REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION. NO. 428 OF 2015

GODFREY MUTAHI NGUNYI.....PETITIONER/ APPLICANT

VERSUS

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

NATIONAL COHESION AND INTERGRATION COMMISSION…….……2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS….....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE…….…….....……4TH RESPONDENT

THE HON. ATTORNEY GENERAL…..…….....…….……5TH RESPONDENT

RULING

Introduction

1. Godfrey Mutahi Ngunyi ("the Applicant") describes himself as a political scientist and a public intellectual trained to describe, explain and predict political activity, processes and relations. He filed this Petition on 6th October 2015. The Petition, in the main seeks to stay the Applicant's intended prosecution. More particularly, the Applicant sought the following prayers:

1. ***THAT*** *the application herewith be certified as urgent and the same be admitted for inter parties* [sic] *hearing and service thereof be dispensed with in the first instance as the object of this application and of the suit will be defeated if the respondents are not prohibited from arresting/charging the Applicant based on recommendations of the 1st Respondent and the Press Statement of the 2nd Respondent dated 5th October 2015 and more specifically titled* "DPP''s Decisions On Investigations Files Submitted by the DCI and the NCIC on Incitement to Violence, Hate Speech and Ethnic Contempt"
2. ***THAT*** *a temporary injunction do issue restraining the Respondents, their agents, servants, employees and/or representatives from arresting and/or instituting criminal charges against the Applicant/Applicant based on recommendations of the 1st Respondent and the Press Statement of*

the 2nd Respondent dated 5th October 2015 and more specifically titled " DPP's Decisions On Investigations Files Submitted by the DCI and the NCIC on Incitement to Violence, Hate Speech and Ethnic Contempt*", pending the hearing and determination of this Application and Petition.*

3. ***THAT*** *a temporary injunction do issue prohibiting the 1st Respondent from commencing proceedings, prosecuting, summoning and/or causing the Applicant to be summoned and/or charged for the purpose of prosecution based on recommendations of the 1st Respondent and the Press Statement of the 2nd Respondent dated 5th October 2015 and more specifically titled "*DPP's Decisions On Investigations Files Submitted by the DCI and the NCIC on Incitement to Violence, Hate Speech and Ethnic Contempt*," pending the hearing and determination of this application and Petition.*
4. ***THAT*** *in the alternative, this Honorable Court be pleased to admit the Applicant to bail pending arrest and that the Respondents, their agents, servants, employees and/or representatives, be restrained from arresting, detaining for interrogation or in any other way interfering with the Applicant's freedom till further orders of the court.*
5. ***THAT*** *this Honorable Court be pleased to issue any further orders it deems fit and just to ensure that justice is maintained.*
6. ***THAT*** *the costs of this application be in the cause.*

2. The broad question at this stage of the proceedings , is whether the court can restrain the Respondents from commencing and or proceeding with the prosecution of the Applicant over an alleged criminal offence pending the determination of the Petition herein.

Background facts

3. I summarize the facts from (but not entirely) the affidavit of Applicant, sworn in support of the application.
4. The Applicant runs a twitter account. In the month of August 2015 he posted on his twitter account several tweets. He also replied to other tweets. His tweets got to his twitter followers and to other internet social media pages. His tweets were said to be laced with negative ethnic nuances and undertones. He denied and still denies they were. The tweets caught the eyes of several Kenyans. Some complained. Finally, the 2nd Respondent, a statutory commission charged with the duty, among other duties, of ensuring and encouraging national cohesion and integration, got involved.
5. The 2nd Respondent summoned the Applicant as it set to investigate the allegedly offending tweets. The summons was issued on 25th August 2015 and served on the same day. The Applicant obliged. He met officers of the 2nd Respondent. He also spoke to a Commissioner with the 2nd Respondent. He meticulously took note of every word that was relayed to him. He then asked to return a couple of days later.
6. The Applicant apparently never returned to the 2nd Respondent but wrote a letter instead. The Applicant also scripted a statement. It was detailed.
7. On 10th September 2015, the 2nd Respondent sent a riposte. The 2nd Respondent's chairman assured the Applicant that the investigations were still ongoing.
8. Then on 5th October 2015, the 1st Respondent issued a press statement. The 1st Respondent had made a decision that the Applicant be charged with the offence of ethnic contempt contrary to Section 62 (1) of the National Cohesion and Integration Commission (NCIC) Act. The charge related to the messages and tweets posted by the Applicant on his twitter account.
9. It is the 1st Respondents decision and press statement that prompted the Applicant to file the Petition and to seek interim conservatory orders.

The Applicant's Case

10. The Applicant's case is that the decision by the 1st Respondent to issue a press statement on the 1st Respondent's verdict to charge the Applicant prior to notifying the Applicant was not in accordance with the Constitution. That, indeed it interfered with the 1st Respondents powers vide

Article 157 of the Constitution. The Applicant contends that the 1st Respondents powers to prosecute must be exercised within the four corners of the Constitution, reasonably and with a view to promoting the policies and objects of the law as set out under Section 4 of the Office of the Director of Public Prosecutions Act, No. 2 of 2013.

11. The Applicant also asserts that the investigations into his alleged criminal activity or action were carried out in bad faith. The Applicant further contends that, in so far as the recommendations to charge him emanated from another person, there was a failure on the part of the 1st Respondent to exercise the 1st Respondent's independent discretion.
12. The Applicant avers that the decision to charge him was discriminatory and thus contrary to Article 27 of the Constitution. He states further that the decision was contrary to the principles of fair hearing and fair administrative actions as captured under Article 47, 48 and 50 of the Constitution. He says he was not and has not been accorded the right to defend himself and has also been tried in the public arena. The Applicant further states that the recommendations to charge him with a criminal offence were actuated by malice and politics.
13. Finally, the Applicant states that there is no prima facie evidence to support the charges brought against him and his prosecution will , besides prejudicing him, serve other motives other than that of enforcement of criminal law. To the Applicant, the criminal charges preferred against him amount to an abuse of the court process and the same ought to be stopped.

The Respondents' case

14. The 1st to 4th Respondents are of the view that there is an unwarranted misjoinder of parties, especially of the 3rd and 4th Respondents, to these proceedings.
15. The Respondents also contend that the 1st Respondent is simply executing a Constitutional mandate under Article 157 of the Constitution. The 1st Respondent contends that the powers to prosecute as vested in the 1st Respondent have not been interfered with or fettered by any of the other Respondents and further that the decision to press criminal charges against the Applicant was only arrived at after a review of the evidence revealed sufficient grounds to sustain the charges.
16. The Respondents' case which can be gathered from the Grounds of Opposition and the Replying Affidavit sworn by Robert Mabera and filed on 7th October 2015, winds up by stating that the Applicant has not shown that the press coverage had prejudiced his rights to a fair trial.

Submissions

17. The Applicant's submissions as made jointly by Ms. J. Shamalla and Mr. C. Maloba largely recount the facts as outlined above. Ms Shamalla adds that the instant criminal process lack any legitimacy. Mr. Maloba on the other hand states that the instant criminal process was novel and that not only was the Applicant being charged with a vague offence but the alleged offence had not been defined by the Court. He further puts in that the Petition actually seeks to have the parameters of the offence clearly defined by the Court.
18. Dr. Maingi, for the 1st through 4th Respondents submits that there is no evidence given to show bad faith on the part of any of the Respondents. He further states that once there is a basis for prosecution then the 1st Respondent should not be injuncted. For this proposition Dr Maingi relies on the case of **R v Attorney General & 4 Others Ex parte Kenneth Kariuki Githii Misc Appl. No151 of 2013 [2014]eKLR**. Dr Maingi adds that there is a basis in the instant case.
19. With regard to the press statement Dr Maingi states that it did not affect or impact on the decision to prosecute. Dr Maingi wraps up his submissions by stating that the offence under Section 62 of the National Cohesion and Integration act, No 12 of 2008 is not novel and has been previously considered and handled by this court . Mr. Ashimoshi, who appears with Dr Maingi, adds that the Applicant has not established any prima facie case for the abuse of or violation of his rights and freedoms. Further, according to Mr Ashimoshi, public interest dictates that the prosecution of the Applicant be allowed to proceed.
20. Ms. Mwangi appearing for the Attorney General, also opposes the application. She urges the court

to respect the powers of the 1st Respondent donated by the Constitution under Article 157 while also noting that that the Applicant will be appearing before a competent court of law where the Applicant will be best placed to relay his defence, if any.

The Law and the issues

21. I have considered the pleadings on record as well as the parties' respective submissions.
22. The Applicant commenced this Petition pursuant to Article 22 of the Constitution. The Applicant alleged a violation of his Constitutional rights and fundamental freedoms. A repertory of the Articles of the Constitution allegedly contravened has been given. As to the particulars, the Applicant stated that his impending arrest and prosecution interferes with and violates his right to freedom of expression. The Applicant also stated that the decision to prosecute him goes against the principles of fair hearing and fair administrative action under Articles 47, 48 and 50 of the Constitution. Finally, the Applicant also particularized Article 27 and stated that he is being subjected to selective and discriminative actions contrary to Article 27 of the Constitution.
23. Pursuant to Article 23 of the Constitution, the Applicant now seeks orders of a temporary reprieve, to ensure that the state of affairs *ante* 6th October 2015 is maintained. The state of affairs was that the 1st Respondent had only recommended that the Applicant be charged with an offence under the National Cohesion and Integration Commission Act.

The Issue

24. At the core for determination at this stage is the broad issue as to whether the court should grant the Applicant the interim orders sought and stay his intended prosecution pending the determination of the Petition.
25. Before proceeding further, I would like to address tow minor issues raised by the Respondents. First, is the contention by the 1st to 4th Respondents that in the Applicant seeking an injunction rather than a conservatory order, the application is fatally defective.
26. Article 23 (3) of the Constitution basically affords a party to proceedings brought pursuant to Article 22, asserting violation or threat of violation of any Constitutional right or fundamental freedom, the avenue of moving the court for any relief, including temporary reliefs. The said Article 23 reads as follows:

> " ***23 (1) …***
>
> ***23 (2) …***
>
> ***23 (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 or 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***." (emphasis)

27. I have emphasized the phrase " a court may grant appropriate relief, including" as I believe it to be the determinant guide on the first minor issue as to the prayers sought.

28. This phrase has, fortunately, been the subject of discussion by this court. I intend therefore to shorten the discussion on the same. The court in **Nancy Makokha Baraza v Judicial Service Commission & 9 Others [2012]eKLR** inter alia expressed itself, with regard to the phrase, as follow :

> " ***The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises***."

29. The court gave the phrase a robust and appropriate interpretation with which I entirely agree. The court stated that there may be need for a court to go outside the expressly prescribed reliefs, depending on the circumstances of each case. I also have no doubt that the court should always be in a position to fashion such new relief as will be necessary to protect and enforce the Constitution, even if it is a remedy or relief which is not itemized under Article 23 (3), so long as such relief too is within the confines of the Constitution : see also **Fose v Minister of Safety and Security (CCT 14/ 96) [1997] ZACC 6**.
30. It is evident that a party may seek and the court may grant an interim order in the form of a conservatory order. Properly so called conservatory orders are intended to help create and or maintain a given state of affairs. It may take the form of a stay order or an injunctive order. It may be negative or positive in form. At the time of grant the court is duty bound to state its effect and extent. I have seen no harm in the way the prayers have been couched by the Applicant. Any reasonable judicial mind would not be yanked to any semantics. It is clear that what the Applicant seeks is a conservatory order, albeit in the form of an interim injunction. If that be the 'new tool' to help secure and protect the rights and freedoms under the Constitution, then the court must oblige.
31. The Respondents also pointed out that the application as well as the Petition are bad in law for the alleged misjoinder of the 3rd and 4th Respondents. Though this point was not strongly pressed by the Respondents during oral arguments , I need only point out that the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,2013 is clear on this point. Rule 5 makes it clear that a Petition, and by extension an application, is not to be defeated by reason of any non-joinder or misjoinder of parties . The court is enjoined to determine every dispute.

Governing legal principles of Article 23

32. Back to the merits of the application, I would start by saying that the pathway to be followed by a court seized with an application under Article 23 (3) (c) is now relatively clear.
33. First, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. As was stated by Musinga J (as he then was) in the case of **Centre for Rights Education and Awareness and 7 Others –v- The Attorney General** [HCCP No. 16 of 2011]:

> ***"*[Arguments] *in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Applicant's application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has 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 the violation or threatened violation of the Constitution".***

34. In my view, it is not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case, in other words, ought to be beyond a speculative basis. In these respects, I would quickly make reference to M. Ibrahim J (as he then was) in the case of **Muslims for Human Rights (MUHURI) & Others –v- Attorney General & Others** CP No. 7 of 2011,who whilst agreeing with Musinga J's statement in **Centre for Rights Education and Awareness (CREAW) and 7 Others –v- The Attorney General (*supra*)**

stated as follows:-

> ***"I would agree with my brother that an applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a prima facie case with a <u>likelihood of success</u>"*** (emphasis)**.**

See also same pertinent observations made by Ngugi J and Muriithi J sitting separately in **Jimaldin Adan Ahmed & 10 Others -v- Ali Ibrahim Roba and 2 Others [2015] eKLR** and **Micro Small Enterprises Association of Kenya (Mombasa -v- Mombasa County Government [2014] eKLR** respectively**.**

35. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success, the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights: see **Patrick Musimba –v- The National Land Commission & 4 Others** HCCP 613 of 2014 (No. 1) [2015] eKLR and also **Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme [2011] eKLR.**
36. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice. In these respects the case of **Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others** CP No. 7 of 2014, is relevant, especially paragraphs [59] [60] and [61] thereof.
37. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of **Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR** is that the court must consider conservatory orders also in the face of the public interest dogma. So stated the Supreme Court:

> ***"Conservatory Orders" bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues on the "prospects of irreparable harm occurring during the pendency of a case; or "high probability of success" in the applicants case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest the Constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes".***

38. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless: see **Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others** HCCP No. 11 of 2012 as well as **Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.**

Determination and Analysis

39. Invoking the principles laid out in the various decisions above the question then is whether the Applicant herein has met the set criterion. Is there a prima facie case? Is the Petition likely to succeed? If no order is granted in the interim, will the Applicant be prejudiced and his petition rendered nugatory? Would public interest be served by the grant of the orders sought?
40. Specifically, during the oral arguments, I drew the Applicant's counsels' attention to these principles and asked that they apply the same to the Applicant's case.
41. The essence of the Applicants case is that his intended prosecution is premised on purportedly

disreputable investigations by the 2nd Respondent which went against the rules of natural justice. Secondly, the Applicant's stand is that the independence of the 1st Respondent's office under Article 157 (10) of the Constitution has been interfered with leading to the 1st Respondent not exercising his discretion legally and reasonably but completely contrary to the Constitution and the law. The Applicant also charges that the decision to prosecute him is selective and discriminatory, and in utter violation of Article 27 of the Constitution.

42. The response is three- fold. Foremost, the 1st Respondent states that there is no evidence that the 1st Respondent has been influenced in any way. Secondly, the Respondents state that the 1st Respondent's Constitutional mandate under Article 157 ought not be easily interfered with. Thirdly, the 1st Respondent argues that the decision to prosecute the Applicant was arrived at after a review of the evidence established sufficient grounds to sustain the charges.
43. I must first bear in mind that I ought not venture into a minute analysis of facts and evidence. I cannot make definitive findings now. That is the recluse of the trial court when the Petition is finally set down for hearing. The Applicant must however demonstrate how his rights and fundamental freedoms have been violated or threatened with violation.
44. Secondly, the Petition seeks to stay his prosecution for alleged criminal conducts. In these respects, I must also bear in mind what the court of Appeal stated in **Manilal Jamnadas Ranji Gohil –v- Director of Public Prosecution NBI CRIM. APPEAL (APPL) No. 57 of 2013**. The court stated as follows:

> "***we are mindful that an order staying criminal proceedings would be granted only in the most exceptional circumstances. See Goddy Mwakio & Anor –v- Republic [2011] eKLR where this court in illustration of this point, stated that:***
>
> ***"An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances"***

45. It can be clearly understood why the Court of Appeal made such pertinent observations. There is the public interest that a person accused of crime should be tried without hindrance. Then too, there is the public interest that any misconduct on the part of the executive (read the prosecutor) must not undermine public confidence in the criminal justice system and bring it into disrepute. The two public interests must be balanced carefully even though the burden is heavier on the accused person, in this case the Applicant, to show that he is deserving of a stay of the proceedings. In fewer words, the Applicant needs ultimately to establish exceptional circumstance which would entitle him to an order of stay of his prosecution.
46. I also hasten to add that in view of the infinite variety of cases in which the issue as to whether or not to stay prosecution of alleged offenders might arise, it is impossible to provide a rigid classification as to the circumstances when stay may issue. Each case must be considered independently and on the basis of its own facts. Of course there are obvious instances when stay ought to issue without much interrogation. Such instances include; entrapment cases, breach of assurances not to prosecute, cases of unlawful abduction and instances of purported prosecution on the basis of a nonexistent criminal offence: See for example **Stanley Githunguri -v- Republic [1986] eKLR, Kuria & 3 Others -v- Attorney General [2002]2 KLR 69** and the English cases of **R -v- Looseley [2001] 1 WLR 2060** as well as **Warren v Attorney General of Jersey[2011]3 WLR 464** .
47. With the foregoing in mind alongside the principles for grant of a conservatory order, the question is whether the Applicant has shown a prima facie case with a likelihood of success and whether the public interest dogma would tilt in the Applicant's favour and vindicate a stay of the criminal proceedings when the Petition is finally determined?

The media statement

48. First, in considering the Applicant's claim that he has been tried through the media, I must ask myself the question whether even in the absence of such media briefing or statement, the Applicant would still have been charged. The 1st Respondent says the Applicant would still have

been charged.

49. I would agree.

50. I have read the press release. It is clear that a decision had been made by the 1st Respondent even before the press release. It was not an impromptu off the cuff or roadside remark. An informed decision had been made. With or without the press statement, the Applicant would still have been charged. Would the press release interfere with the fair trial of the Applicant? This is a question for the court whilst determining the Petition proper. At the moment , and on the basis of the documents before me, I would answer the question in the negative. The press release did not venture in any way into the merits or demerits of the intended criminal prosecution. It simply expressed the decision to prefer charges and no more. I am unable to discern how the press statement, in the circumstances, could be read to mean that the Applicant had already been pre-judged and convicted. The Applicant has not demonstrated how the Press Statement could be one of the forces to influence the trial court.

Of selective prosecution

51. Secondly, the Applicant alleged selective and discriminatory prosecution. The Applicant has however not stated how discrimination comes forth. During oral submissions, I however understood counsel for the Applicant Mr. Conrad Maloba in his endeavour to demonstrate discrimination,to reason as follows. That the Applicant is not the first to make comments or express views, the likes of which he is now being indicted. Others have done so previously and are yet to be charged, including those who posted and re-posted or reacted to the Applicant's tweets. To the Applicant that amounted to discrimination under Article 27 of the Constitution.

52. I am not aware of any law that dictates that all participants in a twitter trail must be charged together. In the absence too of any specifics and particulars of those selectively not prosecuted, I am not satisfied that the Applicant has, on a prima facie basis, demonstrated any favoritism or discrimination.

53. Besides, the 1st Respondent only has the liberty to prefer charges against a party in respect of whom he finds sufficient evidence: see **James Ondicho Gesami v The Hon Attorney General & 2 Others HCCP No 376 of 2011.**

Freedom of expression

54. The Applicant also states that the provisions of Article 33 which guarantees all Kenyans the right to freedom of expression protects and shields him from the intended prosecution. Apart from the restatement in the Petition that the intended prosecution would run counter to and offend the provisions of Article 33, no mention of the alleged violation was made either in the course of arguments or in the Applicant's supporting affidavits. The Petition merely states that the Applicant's tweets are protected under Article 33 of the Constitution.

55. A cursory reading of Article 33 of the Constitution would reveal that the right to freedom of expression is not absolute and further that it does not extend to hate speech, propaganda for war , incitement to violence or advocacy of hatred which would constitute ethnic incitement. It is not enough therefore for the Applicant to merely contend that his tweets, which is one way of expressing oneself, are protected under Article 33 of the Constitution.

56. I would agree that the protection of the right to freedom of expression is of great significance to democracy: see **Charles Onyango Obbo v Attorney General of Uganda, Constitutional Petition No 2 of 2002**. I must however also take cognizance of the fact that there are limitations provided for both under the Constitution under Article 33(2) as well as under international conventions which form part of Kenya's law under Article 2 (6) of the Constitution: see for example **Article 19(3)** of **the International Convention on Civil and Political Rights.**

Deficient evidence and the investigation

57. The Applicant also contends , with a view to showing a prima facie case , that the 1st Respondent recommended his prosecution based on insufficient evidence. In the words of the Applicant: " there is no prima facie evidence to support the charges".

58. My view is that accuracy and sufficiency of evidence should not be the remit of this court especially at this stage of the proceedings. Prudence and caution dictate that any intended criminal proceedings are not prejudiced through a minute analysis of facts or evidence. Whether or not evidence shows criminal culpability is for the trial court to decide: see **Thuita Mwangi & 2 Others v EACC & 3 Others HCCP No 369 of 2013.** Suffice to therefore point out that the Applicant has not demonstrated to the court that on the face of the evidence relied upon by the Respondents, the evidence is so insufficient and irrelevant that no reasonable person would deem it sufficient to sustain a criminal charge.
59. Closely related to the preceding point, is the Applicants attack on the process of investigations. On this too the applicant submits that he will not or is likely not to benefit from a fair trial as enshrined in the Constitution. The Applicant along the same lines also argues that the 2nd Respondent, in the course of the investigations, did not accord the Applicant the required treatment in line with the rules of natural justice. I will be short on this issue.
60. It must firstly be pointed out that the 2nd Respondent is enjoined under statute to investigate either on its own accord or on request from any institution, office, or person any issue affecting ethnic and racial relations and make appropriate recommendations to any relevant authority: see **Section 25** of **the National Cohesion and Integration Act**. In investigating the Applicant , consequently, the 2nd Respondent was merely executing a statutory mandate.
61. In the course of the investigations, the Applicant was summoned to appear before the 2nd Respondent on 1st September 2015. The summons was issued on 25th August 2015. He apparently did attend but it is unclear whether he attended on 25th August or 1st September 2015. Portions of his affidavit evidence appear to state that he attended on the 25th August, yet too other portions of his affidavit evidence state that on 25th August 2015 the Applicant was out of the country. There is nonetheless no controversy that he honoured the summons. He then sought to sequester the session through a continuance for two or so days later. The 2nd Respondent's officers agreed and the session was rescheduled to 3rd September 2015. The applicant did not however return. He sent a written statement instead.
62. The 2nd Respondent, from the Applicant's own evidence, afforded the Applicant an opportunity to state his side of the story. He could have asked questions then. He could have been asked questions too. He apparently opted not to .
63. On the face of the documents and affidavit evidence before me, I am not satisfied that, in the circumstances of this case, the rules of natural justice were abused.

Conclusion

64. The totality of the foregoing would reveal that the Applicant has not met the threshold. He has not demonstrated on a prima facie basis exceptional circumstances to warrant an immediate interference with the 1st Respondent's powers under Article 157 of the Constitution. As was stated by the House of Lord in **Director of Public Prosecutions v Humphreys [1976] 2 All E R 497**

> ***"A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval …<u>If there is a power…to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances.</u>"*** **(emphasis)**

65. No prima facie evidence, pointing to exceptional circumstances, has been laid before me to warrant a stay of the intended criminal prosecution. The Applicant says he will be embarrassed in the public eye and hence prejudiced beyond repair. However, the need to balance the public interest in ensuring that those accused of crimes are tried with the public interest that private interests be protected would dictate otherwise. In the absence of exceptional circumstances and in the absence of prima facie revelations that there has been manipulation or abuse and misuse of the

criminal justice process to threaten the private citizen's right to a fair trial, I ought not interfere with the criminal justice process now.

Disposal

66. In this case, I do not view it that it would offend the court's sense of justice and propriety to ask that the Applicant proceeds on to the criminal trial court even as the Petition still awaits determination . I decline to grant the orders sought and intended to stay the prosecution of the Applicant as prayed in the application dated 6th October 2015.
67. The application is dismissed.

Costs

68. The costs shall await the outcome of the Petition.

Dated at Nairobi this 12th of October 2015 and duly signed and delivered in open court.

J.L.ONGUTO

JUDGE