REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CONSTITUTION AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 14 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2(1&4), 3(1), 10(1&2) (A-C) 19, 20, 21, 22 (1), 23, 24, 27(1-5), 28, 29, 49, 50, 157, 159, 165, 238,239,243, 247, 244 AND 258

AND

IN THE MATTER OF SECTION 4, 5 & 6 OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT

AND

IN THE MATTER OF SECTION 4 & 5 OF THE FAIR ADMINISTRATIVE ACTION ACT

BETWEEN

REUBEN WAMBURU KAROBA........................PETITIONER/APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.................1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS...........2ND RESPONDENT

AND

JOHN KAROBA IROHA......................................1ST INTERESTED PARTY

MBURU KAROBA...2ND INTERESTED PARTY

RULING

1. Reuben Wamburu Karoba (hereafter the Applicant) is a son to **John Karoba Iroha** *alias* **Karoba Iroha** (the 1st Interested Party) and a stepbrother to Mburu Karoha (the 2nd Interested Party). At the heart of the dispute between them is a land parcel LR No. Githunguri/Githiga/T.408 (hereafter the suit property) which was until July, 2014 the property of the 1st Interested Party and registered in his name.

2. The said property was however transferred to the name of the Applicant on 28/07/2014. While the Applicant claims to have bought the suit property from the 1st Interested Party for the sum of Kshs. 5,000,000/=, the 1st Interested Party denies entering into a sale agreement with the said Applicant asserting to have been duped into signing transfer documents in favour of the Applicant. He claims to have previously temporarily allowed his two sons herein to use the land parcel.

3. The suit property is also the subject of two suits, namely **Nairobi ELC Suit No. 1032 of 2014 Mburu Karoba v Reuben Wamburu karoba and Nairobi ELC Suit No. 891 of 2015 John Karoba Iroha v Reuben Wamburu Karoba & the Land Registrar Kiambu**. What provoked the instant petition and application was the arraignment in April, 2019 of the Applicant before the Githunguri CM's Court in

Criminal Case No. 583 of 2019 Republic v Reuben Wamburu Karoba following a complaint filed by the 1st Interested Party with the Directorate of Criminal Investigations Githunguri. In the said case the Applicant is charged with the offence of Procuring execution of a document by false pretenses contrary to Section 355 of the Penal Code. In that on 23rd June, 2014 at Githunguri town in Githunguri Sub-County of Kiambu County, by means of false and fraudulent representation as to the content of an application of Land Control Board Document, the Applicant procured Karoba Iroha to execute the said application for consent for the transfer of LR No. Githunguri/Githiga/T.408.

4. The Applicant filed instant petition on 17th May 2019 against the Director of Public Prosecutions (DPP) as the 1st Respondent and the Directorate of Criminal Investigations (DCI) as the 2nd Respondent and against the 1st and 2nd Interested Parties. The key relief sought in the petition is an order of *certiorari* to quash the charges and prosecution of the Applicant in the criminal case. A notice of motion filed contemporaneously with the petition was withdrawn on 28th June, 2019 and replaced with the motion filed on 1st July, 2019 which is the subject of this ruling and is dated 28th June 2019.

5. The substantive prayer therein seeks that ***"pending the hearing and determination of this application, the court be pleased to grant a CONSERVATORY ORDER OF STAY, staying the proceeding of the criminal case number 583 of 2019 at the Chief Magistrate's Court at Githunguri in so far as the same relates to the charge of procuring execution of a document by false pretenses contrary to Section 355 of the Penal Code."*** **(**sic)

6. As correctly pointed out in the grounds of opposition and submissions of the DPP, this prayer is temporary and effectively spent, referring as it does to its pendency rather than to the pendency of the petition. The court is nevertheless prepared to deem the said obviously erroneous reference as reference to the pendency of the petition. The motion invokes *inter alia* the provisions of Articles 22 and 23(a), (b) (c) (d) and (f) of the Constitution and is supported by the affidavit of the petitioner. The gist thereof is that the Applicant lawfully and properly acquired the suit property from the 1st Interested Party and that the 2nd Interested Party alongside other siblings have incited the 1st Interested Party to renege on the agreement, while claiming that they were not consulted and/or that the suit property was given to the Applicant to hold in trust for the siblings; that as a consequence, the two Interested Parties filed two separate suits against him in respect of the suit property.

7. Further, that the 1st and 2nd Interested Parties made an unfounded complaint to the DCI; that the DCI without conducting investigations or questioning him recommended his prosecution, leading to the impugned charges. He complains that the DPP acted in a discriminatory and selective manner; that he unlawfully and maliciously brought against him charges bereft of evidential foundation in breach of his duty to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid the abuse of the legal process. He asserts that given the alleged lack of proper foundation, the proceedings against him will be oppressive, vexatious and an abuse of the process of the court and therefore ought to be stayed and/or prohibited.

8. In opposition to the motion, the DPP and 1st Interested Party swore replying affidavits. The former sets out the steps leading to the criminal charges, including the receipt of the complaint by police from the 1st Interested Party *vide* OB no. 27/10/4/2019, the summoning of the Applicant by police and his alleged refusal to record a statement, the collection of evidence and forwarding of the same to the DPP for review and ultimate decision to have the Applicant prosecuted. According to the DPP, there was sufficient evidence to support the charges preferred against the Applicant; that in arriving at the decision to lay charges, the DPP considered the evidentiary threshold and duty to uphold the interests of the administration of justice.

9. The deponent highlights the key grounds upon which the decision was based, including the 1st Interested Party's alleged uncontroverted statement, evidence of falsification of the Land Register, the fact that the sale agreement upon which the transfer of land to the Applicant was based did not bear the signature of the 1st Interested Party; and the alleged failure by the Applicant to furnish police with evidence of alleged payment of the purchase price to the 1st Interested Party. The deponent asserts that the Applicant was duty bound to demonstrate the alleged infringement of his rights by the DPP and DCI through contravention of the law or the breach of their respective mandates under the Constitution. The DPP views the application as frivolous and vexatious and urges its dismissal.

10. For his part, and on behalf of the 2nd Interested Party, the 1st Interested Party deponed in his replying affidavit that he never executed the alleged agreement of sale in favour of the Applicant, receive consideration thereunder, or execute any transfer in favour of the Applicant; that he was duped into signing the documents which are the subject of the criminal charge against the Applicant ; that there are sound legal grounds to support the charges and that the Applicant ought to lay his evidence and grounds in his defence before the trial court and this court should dismiss his motion.

11. Directions were given on 16/10/2019 to canvass the motion by way of written submissions. The Applicant having set out the factual background to the motion proceeded to submit on the sole issue identified, namely, whether the Applicant has established a *prima facie* case to justify the issuance of the conservatory orders sought. Citing the relevant legal provisions and case law and the DPP's duty to uphold the rule of law, the Applicant reiterates his complaints as to the circumstances in which the complaint against him was filed, investigated and the manner in which the decision to prosecute him was made.

12. He complains that despite the existence of two civil suits in relation to the dispute and the fact that an advocate who allegedly drew the disputed sale agreement had been implicated during the investigations, the DPP determined to charge the Applicant alone. Further emphasizing that the decision to charge him was not based on adequate evidence, the Applicant asserts that the DPP failed to act independently and impartially as mandated by the Constitution and the Office of the DPP Act and is therefore guilty of abusing his powers with a view to circumventing the two pending civil suits.

13. Citing the decision of the High Court in **Prasul Jayantital Shah & Anor v. Inspector General of the National Police Service & 3 others [2019] eKLR** as to the nature of conservatory orders, the Applicant urged the court to halt the proceedings in the lower court in order to preserve the subject matter, namely the suit property, and to give opportunity to the Environment and Land Court to determine the rightful owner of the property in dispute. According to the Applicant the DPP has failed to rebut the assertions contained in his supporting affidavit

and to give satisfactory reasons for preferring charges against the Applicant, which failure is an indicator that the prosecution was actuated by ulterior motives. The Applicant therefore urged the court to allow the motion.

14. The DPP commenced his submissions by restating the principles governing the grant of conservatory orders as enunciated by **Musinga J.** (as he then was) in **Centre for Rights and Awareness (CREAW) and 7 others v The Attorney General High Court Petition No. 16 of 2011**. The DPP submitted that the Applicant had failed to demonstrate a *prima facie* case whereas the DPP had presented material through affidavit to demonstrate that due process was followed from the moment when the criminal complaint was received up until the decisions to prefer charges was made. The DPP asserted that the Applicant despite invoking a plethora of articles in the Constitution had not demonstrated with a reasonable degree of precision the rights allegedly violated and the manner in which they have been violated. The DPP placed reliance on the celebrated case of **Anarita Karimi Njeru V Republic (No. 1) [1979]1 KLR 154.** The DPP therefore takes the position that the application does not rise up to the requisite threshold and should be dismissed.

15. T he interested parties, relying on the Supreme Court decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others (2014) eKLR** and the **CREAW** case echoed the principles governing the grant of conservatory orders .As to what constitutes a *prima facie* case they cite the English decision in **American Cynamide V. Ethicon [1975] AC 396** where it was held that a successful applicant must furnish evidence and material which satisfy a serious question of law and fact to be tried at the hearing and that he has a case which raises triable issues, and with a probability of success.

16. The submissions emphasize the alleged fraudulent transfer of the suit property to the Applicant and the fact that the DPP properly exercised his mandate in laying a prosecution against the Applicant. They assert that the alleged fraudulent transaction attracts both civil and criminal sanctions and that the aim of mounting a prosecution is not only to secure a conviction but to present available evidence in a fair and public hearing. The interested parties further submit that the Applicant has failed to demonstrate any sound grounds to justify the issuance of the orders he seeks and that the motion is a ploy to derail the hearing and determination of the criminal case.

17. The interested parties reiterate the independent mandate of the DPP, the situations when the court may properly interfere therewith, and provisions of Section 193A of the Criminal Procedure Code (CPC) and rely on pronouncements in respect of the former in **Peter Ngunjiri Maina v DPP & 2 others [2017] eKLR** and in respect of the latter, the case of **Kuria and 3 Others v. Attorney General [2002] 2KLR 69.** In conclusion, the interested parties assert that the proper forum to agitate the arguments raised by the Applicant is the trial court and his instant application ought to be dismissed as it represents an abuse of the process of the court.

18. The court has considered the rival affidavits and submissions made in respect of the application. In **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** the court defined the nature of conservatory orders as follows:

> **"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."**

19. Further, in the case of **Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held that:

> **"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."**

20. The principles governing the grant of conservatory orders are now settled. In the oft-quoted case of **Centre for Rights Education and Awareness (CREAW) and 7 Others v Attorney General Petition No. 16 of 2011 Musinga J (**as he then was) stated that:

> **"...It is important to point out that the arguments that were advanced by Counsel …. relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires demonstrating that he has a *prima facie* case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."**

21. These principles were further reiterated in the case of **Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 Others, Petition No. 7 of 2014; (2014) e KLR** where the Court held that;

> **[59] In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: "… [an Applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.**

[60] To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.

[61] The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.

[62] The third principle is one recently enunciated by the Supreme Court in the election petition case of Gatirau Peter Munya v Dickson Mwenda Githinji and 2 Others, SCK Petition No 2 of 2013. The principle is that the public interest must be considered before grant of a conservatory order. Ojwang and Wanjala JJSC stated that: "[86] 'conservancy orders' bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as 'the prospects of irreparable harm' occurring during the pendency of a case; or 'high probability of success' in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.

[63] Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest."

22. The key complaints raised by the Applicant herein are that proper investigations were not carried out by the DCI as evidenced in part by the alleged failure by the DCI to interview the Applicant; that the evidence gathered is inadequate to sustain the charge; and that the dispute between him and the interested parties is essentially a civil dispute which is the subject of two civil causes, and that in arriving at the decision to prosecute him, the DPP had failed to act independently and to consider the interests of the administration of justice and the resultant proceedings will be oppressive and vexatious to the Applicant.

23. The DPP and DCI by their replying affidavit and annexures attempted to answer these complaints. There are attached among other material to the said replying affidavit, statements recorded by the DCI from the 1st Interested Party (annexure "**KM2a")** and by CPL John Warui the Investigating Officer, as annexure "**KM3".** The latter contains an account of the investigations carried out and asserts that the Applicant declined to record a statement when called upon to do so. There is also annexed to the said replying affidavit a letter marked **"KM6b"** written by the DCIO Githunguri to the CCIO Kiambu further detailing the enquires made by the police pursuant to the report by the 1st Interested Party.

24. Looking at the uncontroverted depositions in the replying affidavit of the 1st and 2nd Respondents and the annexures thereto, it is difficult to agree with the complaint by the Applicant that no investigations at all were carried out or that police did not seek an explanation from him. The police are under a duty upon receiving a complaint to investigate the same, and unless it is demonstrated clearly that the investigations are carried out in breach of the law, statute and abuse of process, the court would be slow to interfere. As stated in **R. v Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

"The police have a duty to investigate ---- any complaint---- made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime (if they failed to do so) …The police need to only establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reasons for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to interfere."

25. The independent mandate of the DPP under Article 157 of the Constitution is not to be lightly interfered with. Article 157(6) stipulates that:

"The Director of Public Prosecution 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 allege 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)"

26. In securing the independence of the DPP's office and the discharge of his mandate, Article 157(10) provides that: -

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any

person or authority."

27. However, the stricture provided in Article 157(11) of the Constitution requires that in exercising the powers conferred to him under the Constitution, the DPP will have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. The Petitioner herein repeatedly claims that the evidence upon which his prosecution is based is insufficient, and while that alone is not evidence of abuse, the Petitioner but he has failed to furnish evidence of assertions that the DPP acted contrary to the provisions of Article 157 of the Constitution.

28. A decision by the DPP to prosecute will be considered an abuse of the legal process if the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; when the person against whom the prosecution has been commenced has been deprived of his fundamental right to a fair trial; and when the prosecution is against public policy. See **Shadrack Mwiti Ithinji and 9 Others v R [2006] e KLR,** citing **Emmanuel Kuria Gathoni and Another v R Cr. App. 1384/01**.

29. The onus lay with the Applicant to demonstrate that the DPP abused his discretion in preferring the charges against him. No such evidence has been tendered. Mere inadequacy of evidence as asserted by the Applicant is not enough to move the court to interfere with the DPP's exercise of his mandate. The mere fact that there are civil suits already in existence and arising from the same facts as the criminal charges cannot defeat a criminal prosecution arising from the same facts. Section 193A of the CPC makes that clear.

30. It is to be expected that the Petitioner will have a fair trial before a competent court as guaranteed under Article 50 of the Constitution and the Criminal Procedure Code, where he will have the opportunity to challenge the prosecution evidence and to canvass his defence without hindrance. There is nothing to suggest that such fair trial cannot be conducted or that the possibility of such trial has been compromised.

31. In the case of **Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** the Court while declining to stop the prosecution of the Applicants stated that:

> **"Our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Applicants demonstrate that the circumstances of the impugned process render it impossible for the Applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the Applicant's chances of being acquittal are high. In other words, a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited."**

32. It is in the public interest and consistent with the rule of law that persons suspected of committing offences be subjected to the due process of the law. There is as public interest element underlying every prosecution, namely the vindication of the rule of law by addressing the grievances of the complainant while upholding the private interest of the accused whose rights are to be protected. The court would not be acting in public interest if it were to usurp and interfere, without proper cause being shown, with the work of the investigative arm of the police or the DPP's exercise of his mandate to prosecute those suspected of committing offences.

33. On the above point, I associate myself with the sentiments of **Odunga** J in **Republic vs Director of Public Prosecution & Another Ex-parte Geoffrey Mayaka Bogonko & Another (2017) eKLR** where he observed as follows:-

> **"The circumstances under which the court will grant stay of a criminal process in these kinds of proceedings are now well settled. The court ought not to usurp the constitutional mandate of the Director of the Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an Applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is open to the Applicant in those proceedings. However, if the Applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legality recognized aim."**

34. The Applicant has claimed that he will suffer prejudice through the prosecution mounted against him. He has not shown how such prejudice is likely to occur. No doubt an accused person is liable to be inconvenienced by his trial but of itself that is not oppressive or vexatious as asserted by the Applicant, whereas there appear to be grounds for reasonable suspicion against the Applicant, based on some of the undisputed facts. Firstly, he claims to have purchased the suit property from the 1st Interested Party but the sale agreement he proffered is apparently not executed by the Interested Party in the space provided for the vendor's signature. Nor is there any evidence furnished that the Applicant indeed paid the alleged purchase price of Kshs. 5 million to the 1st Interested Party. Additionally, it appears that there may be *prima facie* evidence of tampering with the title records in respect of the suit property at the lands' office or at least some malpractice in the handling of official records/transactions in relation to the registration of the disputed transfer in favour of the Applicant.

35. The Applicant will have ample opportunity to challenge the repeated denials by the 1st Interested Party as to the execution of the sale

agreement and the applications for consent to the Land Control Board which is the subject of the criminal charges before the lower court. This court is not the proper forum at which contested matters of evidence related to the criminal case are to be resolved.

36. Ultimately, reviewing all the material proffered by the Applicant, this court is unpersuaded that the Applicant has made out a prima facie case with a likelihood of success and that he is in danger of suffering prejudice arising from violation or threatened violation of his rights or of the Constitution, or that the Petition will be rendered nugatory if the conservatory orders are denied. Moreover, in the circumstances of this case the public interest militates against the halting of the criminal case. The Applicant's motion has no merit and is accordingly dismissed.

SIGNED AND DATED ELECTRONICALLY THIS 16TH DAY OF MARCH 2021.

C. MEOLI

JUDGE

DELIVERED AND SIGNED AT KIAMBU ON THIS 23RD DAY OF MARCH 2021.

M.KASANGO

JUDGE

IN THE PRESENCE OF:

………………………………… FOR THE PETITIONERS

………………………………… FOR THE RESPONDENTS