



**Munene & 2 others v The Ethics And Anti-Corruption Commission & 2 others (Constitutional Petition E1 of 2021) [2022] KEHC 13805 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13805 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CONSTITUTIONAL PETITION E1 OF 2021  
WM MUSYOKA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**PETER MWANIKI MUNENE ..... 1<sup>ST</sup> PETITIONER  
PAUL KIPKURUI BYEGON ..... 2<sup>ND</sup> PETITIONER  
RODGERS WEKESA WAFULA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION .... 1<sup>ST</sup> RESPONDENT  
THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The cause herein was commenced by the petitioners, by way of a petition, dated July 2, 2021. The petitioners are public servants, working, respectively, for the National Treasury, the National Constituencies Development (NG-CDF) and the county government of Bungoma.
2. The case by the petitioners is that the 1<sup>st</sup> petitioner was accused of misappropriating and embezzling Kshs 3, 160, 000.00, belonging to the Bumula constituency uwezo fund, which allegations were denied by the 1<sup>st</sup> petitioner. The 1<sup>st</sup> respondent was said to have encouraged the petitioners to engage in alternative dispute resolution or out of court settlement, creating the impression that if they deposited the sum of Kshs 3, 160, 000.00 with the 1<sup>st</sup> respondent the case would be closed, and they would not be subjected to double jeopardy. The petitioners then acted on those representations and made the deposit of Kshs 3, 160, 000.00, but to their dismay the respondents still went ahead to proffer charges against them for conspiracy to commit the offences of corruption, unlawful acquisition of public property, abuse of office and breach of trust by persons employed in the public service, contrary to the provisions of the *Anti-Corruption and Economic Crimes Act*, No 3 of 2003, and the *Penal Code*, Cap 63, Laws of



Kenya. The petitioners argue that they were set up and entrapped, and the actions by the respondents infringed their constitutional rights. The petitioner allege that various provisions of the Constitution were violated, and seek various declarations.

3. The respondent opposed the petition, by a replying affidavit sworn on July 15, 2021, by George Ojowi, an official of the 1<sup>st</sup> respondent. He avers that the 1<sup>st</sup> respondent had mandate to recover and protect public property, and confiscate proceeds of corruption, and to recommend to the 2<sup>nd</sup> respondent to prosecute any perceived offence in connection with the handling of any public funds or property. He states that the 1<sup>st</sup> respondent received a complaint concerning funds belonging to the Bumula Constituency Uwezo Fund, conducted investigations, interviewed the petitioners and recommended their prosecution by the 2<sup>nd</sup> respondent, whereupon charges were brought against them. While the proceedings were going on, the petitioners voluntarily paid the sum in contention, without admitting liability. He asserts that there was no promise on the part of the respondents that the payment would lead to a closure of the investigations and the prosecution of the petitioners. He asserts that the said payment did not absolve the petitioners of liability. He submits that section 193A of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, allowed parallel criminal and civil proceedings.
4. Directions were taken on July 22, 2021 and September 2, 2021, for disposal of the petition by way of written submissions. Both sides complied, and filed their respective written submissions, which I have read through and noted the arguments made.
5. The matter is fairly straightforward. Both sides agree that there was an issue on loss of funds belonging to the Bumula Constituency Uwezo Fund, and that a criminal investigation ensued, in the course of which the petitioners paid to the 1<sup>st</sup> respondent the sum in contention, in supposed settlement of the matter. The contention is on the effect of the said payment. The petitioners argue that the payment was made on the promise that it would absolve them of liability and lead to withdrawal of the criminal charges facing them. The respondents argue that there was no promise that the payment would absolve the portioners of liability, and that the same was paid without admission of liability.
6. I have gone carefully through the filings by both sides. I have not, with respect, found any promise moving from the respondents to the petitioners, that if the petitioners paid the sum in contention the respondents would withdraw the charges against the petitioners. I agree with the submission by the respondents that criminal and civil proceedings can run parallel. There is no contention that the petitioners were in any way forced or coerced to make the deposit. The same was made while the criminal case was pending, and I trust that the petitioners had the benefit of legal advice. The issues that the petitioners raise, in these proceedings, are matters that they can place before the trial court, and the trial court can take them into account, either as a complete defence or as extenuating and mitigating circumstances.
7. I am not persuaded that there has been violation of the constitutional provisions cited by the petitioners, nor that the deposit of the sum in contention affects their constitutional rights to a fair trial in the pending criminal proceedings. The declarations sought are not available. Consequently, I do hereby dismiss the said petition herein. Each party shall pay their own costs.
8. For the record, this is one of the matters that were pending before F. Amin J It was due for delivery of judgment on November 9, 2021. The file was handed over to me on June 16, 2022.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2022.**

**W. MUSYOKA**

**JUDGE**



Mr. Erick Zalo, Court Assistant.

Ms. Mburu, instructed by Malalah & Company, Advocates for the petitioners.

Ms. Tarus, instructed by the Attorney General, for the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

Mr. Mutua, instructed by the Director of Public Prosecutions, for the 2<sup>nd</sup> respondent.

