



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO.15 OF 2016

IN THE MATTER OF ARTICLE 22(1)

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL
FREEDOMS UNDER THE BILL OF RIGHTS (CHAPTER 4 OF THE CONSTITUTION OF
KENYA ARTICLE 29) & ARTICLE 9 OF THE UNIVERSAL DECLARATION OF HUMAN
RIGHTS**

MOUREEN NDUNGE NZIOKA.....PETITIONER

VERSUS

BENSON NJUI KARIGI1ST RESPONDENT

OFFICE OF THE INSPECTOR GENERAL.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL..... 3RD RESPONDENT

RULING OF THE COURT

THE APPLICATION:

1. The Petitioner herein has filed a Notice of Motion dated 7th November, 2016 pursuant to the Provisions of Articles 29 and 259 (1) of the Constitution of Kenya Rule 4(1) 8(1) and 13 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 for the following orders:-

1. That conservatory orders be issued restraining the 2nd Respondent, his servants, agents, assignees, or anyone acting under his authority, and in particular officers from the national Police Service from arresting, charging and arraigning the Petitioner herein in Court on any charges.

2. THAT the 2nd Respondent, his servants, agents, assignees or anyone acting under his authority, and in particular officers from the National Police Service, be permanently restrained and enjoined against, charging and arraigning the Petitioner in court on criminal charges.

3. THAT the court does give directions/orders requiring the 1st Respondent to comply with the terms of the Agreement for Sale dated 10th June, 2016.

4. THAT appropriate sanctions/disciplinary orders be issued against any officer of the National Police Service deemed to have abused his office in the handling of the dispute between the Petitioner and the 1st Respondent.

5. THAT such further or other orders as are appropriate for the effective administration of justice be issued.

6. THAT the costs of these proceedings be provided for.

The Application is supported by an annexed affidavit of the Applicant sworn on even date and further on the following grounds:-

1. That the Petitioner, on the 10th day of June, 2016 entered in to an agreement with the 1st Respondent for the proposed sale and transfer of her property to the 1st Respondent for a consideration of Kenya Shillings One Hundred and Thirty Million (Kshs.130,000, 000/=), upon the terms and conditions expressly stated in the same agreement.

2. That the 1st Respondent defaulted in keeping his part of the bargain and was, specifically, unable and incapable of paying even the commitment sum, as a result of which the Agreement for Sale was rescinded in accordance with the terms of the said Agreement, and the partly Kenya shillings Two Million (Kshs. 2,000,000/=) that he had paid pursuant to the said agreement was forfeited as by law provided.

3. Instead of paying the Petitioner the balance of Kenya shillings Eleven Million (Kshs.11,000,000/=) as liquidated damages as expressly provided under the Agreement for Sale, the 1st Respondent has now engaged the services of rogue policemen from Kangundo police Station to intimidate and arm twist the Petitioner in to refunding the already forfeited monies at the paid of arresting her and arraigning her in court on trumped up of charges of obtaining by false pretenses.

4. That the actions of the police are a wanton and reckless infringement on the constitutional rights of the Petitioner as spelt out under the Bill of Rights, Chapter 4 of the Constitution of Kenya, as the Petitioner has not committed any known crime under the law.

5. That under Article 9 of the 1948 Universal Declaration of Human Rights, of which Kenya is a signatory, “no one shall be subjected to arbitrary arrest, detention....., that is, no individual, regardless of circumstances, is to be deprived of their liberty without having first committed an actual criminal offence.....”

6. That the nature of the dispute between the Petitioner and the 1st Respondent is squarely within the province of civil law and there is no place for the application of criminal law sanctions. In particular, the agreement between the parties herein is clear and express on the mechanism for addressing disputes arising out of the said agreement.

2. The Applicant’s case is that she entered into a sale agreement with the first Respondent herein who had expressed interest in purchasing her parcel of land reference **DONYO SABUK/KOMAROCK BLOCK 1/48365** now **BLOCK 1/67184**. The said agreement was entered on the 10th June, 2016 with the purchase price agreed at Kshs.130,000,000/=. Pursuant to the said agreement, the 1st Respondent was to pay a deposit of **Kshs.2,000,000/=** upon execution and a further **Kshs.1,000,000/=** on or before the 16/06/2016 which was to serve as deposit and commitment by the 1st Respondent for the due performance of the terms of the agreement. It was further agreed the balance of **Kshs. 127,000,000/=** was to be paid within a period of 180 days. It was a term of the agreement that in the event of default by either party, the party in default was to pay the aggrieved party 10% of the purchase price. The Applicant further states that the 1st Respondent only made the deposit of kshs.2,000,000/= but failed to pay the

KShs.1,000,000/= on the due date forcing her to resort to the default clause in the agreement and rescinded the same and demanded the full 10% of the purchase price. The Applicant avers that the 1st Respondent has resorted to the use of police at Kangundo police station who are now hell bent on arbitrarily arresting and detaining her yet the dispute is purely one of a civil and not a criminal nature. The Applicant now seeks conservatory orders to restrain the Respondents from harassing her and further a permanent injunction do issue to restrain the Respondents and that the 1st Respondent be directed to abide by the terms of the agreement entered on 10/06/2016.

3. The 1st Respondent opposed the Application and filed a Replying Affidavit sworn on 30/11/2016. The 2nd and 3rd Respondent neither entered appearance nor filed any replying affidavits. The 1st Respondent's case is that the Applicant has since sold the land the subject of the agreement to third parties and it is the contention of the 1st Respondent that the Applicant has obtained money from him by false pretence and in which the police are now investigating. The 1st Respondent is interested in the refund of the monies or in the alternative the sale transaction should continue from where it had been left.

4. With the leave of the Court, parties filed submissions. It is only the Petitioner and 1st Respondent who filed submissions while the 2nd and 3rd Respondents did not. I have carefully considered the said submissions. This being a Constitutional Petition, the principle applicable for grant of conservatory order would be as was stated in **PETITION NO. 16 OF 2011 NAIROBI – CENTRE OF RIGHTS EDUCATION AND AWARENESS (CREAW) & 7 OTHERS** where Musinga J, (as he then was) has this to say:

***“..... a party seeking a conservatory order only requires to have a prima facie case with a likelihood of success and that unless the court grants the conservatory order – there is real danger that he will suffer prejudice as a result of violation or threatened violation of the Constitution.*”**

It is averred by the Applicant that her rights as provided by the Constitution are likely to be trampled upon by the 2nd and 3rd Respondent following false allegations by the 1st Respondent. The Applicant further avers that the involvement of the police is a wanton and reckless infringement of her Constitutional Rights as spelt out under the Bill of Rights. Applicant further seeks reliance under Article 9 of the 1948 Declaration of Human rights of which Kenya is a signatory, - ***“no one shall be subjected to arbitrary arrest, detention, - that is no individual regardless of circumstances is to be deprived of their liberty without having first committed an actual criminal offence.....”***

The Applicant has hinged her application on Article 29 of the constitution which relates to freedom and security of the person as follows:-

“Every person has the right to freedom and security of the person, which includes the right not to be –

(a) Deprived of freedom arbitrarily or without just cause.

(b) Detained without trial, except during a state of emergency in which case the detention is subject to Article 58.

(c) Subjected to torture in any manner, whether physical or psychological.

(d) Subjected to corporal punishment.

(e) Treated or punished in a cruel inhuman or degrading manner.

The Applicant has further averred that the conduct of the Respondents is unlawful and malicious since the said actions are intended to aid a party in what is purely a civil process.

I have perused the sale agreement entered herein by the Petitioner and 1st Respondent on 10/06/2016. The same has various clauses and that each of them blame each other for breaching the terms of the agreement. The 1st Respondent claims that he later learnt that the land sought to be sold had again been sold to other third parties by the Petitioner and he was compelled to place a caveat/caution on the register as well as alerting the police at Kangundo police station, since he felt that the petitioner had received money from him by false pretence. The police then started contacting the Petitioner over the matter and which forced her to file the present application. The transaction entered herein is basically a civil matter but for the emergence of the 1st Respondent's claim that the land has been sold to third parties and notices for sale put up on the land. The 1st Respondents complaint to the police has to be investigated. In fact the Petitioner is yet to present herself to the police and give her version of events from her own view. The 2nd and 3rd Respondents are empowered by law to investigate and prosecute criminal offences pursuant to the provisions of section 24 of the National Police service Act and Articles 156, 243 and 245 of the Constitution. The powers of the 2nd and 3rd Respondents should be exercised within the legal boundaries. The Applicant has not shown that the 2nd and 3rd Respondents are not going to respect her Constitutional rights. It was incumbent upon her to demonstrate that the intended police investigation is hinged on illegality or bad faith. The Applicant has maintained that the dispute between her and 1st Respondent is one that can be resolved through the civil courts. That could well be most likely the case. However, the 1st Respondent has claimed that the Applicant has received the money by false pretence since the land sought to be sold has again been sold to third parties. The police shall need to investigate the same and establish if it is indeed true. If the police establish an offence has been committed then criminal proceedings could be instituted as appropriate and the Applicants rights will definitely be protected under the provisions of Article 50 of the Constitution, Evidence Act and other relevant laws wherein she shall get a fair trial as evidence will be adduced in accordance with the law. It is also noted that even though the dispute herein is one of a civil nature there is no bar to the 2nd and 3rd Respondents from instituting criminal proceedings by dint of the provisions of section 193A of the Criminal Procedure Code that allows concurrent criminal and civil proceedings.

The Applicant has also claimed that the 1st Respondent has colluded with police to arm twist her in order to make illegal payment to the 1st Respondent. Indeed the Applicant is yet to present herself to the police and establish what the issues are and she could even be accompanied by her Advocate. The complaint lodged by the 1st Respondent is yet to be investigated before an opinion is reached as to whether a charge is to be preferred. Hence barring the 2nd and 3rd Respondents from performing their constitutionally mandated duties would be unjustified in the circumstances. The prayers sought by Petitioner more particularly prayers 3, 4 and 5 are rather capricious when looked at from the point that the matter is yet to be investigated and therefore this court is reluctant to grant the same.

From the material placed before the court it is clear that the Applicant's case has no merit. The Applicant's Application dated 7/11/2016 is dismissed with no order as to costs.

It is so ordered.

Dated, signed and delivered at Machakos this 6th day of April 2017.

D. K. KEMEI

JUDGE

In the presence of:

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