct-line Assurance Company Limited; Garsen RMCC NO. 16 of 2011 Amina Aden Dawala v. Direct-line Assurance Company Limited; Garsen RMCC NO. 9 of 2011 Ismael Isaack Meti v. Directline Assurance Company Limited; Garsen RMCC NO. 15 of 2011 Hassan Jele Maalim v. Directline Assurance Company Limited shall violate the petitioners rights to fair administrative action as served under Article 47 of the Constitution of Kenya.

d. A declaration that the evidence relied upon and documents attached by the 4th respondent to its Notice of Motion application dated 28th November 2011 in Malindi High Court being Civil Appeal No. 48 of 2011 Directline Assurance Company Limited v. Ismael Isaack Meti; Malindi High Court Civil Appeal No. 49 Of 2011 Directline Assurance Company Limited V. Elijah Mobegi Omari; Malindi High Court Civil Appeal No.53 Of 2011 Directline Assurance Company Limited V. Ismael Issack Meti; Malindi High Court Civil Appeal No.52 Of 2011 Directline Assurance Company Limited V. Veronica Mtindi Nzuki; Malindi High Court Civil Appeal No.50 Of 2011 Directline Assurance Company Limited V. Amina Aden Dawada; Malindi High Court Civil Appeal No.54 Of 2011 Directline Assurance Company Limited V. Ismael Hussein Abdi; Malindi High Court Civil Appeal No.51 Of 2011 Directline Assurance Company Limited V. Hassan Jele Maalim particularly evidence in the nature of:

i. Copy of Wambua and Kilozo Company Advocates Kenya Commercial Bank client Account Number 1106363248 account statement for the period beginning 25th November 2011 to 3rd December 2011.

ii. Copy of discharge vouchers executed by the petitioner's clients Evalyne Chepchumba Kipruto, Ismael Hassan Abdi, Amina Aden Dawata Hassan Jele Maalim, Veronica Mtindi Nzuki, Ismael Isaack Meti and Elijah Mobegi Omari all of which were executed on the 26th of November, 2011.

iii. Copy of 4th respondent's letter dated 7th December 2011 addressed to Tangopsi loss Assessors

iv. Copy of Tangopsi loss Assesor tracing and means Report dated 6th January 2012 is evidence obtained in a manner that violates the petitioners rights under Articles 31 (c) and 31 (d) of the Constitution of Kenya.

e. General damages.

f. Costs.

Affidavit in support of the Petition

7. The petitioner swore an affidavit in support of the Petition on 3rd July 2012. He averred that he was instructed by 7 clients to claim general and special damages and they agreed to pay the firm's fees and disbursement. (he attached the instruction notes for all the 7 clients) copies of police abstract forms copies of medical examination forms, search of the motor vehicle.

8. Further the 4th respondent filed an application in the high court, interim orders were granted to the effect that a temporary stay of execution of the decree in Garsen RMCC NO. 12 of 2011 pending inter-parties hearing on 6.12.2011. The monies deposited in Garsen RMCC NO. 12 of 2011 was withheld from release to his clients as condition. The 4th respondent went ahead and made an application by way of Notice of Motion to have the petitioner return the money already released to him. In response to this application he averred to the court that he had released the said monies to his clients. This prompted the 4th respondent to file a further affidavit which included an investigative report by Tangopsi loss Assessors who had found his client's and got information from them on whether they had received money in settlement of their cases.

9. In addition to the above, the 4th respondent had asked the Criminal Investigation Department to investigate him through imputing criminal

motives. This was a motive done in bad faith to frustrate him. Further he averred that this was a deliberate move to belittle him and to taint his name yet he had received instructions and was acting in a professional capacity.

10. It was his averment further that the 4th respondent did not have a right to inquire whether he had paid his clients in the lower court civil cases. The 4th respondent had breached his privacy to communication between his clients and him as provided under Article 31 (c) and (d) of the Constitution.

11. Further, he averred that the application for stay pending Appeal did not raise any issue on whether he had paid his clients. The Malindi High Court had infringed on his right as provided under Article 31 (c) and (d), when he was asked to produce evidence within 30 minutes to prove whether he had paid his clients. This was in breach of Article 50 (4) and Article 47 (1) as read with Article 50 (1) of the Constitution.

12. He finally urged the court to grant him the prayers sought with costs.

4th Respondent's replying affidavit

13. The legal adviser to the 4th respondent Samuel Kinyanjui swore an affidavit in response to the petition and the affidavit in support thereof. He averred that the petition was an alleged contravention or violation of this fundamental rights and freedoms out of the orders issued by the judge in Malindi High Court Civil Appeal NO. 48, 49,50,52,53 and 54 of 2011.

14. He further stated that filing of this petition was an abuse of the process of the court as the High Court in Malindi had jurisdiction to hear and determine the issues raised in the petition.

15. Further the 4th respondent is entitled to equal protection of the law under Articles 25(c); 35 (1) (a)(b) and 35 (2); 47; 48 and 50 of the Constitution whereas the petitioner's right are subject to Articles 24 (1) (d).

Preliminary objection

16. The 4th respondent filed a preliminary objection dated 21st September on jurisdiction.

SUBMISSIONS

Petitioner's Submissions

17. The petitioner filed its submission in response to the Notice of Preliminary Objection and to the petition. It was urged that the 4th respondent did not serve them with the Notice of Preliminary objection. The issue on jurisdiction the urged that his rights under Articles 31(c), 31(d), 47 (1) as read with Article 50 (1) and 50(4) were under threat. He had his right to privacy of communication and fair administrative action.

18. Article 50 (4) states as follows;

- i. "Evidence obtained in a manner that violates any right or fundamental freedom in the bill of rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice".

The 4th respondent's allegation on forged certificate of insurance could be proved in court. The investigation report annexed to the application was to paint the petitioner in bad light before the court. He referred to the ***Court of Appeal Civil Appeal NO. 206 of 2006 Peter Nganga Muiruri v. Ecobank Ltd, Charles Nyachae & A.G.*** the case was relied upon by the 4th respondent yet the ordered sought in this are different from the orders being sought in this instant petition. On the other hand in the High Court case before appeal to the Court of Appeal the applicant had sought for grant of supervisory orders against the superior court on violation of his right by the superior court as its judges. In the instant petition the issue is on the evidence that was obtained unconstitutionally by the 4th respondent. This court has jurisdiction to hear and determine this petition and whether it is restricted by geographical jurisdiction. In the same case ***Peter Nganga Muiruri*** (Supra) the Court of Appeal held as follows:

"any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question".

19. Further it is his submission that his motion is not technically and soundly defective. Article 22 (3) (d) provides that enforcement proceedings shall not be unreasonably restricted by procedural technicalities.

20. In addition to the above the 1st respondent's action is imputed with criminal motive and the preliminary objection is an affront to the petitioner's right to the presumption of innocence. Finally the petition raises fundamental issues which are meritorious and striking out the petition at this stage would be premature. He urged the court to grant the orders sought in the petition and dismiss the preliminary objection with costs.

The 4th respondent

21. They filed their submissions on 15.11.2012. It was their submission that the issues raised in the petition are the same as those raised in Malindi High Court Civil Appeals NO 48 of 2011, 49 of 2011, 50, 52, 53 and 54 of 2011 which cases are still pending. The Malindi High

Court had ordered him to furnish evidence on payments to his clients since he had averred in his affidavit that it was not a question for determination by that court.

22. The High Court is established under Article 165 (1) and 165 (5) which gives it unlimited original jurisdiction in criminal and civil matters and to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Further that Article 165 (6) which gives the High Court supervisory jurisdiction over the subordinate courts person, body or authority exercising a judicial or quasi-judicial function but not over a superior court thus it renders the petition fatal. The High Court in Mombasa does not have supervisory jurisdiction over the High Court in Malindi. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be an usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a Constitutional court with powers of review over decisions of judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and power vested in them. As the late Nyarangi JA once remarked in the case of the **Owners of the Motor Vessel Lilians v. Calter Oil Kenya Ltd (1989) KLR** “*jurisdiction is everything. Without it a court has no power to make one more step*”.

23. Further the allegation by the petitioner that they obtained his bank statement without his knowledge or consent was unfounded since they were in pursuit of its legal and Constitutional right to its money. Also that they had been served with the petition 21 days after filing which was in violation of Rule 15 of the High Court Practice and Procedure Rules.

24. It was further submitted that the Petition does not raise any Constitutional issue as against them. No relief or right are enforceable since Article 25 (c) preserves their right to a fair trial and Article 35 (1) (a) (b) and 35 (2) gives them (4th respondent) right to access to information for the exercise and protection of its rights and freedoms. The petitioner’s right and freedom are not superior to their rights since the petitioner obtained judgment by adducing uncontroverted evidence on a forged certificate of insurance. The petitioner wants to shield himself from the 1st, 2nd and 3rd respondents from investigating and possibly prosecuting him for obtaining and depriving the claimants’ funds illegally released to him by the Garsen Senior Resident Magistrate.

25. Finally, they urged the court to dismiss the petition with costs and allow the Preliminary Objection.

26. Counsel for the Attorney General supported the case of the 4th Respondent.

Issues for determination

27. The court has referred to the Petition, replying affidavit, the Preliminary Objection and the submissions in support and in objection to both the petition and Preliminary Objection and has formed the following specific issues.

- a. Whether this court has jurisdiction hear and determine the petition; and, if so,
- b. Whether the petitioner’s fundamental rights and freedoms have been violated.

Determination

28. The petition herein was filed on 16.08.2012. The 4th respondent filed its replying affidavit on 21/09/2012, which indicates that they were served. It was an issue not raised in the replying affidavit dated 21/09/12 and filed on the same date, it cannot arise now.

29. The 4th respondent raised an issue on the Preliminary Objection citing that this court did not have jurisdiction to hear the petition. It has to be dealt with first. As was held in the **Owners of the Motor Vessel Lilians** (Supra) jurisdiction is everything. Article 165 (1) (b) gives this court jurisdiction to determine the question whether a right or fundamental freedom on the Bill of Rights has been denied, violated, infringed or threatened. The 4th respondent had instructed Tangospi investigations to record statements from the petitioner’s clients whom he had represented in Garsen Law Courts. Upon receipt of this report the same was forwarded to the 1st respondent, 2nd respondent and 3rd respondent.

30. The cause of action arose in Bura Hola and the cases were filed first in Garsen Law Courts. The 4th respondent appealed at the Malindi High Court. The petitioner urged that the 4th respondent could not raise a Preliminary Objection based on geographical location. Indeed this court has unfettered jurisdiction as enshrined in the Constitution, without it then the court has to down its tools in respect to the matter before it, if it holds the opinion that it is without jurisdiction. Jurisdiction is specified either by the Constitution or Statute. In **Samuel Kamau Macharia & another v. Kenya Commercial Bank & 2 Others (2012) eKLR**. The Supreme Court delivered as follows on jurisdiction.

“A Court’s jurisdiction flows from either the Constitution or Legislation or both. This court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law”.

31. Article 162 (1) provides as follows:

(1) the Superior courts are the Supreme Court the court of Appeal, the High court and the courts mentioned in clause (2)

(2) Parliament shall establish Court with the Status of the High Court to hear and determine disputes relating to;

a) employment and labour relations

b) the Environment and the used and occupation of, and title to, land.

(c) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

On the other hand, the Constitution outlines instances in which the High Court shall not have jurisdiction; Article 165 (5) provides as follows:

“The High Court shall not have Jurisdiction in respect of matters.

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution or

(b) falling within the jurisdiction of the court’s contemplated in Article 162 (2).

32. In addition to the above the High Court is vested with supervisory Jurisdiction over the subordinate courts, persons, body or authority exercising a judicial or quasi-judicial function but not over a Superior court as provided in Article 162 (1). The 4th respondent urged that this court was being supervisory over the Malindi court. This line of Submission would fail since the High Court at Malindi and this court are courts of concurrent jurisdiction to hear and determine disputes. The court thus finds that it has jurisdiction to hear and determine the petition.

33. On the third issue on whether the Preliminary Objection has merit. This court having illustrated above on the issue of jurisdiction it therefore will not dwell more on the same. The Preliminary Objection raised by the 4th respondent fails.

34. The next issue is whether the orders sought in the petition has merit. In the case of **Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012**, a party alleging violation of constitutional rights must demonstrate how the articles of the Constitution that he alleges have been infringed have been violated with respect to him, and the manner of such violation before proceeding to demonstrate that there was a violation. The petitioner averred that the 4th respondent asked the 1st and 2nd respondents to investigate him which evidence on the same was not availed.

35. Article 50 (4) of the Constitution provides that evidence should be obtained in a manner that does not violate any right. The 4th respondent acquired information from the petitioner’s clients through its own investigations. The 4th respondent is an Insurance company who had compensated the petitioner’s clients though it was their contention that the monies paid were not the actual sums received by the Petitioner. The Petitioner in this instant case is an advocate of the High Court of Kenya who is a member of the Law Society of Kenya which is governed by the Law Society of Kenya Act. There is also the Advocates Complaint Commission which is tasked with the following mandate:

1. Investigating complaints against Advocates
2. Undertaking reconciliation of the parties
3. Referral of complaints to the Disciplinary Committee
4. Prosecution of disciplinary actions before the Disciplinary Committee.

36. The petitioner stated that the 4th respondent was in breach of fair administrative action as provided under Article 47. The court agrees with the 4th respondent that if at all the monies paid to the petitioner for compensation to his clients was not paid out, then that amounts to Professional misconduct. The advocate would still be investigated even under the Advocates Act, section 80 of the **Advocates Act**, Cap 16 Laws of Kenya which provides:

“Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence:

Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the Attorney-General by the Committee under subsection (3) of section 61.”

37. It is therefore clear that the conduct complained of may well constitute an offence and under the **Advocates Act** and I do not agree with the applicant herein that the mere fact that the said conduct may be subject to disciplinary proceedings precludes the 4th respondent from proceeding in the manner they did.

38. The petitioner herein being an advocate is subject to the law and thus liable for any breach of the law in the same manner as any other person. He has a higher calling to observe a strict code of Professional conduct and etiquette to its clients. In case an advocate is in breach of this then any person can lodge a complaint to the Advocates complaints Commission or the Disciplinary Tribunal or any other body

including the police. In the court of Appeal decision of *Kimani Wanyoike v. Electoral Commission of Kenya A 213/95* (unreported) it was held.

“Where there is a law prescribed by either a Constitution or an Act of Parliament governing a procedure for the redress of any particular grievance that procedure should be strictly followed”.

The same sentiments were affirmed in the court of Appeal decision of *Speaker of the National Assembly v. Karume (2008) KLR 245*. The law in this case is the mandate given to the police and the Director of Public Prosecutions.

39. The 4th respondent has a duty to make a complaint to the police where an abuse of justice has been done. Section 89 of the CPC provides for the making of complaints and who may complain. The section reads as follows:

“S.89(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.

(2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.

(3) A complaint may be made orally or in writing but if made orally shall be reduced to writing by the magistrate, and in either case, shall be signed by the complainant and the magistrate.

(4)

(5) Where the magistrate is of the opinion that a complaint signed made or presented under this case does not disclose an offence the magistrate shall make an order refusing to admit the complaint or formal charge and shall record no reasons for the order.”

40. The police is established under Article 243(1) of the Constitution and it has been given the mandate to prevent corruption and promote and practice transparency and accountability under Article 244 (b). Also section 4. (1) of the Police Act gives the police the power to conduct investigations. It states as follows;

“The Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged”.

41. The petitioner cannot stop this mandate. The petitioner can only wait for the police to summon him to give information relating to the complaint made by his former clients. In *Republic vs. Commissioner of Police and another ex-parte Michael Monari & Another [2012] eKLR* where it was held that:

“the police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...” The court went on to state that: -

“As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

42. The Petitioner herein wishes the police and the C.I.D to stop investigations. The petitioner herein has the fear that if the investigations are commenced it may lead to his arrest and may presumably lead to his prosecution. The petitioner has not shown whether the 1st and 2nd respondents have commenced any investigations. The only evidence on record is the investigation report compiled by Tangospi Loss Assessors who had been hired by the 4th respondent. The report contains the petitioner’s former clients statements that allege they were not fully compensated. The court has gone through the pleadings and evidence on record and analysed that the only contention is investigations to be carried out by the 1st and 2nd respondents. How can this be a violation of rights when investigations have not commenced? More is required to curtail the constitutional mandate of the Police as an investigative agency of the State.

43. In addition, the Police (the 1st respondent herein) may receive instructions from the Office of Director of Public Prosecutions acting pursuant to public interest and interests of due administration of justice and to prevent abuse of the legal process, to carry out investigations as provided under Article 157 (4) and (11) which states as follows;

“4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

11. In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

44. It is for the above mandate and functions given to the police that this court would not interfere with. The police carry out investigations for the better functioning of the country. Once a complaint is received then it is their duty to carry out investigations. The same cannot be carried out in bad faith or against the law as was held in *Commissioner of Police & The Director of Criminal Investigations Department & Or v. Kenya Commercial Bank Limited & 4 Ors [2013] eKLR* where the Court of Appeal held as follows:

“The investigation of any particular offence or offences.” (Emphasis).

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.**

45. There was no evidence in this matter that investigation by the police and possible prosecution would be a marred exercise for being **“unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification.”** The conduct by the police of their constitutional mandate to investigate in these circumstances has not been shown and cannot, therefore, be held to violate any right to privacy. The can be right to privacy against a properly conducted investigation into alleged criminal conduct. It was incumbent on the Petitioner to demonstrate that in conducting the investigations, the police had adopted or proposed to adopt unconstitutional methods of investigation. This has not been done.

46. The Director of Public Prosecutions was established under Article 157 of the Constitution. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct as provided under Article 157(4). The petitioner in filing his cases in the lower court in Garsen used an Insurance Policy number 0008469 for motor vehicle Registration Number KAX 085J, which the 4th respondent avers did not emanate from them. It is for that reason they went ahead and asked Tangospi Loss Assessors to trace the claimants in the lower court cases and file a report. The said report was to be used by the C.I.D and the police to investigate the petitioner herein who would then forward their findings to the Director of Police to make recommendations on whether to prosecute or not. Article 157(6) provides as below:

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 permission of the person or authority, and
- c. Subject to clause (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

47. The office of the Director of Public Prosecutions being an independent office does not require the petitioner’s consent or authority for commencement of criminal proceedings. The 4th respondent can also not seek permission from the petitioner on whether to forward the report to the 1st and 2nd respondents. The court cannot interfere this mandate unless the petitioner shows that there is gross violation of his rights. Since the police have not even arrested him or made any threat of arrest then there is no violation of his constitutional rights as long as the police follow the due process of the law and the rights of the arrested person as provided in Article 49 and 50(2) of the Constitution is observed.

48. The petitioner has not shown how the 4th respondent was on breach of his right to privacy. The 1st and 2nd respondents on the other hand being investigative bodies have the right to obtain relevant information and documents to be used as evidence. That right is not absolute if the former petitioner’s clients allege they were not fully compensated by the petitioner. The only way to verify this allegation is for the 1st and 2nd respondents to have access to the petitioner’s documents. Article 31 (c) states as follows; *“every person has the right to privacy which includes the right not to have:*

(c) information relating to their family or private affairs unnecessary required or revealed: or

(d) the privacy of their communication infringed.

49. The court notes from the proceedings of the 6/12/2011 in Malindi HCCA No.48 of 2011 that it was the petitioner himself who produced the bank statements and payment vouchers, the subject of the privacy complaint. Further the court had ordered the petitioner himself to supply the 4th respondent with the statements and the payment vouchers.

50. The court shall not delve into the merits as to whether the 4th respondent paid the petitioner and whether he in turn remitted the same to his clients. This is the very issue to be investigated and tried by a competent court, if necessary. It is upon the investigative agency to investigate and forward the findings to the Office of Director of Prosecutions for determination as to whether to prosecute or not, in accordance with his role under Article 157 of the Constitution.

Conclusion

51. In conclusion, the matter calls for the balancing of the petitioner's right to fair trial, the 4th respondent's right to access justice, the investigative powers of the police and the DPP's constitutional duty as holder of the State's prosecutorial powers. The balance lies, in my respectful view, in allowing the 4th Respondent its right to access justice by making its complaint which is investigated by the police and prosecuted by the DPP, if sufficient inculpatory evidence is established, in a trial before competent court, consistently with the Petitioner's fair trial rights. This must be the constitutional role of a functioning criminal justice system. Needless to say, this is without prejudice to any civil claims any party may be advised to pursue.

Orders

52. Accordingly, for the reasons set out above, the court makes the followings specific orders:

- a. The 4th respondent's Preliminary Objection is dismissed.
- b. The Petition is dismissed for lack of merit.
- c. There shall be no order as to costs.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2018.

E.K. OGOLA

JUDGE

Appearances

M/S Khaminwa & Khaminwa Advocates for the Petitioner.

Mr. Eredi, Litigation Counsel for 1-3 Respondents.

M/S. Samuel Kinyanjui, Advocate for the 4th Respondent.