



**Kabogo & another v Office of the Director of Public Prosecutions & 3 others (Constitutional Petition E003 of 2023) [2024] KEHC 16843 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16843 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CONSTITUTIONAL PETITION E003 OF 2023  
DO CHEPKWONY, J  
DECEMBER 20, 2024**

**BETWEEN**

**DAVID KABOGO ..... 1<sup>ST</sup> PETITIONER**

**FAITH AND HOPE PROPERTIES KENYA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner moved this court by way of Petition and Notice of Motion application, both dated 23<sup>rd</sup> May, 2023. In the Notice of Motion application, the petitioner seeks the following orders:
  - a. Spent.
  - b. Spent.
  - c. That pending the hearing and determination of the Petition, this Honourable Court be and is hereby pleased to issue a conservatory order temporarily directing the Respondents either by themselves, agents, officers or employees from continued prosecution of Criminal Court Case No. E013 of 2022, Republic v David Ruthia over his involvement as a purchaser over land known as No. Ruiru/East/Juja East Block 2 /4424.
  - d. Costs and interests be provided.
  - e. Any other relief that this court will be pleased to issue in the circumstances.



2. By consent of Counsel for the parties herein, the Notice of Motion application dated 23<sup>rd</sup> May, 2023, was then marked as compromised on and the court issued directions on the disposal of the main Petition by the parties.
3. The Petition dated 23<sup>rd</sup> May, 2023 seeks the following orders:-
  - a. A Declaration be and is hereby made that the continued prosecution of the Petitioner herein David Ruthia over his involvement as a purchaser of land known as No. Ruiru/East/Juja East Block 2 /4424 is unreasonable, an abuse of the prosecutorial powers and certainly inimical to Article 157 (11) of *the Constitution* as read with Section 4 of the Office of Director of Public Prosecutions.
  - b. A Judicial Review Order of Prohibition does hereby issue permanently restraining/prohibiting the Respondents either by themselves, agents, officers or employees from further prosecuting and/or continuing any prosecution of Kiambu Criminal Court Case No.E013 of 2022 Republic –vs- David Ruthia over his involvement as Purchaser over land known as land known as No. Ruiru/East/Juja East Block 2 /4424.
  - c. An order for costs and interest at court rates.
  - d. Compensation for the threats and violation of the Petitioner's right and any other relief that the court will deem just and fair in the circumstances.
4. The Petitioner relied on the facts as stated in the Supporting Affidavit filed in support of the Notice of Motion, wherein he has averred that he is a Director of the 2<sup>nd</sup> Petitioner. According to the Petitioner, in or around the month of February, 2017 he entered into a sale agreement over the parcel of land within Juja South with the vendor/owner and he paid the full purchase price which was channelled into the Vendor's account with the Family Bank, Thika Branch and in turn the Vendor released the conveyancing documents being the Original Title Deed in the name of George Waweru Muriithi, Agreement for sale duly executed and registered, case from the Land Control Board, Application for transfer duly executed. Payment transfer, National Identity Cards of the vendor and the purchaser.
5. It is the Petitioner's case that on 22<sup>nd</sup> June, 2017, the Vendor instructed his advocates, M/s Macharia & Co. to demand completion notice and intimated rescission of the agreement. On this background, the Petitioner was faced with an afterthought disclosure by the receiving bank that the Vendor's account was not authentic and he promptly instructed his advocate who wrote to Family bank and Central Bank.
6. The Petitioner goes on to state that due to this development, he made a complaint against the conduct of the bank in collusion with the Vendor who he believed were working in cahoots, as a result of which criminal charges were preferred against the Vendor as per the charge sheet annexed as DR-7 and he is the main witness. The Petitioner also avers that he further initiated a Civil Suit in Thika Magistrate Court on 12<sup>th</sup> October, 2021 contemporaneous with the general case just so as to secure his interest as a purchaser.
7. The Petitioner has stated that despite the two suits being in court, the Respondent still preferred charges against him in Kiambu which amount to abuse of the 1<sup>st</sup> Respondent's prosecution powers under Article 157 of *the Constitution* and a threat to fair administration action. He holds that the charges have put him in an awkward position yet he is an innocent purchaser which is complete abuse of the criminal justice system.



8. The Petitioner contends that it is wrong for law enforcement officers to use the criminal justice process to achieve ulterior motives with the intention of denting his reputation and affecting his business as a land agent. He also holds that the subject land was subsequently conveyed to him and he has since disposed the same to 20 new owners who have since settled on it. The Petitioner further contends that the issue at hand is purely civil and commercial as it relates to an on interest on land.
9. The Petitioner holds that he discharged his mandate faithfully and thus urges the court to protect him from abuse of police and prosecutorial powers that will ruin his professional career. He prays that the court grants the orders sought and protect his rights and fundamental freedoms.
10. The Petition was opposed through an undated Replying Affidavit sworn by No. 101311 PC. Agnes Wamugi but filed on 29<sup>th</sup> October, 2024, wherein she confirms that she is a police officer and Investigating Officer in Kiambu Court File No. E013 of 2022. It is the Respondents case that a complaint was lodged on alleged fraudulent acquisition of the Land Parcel No. Ruiru East/Juja East Block 2/4424 which was reported at DCI Headquarters by one George Waweru Muriithi vide a complaint letter dated 21<sup>st</sup> November, 2020, and the same was conclusively and objectively investigated and the Petitioner afforded an opportunity to give his side of the story which was recorded in a statement of 24<sup>th</sup> November, 2020.
11. The Respondent avers that during the investigations and according to the records at the Land Registry, the Investigating Officer established that the subject land was registered in the name of George Waweru Muriithi before the Petitioner fraudulently transferred the same to Faith and Hope Properties Kenya on 24<sup>th</sup> April, 2019. It is also stated that prior to the said transfer in favour of the Petitioner, the Petitioner had entered into a Land Sale Agreement for the purchase of the subject land on 6<sup>th</sup> February, 2017, from one Danson Maina Njunje who at the time misrepresented himself as the said George Waweru Muriithi (vendor) and fraudulently opened a bank account at Family Bank in the name of George Waweru Muriithi using forged documents where part of the purchase monies were deposited.
12. The Respondent goes on to state that the DCI Banking Fraud unit conducted investigations on the authenticity of the documents used by the said Danson Maina Njunje in impersonating George Waweru Murithi and he was subsequently arrested on 22<sup>nd</sup> August, 2018, at the Family Bank, Thika Branch and charged in Thika Law Courts on 29<sup>th</sup> August, 2018 vide Court File No. 5662 of 2018. The Respondent holds that the Petitioner recorded his statement which formed the charge of Danson Maina Njunje of obtaining money by false pretences contrary to Section 313 of the *Penal Code*.
13. According to the Respondent, the 1<sup>st</sup> Petitioners was thus aware that the land sale agreement was an act of fraud, void and with no legal binding effect to the real owner George Waweru Muriithi but he still proceeded to use the said sale agreement and forged the owner's signature as well as made false title deed for the said property in order to initiate transfer of the property in favour of the 2<sup>nd</sup> Petitioner on 24<sup>th</sup> April, 2019, which was almost eight months after the fraud was made known to him. The Respondent attached a Forensic Document's examiner's report to support the claim.
14. It is the Respondent's case that two months after the fraudulent transfer of the subject land, the Petitioners further subdivided the land and disposed off the same to third parties thus deliberately disposing the rightful owner George Waweru Muriithi of his rights over the said property.
15. The Respondent avers that upon the conclusion of the investigations, the file was forwarded to the 2<sup>nd</sup> Respondent for an independent review and through a letter referenced ODPP/KBU/CR/7/21(427) dated 16<sup>th</sup> December, 2021, it was recommended that the Petitioners be charged and they entered a plea of not guilty in Kiambu Court File No. E013 of 2022.



16. The Respondent contends that the Petitioners were not charged in Thika Law Courts Case No.5662 of 2018 but rather are witnesses and complainants for the charges. The Respondent further holds that the Petitioners have not disclosed the civil suit that is pending in any court over the subject matter which he alleged but still maintain, that Section 193A of the *Criminal Procedure Code* allows for concurrent criminal and civil proceedings.
17. Therefore, the Respondent deny that the charges against the Petitioners are unconstitutional and based on his unwillingness to engage the investigator in ‘unholy relationship’. It holds that the charges emanate from the decision of the Office of Director of Public Prosecution under Article 157 of *the Constitution*. The Respondent holds that the Petitioners’ claim that his fundamental rights and freedoms have been infringed and threatened is frivolous, far-fetched and an abuse of court process intended and calculated to derail and deny the ongoing matter before Kiambu Law Court in Criminal Case No. E013 of 2022 to the detriment of the interest of justice.

### **Analysis and Determination**

18. Having carefully read through the applications, supporting reports and the Affidavits sworn in support in rebuttal of the same, the sole issue arising for determination is whether the Petitioner has made a case to warrant the court to issue conservatory Order restraining the Respondents from continuing prosecuting Criminal Case No. E013/2022.
19. It is trite law that courts should not interfere with the duties of Respondents as they are all independent bodies established under *the Constitution* as explained hereinunder:
20. The 1<sup>st</sup> Respondent is established under Article 157 of *the Constitution* where its functions are provided for under Article 157 (6) of *the Constitution* as follows:-

[6].The Director of Public Prosecutions shall exercise State powers of prosecution and may

- a. Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
- b. Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- c. Subject to Clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

21. The 2<sup>nd</sup> Respondent is established under Section 28 of the *National Police Service Act* , No 11 of 2011 which provides that,

“There is established the Directorate of Criminal Investigations which shall be under the direction, command, and control of the Inspector-General.’



22. The 3<sup>rd</sup> Respondent on the other hand is established under Article 245 (1) of *the Constitution* vested with powers to investigate crimes as dictated under Article 245 (4) of *the Constitution* which provides 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.”

23. Similarly, the court is persuaded by the High Court in Judicial Review Application 8 of 2017, Republic –vs- Director of Public Prosecutions & 2 Others Ex parte Edwin Harold Dayan Dande & 3 Others which held as follows:-

“A reading of Article 157 of *the Constitution* leaves no doubt that the DPP is required to not only act independently, but to remain fiercely so. It is also important to mention that Article 245(4)(a) of *the Constitution* provides that:

“No person may give a direction to the Inspector General with respect to the investigation of any offence or offences.’ Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.”

24. From the above legal provisions and the decided case, it follows that the court can only interfere with duties of the Respondents where the constitutional and statutory provisions are not adhered to or if their actions are illegal and unlawful. In the present case, the Applicants contend that Criminal Justice and especially the case filed against the Applicants in CMCCR No. E011 of 2022 is an abuse of the court process since the land in question was long ago converted to the Applicant who has since then transferred the same to over 20 new owners. That during the transfer there was some fraud detected on proof of the vendor who was eventually charged with criminal offence before the Thika Law Courts. The Applicant is key witness in that Criminal case and he avers that he has likewise instituted Civil proceedings before the Thika Law Courts over the same parcel of land. According to the Petitioner/Applicant, the dispute is purely commercial hence the Criminal case is meant to intimidate him to give up on the Civil Case.

25. I have considered the charge sheet dated 18<sup>th</sup> January, 2022 wherein the Petitioner/Applicant is charged with among other charges the offence of Making a False Document contrary to Section 347(a) as read with Section 349 of the *Penal Code*. The facts of the case being that the Applicant had on diverse dates in the year 2017 to 2019 with intent to defraud made a certain false document with relation to titles with respect to the subject suit properties. However, the Applicant has not stated the inconvenience is likely to suffer if he faced these charges while pursuing the Commercial Case other than more inconveniences. I am also persuaded that the Petitioner/Applicant shall be granted an opportunity to allay those accusation. The allegation for making false documents has a higher threshold other than the mere balance of conveniences require under Civil matters.

26. From the Application therefore, there is no evidence of violation of any constitutional or statutory provisions as the Respondents were acting within their mandate to investigate the matter to establish whether there is need to arrest the Applicant or have the 1<sup>st</sup> Respondent charged with respect to



the complaint made. Therefore, the Respondent did not infringe on any Constitutional Rights by summoning the Applicant over the purchase of the subject land.

27. With respect to the argument raised by the Petitioners that there is a civil case pending in Kiambu which should address all issues now present before this Court, the court reiterates on the provisions of Section 193A of the *Criminal Procedure Code* which provides as follows:

[193]A. Concurrent criminal and civil proceedings-

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition, or delay of the criminal proceedings.'

28. Otherwise, this court finds that the presence of the civil matter should not stop the investigations in this matter as the criminal proceedings and civil proceedings can run concurrently. The court cannot stop the Respondents from conducting their duties for having them conclude to charge and arrest the Applicants in view of the complaint made against them. For that reason this court finds no merit in the Notice of Motion application dated 23<sup>rd</sup> May, 2023. Consequently, this Court proceeds to dismiss it. Costs be in the cause.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 20TH DAY OF DECEMBER, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

