



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**MISC. CRIMINAL APPLICATION NO. 12 OF 2017**

**IN THE MATTER OF INCITMENT TO VIOLENCE AND DISOBEDIENCE OF THE LAW UNDER  
PENAL CODE ACT CAP. 63 SECTION 96(a)(b) AND (c) LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE DPP INCHARGE FO EMBU COUNTY WHO FIALED TO INSTRUCT THE  
DCIO KIRITIRI POLICE STATION SO AS TO ARREST MCA ASPIRANT OF MAKIMA WARD MR.  
BERNARD MWANIKI AND HIS TEAM WHO DEMOLISHED THE STRUCTURES AND BURNED  
THEM AT GIKURU VILLAGE ON 17TH MARCH 2017 AFTER PRAYERS**

**AND**

**IN THE MATTER OF A THREAT TO BORN ETC UNDER PENAL CODE ACT CAP 63 SECTION 344  
LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION MADE BY JAMES MWANGI KARANGI, ANDREW IRERI  
NJRU (CHAIRMAN) OF EMBU NYANGI NDIIRIRI CULTURAL CROUP & OTHER 250 MEMBERS  
AGAINST DPP IN CHARGE OF EMBU COUNTY WHO FAILED TO ARREST THE INTERESTED  
PARTIES MENTIONED UNDER CONTRARY TO PENAL CODE ACT CAP 63 SECTION 130 LAWS  
OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**JAMES MWANGI KARANGI.....1ST APPLICANT/CLAIMANT**

**ANDREW IRERI NJERU(CHAIRMAN & OTHERS)....2ND APPLICANT/CLAIMANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS IN CHARGE**

**EMBU COUNTY (SUED ON BEHALF OF HIS OFFICERS).....1ST RESPONDENT**

**DCIO KIRITIRI POLICE STATION.....2ND RESPONDENT**

**MR. OKINDA POLICE INVESTIGATION**

**OFFICER KIRITIRI POLICE STATION.....3RD RESPONDENT**

**MR. MUGAMBI POLICE INVESTIGATION OFFICER**

**KIRITIRI POLICE STATION & OTHERS.....4TH RESPONDENT**

### **R U L I N G**

1. This is a ruling on a miscellaneous criminal application dated 20/07/2017 seeking for the following orders:-

*(i) That the District Criminal Investigations Officer (DCIO) Kiritiri and his officers through the Director of Public Prosecution (DPP) Embu County be ordered to arrest the interested parties.*

*(ii) That the DPP Embu County be ordered to explain why the interested parties were not arrested and charged.*

*(iii) That the applicants be allowed to revenge against the interested parties by burning their houses as they did to them.*

2. The application is supported by the affidavit of the 1st applicant James Mwangi Karangi who deposes that on the 17/03/2017 at Gikuru village the applicant were holding prayers for a group project of Embu Nyangi Ndiiriri Cultural Group when the 1st interested party incited people to demolish their structures and burnt them to ashes. The 1st applicant states that he had given the group land measuring 2 acres for their project. He was also injured by the interested parties in the fracas.

3. It is stated that a report was made at Kiritiri police station OB No. 57 of 17/03/2017 but no action was taken by the DCIO Kiritiri or by the office of the 1<sup>st</sup> respondent. It is therefore appropriate that the respondents be summoned before this honourable court to explain why they did not take action against the interested parties. The applicants' group had been issued with a permit to hold prayers on the material day and required to be protected by the respondents.

4. The application was opposed by the respondents relying on the replying affidavit of Ms. Brenda Nandwa a prosecution counsel of the 1st respondent. She deposes that investigations were carried out immediately after the report was received at the police station. The 1st respondent advised the police on the way forward based on the evidence that had been compiled by the DCI Mbeere South Inquiry File No. 11 of 2017. The interested parties were arrested and charged with the offences of arson and assault.

5. The 1st respondent further states that the respondents did their duty as required by the law and under its mandate under Article 157 of the Constitution. The order for revenge sought by the applicants cannot be granted by this court. This application should be dismissed for it is an abuse of the due process of the law.

6. This application was argued by way of written submissions filed by the applicants jointly on one hand and by the 1st respondent on the other hand.

7. The applicants submitted that it is evident that no action was taken by the respondent for they have not presented any evidence that the interested parties were arrested and charged.

8. It was the submission of the 1st respondent that investigations were conducted by the DCI Kiritiri who forwarded the file to the 1st respondent for advice. The DCI was directed to charge the interested parties which he did. There is no doubt that the respondents discharged their duties as required by the law.

9. The 1st respondent annexed 2 documents to its replying affidavit. The first one is a letter dated 29/09/2017 addressed to the Assistant Director of Public Prosecutions, Faith House, P.O. Box 2855, Embu. The subject was DCI Mbeere South Inquire File No. 11 of 2017. The letter contained a brief summary of the evidence stating that the prayers by the group led by the two applicants were licenced for the 17/03/2017.

10. it is stated further that during the said prayers various speakers addressed the gathering. When the 1st applicant rose to speak he said that he had sold the land to the group all the way from from Thiba river to Masinga dam. The group had already constructed 15 timber structures on the land with a view of starting a project. The words uttered by the 1st applicant angered the crowd who had issues with the scheme and they started blaming the applicant with their problems as he was corroborating with outsiders to sell their land. The 1st applicant was assaulted by the crowd but was rescued by one Penina Mutua the then Member of County Assembly (MCA) Makima Ward among others. The wooden structures were burnt to ashes by the mob.

11. The letter further states that the DCI Mbeere South recommended that the suspects be charged with the offence of arson contrary to Section 332 of the Penal Code and assault causing actual bodily harm contrary to Section 251 of the same Code.

12. The 2nd letter dated 3/10/2017 was addressed to DCI Mbeere South by the DPP directing that the suspects be charged with the offence.

13. The issues for determination are as follows:-

*(a) Whether the petitioner has established that he deserves the orders sought.*

*(b) Whether the first respondent complied with the law in view of the powers donated under the Constitution.*

*(c) Who should bear the costs of the petition.*

14. The jurisdiction of this court to hear and determine this petition is not in question.

15. The application is against 4 respondents who are the Director of Public Prosecutions, the DCI Kiritiri and 2 police officers from Kiritiri police station. It also names 7 people as interested parties. The orders sought are to direct the DCI Kiritiri and his officers through the DPP Embu County to explain why the interested parties were not arrested and charged. The applicant further seeks for orders that the DPP be directed to arrest and charge the interested parties. An order to revenge against the interested parties has also been sought.

16. It is important for the court to interrogate whether such orders may be granted against the 1st respondent. Article 157(4) of the Constitution confers on the Office of the DPP powers to direct investigation in any information or allegations of criminal conduct by the Inspector General. Article

157(6) provides that the DPP *shall exercise State powers of prosecution and may institute and undertake criminal proceedings against any person or any court (other than a court martial) in respect of any offence alleged to have been committed, among other duties.*

17. Article 157(10) provides that the DPP *shall not require the consent of any person or authority for the commencement of criminal proceedings..... and shall not be under the directions or control of any person or authority.*

18. It is alleged that the petitioners reported a case of arson and that of assault to Kiritiri police station on 17/03/2017 and that no action was taken by the DCI Kiritiri against the interested parties who were the suspects. The defence of the 1st respondent was that after the report was received the 2nd respondent commenced investigations into the matter and opened an inquiry file which was later forwarded to the 1st respondent for advice. On perusal of the file, the 1st respondent directed the DCI on the action to be taken.

19. From the correspondences annexed to the replying affidavit, it is evident that the DCI forwarded the file to the 1st respondent on 29/09/2017 accompanied by the case summary. The instructions to charge the suspects are contained in the 1st respondent's letter dated 3/10/2017. It was also directed that statements of more independent witnesses be recorded. The duplicate file was therefore returned to the 2nd respondent for further action.

20. This petition was filed on 20/07/2017 and served on the respondents on 15/08/2017. The incident allegedly occurred on the 17/03/2017. It appears that no action was taken by the 2nd respondent until he was served with this petition. The 1st respondent was also served on the same date and may have directed the DCI to take the necessary action. The applicant property was burnt down in an arson attack and the 1st petitioner was assaulted in the process. This was a serious matter that ought to have been given attention by the 2nd respondent as soon as it was reported. He did not have to wait to be taken to court by the petitioners or to be directed by the 1st respondent to perform his duties. This is neglect of duty on part of the 2nd respondent which should not be condoned.

21. The law does not give time limit within which the DPP should investigate a complaint. However, this court notes that the DCI took too long to attend the matter and it had to take these proceedings for him to do his duty. The petitioners had a genuine grievance that ought to have been addressed by the 2nd respondent expeditiously. For this reason this court recommends that the Embu Police County Commander takes disciplinary action against the officer irrespective of the outcome of this petition.

22. The provisions of Article 157(10) are very clear that the DPP under whose supervision the 2nd respondent works does not require the consent, directions or control of any person or authority in exercising of his or her powers. The orders sought by the petitioner for directing the DCI through the 1st respondent to arrest and charge the interested parties cannot be granted. Such orders would be contrary to the constitutional provisions that donate power to the Office of the DPP.

23. The petitioner also seeks for an order for revenge against the interested parties. The action complained of was burning of property and assault. It would not only be unlawful but against the interest of justice for this court to grant the orders sought. This is a court of law and shall only grant remedies provided for by the law.

24. I find this application lacking merit and dismiss it accordingly.

25. For the reasons given in this ruling the petitioners will not be condemned to meet the costs.

26. The Embu Police County Commander to be served with a copy of this ruling.

27. It is hereby so ordered.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 19TH DAY OF DECEMBER, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Manyal for the respondent**



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