



**Wambua v National Police Service Commission & another (Petition E150 of 2022)
[2025] KEHC 3794 (KLR) (Constitutional and Human Rights) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E150 OF 2022

LN MUGAMBI, J

MARCH 27, 2025

BETWEEN

SUSAN MUTAVE WAMBUA PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

JUDGMENT

Introduction

1. The petition dated 7th April 2022 is supported by the petitioner's affidavit in support of equal date.
2. The gravamen of this petition is that there is intended arrest and prosecution of the petitioner following a malicious instigation by Yedhi Investment Limited's manager hence the petitioner is fearful of the violation of her constitutional right to a fair hearing.
3. In view of the foregoing, the petitioner seeks the following reliefs:
 - a. A declaration that the impending arrest is not only baseless but is also arbitrary and illegal and founded on unsubstantiated accusations which 2nd respondent is yet to investigate.
 - b. A permanent injunction restraining the 1st and the 2nd respondents by themselves, their officers, servants, agents or any one acting on their behalf from instituting, charging, or prosecuting the petitioner herein in connection with the complaint or allegations made arising from or in relation to this matter.
 - c. A permanent injunction do issue restraining the Director of Public Prosecutions by himself, his officers, servants, agents or anyone acting on his behalf from instituting, charging or



prosecuting the petitioner herein in respect of or in connection with the complaint or allegation(s) made arising from or in relation to this matter.

- d. This Court do award any other orders it may deem just, fit and expedient to award in the interest of justice.
- e. The costs of this petition be provided for.

Petitioner's Case

4. The petitioner depones that on 15th November 2021, she took a loan facility of Kshs. 639,200 from Yedhi Investment Limited using her motor vehicle, registration No. KCU 876X as security for the loan.
5. On 21st February 2022, Yedhi Investment Limited issued the petitioner with a notice directing that she clears her outstanding loan balance. In response, she proposed to them a payment plan.
6. The petitioner avers that while at the Karen Club on 8th March 2022, some people approached her, claiming to be agents and auctioneers of Yedhi Investment Limited. They informed her that they had been instructed to claim her motor vehicle.
7. A call to the owner of the Company, Mr. Morris proved futile as later on in the evening, the auctioneers returned and impounded her vehicle. In reaction she immediately called and informed the owner and the Manager, one Mr. Antony of what had transpired.
8. The petitioner avers that when she followed up on the matter the next day, the owner of Yedhi Investment Limited to her surprise, denied having sent their agents to impound her vehicle. As a result, the petitioner proceeded to Kilimani Police Station to report her vehicle as stolen. The police then summoned the manager of Yedhi Investment Limited to the station.
9. It is asserted that this did not augur well with the manager. She claims that in retaliation, the manager lodged a complaint against her at the Central Police Station claiming that the petitioner had procured a loan from them under false pretenses.
10. The petitioner alleges that the manager's reprisal became even more evident when he sent other auctioneers on 9th March 2022 to impound her second vehicle motor vehicle registration number KCS 817G. This was despite the petitioner having diligently paid the loan amount and having a balance of Ksh.136,730.
11. The petitioner avers that she lives in constant fear of being arrested and prosecuted for a crime that they were already charged with and is pending investigation. She asserts thus that the intended arrest and prosecution is intimidation intended to curtail her fundamental rights and freedoms under Article 50 of the *Constitution*.

Respondents' case

12. The respondents' responses are not in the Court file or Court Online Platform, this is in spite of the 2nd respondent noting that it filed its Grounds of Opposition dated 27th July 2022.
13. The 1st respondent's submissions are also not in the Court file or Court Online Platform (CTS).

Petitioner's Submissions

14. On 22nd March 2024, the petitioner through Okatch and Partners Advocates filed submissions where the issues for discussion were identified as: whether the petitioner has met the threshold for an



injunction against the respondents and whether the intended arrest and prosecution will infringe the petitioner's constitutional rights.

15. Counsel in the first issue submitted that based on the petitioner's case, it was clear that she had satisfied the threshold for grant of an injunction. This is because the petitioner is under the threat of arrest by the 1st respondent owing to Yedhi Investment Limited manager's report. It is claimed that this will have a negative effect on her business being a renowned business woman.

16. Reliance was placed in *Giella v Cassman Brown* (1973) EA358 where it was held that:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

17. Equal dependence was placed in *Gladys Mumbi Irungu Versus David Gikaria & 2 Others* [2017] eKLR, *Nguruman Limited versus Bonde Nielsen & 2 Others* (2014) eKLR and *Pius Kipchirchir Kogo Versus Frank Kimeli Tenai* [2018] eKLR.

18. On the second issue, Counsel answered in the positive. This is since the intended arrest and prosecution is not premised on a proper factual and legal basis. Counsel noted that the manager's complaint was made in reprisal. Counsel asserted that the respondents' in this regard were not according her equal protection before the law in breach of Article 27 of the Constitution.

19. Counsel further argued that the petitioner had never been informed on the progress and status of her complaint against the manager. It was contended that the respondents are solely focusing on Yedhi Investments Limited's complaint.

20. The respondents' actions are considered to be in violation of the petitioner's rights under Article 50 of the Constitution. This is in relation to the manner in which the respondents are carrying out their mandate. Reliance was placed in *Alfred Nyandieka v Director of Public Prosecutions & 2 others* [2020] eKLR where it was held that:

“Courts have also stated in many decisions that whereas the Constitution confers on the 1st and 2nd respondents mandate to institute prosecution and investigate respectively, they must act in good faith lest the court will interfere with their mandate.”

21. Like reliance was placed in *Republic v Director of Public Prosecutions & another ex parte Patrick Ogola Onyango & 8 others* [2016] eKLR.

2nd Respondent's Submissions

22. Senior Principal Prosecution Counsel, Kerongo Maatwa filed submissions dated 12th September 2024 in opposition to the petitioner's case.

23. To commence with, Counsel pointed out that the Courts have pronounced themselves on the principles that should be considered before issuance of orders based on constitutional provisions. This was established in *Anarita Karimi -Versus-Republic (No.1)* (1979 1 KLR 154. Reliance was placed in



Mumo Matemu -Versus-Trusted Society of Human Rights Alliance (2013)eKLR where the Court of Appeal held that:

“It is our finding that the petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and Anti-Corruption Commission Act, 2011. Accordingly, the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”

24. Counsel recapping the facts of this case underscored that the petitioner had failed to enjoin the officials of Yedhi Investment Ltd and the police in these proceedings. As a consequence, it was argued that it would be difficult to ascertain her allegations. In effect, Counsel asserted that this was a fatal error thus the petition must fail.
25. Furthermore, Counsel submitted that while it was evident that Yedhi Investment Limited had reported the matter at Central Police Station, no further action seems to have been undertaken other than recording of their statement. In fact, Counsel submitted that the police file covering this matter had not been supplied to the 2nd respondent for consideration.
26. In light of this, Counsel stressed that the 2nd respondent had been wrongly joined in this suit. On this premise, Counsel submitted that the petition fails the constitutional threshold for filing a constitutional petition.

Analysis and Determination

27. It is my considered opinion that the issues that arise for determination are as follows:
 - i. Whether the petitioner’s constitutional rights, particularly the right to a fair trial under Article 50 of the Constitution is under threat of being violated by the respondents.
 - ii. Whether the petitioner is entitled to the relief sought.

Whether the petitioner’s constitutional rights, in particular, the right to a fair trial under Article 50 of the Constitution is under threat of being violated by the respondents.

28. A constitutional petition must be pleaded with specificity detailing clearly the articles of the Constitution that were infringed and the manner the violation of the Petitioner’s was occasioned by the respondents. The Supreme Court in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) explained:

“(349) Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”



29. Over and above the pleadings, the Petitioner must then proceed and discharge the burden of proof by adducing evidence in support of the allegations made in the Petition. In *Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] KESC 66 (KLR) the Supreme Court held:

“(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

(50) This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”

30. The question thus becomes, has the Petitioner discharged the burden of proof that there is the real likelihood of being arrested following a malicious complaint filed against her by Yedhi Investment Manager at Central Police Station?

31. Although this Court is empowered by Article 23 of the *Constitution* to hear and determine applications for redress of a denial, violation or infringement of, including threat to a right or fundamental freedom in the Bill of Rights, it is necessary in cases premised on fear, apprehension or threat of violation of a right, that the party expressing such fears or apprehension do sufficiently demonstrate the basis of such fears by providing credible evidence upon which the Court can objectively assess if such fear is real or is imaginary. Short of that, the Court will have no basis or reason for intervening.

32. In this case, other than the Petitioner mentioning Yedhi Investment in her pleadings and affidavit and claiming its manager has lodged a malicious complaint against her at Central Police Station which could see her get arrested, the Petitioner omits to join either the Company or the Manager as a Party in this Petition denying the Court the opportunity of being able to objectively evaluate the two sides of the story in arriving at a determination of whether indeed such complaint was made and if so, whether it was actuated by malice.

33. Secondly, although the Petitioner alleges the complaint was made at Central Police Station, she failed to provide proof of the existence of such a complaint against her, there is no O.B entry provided, police summons or even police bond that is exhibited as proof of existence of the complaint.

34. In addition, not even Central Police Station or the National Police Service is which it is alleged the complaint was filed is a party to confirm or deny that the complaint against the Petitioner exists let alone the same being malicious.

35. In my view, the Petitioner has not even discharged the evidential burden that prima facie entitle any orders from this Court be given as she makes bare allegations that are not supported by any evidence.

36. Moreover, even assuming that is true that a complaint against her was indeed filed with the police, she has demonstrated to why such investigations must be stopped from going on, if indeed there are on (as of now there is no proof).



37. In Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others [2019] KEHC 12121 (KLR) the Court discussing the mandate of the police cited with approval a number of authorities and noted as follows:

“The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.

38. It is inconceivable how this Court can be called upon to stop an investigation by the police who are not parties to the Petition and who were not given a chance to rebut the allegations of abuse of power levelled against them.

39. In respect of the second respondent, the petitioner has not proved how it is connected to this petition. The 2nd Respondent has not been shown to have given any directions in respect to the complaint by the petitioner or even threatened that it is about to make any. In any case, the 2nd Respondent has a constitutional duty to make prosecutorial decisions and that mandate can only be interfered with only if it can be shown it abused his powers. This was the holding of the Court in Francis Anyango Juma vs The Director of Public Prosecutions and another [2012] KEHC 2618 (KLR) in which the Court stated thus:

“Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under the Constitution, or violation of the Constitution itself.”

40. In view of the above findings, this Court finds no merit in this Petition. It is hereby dismissed with no orders as to cost.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH MARCH, 2025.

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L N MUGAMBI

JUDGE

