



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CONSTITUTIONAL PETITION NO. 10 OF 2016**

**GEORGE MAGENZI MUSUNDI.....PETITIONER/APPLICANT**

**VERSUS**

- 1. PC KIPNGETICH RONO.....1<sup>ST</sup> RESPONDENT**
- 2. DIRECTOR OF CRIMINAL INVESTIGATION, KAKAMEGA.....2<sup>ND</sup> RESPONDENT**
- 3. INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**
- 4. DIRECTOR OF PUBLIC PROSECUTIONS.....4<sup>TH</sup> RESPONDENT**
- 5. CHIEF MAGISTRATE'S COURT, KAKAMEGA.....5<sup>TH</sup> RESPONDENT**

**AND**

**FAMILY BANK LIMITED.....INTERESTED PARTY**

**J U D G M E N T**

**Introduction**

- (i) The petition herein arises out of the arrest and arraignment in court of the petitioner vide Kakamega Cm Criminal case No. 1593 of 2016 where he was charged with 3 counts for:-
- (ii) Alleged obtaining registration of land contrary to section 320 of the Penal Code.
- (iii) Alleged making of a false document, to wit certificate of lease over LR. No. Kakamega/municipality/block IV/512 contrary to Section 347(a) of the Penal Code and
- (iv) Alleged forcible detainer contrary to Section 91 of the Penal Code

2. While the above case was proceeding, further proceedings were separately conducted vide Kakamega CM Misc. Criminal Application No. 77 of 2016 where the 1<sup>st</sup> Respondent obtained from the Court (5<sup>th</sup> Respondents) warrants to investigate the petitioners Bank Account No. 07800010952 held at Family Bank Limited Kakamega, the interested party herein.

3. This did not go well with the petitioner who now claims that the warrants were obtained in a manner

that raises doubts as the said proceedings were conducted and concluded in a summary manner and circumstances as neither the purported applicant, the petitioner nor the interested party were disclosed as parties which is contrary to ordinary practice and law.

### **The petition**

4. The petitioner claims that the warrants herein were issued notwithstanding that the petitioner had not been charged with any banking, economic, financial related and or any crime to justify the said investigation into his private affairs including the aforesaid bank account. The petitioner contends that the above mentioned criminal Misc. Application which led to the issuance of the warrants infringed on his rights to a fair trial and protection against invasion of privacy, right to property and fair administrative action because he was not given an opportunity to be heard. He claims that there was no objective justification to issue the warrants but to facilitate an intrusion into his privacy and property for social-economic –profiling in a bid by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to intimidate, harass and possibly for extortion purposes. He adds that the proceedings in respect of Kakamega Cm Criminal Case No. 1593 of 2016 are merely made up charges against him. He contends that he procedurally bought and took possession of the suit land which is the subject of the said case. The petitioner contends that the 1<sup>st</sup> respondent has not disclosed his role in the above case as he is not among the witnesses to be called and further that when obtaining the search warrants no explanation was given as to why there had to be separate proceedings which were kept secret from the petitioner. The petitioner adds that the investigation of his account cannot be linked to any justifiable criminality or reasonable suspicion thereof in respect of the made up charges facing him.

5. The Petitioner also argues that by the unconstitutional, unlawful unjustified, malicious and illegal acts of the respondents his rights and fundamental freedoms under the constitution particularly the rights under Articles 27(1),28,31,35,40,47,48 and 50(1) of the Constitution together with the guiding principles and values were infringed. Further the petitioner claims that the respondents violated Articles 1(1) 2(1)3(1) and 10 of the Constitution by failing to follow the procedure for fair trial and without considering the national values. He further explains in the petition that his rights under Articles 50,27(1) 47 and 48 of the Constitution have been infringed.

6. The petitioner prays for orders that;-

(a) A conservatory order to permanently stop the trial of the petitioner herein with the aforementioned offences.

(b) A declaration that the joint, unlawful and illegal acts of the respondents complained of herein are offensive to and violate the provisions of Articles 1(3)(c), 2(1),10(1)(b) 19,20,21(1), 22, 25(c), 27(1), 28 31,35, 40., 47,48, and 50 of the Constitution, 2010 and consequently unconstitutional

(c) An order of judicial review by way of **certiorari** to remove unto this court the warrants to investigate the petitioners Bank Account as disclosed hereinabove for the purposes of and quashing the said warrants on account of the circumstances and constitutional violations in the manner of treatment and decision so far obtained.

(d) An order of judicial review by way of **certiorari** to remove into this court the decision of the respondents herein to prefer charges against the petitioner for the purposes of quashing on account of the circumstances and constitutional violations in the manner of treatment and decision so far to prefer the current charges.

(e) An order of judicial review by way of **prohibition** to prohibit further trial of the petitioner by the 1<sup>st</sup>,2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondent before the 5<sup>th</sup> respondent vide Kakamega CM Miscellaneous Criminal Application No. 77 of 2016 and or such further and/or proceedings that may be instituted in respect hereof over the said parcel of land.

(f) An order of **compensation in damages** against the respondents herein jointly and/or severally

for the constitutional violations complained of herein.

(g) Costs of this petition.

### **Response to the petition**

7. The petition is opposed. There is a replying affidavit sworn by Chief Inspector of Police Kakamega Police Station No. 230540, Richard Cheruiyot on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. He depones that the 1<sup>st</sup> respondent was under his command and supervision but has since been transferred to Kilifi County.

8. He depones further that he is well versed with the criminal offence investigated by his office which led to the petitioner being charged in Kakamega Chief Magistrate's Court Criminal Case No. 1593 of 2016, and that in the course of the investigations it was established that the petitioner had obtained credit from the interested party using a certificate of lease which had been obtained illegally and which was the subject of investigations, the certificate of lease being in respect of Kakamega/Municipality/Blok Iv/512 which according to the investigations belongs to Victory Faith Ministries. He claims that the said certificate of lease which is being investigated may bring more criminal charges against the petitioner and others.

9. The deponent avers that it was for this reason that the 1<sup>st</sup> respondent applied for warrants to investigate the account of the petitioner where the alleged fraudulent transactions may be found. He claims that the said exercise was done in good faith, in the interest of justice and with the sole aim of investigation and securing evidence to be used in the criminal case. He maintains that there is a nexus between the charges brought against the petitioner and the warrants issued to investigate his bank account since the certificate of lease is an exhibit in the criminal case.

10. Mr. Cheruiyot also says that the warrants were issued by the 5<sup>th</sup> respondent on a reasonable suspicion that an offence had been committed and that the inspection of the petitioner's account was necessary for the purpose of any investigation into the commission of an offence and thus it was proper for the 1<sup>st</sup> respondent to seek and obtain the orders to investigate the petitioner's bank account. He also claims that the petitioner did not cooperate with the investigating Officers as a result of which they were forced to apply to court for warrants to investigate the petitioners account where the fraudulently obtained lease was used to obtain credit.

11. He denies that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents have infringed on the rights of the petitioner as alleged in the petition and opines that the law envisages instances where the right to privacy can be infringed and private information revealed. He denies the allegation that the petitioner's rights under Article 40 have been infringed and states that there is no evidence to show that the petitioner has been deprived of his property. He further depones that there is also no evidence that the petitioner was discriminated against and lastly that the 5<sup>th</sup> Respondent had jurisdiction to issue the warrants complained of by the petitioner. Finally, the deponent says that the rights enshrined under Article 50 of the Constitution are trial related and that the petitioner cannot raise complaints on the same before trial.

### **Petitioner's Submissions**

12. The petition was canvassed by way of written submissions. The petitioner's submissions which are dated 25.11.2016 have isolated the following issues for determination:-

- i) Whether the Petitioner, a Registered Proprietor and by extension a bona fide and innocent purchaser for value, can be charged with the foregoing offences as disclosed vide Kakamega CM Criminal Case No. 1593 of 2016;
- ii) Whether the infringement of the Petitioner's Constitutional rights attendant to his privacy, property, fair administrative action, access to justice and fair trial were justified in the

circumstances;

iii) Whether the general treatment of the petitioner by the respondents in the circumstances is constitutional.

iv) Whether the decision to close the investigation file and not charge the petitioner by the then DCIO Mr. Wambugu created in the Petitioner a legitimate expectation against preference of the present charges out of the already investigated allegations.

v) Whether the remedies sought herein are available to the said petitioner in the circumstances.

13. In discussing the above issues, Counsel for the Petitioner has placed reliance on Section 25(1) of the Land Registration Act, No. 3 of 2012 and also on Section 26(1) of the same Act whose provisions guarantee and recognize the rights of a proprietor and the certificate of title issued by the Registrar. Reliance was also placed on the following authorities:-

i) Nairobi HC Constitutional Petition No. 186 of 2013 Shalein Masood Mughal – Vs – A.G. and 5 others [2014] eKLR.

ii) Mwai Limited & 2 others – vrs – Municipal Council of Mombasa & 5 others [2015] eKLR

iii) Tom Ojienda t/a Tom Ojienda and Associates Advocates – vs – EACC & 5 others [2016]eKLR

iv) Republic – Vs – Nairobi City County & another ex parte Wainaina Kigathi Mungai [2014]eKLR

14. Counsel also relies on Section 8 of the Penal Code and all the relevant provisions of the Constitution under which the petition is brought and asks this court to grant the orders as prayed.

#### **The Respondent's Submissions.**

15. The submissions filed on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents are dated 19.10.2016. The Attorney General submits that there is no merit in the Petitioner's allegations of contravention of his constitutional rights. In responding to the issues raised by the petitioner, the AG relies on Section 118 of the Criminal Procedure Code and contends that it was absolutely in order for 1<sup>st</sup> respondent to obtain warrants to investigate the petitioner's account(s) held at the interested party's bank. Counsel also relies on the case of **JLN & 2 others – vrs – Director of Children Services & 4 others [2014]eKLR** in support of the proposition that in certain instances under the law the right of privacy of individuals can be interfered with. Regarding alleged violation of the Petitioner's rights under Article 50 of the Constitution, the respondents cite the case of **Eng. Michael Kamau – vs- EACC & others, Petition No. 230 of 2015(unreported)** for the proposition that if the rights under the said Article are violated in the course of the trial then the Petitioner would be entitled to relief. It is the contention of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents that the police have a duty to carry out all and any investigations for the purpose of preventing crime. For this argument, reliance is placed on the case of **Republic – vs- Commissioner of police and another, ex parte Michael Monari & another [2012]eKLR.**

16. In summary, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents, pray that the petition be dismissed on the basis that the respondent's acts were undertaken in good faith and in the interest of the administration of justice.

17. I now return to the issues as framed by the Petitioner with a view to determining whether the reliefs sought by the Petitioner should be granted.

**(a) Whether the Petitioner a Registered proprietor and by extension a Bona fide and innocent purchased for value can be charged with the foregoing offences as disclosed vide Kakamega CM Criminal Case No. 1593 of 2016.**

18. Whereas the respondents support the court case against the Petitioner, the Petitioner contends that as a registered proprietor and an innocent purchaser for value, the petitioner is under the protection of sections 25(1) and 26(1) of the Land Registration Act No.3 of 2012 and cannot be charged in connection with a title which the respondents have not shown to be invalid on the ground of fraud or misrepresentation to which the petitioner is a party, or where it is not proved that the title has been acquired illegally, unprocedurally or through a corrupt scheme to which the petitioner is a party.

19. From the evidence on record, it is clear that the petitioner's title was obtained openly and there is no evidence placed before this court to suggest that the petitioner was engaged in any impropriety illegality fraud or misrepresentation as would render his title defeasible. The petitioner purchased the suit property from the first registered owner and was an innocent purchaser for valuable consideration having paid a sum of Kshs.1,750,000/=. I will borrow from the case of Mwai Limited and 2 others (supra) for the definition of "purchaser for value without notice" as follows:-

" In American jurisprudence, according to Black's Law Dictionary, he is referred to as a "bona fide purchaser, one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects or infirmities, claims, or equities against the seller's title, he is one who has in good faith (bona fide), paid valuable consideration for property without notice of prior adverse claims."

Generally, a bona fide purchaser for value is not affected by the transferor's fraud against a third party and has a superior right to the property as against the transferor's creditor to the extent of consideration that the purchaser has paid. In short a purchaser for value is also referred to as:-

" a bona fide purchaser for value, good faith purchaser, purchaser in good faith, an innocent purchaser for value."

20. As rightly submitted by counsel for the Petitioner, there has never been any information either through Kenya Gazette on some other public advertisement showing some other interest in the same title which passed to the Petitioner from the seller John Rote Muswanyi on 21.07.2010. In summary, I find and hold that by dint of the provisions of Sections 25(1) and 26(1) of the Land Registration Act, No. 3 of 2012 and by the provisions of Section 8 of the Penal Code, Cap 63 of the Laws of Kenya, the Petitioner, being the proprietor of the indefeasible title, cannot stand trial against his own parcel of land as the respondents have purported to do in Kakamega Cm Criminal Case No. 1593 of 2016. Section 7 of the Penal Code reads:-

"8 A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud."

**(b) Whether the infringement of the Petitioner's Constitutional rights attendant to his privacy property fair administrative action, access to justice and fair trial were justified in the circumstances.**

21. The answer to the above question is no. The respondents have argued that all their actions were justified in view of the decision in the **JLN & 2 others** case (above). The respondents' argument is premised on their belief that the petitioner's certificate of lease was fraudulently acquired, but as pointed out in the preceding paragraphs of this judgment, the respondents have not placed any evidence before this court to suggest that there was any impropriety illegality fraud or misrepresentation on the part of the petitioner in acquiring the impugned title. The Law of evidence is clear that he who alleges must prove. The respondents have not discharged their duty in this regard.

22. In any event, the manner of obtaining the warrants to search the petitioner's bank account left a lot to be desired. This issue was discussed at length in this court's interlocutory ruling dated 27.07.2016. I need not belabor the point.

23. It is to be noted that 19 documents to the impugned title were availed to their DCIO, Mr. Wambugu who in fill investigations closed the file without preferring any charges against the petitioner. This factual position has not been refuted. This was way back in 2011. From both the relying affidavit and the submissions made on behalf of the respondents, no new facts have been brought on board in support of the charges against the petitioner.

24. What did the closure of the matter in 2011 mean? It meant that the petitioner did not expect to be investigated again over the same matter that had been fully investigated and closed. The petitioner relies on the provisions of Articles 47(1) and 48 of the Constitution, 2010 and argues that the doctrine of legitimate expectation applies in this case; and especially so when the case against the petitioner is being revived some five odd years down the line. The case of **Stanley Munga Githunguri** (supra) supports the petitioners stand. I fully agree with the words of the court where it said:-

“We are of the opinion that to charge the applicant four years after it was decided by the Attorney General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the Court will be within a reasonable time as required by Section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because his was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney General. It was a case which had received notable publicity, and the matter was considered important enough to be raised in the National Assembly.

We are of the opinion that two infeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in Section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the court, oppressive and vexatious.”

25. For the above reasons, and from the circumstances of this case, I am satisfied that the decision to close the investigation file in 2011 and not to charge the petitioner by the then DCIO Mr. Wambugu indeed raised the petitioner’s legitimate expectation that the case was closed. Reopening the casenow in my considered view amounts to double jeopardy for the Petitioner. The law does not allow it. The Constitution, 2010 outlaws it in the absence of concrete fresh evidence warranting the same.

26. To my mind there seems to have been something much more to these “fresh” investigations than merely investigating the petitioner’s certificate of lease. Is it malice on the part of the Investigating officer? Is it selective prosecution? Whatever the reason, the respondents are estopped from charging the petitioner on same facts on which a finding had earlier been made.

#### **Whether the remedies sought herein are available to the petitioner in the circumstances.**

27. The respondents argue that these remedies cannot be granted because the petitioner has not met the conditions nor satisfied this honourable court that the criminal proceedings need to be quashed and further that the petitioner has not shown that the respondents are precluded from preferring fresh charges against the petitioner. The respondents also contend that he petitioner has not demonstrated that the charges were preferred against the petitioner on 05.05.2016 while the application for warrants was made on 11.05.2016 under a separate file and before a different Magistrate. This court finds that the application was rushed through the system without notice either to the petitioner or the interested party. It is therefore not without reason that the petitioner complains of unfair administrative action by the respondents. Consequently, the petitioner’s rights under Article 50(1) and (2) of the Constitution, 2010 were breached. The conclusion on this point is that he respondents invasion of the petitioners’ private rights and a denial to affair trial were not justified.

**Whether the general treatment of the petitioner by the respondents is in the circumstances unconstitutional.**

28. The respondents contend that the warrants issued by the 5<sup>th</sup> respondent were issued on reasonable suspicion that an offence had been committed hence the need to investigate the petitioner's account. This court found during the interlocutory ruling and still finds it so that the said warrants were issued as a matter of course. There were neither handwritten nor typed proceedings that warranted the orders of 11.05.2016 from which this court would be able to see for itself whether the trial court exhaustively considered the facts placed before it by the 1<sup>st</sup> respondent before issuing the warrants.

29. The other issue for which the respondents have not given an answer is why the 1<sup>st</sup> respondent chose to investigate the Petitioner's account instead of investigating the source of the certificate of lease which was alleged to have been fraudulently obtained. Interestingly again, no other party has been arraigned in court in relation to the land transactions leading to the registration, disposal and/or acquisition of the Petitioner's title. As rightly submitted by counsel for the petitioner, the investigations into the petitioner's title were of their own peculiar kind done in such a manner as to expose the petitioner to discrimination and denial of his basic right to be heard. Clearly therefore the general treatment of the petitioner in this whole matter was unconstitutional.

**Whether the decision to close the investigation file and not charge the petitioner by the then DCIO Mr. Wambugu created in the petitioner a legitimate expectation against preference of the present charges out of the already investigated allegations.**

30. The fact that the former DCIO Mr. Wambugu uninvestigated the allegations on the basis of Kakamega CM Criminal Case No. 1593 of 2016 and also summoned the petitioner took his statement and obtained before finally deciding to close the matter without charge shows that the criminal process now is placed as an abuse of the court process. From the affidavits and the submissions, this court has reached the conclusion that the petitioner was not subjected to fair administrative action when the warrants to search his bank account were issued in total secrecy and without being given a chance to respond to the application. This court also finds and holds that the decision to investigate the petitioner's bank account instead of investigating the source from which the alleged fraudulent certificate of lease emanated had no basis. Thirdly deciding to reopen the case five years after the original investigations were concluded and the file closed in favour of the petitioner is not only an abuse of the process of the court, but as was held in **Munga Githunguri's case** (above) it is "oppressive and vexatious."

31. Article 23 of the Constitution 2010 donates authority to the courts to uphold and enforce the Bill of Rights. The article reads as follows:- "

"23 (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right of fundamental freedom in the Bill of Rights and is not justified under Article 24.

(e) an order for compensation; and

(f) An order of judicial review.

32. Having thus found that the petitioner's rights under Articles 27(1),28,31,35,40,47,48 and 50(1) of the Constitution 2010 were violated by the respondents, the petitioner is entitled to the reliefs sought. The 1<sup>st</sup> respondent as an investigating officer violated the rights of the petitioner by deciding to charge the petitioner in Kakamega CM Criminal Case No. 1593 of 2016 long after previous exhaustive investigations had exonerated the petitioner.

### **Conclusion**

The upshot of all the above is that the petitioner is entitled to the following reliefs/remedies:-

(a) A **conservatory** order to permanently stop the trial the petitioner herein with the aforementioned offences in view of the circumstances herein before disclosed.

(b) A **declaration** that the joint, unlawful and illegal acts of the Respondents complained of herein are offensive to and violate the provisions of Articles 1(3) (c ), 2(1), 3(1), 10(1)(b), 19, 20, 21(1), 22, 25(c), 27(1), 28, 31,35, 40, 47, 48 and 50 of the Constitution, 2010 and consequently unconstitutional.

(c) An order of judicial review by way of **certiorari** to remove into this court the warrants to investigate the Petitioner's Bank Account as disclosed hereinabove for the purposes of quashing the said warrants on account of the circumstances and constitutional violations in the manner of treatment and decision so far obtained.

(d) An order of judicial review by way of **certiorari** to remove into this court the decision of the Respondents herein to prefer charges against the petitioner herein for the purposes of quashing on account of the circumstances and constitutional violations in the manner of treatment and decision so far to prefer the current charges.

(e) An order of judicial review by way of **prohibition** to prohibit further trial of the Petitioner by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents before the 5<sup>th</sup> respondent vide **Kakamega CM Miscellaneous Criminal Application No. 77 of 2016, Kakamega CM Criminal Case No. 1593 of 2016** and or such further and or other proceedings that maybe instituted in respect hereof over the said parcel of land.

(f) A sum of Kshs.300,000/= (Kenya shillings three hundred thousand only being compensation against the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents.

(g) Costs of this petition as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Orders accordingly

**Judgment delivered signed and dated in open court at Kakamega this 9<sup>th</sup> day of March 2017**

**RUTH N. SITATI**

**JUDGE**

**In the presence of:-**

Mr. Shifwoka .....APPLICANT

.....1<sup>ST</sup> RESPONDENT

.....2<sup>ND</sup> RESPONDENT

Miss were present.....3<sup>RD</sup> RESPONDENT

.....4<sup>TH</sup> RESPONDENT

.....5<sup>TH</sup> RESPONDENT