



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO 47 OF 2013.

**THE MATTER OF AN APPLICATION UNDER ARTICLE 165(3)(b), (d) 2,19,21 AND 22 OF
THE CONSTITUTION**

AND

**IN THE MATTER OF THE PROTECTION OF THE CONSTITUTIONAL RIGHTS
ENSHRINED IN CHAPTER FOUR OF THE CONSTITUTION IN SO FAR AS THE
PETITIONER'S CONSTITUTIONAL RIGHTS UNDER ARTICLES 29(9),47& ARTICLE 50(1)
HAVE BEEN VIOLATED**

AND

**IN THE MATTER OF THE EXERCISE OF PROSECUTION POWERS UNDER ARTICLE
157(11) OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA(PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF VINDICATION RIGHTS OF GEORGE MUOKI NDETO IN CR. NO. 902
OF 2013 AT MAVOKO LAW COURTS**

AND

IN THE MATTER OF AN APPLICATION BETWEEN

GEORGE MUOKI NDETO.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE INSPECTOR GENERAL.....2ND RESPONDENT

THE DIRECTOR OF

CRIMINAL INVESTIGATIONS DEPARTMENT.....3RD RESPONDENT

THE PRINCIPAL MAGISTRATES COURT

AT MAVOKO.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

Introduction

The Petitioner is a citizen of Kenya residing in Mlolongo Township within Machakos County. The first Respondent is a Constitutional office with the mandate of prosecuting all criminal cases in the country. The second Respondent is a Constitutional office heading the National Police Service. The third Respondent is the head of the Criminal Investigations Department (CID). The fourth Respondent is the Principal Magistrate's Court in Mavoko, while the fifth Respondent is the national government's Principal legal adviser

The Petitioner was arrested on 11th August 2013 by an officer called IP Jacob Mureithi and incarcerated at Mlolongo police station. He was subsequently charged with the offence of conspiracy to defraud contrary to section 317 of the Penal Code along with 7 other counts of similar nature on 12th August 2013 in Criminal Case No. 902 of 2013 at Mavoko Law Courts. The Petitioner was granted a cash bail of Kshs. 1,000,000/= or a bond of Kshs. 2,000,000/= after a plea of not guilty. He was unable to raise the bail terms and has consequently been in custody since then.

The Petitioner's case

The Petitioner's case is found in his Petition dated 6th September 2013 and supporting affidavit he swore on the same date. He averred that the charges in Mavoko Law Court Criminal Case No. 902 of 2013 arose from Plot No. 6, Block 11 on L.R No. 1504/7 which he had sold to Joseph Muthemba. The Petitioner's claim is that the said criminal case at Mavoko court was an abuse of the court process and that he was a victim of abuse of police power over an adverse interest in L.R No. 1504/7.

The Petitioner explained that he formed a company with others called Konza Malo Properties, through which they sold properties on behalf of clients. He averred that his company was engaged by Beacon Ranch Limited to act as its property agents in disposing off sub-divisions excised from L.R 1504/7. It was during the period that the Petitioner purchased Plot No. 6, Block 11 on L.R No. 1504/7, which he later sold to Joseph Muthemba Kamau.

The Petitioner averred that subsequently thereafter he started receiving threats from IP Jacob Mureithi arising from claims that there was another group led by one Robert Chege Kamau claiming ownership of the said land. He also averred that the alleged complainant had indicated to his lawyer that they had never complained to the police about being defrauded. The Petitioner deponed that his lawyer had appeared twice before the Magistrate's court at Mavoko and intimated that the complainant wished to withdraw the charges, but that the magistrate refused to do so.

The Petitioner's case was also supported by one Nicholus Nzioka Ndambuki, who filed a supplementary affidavit sworn on 4th October 2013. The said deponent claimed ownership of the parcel L.R 1504/7, and stated that there were on-going civil cases as regard ownership of the said parcel of land. He further stated that the said parcel of land was owned by one Wanjiku Kahore and himself as directors of Beacon Ranch Company. The deponent contended that Beacon Ranch Ltd leased out the suit property to the late Margaret Wamaitha in 1970 for a period of 33 years, which period lapsed in the year 2003. Further, that it was out of the said lease that the estate of Margaret Wamaitha was laying claim on L.R 1504/7.

The Petitioner is thus praying for the following orders in the Petition:

1. A declaration that the Petitioner's rights to freedom of movement enshrined and contemplated in Article 29(a) of the Constitution were violated and/or infringed upon by the Respondents.
2. A declaration that the Petitioner's rights to fair administrative action as enshrined and contemplated in Article 47 of the Constitution were violated and/or infringed upon by the Respondents.
3. A declaration that the Petitioner's rights to fair trial as enshrined and contemplated under Article 50 of the Constitution were violated and/or infringed upon by the Respondents.
4. A declaration that the charging in court and/ or continuation of the proceedings in Mavoko Criminal Case No. 902 of 2013 is a threat to the Petitioner's right to fair trial under Article 50 of the Constitution and is an abuse of the court process aimed at prejudicing the rights of the Petitioner.
5. An order of prohibition restraining the Respondents whether by themselves, subordinates or otherwise from prosecuting the Petitioner in Mavoko Criminal Case No. 902 of 2013 and/or further harassing the Petitioner in respect of performance of his proprietary interest in L.R 1504/7.
6. An order directed at the Principal Magistrate's court in Mavoko quashing all the proceedings in Mavoko Criminal Case No. 902 of 2013.
7. A declaration that as a result of breach of the Petitioner's rights he has suffered loss and damages.
8. An order for compensation for the apparent breach or violation of Petitioner's rights.
9. Costs of the suit and interest thereof.

The reliefs sought are premised on grounds that, first, the Petitioner's rights as enshrined under Article 29(a) of the Constitution have been infringed upon by the police officers from Mlolongo Police station on account of bringing trumped up charges without probable and just cause, on non-existent complaints and misrepresentation of facts of commission of crime.

Second, the Petitioner avers that he had legitimate expectation that any police action would be dispensed with fairness, devoid of conflict of interest, based on good faith, guided by rules of evidence and criminal law principles, and in tandem with provisions of Article 244 of the Constitution. He alleged that the integrity of the investigations and prosecution were fundamentally flawed and instigated with the intention of harassing him and influencing him as regards dealings in L.R No. 1504/7. Thus, that the investigations fall short of Article 157 of the Constitution which mandates the 1st Respondent to carry out duties with due regard to public interest and administration of justice. The Petitioner also opined that the IP Jacob Mureithi was not impartial in carrying out the investigation, and was acting under instructions of a Robert Chege Mbugua and his siblings.

Third, the fact that the Magistrate's court at Mavoko denied the Petitioner the opportunity of having the case withdrawn by the complainant on account of there being no trial magistrate while the matter had never been heard, demonstrated unfair administrative action by the court.

The Respondents' case

The 1st Respondent case is set out in a replying affidavit sworn by IP Jacob Mureithi on 24th September 2013. The 2nd, 3rd, 4th and 5th Respondents filed Grounds of Opposition dated 23rd September 2013. IP Jacob Mureithi averred that he was a police officer attached to Mlolongo Criminal Investigations Department. He stated that on 3rd and 4th May 2013, he received a report at the police station in relation to a land transaction relating to LR No. 1504/7, IR No. 6458, which was made by Joseph Muthemba Kamau and Peter Muange Kimuyu. The said complainants had purchased land from the Petitioner, but upon taking possession found another person claiming to be the owner.

He swore that in the course of the investigations it was established that the parcel of land in question was registered in the name of Margaret Wamaitha Humphrey, and no interests were traced to the Petitioner. He added that from the investigations it was established that Beacon Ranch Ltd was not a beneficiary to any portion in L.R 1504/7; the alleged sale by the Petitioner to Joseph Muthemba of Plot No. 6 Block 11 on L.R 1504/7 was not supported by evidence; the registered owner of L.R 1504/7 one Margaret Wamaitha Humphrey is deceased and her son, one Robert Chege Mbugua, had filed for letters of administration vide Nairobi Succession Cause No. 1754/2010; and lastly, that the said Robert Chege had

no capacity to dispose any part of the deceased's estate until the grant is confirmed.

In addition, the deponent stated that the complaint made by Joseph Muthemba Kamau and Peter Muange Kimuyu had been investigated and had disclosed other offences relating to parcel No. L.R 1504/7. He further stated that after the documents were examined they connected the Petitioner with the offences he was charged with.

The 2nd, 3rd, 4th and 5th Respondents on their part opposed the petition on the following points of law:

- That under the Constitution the Director of Public Prosecution shall not be under the direction or control of any person or authority in order to commence any investigations or any criminal proceedings against any person.
- That under the Constitution, the Inspector General of National Police Service shall exercise independent command over the National Police Service and shall not be under the direction or control of any person or authority in order to investigate any particular offence or enforce the law against any particular person.
- That the Petitioner's petition contravened Articles 50(2)(a)(d)(k) and 160(1) of the Constitution.
- That under Article 24 of the Constitution, the fundamental rights and freedoms the Petitioner claimed to have been violated were not absolute.
- That the Petitioner's petition does not disclose how Articles 165(3)(b)(d) 2, 19,21,22,29(9), 47 and 50(1) of the Constitution are violated.
- That the petition was unmeritorious due to non-disclosure of constitutional violation in a precise and specific manner.
- That the petition was an abuse of court process and the same should be dismissed with costs.

The Issues and Determination

The Petition was canvassed by way of written submissions filed by the parties. The Petitioner's counsel, Maingi Musyimi & Associates, filed submissions dated 13th October 2015. The Respondents relied on submissions dated 23rd September 2013 filed by Adow Deiss Mohammed, a Litigation Counsel in the Attorney General's Office. I have read and carefully considered the pleadings and submissions made herein. There are two issues for determination, the first is whether the institution of criminal proceedings against the Petitioner is in breach of his constitutional rights under Article 29(a), 47 and 50 of the Constitution, and secondly if the Petitioner is entitled to the reliefs sought.

On the first issue, the Petitioner has relied on Articles 29(a), Article 47 and Article 50 of the Constitution to argue that his rights to freedom to movement, fair administrative action and fair trial have been infringed. On the infringement of his right to freedom of movement, the Petitioner argues that he was not arrested on a reported crime nor for a reasonable suspicion of having committed a criminal offence, and that his arrest was an abuse of power by the police and a disregard to the law governing the criminal justice system. Reference was made to the decisions in **Republic V Pattni (2005) eKLR** and **David Gitau Njau & 9 Other V Attorney General(2013) eKLR** in this regard.

The Respondents submitted that the Petitioner had failed to show how the provisions on his constitutional rights had been violated or threatened, and that the rights and fundamental freedoms sought by the Petitioner are not absolute and must be weighed against the rights and fundamental freedoms of other entities and persons. Therefore, that the Petitioner cannot be secured from lawful investigations, arrest and trial.

I have perused Article 29(a) of the Constitution, which provides that every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause. In the instant petition it is not disputed that the Petitioner has been deprived of his physical freedom, which is the threshold for the application of this right. However, for the right to be infringed it must be shown that the reason for his deprivation of freedom is unacceptable, and that the manner in which his freedom was deprived was procedurally unfair. The Petitioner alleges that he was arrested without reasonable cause.

The 1st Respondent has on the other hand stated that the Petitioner was arrested upon a complaint made by Joseph Muthemba Kamau and Peter Muange Kimuyu, which had been investigated and had disclosed offences relating to parcel No. L.R 1504/7 arising from the Petitioner's dealings with the said land. There was thus a reason given by the Respondents for the Petitioner's arrest. In addition the Petitioner has been charged in a court of law, and afforded bail and his trial is on-going. . It cannot therefore be argued both substantively and procedurally that the Petitioner has been deprived of his freedom arbitrarily.

In this regard, it is important to note that the deprivation of freedom particularly in the context of criminal proceedings only requires a just reason or cause for the said deprivation which is consonant with the legal requirements and due process. An examination of whether that reason has merit is the purview of the court charged with the duty of conducting the criminal proceedings which applies the required tests of criminal liability. Warsame J (as he then was) pronounced himself on this issue in the case of **Michael Monari & Another vs Commissioner of Police & 3 Others, Miscellaneous Application No.68 of 2011** as follows:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. "

This finding will also apply to the Petitioner's allegations that the complainants have since withdrawn their complaint. This is a matter that can only be dealt with in the criminal court and not in these proceedings.

The Petitioner has also urged that his right to fair administrative action has been infringed. It was submitted by the Petitioner in this respect that the Respondents' actions were based on collateral considerations, bad faith and ulterior motives, and that their actions had breached the law and the Constitution by denying the Petitioner fair administrative action. On this issue they referred to the decisions in **Joseph Mbalu Mutava V Attorney General & Another (2014) eKLR** and **Geothermal Development Co. Ltd V Attorney General & 3 Others, (2013) eKLR**

The Respondents on the other hand submitted that no person or authority can stop the Director of Public Prosecution from enforcing the law. In addition, they submitted that the court cannot stop the police in enforcing the law against any person or persons unless in exceptional circumstances. It was also argued that under Article 160(1) of the Constitution, the Judiciary was not subject to the control or direction of any person or authority.

The right to fair administrative action is provided for in Article 47 of the Constitution as follows;

- "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
- 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—**
- (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and**
- (b) promote efficient administration."**

The Court of Appeal in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** defined fair administrative action as follows:

“Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law.”

The issue then before the Court is whether the powers given to the Director of Public Prosecution were exercised lawfully and constitutionally in the prosecution of the Petitioner. Article 157(6) of the Constitution provides for the powers of the Director of Public Prosecution as follows:

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

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

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

(c) subject to 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 under paragraph (b).”

The above provisions must also be read with Article 157(10) of the Constitution which provides as follows;

“(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

In **Justus Mwenda Kathenge vs Director of Public Prosecutions and 2 Others, High Court Petition No 372 of 2013** the Court stated as follows as to when the exercise of the DPP’s powers may be deemed to be unlawful:

“[8] It is now trite law that Courts cannot interfere with the exercise of the above mandate [exercise of prosecutorial powers] unless it can be shown that under Article 157(11);

(i) he has acted without due regard to public interest,

(ii) he has acted against the interests of the administration of justice,

(iii) he has not taken account of the need to prevent and avoid abuse of Court process.

The Petitioner’s grievance with the decision of the Director of Public Prosecution to prosecute him is that the said prosecution was mounted with the ulterior motive of settling a civil dispute over ownership of the land that is the subject matter of the prosecution, and at the instigation of a third party. The Petitioner however did not dispute the existence of the said civil dispute, and gave a detailed account of the same as shown in the summary of their pleadings. The Petitioner in addition did not place any material before the Court to show how the alleged 3rd Party, one Robert Chege Kamau, had influenced the prosecution to act or that his claim to the subject land is fictitious. In addition, the Petitioner does not dispute that the complainants in the criminal case were the persons he allegedly land in dispute to, and not the said Robert Chege Kamau.

The law is in this respect clear that a civil matter arising from the same facts and circumstances that also point to the possible commission of a criminal offence, cannot of itself be an ulterior motive in the prosecution of the criminal offence. Section 193A of the Criminal Procedure Code provides as follows in this respect;

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

I am therefore not persuaded, on the facts before me and for the foregoing reasons, that there is an ulterior or improper motive in the Petitioner’s prosecution, or that the Director of Public Prosecution has abused his constitutional mandate under Article 157 of the Constitution.

The last right alleged to have been infringed by the Respondents is the Petitioner’s right to a fair hearing under Article 50 of the Constitution. The Petitioner cited various judicial authorities in support of his contention that the Respondents instituted trumped up charges against him. The Respondents’ submission on this point were that the Petitioner has not shown how his right to be presumed innocent until the contrary is proved has been violated. In that regard they referred to the case of **Ismail Mohamed Garat alias Korio & Others vs Senior Principal Magistrate Garissa& Others, Petition No. 1 of 2012.**

The Court of Appeal in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** held that the right to a fair hearing as employed in Article 50(1) of the Constitution is a term of art, which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. In addition, that by Article 25 that right cannot be limited by law or otherwise. Indeed the application of this right and its scope can only be in the context of a judicial or quasi- judicial hearing.

The allegations of the Petitioner in this petition as to the infringement of his right to a fair hearing are however made in the context of the actions and decision prior to his being charged in the criminal Court, and not in relation to the actual conduct of the criminal proceedings against him. It is thus my finding that it is inappropriate for the Petitioner to invoke Article 50 of the Constitution which is inapplicable in the said circumstances.

In conclusion, the Petitioner is not entitled to the reliefs he seeks there having been no finding by this Court of any infringement of his rights. His Petition is accordingly not merited and is hereby dismissed.

Each party shall bear its own costs of the petition

Orders accordingly.

Dated Signed and Delivered at Machakos this 3rd day of February 2016

P. NYAMWEYA

JUDGE