



Ahmed & 2 others v Prosecutions & another; Agango (Interested Party) (Constitutional Petition E047 of 2021) [2022] KEHC 12949 (KLR) (21 September 2022) (Judgment)

Neutral citation: [2022] KEHC 12949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E047 OF 2021
JM MATIVO, J
SEPTEMBER 21, 2022**

BETWEEN

**AHMED MOHAMED AHMED 1ST PETITIONER
KHALID MOHAMED AHMED 2ND PETITIONER
DCI, NYALI POLICE STATION 3RD PETITIONER**

AND

**THE HON. ATTORNEY GENERAL 1ST RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT**

AND

EMMY ANDISI AGANGO INTERESTED PARTY

JUDGMENT

1. The petitioners' grievance as I discern it from the amended petition dated August 27, 2021 is that: -
 - (a) they are *bona fide* purchasers and registered proprietors of plot No 5815/1/MN CR 24470;
 - (b) notwithstanding the foregoing, the Interested party has instigated their arrest and prosecution on trumped up charges through the 1st respondent;
 - (c) that the intended prosecution lacks factual basis and proper foundation;
 - (d) there is no reasonable and probable cause for mounting the threatened prosecution;
 - (e) that the intended prosecution is not rooted on the rule of law;



- (f) that the dispute surrounding the criminal proceedings revolve around the estate of the late Juma Agano alias Nashon Juma Asango in respect of which succession proceedings were finalized in or about February 2014; and,
- (g) that the interested party is alleged to be a beneficiary of the deceased's estate.

As a consequence, the petitioners avers that they will suffer prejudice if the prosecution proceeds. They seek the following reliefs: -

- a. A declaration that their right to a fair administrative action under article 47 (1) of the Constitution has been violated;
 - b. A conservatory order staying the petitioner's prosecution and or taking of plea touching on the property known as plot No 5815/1/MN CR 24470 registered in the petitioner's name;
 - c. A declaration that the respondents decision to prosecute them on issues relating to the said land violates their constitutional rights, hence it is a nullity in law, void and of no legal effect.
 - d. An order of judicial review in the nature of *certiorari* directed to the respondents or any officer and or agent acting under their authority to quash the prosecution
 - e. An order of compensation to be assessed by the court.
 - f. Any further order or relief that the court deems fit, just and expedient to uphold the rule of law and to protect the petitioners' rights constitutional rights.
2. The Hon Attorney General filed substantially identical grounds of opposition dated August 26, 2021 and September 17, 2021 stating:
- (a) that the petition is misconceived, frivolous, vexatious and an abuse of court process;
 - (b) that the 1st respondent is empowered by law to investigate and prosecute criminal offences pursuant to section 24 of the National Police Service Act¹(the NPS Act) and articles 243 and 245 of the Constitution;
 - (c) that the allegations of malice are unfounded, baseless and a mere assumption;
 - (d) that its incumbent upon the petitioners to demonstrate that the intended prosecution and or arrest are hinged on illegality or bad faith;
 - (e) that the petitioner has not demonstrated that he will not be accorded a fair trial or that the respondents will not respect his constitutional rights;
 - (f) that the 1st respondent has no prosecutorial powers, so, the order sought cannot be granted.
3. The 3rd respondent does not appear to have filed a response to the petition.
4. The interested party filed a replying affidavit dated March 17, 2022 in response to the amended petition. The salient points are: -
- (a) that the petitioners purchased the property from parties who had no capacity to transact;
 - (b) that as the deceased's widow, she has a claim to the property;

¹ Act No 11A of 2014.



- (c) that the deceased left behind 7 beneficiaries but only 2 obtained letters of administration disclosing only 2 persons as the deceased's dependants;
 - (d) that the grant was obtained fraudulently using a false death certificate;
 - (e) that the transfer was fraudulent and a restriction was registered but after that, Lucy Damar Agango and George Ojwang Agango applied for a second grant in excluding her from the grant;
 - (f) that the grant disclosed a different property ie No 58 (original number 976/33/7, section 1, Mainland North instead of subdivision 5815 (original number 976/33/7);
 - (g) that the property was transferred to the Petitioners without the other beneficiaries' consent.
5. Additionally, the interested party stated that:-
- (a) the two grants of letters of administration to the deceased's estate are subject to investigations by the DCIO;
 - (b) that the interested party has since obtained a limited grant to challenge the said transactions;
 - (c) that the petitioners had obtained eviction orders against her in ELC No E053 of 2021 even though she lived in the premises in addition to renting part of the premises;
 - (d) that the petitioners transferred the property to a one Abdelhamid Ahmed Alhassan Elgalie to evade the consequences of dealing with controversial suit property; and
 - (e) that the transferee has filed ELC Case No E029 of 2022 seeking restraining orders against the Interested Party.
6. The parties filed written submissions. The petitioner's counsel argued that the constitutional threshold has been enlarged by the inclusion of threat to infringement of constitutional rights. He cited *Agnes Ngenesi Kinyua aka Agnes Kinyua v Director of Public Prosecution & another*² in support of the proposition that where it is clear that the prosecution's evidence does not disclose an offence known in law, allowing the proceedings to continue amounts to the court abetting abuse of the court process by the prosecution. He listed several points key among them that the petition is not rooted in the rule of law and that no criminal conduct has been attributed to the petitioners. He also relied on *Republic v Attorney General & another ex parte Kipngeno Arap Ngeny*³ in support of the proposition that the court has jurisdiction to stay criminal proceedings to do justice.
7. The 1st and 2nd respondents' counsel submitted that: - the amended petition lacks sufficient particulars; that there is no evidence that the petitioners have been summoned by the police; that the 1st respondent's powers flow from the *NPS Act* and the *Constitution*; that the orders sought cannot be granted without meeting a higher evidential burden; that the orders seek to prevent a constitutional body from performing its mandate. He cited *Katana Fondo Birya v Krystalline Salt & 2 others*⁴ in support of the proposition that scandalous pleadings can be struck out. He relied on *Kivanga Estates Limited v National Bank of Kenya Limited*⁵ which underscored the courts duty to maintain its

² [2019] eKLR.

³ [2001] eKLR.

⁴ [2018] eKLR.

⁵ [2017] eKLR.



integrity. Lastly, counsel cited *Anarita Karimi Njeru v Republic No 1*⁶ and *Mumo Matemu v Trusted Society of Human Rights Alliance*⁷ both of which underscored the need for a petitioner to set out the complaints with a reasonable degree of precision and to set out the provisions of the *Constitution* said to have been infringed.

8. The 3rd respondent submitted that it is not sufficient for a petitioner to enumerate constitutional provisions and that he who alleges must prove as required by section 107 (1) (2) & (4) of the *Evidence Act*.⁸ She cited *Anarita Karimi Njeru v Attorney General* (*supra*) and submitted that the petition lacks merit. She argued that for a petitioner to succeed, he must demonstrate threats to infringement of fundamental rights and cited *Diamond Hashman Lalji & another v Attorney General*.⁹ She cited article 157(10) of the *Constitution* which provides for the independence of the office of the Director of Public Prosecutions and argued that no evidence was tabled to show that the petitioners were under investigation. She argued that in undertaking its functions, the DPP cannot be said to be violating the *Constitution* and relied on *Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others*¹⁰ which underscored the DPP's mandate to investigate crime. Additionally, counsel cited *Judges and Magistrates Vetting Board v Centre for Human Rights and Democracy*¹¹ and argued that the Petitioners have failed to prove threat of rights. Lastly, she cited *Hangsraz v Mahatma Gandhi Institute & 2 others*¹² in support of the proposition that judicial review is not a fishing expedition.
9. In her submissions dated April 22, 2022, the interested party argued that the 1st respondent's mandate to investigate crime flows from articles 243 and 245 of the *Constitution* and section 24 of the *NPS Act*. She submitted that the first grant was obtained fraudulently and it was the subject of police investigations. Further, she submitted that the petitioners are using this petition to determine their innocence which is a function of the criminal court and relied on *Republic v Attorney General & another ex parte Diamond Hashim Lalji and Ahmed Hasbam Lalji*.
10. A useful starting point in resolving the issues presented in this case is to recall that article 245 (4) of the *Constitution* provides that no person may give a direction to the Inspector General of Police 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...These provisions are meant to guarantee the independence of the National Police Service in the performance of its functions.
11. Importantly, the functions of the National Police Service are enumerated in section 24 of the *NPS Act*. They include: -
 - (e) investigation of crimes;

⁶ (1979) 1 KLR 54.

⁷ [2013] eKLR.

⁸ Cap 80, laws of Kenya.

⁹ [2018] eKLR.

¹⁰ [2019] eKLR.

¹¹ [2014] eKLR.

¹² [2008] MR 127.



- (g) prevention and detection of crime;
 - (h) apprehension of offenders;
 - (i) enforcement of all laws and regulations with which it is charged; and
 - (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.
12. Section 35 of the [NPS Act](#) provides the functions of the Directorate of Criminal Investigation to include—
- undertaking investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others; maintaining law and order; detecting and preventing crime; apprehend offenders; and performing any other function conferred on it by any other written law.
13. Unarguably, the police are legally obliged, as soon as they witness or are informed of a crime, to investigate the offence. The functions of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. These responsibilities arise from the [Constitution](#) and are affirmed by the [NPS Act](#). Any other answer would give rise to indignation.
14. Investigation of crime is a solemn duty imposed by law on the police officers. A police man’s position is different from that of ordinary citizen in that they cannot simply walk away from a criminal offence that has been reported to them or has been brought to their attention. As was held in [S v Williams](#) and others:¹³
- “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.”
15. I had the benefit of addressing a similar issue in [Republic v Director of Criminal Investigations & 2 others and Resilient Investments Limited & 3 others \(Interested Parties\) ex parte Pearl Beach Hotels Limited](#).¹⁴ In the said decision, I stated that the legislative intent in that the investigating officer records statements of persons acquainted with the facts of the case promptly to preserve the best evidence and to check any manipulation on the part of witnesses. Therefore, the investigating officers are required to record statements of persons acquainted with the facts promptly and failure to do so is a serious matter. Delayed recording of statements by the investigating officer of the material witnesses renders their evidence unreliable.
16. In the above case, I stated that it is the duty of the investigating officer to take into possession any document or exhibit which has a bearing on the case. The reason for such a necessity is that such document may have effect on the culpability or innocence of the accused. It is the duty of the investigating officers to ensure that the law is observed not only in letters but in spirit during the investigations and arrest and to ensure that they observe the provisions of law scrupulously and do not exceed their powers. It is the duty of the police to investigate the case with utmost impartiality and

¹³ 1998 (2) SACR 191 (SCA), citing Booysen, Justice, in [S v Barnes and another](#) 1990 (2) SACR 485 (N).

¹⁴ Judicial Review Application No E037 of 2021.



fairness, both to the suspect as well as to the aggrieved person. There is no argument before me that the police broke the law or are about to break the law in undertaking the investigations or that they acted outside their powers by summoning the petitioners (if they did) or undertaking the investigations. In fact, they are legally obligated to investigate the complaint. A review of the material presented before me does not suggest that the police exceeded their mandate or they are about to do so. The Petitioners seek to use this court as a shield to buffer them from police inquiries.

17. Importantly, it has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution at the close of police investigations. The Petitioners should be bold enough to face the investigators and await the outcome of the investigations. For this court to block or halt police investigations, there must be sufficient evidence to show that the investigation is inherently unfounded, malicious and without foundation and or the same is being done in gross abuse of the law.
18. The power of stop or quash police investigations on a suspected offender must be exercised sparingly and with circumspection and in the rarest of rare cases and the court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the court do not confer an arbitrary jurisdiction on the court to act according to its whims or caprice. The power to stop investigations is immense since it amounts to exonerating a suspect before a decision is made whether or not to prosecute him. Such power must be exercised with extreme care and caution. It is a power, which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution. The issues cited by the Petitioners are essentially what should be their defence should the decision to charge them be made. It is not for this court to weight the innocence or otherwise of a suspect.
19. It should be emphasized that there is a strong public interest in the investigation and prosecution of crime. This court can only prohibit criminal investigations where the prohibition is necessary to protect the integrity of the criminal justice system, this is where the court considers that the investigation is manifestly unwarranted and or it is being undertaken in total disregard of the law and fundamental rights. Cases where it will be unfair to investigate a suspect will include, and are not confined to those cases where there has been bad faith, unlawfulness or gross misconduct by the investigators/police. In such cases the touchstone is the integrity of the criminal justice system.
20. The need for an applicant seeking to prohibit or quash police investigations to prove the breach or omission complained of and also to demonstrate the prejudice to be suffered cannot be over emphasized. The starting point is whether or not there is a duty on the part of the police to investigate. Breach of that duty must be proved. It is not enough to claim as has happened in this case that the Petitioners are lawful purchasers of the property in question. The legality or otherwise of the manner in which the property was acquired cannot be shielded from scrutiny. The process leading to the alleged acquisition must be scrutinized, albeit, within the confines of the law. A lawful purchaser of a property should not shy away from scrutiny by law enforcement agencies. The test is whether the police are investigating a crime known to the law pursuant to a complaint lodged at the police station.
21. It is important to recognize that the decision as to whether to prosecute or not involves many interlinking factors and considerations. Once the police finalize their investigation, they are required to forward the docket to the DPP who independently evaluates the evidence and independently decides whether or not to prosecute. Courts must ensure that those under lawful police investigations or those charged with criminal offences do not simply procrastinate and seek to undermine the investigation or prosecution by creating hurdles to overcome all in the hope that at some stage, a particular hurdle



will cause the investigation or prosecution to fail. The police are yet to investigate and forward the investigation file to the DPP who will evaluate the evidence and independently decide whether or not to prosecute. This being the position, there was no basis at all for suing the DPP in this case.

22. Flowing from my discussion on the issues discussed above and conclusions arrived at, I find and hold that the petitioners' amended petition dated August 27, 2021 is totally unmerited. I dismiss it with no orders as to costs.

Right of appeal

SIGNED AND DATED AT MOMBASA THIS 19TH DAY OF SEPTEMBER 2022.

JOHN M. MATIVO

JUDGE

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2022.

OLGA SEWE

JUDGE

