



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 34 OF 2011

IN THE MATTER OF ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 36(1), 40(1), 50(1),(2), (b) OF THE CONSTITUTION OF KENYA

BETWEEN

MUCHIRI KIUNA MAINA.....PETITIONER

VERSUS

ATTORNEY-GENERAL.....RESPONDENT

RULING

1. In a Petition dated and filed on 26th October 2011, Muchiri Kiuna Maina (*the Petitioner*) named and sought the following orders against the Attorney-General as (*Respondent*) -

- (a) *The Petitioners fundamental rights and freedom more so as set out in Article 36(1), 40(1), 50(1)(2)(b) of the Constitution of Kenya were violated.*
- (b) *The Petitioner is the one and only accredited Secretary/Director of the dissolved Kieni East Farmers Company Limited.*
- (c) *The Company seal, the two members registers the three files, Memorandum and Articles of Association taken from the Petitioner by the officers from DCIO Laikipia West and OCS Kinamba Police Station on Saturday 13/8/2011 be immediately surrendered back to the Petitioner to await official surrender to the relevant authority.*
- (d) *The Petitioner be granted general damages.*
- (e) *The costs of this Petition be awarded to the Petitioner.*
- (f) *Such other orders as this Honourable Court shall deem just.*

2. The Petition was supported by the Affidavit of the Petitioner sworn on 26th October 2011,

and the grounds on the face of the Petition. Simultaneously with the Petition, the Petitioner also filed a Notice of Motion of the same date and in which the Petitioner sought and was granted a conservatory order on the same day to the effect that

1. ***The DCIO, Laikipia West District and the OCS Kinamba Police Station who are said to have collected, Kieni East Farmers Company Seal, two members registers, three files, Memorandum and Articles of Association taken from the Petitioner/Applicant to keep the same in safe custody pending the hearing of the application inter partes.***

3. That order was extended from time to time and was by order made on 7th February 2014 ordered to remain in force pending the determination of the Petition. On the same date, the Court also ordered that the Petition be determined by way of written submissions. Accordingly the Petitioner's submissions dated 19th March 2014 and were filed on the same day. The Respondents submissions dated 16th July 2014 were filed on 18th July 2014.

THE PETITIONER'S CASE

4. The Petitioner's case is based upon the grounds, on the face of the Petition, the aforesaid Supporting Affidavit of the Petitioner, the Petitioner's Further Affidavit sworn on 10th October 2012 and filed on 11th October 2012 and the Petitioner's Counsel's submissions dated and filed on 26th November 2012 (*in relation to the application for the conservatory orders*) and the submissions of 19th March 2014 (*supra*).

5. I have considered both the Petitioner's Counsel's submissions as well as the Respondent's submissions, and in my view the Petition raises the following issues for determination -

1. *Whether the Petitioner's rights and freedoms were violated,*
2. *Whether the arrest and confiscation of the company items in the possession of the Petitioner was constitutional and therefore legal,*
3. *Whether the Petitioner is entitled to the orders being sought.*

6. I will consider these issues in turn, taking into account the respective arguments by the Petitioner and the Respondent.

OF WHETHER THE PETITIONER'S RIGHTS AND FREEDOMS WERE VIOLATED

7. I will commence with the jurisdictional aspect. Article 23(1) and 165(3)(b) of the Constitution of Kenya 2010, is similar to Section 84 of the repealed Constitution. It gives the High Court, a special 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. Article 23(3) thereof sets out the remedies which the court may grant.

8. To establish whether a right or fundamental freedom has been violated, infringed or threatened to be violated, or infringed, I think the court needs to establish that the threshold for granting such orders, has been established by the Petitioner. The Petitioner contended that his rights to personal freedom and to property, that is to say the custody of the records of Kieni Farmers Company Ltd, had been violated.

9. In the decision, much maligned by academics, of **ANARITA KARIMI NJERU VS. REPUBLIC (NO. 1), [1979] 154**, the court said -

“a person seeking redress from the High Court on a matter which involves a reference to the Constitution, should set out with a reasonable degree of certainty that of which he complains the provisions of the Constitution said to be infringed and the manner in which they are alleged to be infringed.”

10. In **PETER O. NGOGE VS FRANCIS OLE KAPARO & 4 OTHERS** (*Nairobi HC. Misc.*

Application No. 22 of 2004) the court observed -

“...Any such inclination to demand an inquiry every time there is a bare allegation of constitutional violation would clog the court with unmeritorious constitutional references which would in turn trivialise the Constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where facts pleaded ... do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry.”

11. The Petitioner alleges that his rights as envisaged in Article 36(1), 40(1) and 50(1)(2)(b) were violated by the Respondent.

Article 36(1) of the Constitution provides -

“36(1). Every person has the right to freedom of association with others, and Article 40(1) provides – Every person has a right to acquire and own property -

(a) of any description, and

(b) in any part of Kenya.

The Replying Affidavit of Inspector Benard Kwarat sworn on 18th September 2012, is quite clear that a report, in fact, a complaint was made to the Rift Valley Provincial C.I.D. Headquarters concerning **“massive corruption and illegal sale of parcels of public land by Directors of Kieni East Farmers Company Ltd – with complainants – Maina Kangecha, James Ngatia and Ngima Wahome, by the Petitioner in conjunction with other individuals. In light of the specific allegations the Criminal Investigations Department (or Directorate) Kinamba Police Station had a duty to carry out investigations. In the course of those investigations the personnel of CID confiscated -**

(1) a company seal of Kieni East Farmers Co. Ltd.,

2. Two Registers of Members (including a copy) of the Kieni Farmers Co. Ltd (Kiriko and Murugo),

(3) Memorandum and Articles of Association,

(4) Three company files.

13. The taking/collection of those files were witnessed by the Petitioner and three other persons as enumerated in Annex. MKM “3” to the Petitioner's Supporting Affidavit.

14. The taking away of those files was merely to help the C.I.D. in their investigations as to whether **firstly** the lands alleged to have been reserved for public utilities to be established, had been illegally sold to unsuspecting purchasers, or **secondly** to persons who were not members of Kieni East Farmers Co. Ltd, and were not entitled to parcels of land in either Kiriko Farm or Morogo Farm. In light of those very specific allegations, the CID were duty bound to carry out those investigations. There is no illegality in that, for that is what the Police were mandated to do under Section 20 of the Police Act (*Cap. 84, Laws of Kenya – now repealed*), and now Section 24 of the Police Service Act 2011 (*No. 11A of 2011*).

Thirdly the taking away of those materials of the company did not in law or in fact deprive the Petitioner of his right of association as guaranteed under the Article 36(1) of the Constitution. It merely prevented the Petitioner and his Board from carrying the sale of land reserved for public utilities, and pave way for further investigations. The contention of the Petitioner to the contrary must fail.

15. Article 40(1) of the Constitution guarantees ownership of property of any description, and in part of

Kenya. The Company materials did not belong to the Petitioner. He was merely a custodian. The owner, Kieni East Farmers Company Ltd, is a separate legal entity from the Petitioner. No property of the Petitioner was taken nor was the Petitioner prevented from owning a share in the company. The Petitioner once again had no basis for the claim under Article 40(1) of the Constitution.

16. The Petitioner also relied upon Article 50(1) of the Constitution of Kenya, 2010. Article 50 says -

“50. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

2. Every accused person has the right to a fair trial, which includes the right -

(a) to be presumed innocent until the contrary is proved,

(b) to be informed of the charge, with sufficient detail to answer it.

17. From both the Petitioner's own Affidavit and Further Affidavit, the Petitioner acknowledges that he was arrested on a Friday afternoon in Nyeri Town and was taken to his residence in Naromoru on Saturday, 13th August 2012, where the company materials referred to above were collected for further investigations, and after recording the Petitioner's Statement, he was released from custody on Sunday, 14th August 2012 on free bond. The allegation that the CID demanded Kshs 100,000/= and Kshs 3,000,000/= by way of bribery to release him has no basis. The Petitioner does not name or give particulars of the Officer or Officers who demanded that bribe from him and neither did he then or upon his release report to either the Provincial CID Officers, or other Police Station of any such attempt to extort money from him. His allegations are baseless.

18. As to whether the Petitioner is or was innocent of the allegations, this could only be proved upon completion of investigations and even upon completion of such investigations, the Petitioner is indeed deemed innocent until the contrary is proved in a court of law. The Petitioner cannot at this stage allege that he has been denied a fair trial when he has not even been arraigned in court. In the circumstances the Petitioner's claim on this count must fail.

THERE BEING NO OF THE COMPLAINANT

19. The Petitioner claimed that there was no complainant. As already stated in paragraph 12, there is annexed as Exhibit BK”1” a letter dated 17th May 2011 addressed to Divisional CID Officer Laikipia West Division, clearly stating the complainants, including their cell-phone numbers, and another letter “BK2” dated 15th May 2010, from Kiriko Farm Land Owners Committee Kieni East Farmers Co. Ltd, again setting out the particulars of parcels of land sold illegally in Kiriko Farm and Morogo Farm. The allegation that there was no complainant is, to say the least, strange.

OF DIRECTORSHIP OF KIENI FARMERS CO. LTD

20. According to a letter dated 11th July 2011, addressed to the Directors Kieni Farmers Co. Ltd P. O. Box 712, Nyeri, by the Senior Deputy Registrar-General, the Petitioner was not according to the last Annual Return filed on 8th February 2000 a Director of Kieni East Farmers Co. Ltd. Though the Petitioner claims in his Further Affidavit sworn on 10th October 2012, that he was a Secretary to the Company at a meeting held on 11th May 2002, he does not say, and does not enclose any minutes of the meeting at which he was appointed Secretary. There is consequently no satisfactory explanation as to how he lawfully came into possession of the Company's Seal, Members Register and other material found in his possession.

OF THE COMPANY AS A DISTINCT LEGAL ENTITY

21. It is trite company law that upon registration of a company limited by shares, the the company is

invested with a corporate body distinct from its sponsors. The company has neither eyes to see, nor ears to hear nor hands to hold nor legs to walk. Most functions are performed by the human agents or sponsors of the company. So in civil, as well as criminal matters, the legal entity, sees, hears, signs and moves by the agency of its agents, the Directors, Secretary, Managers etc. who run the affairs of the company. They are the people who are entrusted with the company's property including land, finances, or equipment. If the Petitioner was not a director or an officer of the company, he had no business to hold on to the company's property, unless for ulterior motives.

22. On the other hand if he was, and may have been according to Return made on 14th March 2001 attached as Annex MKM II to the Further Affidavit of the Petitioner, he and others had no right to sell parcels of land which had been set aside for public utilities. That may well have been a fraud on the company, and other shareholders who sacrificed their interests in the affected plots for the public purpose, as well as abuse of office.

OF WHETHER THE ARREST OF THE PETITIONER WAS LEGAL AND WITHIN THE CONSTITUTION

23. Again it behoves the court to remind itself of the mandate of the Police, under Section 24 of the National Police Service Act. The functions of the Police Service shall be -

- (a) *provision of assistance to the public when in need,*
 - (b) *maintenance of law and order,*
 - (c) *protection of life and property,*
 - (d) *investigation of crime,*
 - (e) *collection of criminal intelligence,*
 - (f) *prevention and detection of crime,*
 - (g) *apprehension of offenders,*
 - (h) *enforcement of all laws and regulations with which it is charged, and*
- I. *performance of any other duties that may be prescribed by the Inspector-General under this Act, or any other written law from time to time.*

24. Having regard to the written complaints by no doubt former members of Kieni East Farmers Co. Ltd that the Petitioner had engaged himself in unlawful or irregular allocation and sale of company land which had been set aside for public utilities, including schools, recreation, and worship it was within the power and mandate of the Police under Section 24 aforesaid to act as they did, particularly after the Petitioner had failed to honour summons to report to the nearest Police Station for interview and record his statement on the complaints. The Police had reasonable and probable cause to move and arrest the Petitioner, and interrogate him on the complaints.

25. Once a complaint is made, the power to investigate crystallises immediately and may lead to an arrest of a suspect if after such investigation, cause to do so is established. The Petitioner has no cause for complaint. He has himself to blame for being uncooperative in a simple and straightforward complaint which he could have answered on first instance. The Police investigations cannot therefore be a basis for a Petition for alleged violation of rights or fundamental freedoms. In the case of **ISMAEL MOHAMED GARAT alias KORIOS & 5 OTHERS VS. SENIOR PRINCIPAL MAGISTRATE GARISSA & ANOTHER [2012] eKLR** Mutuku J. said -

“I wish to state that when Police arrest a suspect on suspicion of criminal involvement it is lawful to allow the legal process to continue, to its conclusion. If those proceedings are informed by malice, then upon proof of the same, there are remedies available under the law. As the matter stands before the court, there has been no demonstration that the rights of the Petitioner have been violated. The prayers sought by the Petitioner cannot issue. This would be tantamount to denying the Respondent and the Interested Party the chance to have their case prosecuted to the final conclusion. If this court were to grant the prayers sought by the Petitioners, it would be setting a bad precedent and would open the flood gates to other like minded people to rush to court to block intended prosecutions on grounds that do not stand the legal test.”

And in conclusion, the court said -

“The Respondent's actions are within the law and are being exercised within their lawful mandate. I also find and hold that the Petitioners have failed to establish and specify which rights have been violated.”

26. I entirely adopt and restate the above opinion in this case.

OF WHETHER THE PETITIONER IS ENTITLED TO THE PRAYERS SOUGHT

27. In this regard I will adopt the words of the Privy Council in the Caribbean case of **HARRISON VS. ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO [1980] AC 265** at 268 -

“...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious, or an abuse of the process of the court ...”.

28. Having considered the Petitioner's allegations under the above sub-headings, I am of the considered view that the allegations made by the Petitioner's are presumptuous, baseless and devoid of merit. It is only after investigations are carried out that the Petitioner can be arraigned in court and tried, and would at that point have an opportunity to defend himself. The Petition herein is frivolous, vexatious and is an abuse of the process of the court.

29. For all those reasons the Petition herein is dismissed with a direction that each party bears its costs.

30. It is so ordered.

Dated, signed and delivered at Nakuru this 14th day of November, 2014

M. J. ANYARA EMUKULE

JUDGE