



REPUBLIC OF KENYA



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Omari v Inspector General of the National Police Service & 7 others; Guto (Interested Party) (Petition E004 of 2024) [2025] KEHC 659 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 659 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PETITION E004 OF 2024**

**WA OKWANY, J
JANUARY 30, 2025**

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS PURSUANT TO ARTICLE 10, 19, 20, 21, 22, 23, 28, 29, 47, 49, 50 AND 258 OF THE CONSTITUTION OF KENYA 2010.

-AND-

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

BETWEEN

NICK ABOKO OMARI PETITIONER

AND

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

GEORGE MACRIDIS GUTO 5TH RESPONDENT

THOMAS MOMANYI GUTO 6TH RESPONDENT

ALICE MOKEIRA 7TH RESPONDENT

MARY NYASUGUTA 8TH RESPONDENT

AND

MOSES NYABOGA GUTO INTERESTED PARTY



JUDGMENT

Introduction/Parties

1. The Petitioner herein is a male adult, an Advocate of the High Court of Kenya and Senior Partner in the firm of Muthoga & Omari Advocates.
2. The 1st Respondent is the Inspector General of the National Police Service, a public office established under Article 243 of *the Constitution*. The 1st Respondent exercises independent command over the National Police Service.
3. The 2nd Respondent is the Director of Criminal Investigations of the Republic of Kenya; a public office is established pursuant to Article 243 of *the Constitution* charged with the responsibility of investigating criminal activities in the Republic of Kenya.
4. The 3rd Respondent is the Director of Public Prosecutions, a public office established under Article 157 of *the Constitution* responsible for all criminal prosecutions in the Republic of Kenya.
5. The 4th Respondent is the Attorney General of the Republic of Kenya, a public office established under Article 156 of *the Constitution* of Kenya charged with the Responsibility of representing the national government in all civil and criminal proceedings and is the principal legal adviser to the government.
6. The 5th, 6th, 7th and 8th Respondents are adults of sound mind residing and working for gain in various counties within Kenya.
7. The Interested Party is an adult male of sound mind residing in Nyamira County.

The Petitioner's Case

8. A summary of the Petitioner's case was that he is a grandson to the late Jackson Guto and is currently pursuing his rights as a beneficiary of his grandfather's Estate as the administrator of the estate of his late father one Robert Nyabuga Omari Guto's. The Petitioner's claim is that his paternal uncles and aunts, the 5th to 8th Respondents herein, attempted to disinherit him through threats and intimidation advanced by the 1st and 2nd Respondents.
9. The Petitioner's case is that no sooner had he obtained injunctive reliefs to preserve his grandfather's Estate from interference by the 5th to 8th Respondents than the said Respondents lodged complaints before the SCCIO, Borabu Division, alleging that the Death Certificate used in the succession proceedings was irregular. He states that the filing of the complaint was a move aimed at forcing him to back down from the Succession cause that is currently pending before the Court.
10. The Petitioner averred that the 1st and 2nd Respondents acted at the behest of the 5th to 8th Respondents by threatening to arrest him and employed the criminal justice system to launch a collateral attack against him in the Succession cause, despite giving the SCCIO at Borabu the full context of the family dispute for his objective decision.
11. It was also the Petitioner's case that on 25th June 2023, the agents of the 1st and 2nd Respondents disrupted church proceedings at the Lavington SDA church in an attempt to arrest him. He states that the timing of the intended arrest was maliciously calculated to embarrass him, taint his image at his church and society and subject him to a prolonged incarceration over the weekend in order to punish him over baseless complaints. He further averred that the agents of the 1st and 2nd Respondents



subjected him to unnecessary stress, anxiety and psychological trauma and that his right to liberty and his professional calling as an officer of the court were in jeopardy.

Reliefs Sought

12. The Petitioner's claim was that his intended arrest and prosecution by the 1st to 3rd Respondents, based on the complaint by the 5th to 8th Respondents, was wrongful, unlawful, illegal and amounted to a brazen violation of his constitutional rights. As a result of the said violations, the Petitioner seeks the following orders: -
 - i. A declaration that the intended arrest, charge and/or prosecution of the Petitioner was unreasonable and without probable cause, unlawful and a violation of the Petitioner's constitutional rights guaranteed by *the Constitution* of Kenya.
 - ii. A permanent injunction be and is hereby issued restraining the Respondents either acting by themselves or their agent, employees, servants, assigns or any other person whomsoever from arresting, detaining, charging and/or prosecuting the Petitioner with relation to his participation as a beneficiary in Nyamira High Court Succession Cause No. E007of 2021.
 - iii. Costs of the Petition.
 - iv. Any other appropriate relief in the circumstances that this Honourable Court may deem fit and just to award.

The Responses

13. The 1st, 2nd, and 3rd Respondents filed a Replying Affidavit sworn by No. 88936 P.C. Robert Mutua in opposition to the Petition. The said deponent avers that the police received a report from one David Kerara who claimed that there was a forged death certificate in respect to the deceased Jackson Guto which report prompted them to commence investigations. He avers that they received a response from Bureti Sub-County Civil Registrar that the genuine death certificate issued by the registry had Serial No. 0555420 with entry No. 0611800642 and not Serial No. 0751132 which the Petitioner annexed in filing the succession cause. It was the Respondent's case that this information led them to forward the matter to the 3rd Respondent with a recommendation for the intended prosecution, which the 3rd Respondent concurred with.
14. The deponent further avers that the Petitioner declined to report to the DCI Borabu for processing and to attend court where he was to be charged with the offence and that it is not true that the matter had not been fully investigated as alleged or that the criminal proceedings were being used to settle personal scores.
15. He avers that after several correspondences, they opted to physically look for the Petitioner in Nairobi and that on 24th June 2023 they proceeded to Nairobi, obtained police reinforcement from the DCI Kabete and proceeded to Lavington SDA Church where the Petitioner was attending a worship service but were unable to make an arrest following resistance from the church members. They left the church after an undertaking, by some of the leaders in the church, that the Petitioner would be availed at the DCI Office in Borabu on 26th June 2023, which promise the Petitioner did not honour.
16. The Respondents' deponent denied the allegation that they acted out of malice and stated that they only carried out their duties under *the Constitution*, the *National Police Service Act* and the Director of Public Prosecution Act 2013. He added that the Petitioner is not above the law and that as an Advocate of the High Court he ought to have complied with the summons and correspondences between him and the 2nd Respondent.



17. The 4th Respondent did not file any response to the Petition herein.
18. The 5th Respondent, George Macridis Guto swore an Affidavit on his behalf and on behalf of the 6th, 7th and 8th Respondents. He averred that there are ongoing succession proceedings in Nyamira Succession Cause No. 7 of 2021 over the Estate of his late father and that the Petitioner and the interested party forged their father's death certificate and used it to file the said succession cause, which prompted the DCI (2nd Respondent) to commence investigations into the matter thereby culminating into the current criminal trial.
19. He states that the mere fact that the Petitioner is a partner in a law firm does not preclude him from a criminal trial where there is overwhelming evidence of forgery. He further avers that the proceedings commenced by the investigative agencies were well within their mandate and that the Petitioner's claims are unfounded and aimed at misleading the court. He also avers that the mere fact that the Petitioner has a good defence in the criminal trial is not a barrier to the said criminal proceedings and cannot prevent the 1st to 3rd Respondents from discharging their duties.
20. The Petition was canvassed by written submissions.

The Petitioner's Submissions

21. The Petitioner submitted that his right to dignity under Article 28 of *the Constitution* was infringed when agents of the 1st and 2nd Respondent attempted to arrest him in a dramatic and malicious manner during a worship service in his local church yet he is a law abiding citizen. He argued that his right to freedom and security from arbitrary arrest was violated when they attempted to arrest him in an unwarranted and disproportionate manner since the alleged charge was one of forgery and did not warrant three police vehicles with fully armed police officers to bring him into custody. It was submitted that the Respondents also violated their mandate under Section 35 of the National Police Service Orders by abusing the resources in the criminal justice system and public resources to act at the behest of the 5th to 8th Respondents in a bid to make him withdraw from the succession cause. Reference was made to the case of Rosemary Wanja Mwangi & 2 Others vs. Attorney General & 3 Others (2013) eKLR where the court recognized that parties have always attempted to frustrate civil proceedings by filing criminal complaints to get state officers to play in their corner.
22. The Petitioner urged the Court to grant the reliefs sought so as to secure the Petitioner's Constitutional rights to liberty, safety, security, fair trial and fair administrative action. Reliance was placed on the case of Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others (2015) eKLR where the principles for granting conservatory orders were outlined. It was submitted that if the said orders are not granted, the 1st to 3rd Respondents are likely to effect the arrest and conduct subsequent prosecution yet they are aware that the Petitioner did not obtain the said forged certificate on his own but had the same handed over to him by the Interested Party. The Petitioner cited the cases of Godfrey Mutahi Ngunyi vs. DPP & 4 Others (2015) eKLR and Keroche Industries Ltd vs. KRA & 5 Others (2007) eKLR as referenced in the case of Mohamed Feisal & 19 Others vs. Henry Kandie, Chief Inspector of Police, OCS Ongata Rongai Police Station and 7 Others, National Police Service Commission and Anor. (2018) eKLR where the courts held that the wider public interest must be considered in ensuring that the state offices vested with responsibility served the people rather than ruled over them.
23. Mr. Chirchir, Learned Prosecution Counsel, informed the Court that the 1st, 2nd and 3rd Respondents would rely on their Replying Affidavit.



24. The 5th, 6th, 7th and 8th Respondent submitted that the 1st, 2nd and 3rd Respondents were mandated by law to investigate, charge and prosecute cases. They cited the case of Republic vs. Chief Magistrate Milimani & Another, Ex-parte Tusker Mattresses Limited & 3 Others (2013) eKLR where it was held that the High Court ought not to interfere with the investigative process conferred upon the police or the DPP unless there are cogent reasons for doing so. They further relied on Section 24 of the National Police Service Act which outlines the functions of the police, Section 35 which outlines the functions of the 2nd Respondent and Article 157 of the Constitution and Section 5 of the ODPP Act 2013, which provides for the functions of the 3rd Respondent.
25. It was submitted that the Court lacks the jurisdiction to entertain the matter because of the doctrine of Separation of Powers which bars it from interfering with the 1st, 2nd and 3rd Respondents' mandate under the law. It was also submitted that the Petitioner had the burden to prove the manner in which his rights were violated or threatened by the ultra-vires actions of the Respondents but failed to do so. Reliance was placed on the principles espoused by the Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Ltd & 5 Others (2014) eKLR, where it was held that the Police could not be faulted for seeking to arrest a person who refused to heed to police summons and that the completeness and propriety of any prosecution was anchored on the presence of a complainant and an offence in accordance with Section 2 of the Criminal Procedure Code. Counsel urged the Court to dismiss the Petition while stating that the circumstances under which the Petitioner came upon the forged document was a matter that could only be addressed by a criminal court.
26. When the matter came before me on 29th May 2024, Counsel for the Petitioner informed this Court that the Petitioner had already availed himself before Nyamira Police Station to record a statement. Learned Prosecution Counsel, Mr. Chirchir, confirmed the said position and stated that the Petition is spent and should therefore be marked as closed.
27. Mrs. Murithi, Learned Counsel for the Petitioner, on the other hand, stated that the matter was still relevant because there had been intimidation and threats of impending arrest of the Petitioner which resulted in a violation of his rights. In response, the Prosecution Counsel stated that prosecution was the sole mandate of the Office of Director of Public Prosecutions who could not be gagged by anyone.

Analysis and Determination

28. I have considered the pleadings filed herein, the law and the parties' rival submissions. I find that the main issue for my determination is whether the Petition is merited.
29. I note that the present case emanates from a Succession cause in Nyamira involving the Estate of the Petitioner's grandfather who was also the father of the 5th to 8th Respondents. It was not disputed that the said succession proceedings were initiated by the Petitioner, and that it is alleged that the death certificate used in the said succession proceedings was forged. The Petitioner however contended that he was not involved in the said forgery of the Death Certificate and that the actions of the agents of the 1st and 2nd Respondents to arrest and prosecute him caused him unnecessary anxiety and violated his rights under Articles 27 of the Constitution which ensures equality and freedom from discrimination, Article 28 which promotes human dignity, Article 29 which guarantees freedom and security of a person so that they are not arbitrarily deprived of their freedom and Article 47 (1) that ensures fair administrative action that is lawful, reasonable and procedurally fair.
30. The Petitioner also contended that the 1st, 2nd and 3rd Respondents were brought into the case to settle personal scores arising out of a family dispute owing to the impending succession cause. It was his case that the dramatic attempted arrest by heavily armed police officers at his place of worship was an act that reeked of malice and was intended to bring his reputation into disrepute yet he was a right standing



member of society, a law abiding citizen and an Advocate of the High Court. He claimed that his rights were violated and that the Court had the power to grant him the reliefs he sought in this regard.

31. Taking the totality of the above facts into consideration, I am minded to outline the functions and duties of the 1st to 3rd Respondents as anchored on *the Constitution* and fortified by the relevant statutes which guarantee the independence of these state offices in discharging their duties. It is imperative to note that any actions considered for redress by officers in these institutions as is the prayer of the Petitioner herein be considered alongside their legal obligations as encapsulated in *the constitution* and statute.
32. Part 4 of *the Constitution* establishes the National Police Service and in particular, Article 244 provides for the functions of the National Police Service while Article 245 provides, in part, that: -
 - (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
 - (a) the investigation of any particular offence or offences;
 - (b) the enforcement of the law against any particular person or persons; or
 - (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service
33. Article 244 (c) of *the Constitution* requires the National Police Service to adhere to constitutional principles and uphold human rights and fundamental freedoms. In this regard, the office of the Directorate of Criminal Investigations is established under Section 28 of the *National Police Service Act*, No. 11 of 2011 which provides as follows:-
 28. There is established the Directorate of Criminal Investigations which shall be under the direction, command, and control of the Inspector-General.
34. The DCI is mandated under Section 36 of the *National Police Service Act* inter alia to undertake investigations on serious crimes, maintain law and order; detect and prevent crime; apprehend offenders; execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157(4) of *the Constitution*.
35. From the above provisions, it is not in doubt that one of the core mandates of the 1st and 2nd Respondents is to investigate crime. The said provisions posit that, when a criminal complaint is lodged, it is the solemn duty of the Police to conduct proper investigations and establish the truth so as to facilitate the prosecution of crimes in collaboration with the office of the 3rd Respondent. This position was stated in *S vs. Williams and Others:62621998 (2) SACR 191 (SCA)*, citing *Booyesen, Justice, in S vs. Barnes and Another 1990 (2) SACR 485 (N)*. thus:

“Although mere failure to report the crime to the authorities would not render a member of the public guilty of being an accessory after the fact of that crime ... a police officer is in a different position as it is his legal duty to bring criminals to book.”
36. The Office of the Director of Public Prosecutions is established under Article 157 of *the Constitution* with the premier mandate of exercising prosecution. The *Office of the Director of Public Prosecutions Act*, Cap. 6b further outlines the role and functions of the ODPP under Section 5. However, just like the 1st and 2nd Respondents, the independence of the 3rd Respondent is not absolute and the courts may



review their prosecutorial powers by following laid down guidelines. (See the decision by the Supreme Court of India in RP Kapur vs. State of Punjab AIR 1960 SC 866).

37. Turning to the instant Petition, I note that the main issue for consideration is whether the 1st, 2nd and 3rd Respondents acted independently as mandated by the law in instituting the criminal proceedings against the Petitioner or whether they were motivated by ulterior motives actuated by the malice of the 5th to 8th Respondents as alleged by the Petitioner, thereby violating his fundamental rights.
38. Having already established the legal mandate of the 1st, 2nd and 3rd Respondents and upon considering the pleadings and the supporting documents, I find that no evidence was presented to show that the 5th to 8th Respondents influenced or orchestrated the investigation and the intended arrest by the 1st, 2nd and 3rd Respondents. I find that the agents of the 1st, 2nd and 3rd Respondents adequately demonstrated that they had reason to believe that a crime had been committed after they investigated the authenticity of the death certificate which they had reason to believe, had been forged. It was not disputed that there is already an active criminal case pending before Keroka Court in CMCCR E662/2022 where one Moses Nyabuga Guto has been charged for the offence of forgery as he was alleged to be the originator of the said document.
39. My finding is that since the Petitioner was mentioned as the one who presented the death certificate in the succession cause, the Respondents had sufficient reason to require him to appear before them and to assist in the investigations and, if necessary, proceed to charge him. I find no lawful justification in stopping the 1st and 2nd Respondents from discharging their mandate of conducting investigations and subsequently proceeding to arrest the Petitioner if there is evidence of commission of a crime. I find that, in the circumstances of this case, the Court cannot issue an orders to permanently bar the 1st, 2nd and 3rd Respondents from discharging their constitutional obligations.
40. In addition to the above findings, I hold that it is only the 3rd Respondent vested with the constitutional mandate to review the case and determine whether it meets the test for a criminal prosecution. This Court cannot curtail or usurp such powers as doing so would be tantamount to interfering with the independence of the said offices. The only time the court can intervene is if the Petitioner demonstrates that the Respondents acted ultra vires or in contravention of their legal mandate or in utter violation of the law and the constitutional principles, a burden which was not discharged.
41. I have carefully reviewed the facts and background of this case and I note that it was not disputed that the 5th to 8th Respondents lodged a complaint of an alleged forgery of their father's death certificate before the DCI at Borabu. It was also not disputed that in discharge of their mandate of investigating criminal complaints, the agents of the 2nd Respondent wrote to the Bureti Sub-County Civil Registrar seeking to verify the authenticity of the death certificate that the Petitioner presented in court when he instituted the succession proceedings. I note that the Petitioner did not deny the claim that he had on several occasions been summoned to appear before the DCI Borabu to shed light on the issue and that he neglected to do so as shown in his letter dated 15th June 2023 and marked 'N9'. I also note that the investigating officer, P.C. Robert Mutua forwarded the matter to the 3rd Respondent with a recommendation that the matter be prosecuted after verifying the authenticity of the death certificate and recording the witness statements.
42. To my mind, the actions of investigating and recommending prosecution, were in compliance with the 2nd Respondent's mandate under Article 157 of *the Constitution*. It was the evidence of P.C. Mutua that the 3rd Respondent concurred with his recommendations and directed him to charge Moses Nyabuga Guto, the Interested Party. It is the view of this Court that if indeed the Petitioner knew that he was completely innocent of the allegations of fraud and that he was not the one who procured the said



certificate but only used the same for the succession proceedings, then he ought to have cooperated with the officers of the 1st and 2nd Respondents and recorded his statement sooner than later so as to avoid the drama that ensued at his church in Lavington SDA on the 24th day of June 2023.

43. My above findings are further fortified by the fact that on 29th May 2024, the Prosecution Counsel informed the Court that the Petitioner had already addressed the questions that the 2nd Respondent had during their investigations and recorded a statement. Counsel informed the court that the matter was now settled and that there was no impending threat of arrest since the Petitioner was only required to comply with the summons from the DCI so as to resolve the matter at the earliest time possible.
44. Based on the foregoing, it is my finding that the actions of the 1st, 2nd and 3rd Respondents were purely within the law as there was no evidence of witch hunt or malice. It my further finding that because the Petitioner is a relative of the deceased and was centrally involved in the succession proceedings, he was better placed to answer the questions that arose concerning the origin of the alleged forged death certificate.
45. In any event, even assuming that the Petitioner was arrested, he would still have been accorded an opportunity to appear before a criminal court to defend himself. Needless to say, the Petitioner would still be entitled to institute a suit for compensation for malicious prosecution and unlawful arrest should it turn out that the arrest and prosecution are found to be unlawful and malicious.
46. In conclusion, I find decline to grant the orders sought in the Petition as the reliefs sought are not only untenable in law but are also moot in light of the revelation, by the Prosecution Counsel that the investigations have been concluded. In the end, I find that the Petition lacks merit and I accordingly dismiss it with no orders as to costs considering that the main protagonists in the case are close relatives.
47. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA THIS 30TH DAY OF JANUARY 2025.

W. A. OKWANY

JUDGE

