



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION**

**CORAM: MUMBI NGUGI J**

**PETITION NO 3 OF 2020**

**FIRSTLING SUPPLIES LTD.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**JUDGMENT**

1. The petitioner, a limited liability company, has lodged this petition dated 17<sup>th</sup> January 2020 challenging its prosecution in Milimani Chief Magistrate's Court Criminal Case No. 8 of 2018- Republic v Lilian Omollo & Others. It contends that its prosecution in the said matter is in contravention of Article 157 (11) of the Constitution and violates its rights under Articles 27, 28, 29 and 50 of the Constitution. It prays for the following orders from the court:

- a. A declaration that the initiation, maintenance and prosecution of the Petitioner in Milimani Magistrate's Court Criminal Case No. 8 of 2018, Republic v Lilian Omollo & Others contravenes article 157 (11) of the Constitution and violates the Petitioner's rights under articles 27, 28, 29 and 50 of the Constitution.**
- b. A judicial review order of prohibition, prohibiting the Respondents from continuing with the prosecution of the Petitioner via Milimani Chief Magistrate's Court ACC No. 8 of 2018.**
- c. An order of compensation for violation of each of the above rights more so for subjecting the Petitioner to an unfair trial.**
- d. That the costs of this suit Petition be borne by the Respondents.**
- e. Any other/further relief that this Honourable Court may deem fit to grant.**

2. The petition is lodged against the Director of Public Prosecutions (DPP), a constitutional office established under Article 157 of the Constitution and charged with the mandate of conducting public prosecutions on behalf of the Republic.

3. The petitioner states that it is a limited liability company whose directors are Yvonne Wanjiku Ngugi and James Thuita Nderitu, and that James Thuita Nderitu also runs a separate business known as Firstling Supplies. This latter business is not owned by either Yvonne Wanjiku Ngugi or Firstling Supplies Limited. It further states that both Firstling Supplies and Firstling Supplies Limited hold different accounts at Standard Chartered Bank, and both have conducted business with the National Youth Service (NYS) in the past.

4. It further states that sometimes in May 2018, the petitioner's directors, Yvonne Wanjiku Ngugi and James Thuita Nderitu, were arrested and charged in court for allegedly fraudulently acquiring public property from the NYS as directors of Firstling Supplies Limited. Thereafter, one of the petitioner's directors, Yvonne Wanjiku Ngugi, challenged her prosecution on the basis that she was not actively involved in the day to day running of the petitioner company, but her petition was dismissed. Following the determination of her petition, the DPP amended the charge sheet sometime around February 2019 to introduce the entity whose payment (from NYS) is the subject of the criminal case, James Thuita Nderitu T/A Firstling Supplies. The said James Thuita Nderitu is also a director of Firstling Supplies Limited, an entity which the petitioner asserts is distinct from James Thuita or James Thuita Trading as Firstling Supplies Limited.

5. It is the petitioner's contention that since Mr. James Thuita Nderitu confirmed to the DPP that he has been trading as Firstling Supplies, there was no legal basis to charge the petitioner. The petitioner complains that contemporaneously with charging it in court, the DPP has

caused its bank accounts to be frozen at the instance of the Asset Recovery Agency. It contends that it has not only experienced hardship trying to obtain legal representation but its directors have also been subjected to similarly impugned proceedings.

6. The petitioner contends that as a result of his actions as set out above, the DPP has countermanded (sic) Article 157 (11) as the prosecution of the petitioner constitutes an unfair trial within the meaning of Article 50 of the Constitution. It further contends that there is no agency relationship between various directors of a company, and while criminal acts of a company can be attributed to a director, acts of another director cannot be attributed to a company.

7. It is its argument further that the DPP has ‘at the instigation countermanded’ Article 157 (11) by failing to take into account relevant matters before instituting criminal proceedings against the petitioner. It contends that the proceedings in Milimani Chief Magistrate’s ACC No. 8 of 2018 are unfair to it and constitute a violation of its rights to fair trial, dignity and security of person of its director, Yvonne Wanjiku Ngugi. It argues further that there is an apparent failure on the part of the DPP to judiciously exercise his powers. The petitioner argues that its prosecution unjustifiably abridges its right to equal benefit and protection of the law, a violation of Article 27 (1) of the Constitution, and is unreasonable and irrational.

8. The Petition is supported by an affidavit sworn by its Director, Yvonne Wanjiku Ngugi, on 17<sup>th</sup> January 2020. She deposes in this affidavit that she is an inactive director of the petitioner, whose incorporation she participated in around 2006 with one James Thuita Nderitu. She is a minority shareholder with 10 % of the total shares of the company. The said James Thuita Nderitu also trades in his personal capacity as Firstling Supplies.

9. Ms. Ngugi avers that sometime in May 2017, she was arrested at night and charged in court with the said James Thuita Nderitu for allegedly fraudulently acquiring public property from the NYS as directors of Firstling Supplies Limited. It was claimed that on diverse dates between 9<sup>th</sup> December 2016 and February 2017, the petitioner had fraudulently acquired a sum of Kshs. 115,534,000/= purportedly as payment for supply of goods by the petitioner company, Firstling Supplies Limited. It is her deposition that as a matter of fact, no such amount had been paid to the petitioner for the alleged period. Instead, the said amount had been paid to James Thuita Nderitu trading as Firstling Supplies through account number 0102098154000 and not to Firstling Supplies Limited.

10. Ms. Ngugi states that she filed a petition to challenge her prosecution as a director of Firstling Supplies Limited as she was an inactive director, but the petition was dismissed. She reiterates the contents of the petition with respect to the amendment of the charge sheet by the DPP to introduce James Thuita Nderitu T/A Firstling Supplies. She avers that the DPP deleted the claim that the money had been paid to Firstling Supplies Limited but elected to subject her and the petitioner to the impugned proceedings. It is her deposition that the entity that fraudulently acquired the sum of Kshs. Kshs. 115,534,000/= was James Thuita Nderitu T/A Firstling Supplies and not the petitioner.

11. Ms. Ngugi further avers that the proceedings in the trial court have been a subject of wide media coverage. As a result, she has endured not only widespread profiling of criminality but has also been exposed to stigma associated with criminality. She asserts that the DPP’s actions are a violation of the petitioner’s rights and are contrary to Article 157 (11) of the Constitution. She further echoes the claims in the petition regarding the reasonableness and rationality of the prosecution of the petitioner, and asserts that the prosecution is a violation of her right to her dignity and security of person as its director.

12. The DPP opposes the petition and has filed Grounds of Opposition dated 3<sup>rd</sup> February 2020. The DPP argues in these grounds that his office acted within the confines of the Constitution which, under Article 157 (6), vests in his office State powers of prosecution to institute and undertake criminal proceedings against any person. The DPP asserts that in making the decision to prosecute, he does not require the consent of any person or authority, nor is he subject to the direction or control of any person or authority. It is his contention that the petitioner has failed to demonstrate any evidence of malice, unlawful actions, excess or want of authority, harassment or intimidation or even manipulation of the court process that would show that the petitioner is unlikely to get a fair trial to warrant the High Court’s interference with the DPP’s independent decision.

13. The respondent further opposes the petition by an affidavit sworn on 26<sup>th</sup> May 2020 by Berryl Marindah, a Prosecution Counsel in the Office of the DPP. Ms. Marindah avers that the matters raised in this petition are *res judicata* as they have already been determined in Petition No. 18 of 2018 in which the petitioner had sought similar orders before this court. The petition was dismissed by Hon Justice J. N. Onyiego J on 7<sup>th</sup> December 2018. Ms. Marindah avers that the court that dismissed the petition is a court of competent and parallel jurisdiction and accordingly, this petition is bad in law, vexatious and an abuse of the court process.

14. Ms. Marindah cites the provisions of section 7 of the Civil Procedure Code (CPC) which prohibits the court from dealing with a matter that was directly and substantially in issue in a former suit between the same parties. The DPP avers that the present petition is in breach of this provision and a matter that satisfies the tests for a defense of *res judicata* as there must be an end to litigation. The DPP deposes that he relies entirely on the proceedings in Petition No. 18 of 2018 and the evidence his office had adduced in that matter entirely for this petition.

15. With regard to the factual matters relating to the prosecution of the petitioner, Ms. Marindah avers that in early 2018, the Directorate of Criminal Investigations (DCI) was conducting investigations in regard to loss of public funds at the NYS in the Ministry of Public Service, Youth and Gender Affairs in which funds were lost through fraud perpetrated by public officials in collusion with various business entities and their directors. One of the companies and directors who were being investigated for the said serious economic crimes is the petitioner and its directors. The petitioner had been incorporated in Kenya on 4<sup>th</sup> August 2006 with James Thuita Nderitu and Yvonne Wanjiku Ngugi as directors. The company operated a bank account number 0102010315700 at Standard Chartered Bank, Harambee Avenue branch.

16. Ms. Marindah avers that upon perusal of the evidence gathered by the DCI, the DPP was satisfied that indeed the petitioner as a separate legal entity and its directors were all criminally liable, hence the charges filed against them.

17. It is the DPP’s averment further that Ms. Ngugi’s averments in support of the petition are false as DCI investigations revealed that she was actively involved in the transactions of the said bank account, and she cannot therefore claim that she was an inactive director. She

observes that the petitioner's bank statements annexed to Ms. Ngugi's affidavit show various instances where Ms. Ngugi withdrew large sums of money between July 2016 and January 2018, which is an indication of her active involvement in the affairs of the petitioner.

18. Ms. Marindah further avers that the bank statements also show that there was transfer of funds from the petitioner's account number 0102010315700 held at Standard Chartered Ruaraka branch to a business entity known as Ellwyn Supplies solely owned by Ms. Ngugi in which she has filed a Criminal Revision No. 12 of 2018 seeking orders to unfreeze the bank account number 1550262440276 held at Equity Bank Limited, an application that is pending before the court.

19. It is also the DPP's averment that the amendment of the charge sheet in February 2019 was tailored to rectify the recipient of some of the fraudulent funds after further investigations. It was not to exonerate the petitioner from charges of participation in the several offences pending in Milimani Chief Magistrate's ACC No.8 of 2018. Further, that there are payment vouchers to be adduced into evidence that clearly indicate that the payee's name is the petitioner's, and there is therefore sufficient evidence to establish a *prima facie* arguable case against the petitioner.

20. It is the DPP's averment that the accuracy and correctness of the evidence or facts gathered in the investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of the evidence adduced in support of the charges. In the DPP's view, the issues raised by the petitioner in this matter amount to a defence which the petitioner shall be accorded an opportunity to present at the trial.

21. The petitioner filed a Supplementary Affidavit sworn on its behalf by its other director, Mr. James Thuita Nderitu. The affidavit is sworn in response to the affidavit sworn by Ms. Marindah for the DPP.

22. Mr. Nderitu avers that indeed the petitioner is different and distinct from Firstling Supplies, which is a sole proprietorship under his stewardship. He avers that it is true that the petitioner holds account No. 012010315700, but that the money the subject matter of Milimani Anti-Corruption Case No. 8 of 2018 was not paid to that account but to his account number 0102098154000 which he holds while trading as Firstling Supplies. That is the account whose statement, which he attaches to his affidavit, shows receipt of the money at issue.

23. It is his averment that both he, trading as 'Firstling Supplies' and the petitioner, conducted different businesses with the NYS, and both were paid for the various works done. It is his averment further that the petitioner did business with the NYS in 2017 and was paid way after 17 February 2017. Mr. Nderitu avers that a perusal of the petitioner's bank statement shows that during the period when it is alleged that money was paid, the petitioner had a negative bank balance. The entity that was paid for the period mentioned in the charge sheet was Firstling Supplies and not the petitioner.

24. Mr. Nderitu avers that the voucher referred to by Ms. Marindah was not made by the petitioner, and that it makes reference to a different entity, 'Ms Firstling SUPPLIERS Limited' which is not the petitioner's name. Mr. Nderitu deposes that because Firstling Supplies Limited and Firstling Supplies conducted different businesses with the NYS, the use of different names was likely an error or oversight on the part of the NYS officials. Mr. Nderitu deposes that payment was nonetheless made to Firstling Supplies and not Firstling Supplies Limited which has a different IFMIS detail as the account details show.

25. He further deposes that the charge sheet in the criminal case shows that payment was made for "goods not supplied", and it shall be his duty, as 'Firstling Supplies,' to show at the criminal trial that he did supply goods to the NYS. The question whether he was paid, as Firstling Supplies, the sum of Kshs. 115, 534,000/= for goods supplied or not can still be addressed without the petitioner, Firstling Supplies Limited, and all its directors as a party to the proceedings.

#### **The Petitioner's Submissions.**

26. It is submitted on behalf of the petitioner that it was incorporated by Ms. Ngugi and James Thuita Nderitu, its two directors, when they were married to each other. Mr. Nderitu also runs a business known as "Firstling Supplies", which they contend is a different and separate legal entity from the petitioner. The two entities also have different bank accounts, and both have conducted business with the NYS on their own different and distinct rights.

27. The petitioner reiterates the arguments made in the affidavits in support of the petition. It argues that the payments received by 'Firstling Supplies' was at first attributed in the charge sheet in Mililani ACC No. 8 of 2018, Republic vs. Lillian Omollo & Others, to the petitioner. It submits, however, that the sums in contention were paid to James Thuita Nderitu, trading as Firstling Supplies, in a different account.

28. The petitioner submits that a petition involving Ms. Ngugi, one of the petitioner's directors was heard and dismissed by the High Court. She was, in that petition, claiming that she was an inactive director of the petitioner, but it emerged that the subject money was paid in James Thuita's account and not in the petitioner's account. The court had, however, dismissed the petition after finding that Ms. Ngugi had made cash withdrawals from the petitioner's account.

29. The petitioner submits, however, that Petition No. 18 of 2018, Yvonne Wanjiku Ngugi v The Director of Public Prosecutions, is different from this petition, and that this petition is therefore not *res judicata*. The basis of this submission is, first, that the parties are different since the petitioner in the previous petition was one of the directors of the present petitioner. She was, in that petition, claiming that while she was one of the directors of the petitioner, she was an inactive director.

30. It is submitted, secondly, that in the instant petition, the petitioner is claiming that it is another and different legal personality that was paid the sum of money that is the subject of the criminal cases. Further, that the only connection between the present petitioner and the entity that was paid is that one of its directors, James Thuita Nderitu, also trades as Firstling Supplies, an entity that came to existence first, before he used its name to form the present petitioner, a limited liability company.

31. The petitioner submits that the DPP had amended the charge sheet in the criminal case in February 2019 sheet so as to introduce James Nderitu Thuita T/A Firstling Supplies, but had not removed the present petitioner from the case. The petitioner submits that the only issue arising in this case is whether its prosecution in Mililani ACC No. 8 of 2018, Republic vs. Lillian Omollo & Others for fraudulent acquisition of a sum of Kshs. 115,534,000 actually paid to James Thuita Nderitu trading as Firstling Supplies is in conformity with Article 157 (11) of the Constitution.

32. Its submission is that the prosecution is not in the public interest and is contrary to the said provision. Reliance is placed on the case of **Justus Mwenda Kathenge v Director of Public Prosecutions & 2 others [2014] eKLR** in which Lenaola J (as he then was) held as follows:

**‘Where a prosecution is based on a complete misapprehension of facts and the applicable law and where a suspect is being lumped together with others for no credible reason that is called abuse of process of court.’**

33. The petitioner submits that a reading of Article 157 (11) as amplified by section 14 (5) of the ODDP Act shows that a trial is unfair if it is an abuse of the court process, when it embodies partiality and discrimination, when it fails to take into account relevant factors, and generally, when it is not instituted as a bid to honestly enforce criminal law.

34. The petitioner argues that this position obtains in the present case. This is because in law, James Thuita t/a Firstling Supplies is different and distinct from the petitioner, and they have different statutory and contractual obligations. Firstling Supplies and James Thuita Nderitu are one and the same thing in law, and Firstlings Supplies cannot enter into a contract on behalf of the petitioner, nor fulfil its statutory obligations. It is also submitted that no legal regime or judicial decision justify transfer of criminal liability from an individual (James Thuita t/a Firstling Supplies) to a corporate entity.

35. It is submitted further that failure to consider that James Thuita t/a Firstling Supplies Limited (sic) was the entity that was paid the sum of money at issue and to bring on board anyone associated with the petitioner is failure to take into account relevant factors and an abuse of court process. It is also an abuse of the court process to use the criminal justice system to punish the petitioner on the basis of the criminal conduct of one of the petitioner’s directors. constitutes an abuse of the court process and brings the institution of criminal justice into disrepute.

36. In its supplementary submissions, the petitioner reiterates that its petition is not *res judicata*. It submits that its case is overwhelmingly distinguishable from Petition No. 18 of 2018, between Yvonne Wanjiku Ngugi vs. The Director of Public Prosecutions, to the extent that the petitioners are different and the claims are different. It further submits that this petition is novel and its facts could not have been used in a review application in Petition No. 18 of 2018, hence this fresh petition. The petitioner submits that the DPP has conflated the facts in Petition No. 18 of 2018 with the facts in this petition.

37. The petitioner further makes submissions which are more in the nature of factual responses to the DPP’s affidavit. It reiterates that the culpability of James Thuita Nderitu T/A Firstling Supplies can indeed be established without the involvement of the petitioner and its directors as these are different legal entities.

#### **Submissions in response**

38. The DPP submits that the issues raised in this petition are *res judicata*. They are the same or substantially the same as and were extensively argued by similar parties as in this instant petition and determined by a court of competent and parallel jurisdiction. The DPP relies on section 7 of the CPC which contains the statutory provision on *res judicata*. He also relies on the case of Nancy **Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR** in which the court identified the four ingredients necessary for the doctrine to apply. These are whether there was previous litigation in which identical claims were raised or in which identical claims could have been raised; whether there are parties in the present suit that are the same as in the previous suit; whether the court which determined the original claim had jurisdiction to determine the claim; and finally, whether the original action received a final judgment on the merits.

39. It is the DPP’s case that these ingredients are present in the present case. There is an identical claim for an order of judicial review of prohibition to prohibit the DPP from prosecuting the petitioner in Milimani Chief Magistrate’s Court ACC No. 8 of 2018. The parties are also the same in both petitions, and Petition No.18 of 2018 was heard and determined by Justice J.N. Onyiego of the Anti-Corruption and Economic Crimes Division of the High Court, a court of competent and parallel jurisdiction. The petition was dismissed on 7<sup>th</sup> December 2018.

40. The DPP denies having acted in violation of his mandate under Article 157(11) of the Constitution. He submits that the decision to charge an accused person lies within his mandate under Article 157(6)(a) of the Constitution. Such decision is reached independently based on the evidence disclosed by the investigations. His office had reviewed the investigations file forwarded to his office by the DCI and was satisfied that there was sufficient evidence to prefer charges against the petitioner and others. In making the decision to prosecute, the DPP does not act under the direction or control of any person or authority and is subject only to the Constitution and the law. The DPP submits that the petitioner has not demonstrated that his office acted without or in excess of the powers conferred upon him by law, or that he has infringed, violated, contravened or in any other manner failed to comply with or respect and observe the constitutional provisions that vest the prosecutorial mandate in his office.

41. The DPP further denies the petitioner’s allegation that he has discriminated against it, contrary to Article 27 of the Constitution. In what seems to be a conflation of the arguments by Yvonne Wanjiku Ngugi and the petitioner, Firstlings Supplies Limited, the DPP submits that the petitioner alleges that ‘*her rights to a fair trial have been violated as the charges against her are discriminatory because the DPP failed to take into account that she was a minority shareholder controlling a mere 10 % of the total shareholding*’; that the DPP failed to take into account that the petitioner was amongst other beneficiaries of monies from the account of Firstling Supplies Limited; and that his decision to

charge 'her' alongside James Nderitu Thuita was discriminatory 'because she was not involved in the day to day running of the accused company.'

42. The DPP submits that he has enough evidence to support charges of conspiracy and fraudulent acquisition of public property against the petitioner. His decision to charge was based on cogent and sufficient evidence disclosed by the investigations and was not based on malice or bad faith. The DPP makes detailed submissions on the evidence in his possession which is not relevant for present purposes.

43. The DPP further submits, in reliance on **Republic v Kenya Revenue Authority & 2 Others [2013] eKLR**, that the DPP's decision to prefer charges against any person pursuant to section 23 of the Penal Code and whether or not those charges can be sustained is a matter of law and fact for the trial court to decide. The innocence or otherwise of the petitioner as a director of the subject company- again a conflation of the petitioner with Yvonne Wanjiku Ngugi- is a matter for the trial court. The DPP also cites the case of **Njuguna S. Ndung'u v Ethics & Anti- Corruption & 3 Others [2014] eKLR, Leposo Musengi v DPP & 3 Others[2015] eKLR** to submit that the power to stop a prosecution arises only where it is an abuse of the process of the court.

44. The DPP also denied that his decision to charge the petitioner violated its rights to a fair trial. He had made his decision to charge having been satisfied that the totality of the evidence clearly established that the petitioner committed offences in law. He submits that the petitioner has sought to argue matters of evidence, but the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges. The petitioner has also not demonstrated that it will not receive a fair trial during the hearing of the matter. It has also not demonstrated that the prosecution is an abuse of the court process or an infringement of fundamental rights.

45. The DPP asks the court not to grant the orders that the petitioner seeks. He submits that the petitioner is seeking judicial review orders of prohibition, and the court should look into the process leading to the prosecution of the petitioner but not the merits of the prosecution case. In the DPP's view, his decision to prefer charges against the petitioner was based on the law and evidence, and the petitioner has not presented a prima facie case to warrant the orders of stay, prohibition, mandamus and certiorari.

46. The DPP further cites section 23 of the Penal Code which provides for persons in the management or control of a company to be charged with respect to offences committed by a company. He submits that under the said section, an investigative agency only needs to prove that an offence was committed by a company or any persons charged with the affairs of the company, and it is then incumbent upon the person charged to prove that he or she was not involved or took reasonable steps to prevent the commission of the offence.

47. The DPP submits that the petitioner has not demonstrated that he did not act independently, or that he acted capriciously, in bad faith or has abused the legal process in a manner to trigger this Court's intervention.

### **Analysis and Determination**

48. Having considered the pleadings and submissions in this matter, I believe two issues arise for determination. The first is whether the present petition is *res judicata*, the issues raised therein having been determined in an earlier petition by a court of competent jurisdiction. Should this issue be in the negative, the second issue to address is whether the petitioner has presented a case that would justify the exercise of the court's jurisdiction to prohibit its prosecution in the matter pending before the lower court in Milimani Anti-Corruption Case No. 8 of 2018.

### **Whether this petition is *res judicata***

49. Section 7 of the Civil Procedure Act provides as follows:

**No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. (Emphasis added)**

50. The petitioner is a limited liability company. Its directors are Yvonne Wanjiku Ngugi and James Thuita Nderitu, who incorporated the petitioner in 2006. Following investigations into the loss of public funds at the NYS, the directors of the petitioner and others were charged in Milimani Anti-Corruption Case No. 8 of 2018. Yvonne Wanjiku Ngugi then challenged her prosecution in Petition No. 18 of 2018. The basis of her challenge was that she was not actively involved in the day to day running of the petitioner. Her petition was heard and determined, the court dismissing the petition in its judgment dated 7<sup>th</sup> December 2018.

51. The facts before the court in Petition No. 18 of 2018 were that the petitioner, Yvonne Wanjiku Ngugi, and her husband, James Thuita Nderitu, were the directors of the present petitioner, Firstling Supplies Limited. They had, together with others, been charged in Milimani Anti-Corruption Case No. 12 of 2018. The charges against them as they emerge from the judgment in Petition No. 18 of 2018 were that they had fraudulently received Kshs 115,534,000 from the NYS. Yvonne Wanjiku Ngugi alleged in the Petition that she held 10% of the shares in the company, the present petitioner, and was not actively involved in its management. She sought, almost word for word, the same orders as are sought in the present petition. Indeed, the opening words of the judgment of Onyiego J dated 7<sup>th</sup> December 2018 reflect the fact that the present petition is a rehash of the petition that was before him:

**1. On the 29<sup>th</sup> May 2018, Yvonne Wanjiku Ngugi herein referred to as the petitioner, was together with several other persons arraigned before Nairobi Chief Magistrate's Court vide Anti-Corruption case No. 12/2018 facing various corruption related charges. In particular, the petitioner together with her husband James Thuita Nderitu and their company to which they are**

joint directors Firstling Supplies Ltd, were charged with the offence of fraudulent acquisition of public property contrary to Section 45 (1) (A) as read with Section 48 of the Anti-Corruption and Economic Crimes Act 2003 (Count 18 of the Charge Sheet).

**2. Particulars of the offence are that, on diverse dates between 9<sup>th</sup> December 2016 and 15<sup>th</sup> May 2017, within Nairobi County, in the Republic of Kenya, fraudulently acquired public property, to wit Kshs.115,534,000 purportedly as payment for the supply of goods by Firstling Supplies Ltd to National Youth Service, Mechanical and Transport Branch, Ministry of Public Service, Youth and Gender.**

52. I observe that there is a bit of confusion with respect to the case number in the criminal trial facing the petitioner and its two directors, ACC No. 8 and 12 of 2018 being cited by the parties. However, the case number is not material for the purposes of this petition. From the paragraphs set out above and a full reading of the judgment in Petition No. 18 of 2018, it is evident that the matters that are raised in the present petition were within the knowledge of the present petitioner, and should have been pleaded with the other issues raised in the earlier petition. Explanation 4 at section 7 of the CPC states as follows:

**Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

53. A consideration of the pleadings and averments in this matter suggests that the petition is a second attempt to shelter a director of the petitioner, Yvonne Wanjiku Ngugi, from prosecution in the criminal case against her, her husband and the present petitioner. It is no wonder that in his response and submissions, the DPP conflates the two petitions and seems to be responding to the petition by Yvonne Wanjiku Ngugi. Indeed, it is to be noted that in her affidavit in support of this Petition, Ms. Ngugi avers as follows:

**“3. THAT I am an inactive director of Firstling Supplies Limited a company which I participated in its incorporation around 2006, with one James Thuita Nderitu. ...**

**4. THAT I am its minority shareholder, wielding 10 % of the total shares of the said company....**

**13. THAT the proceedings in the trial court have been a subject of wide media coverage and I have endured not only widespread profiling of criminality mush but I have also been exposed to stigma associated with criminality....**

**16. THAT I believe that the decision of the Respondent to mount charges against myself is illegal, irrational, unlawful and unreasonable....**

....

**21. THAT I swear this affidavit in support of the instant petition seeking to have decision of the Respondent to institute and maintain proceedings against me to be declared as an abuse of court process.”**

54. It seems to me that the present petition seeks to achieve exactly what Petition No. 18 of 2018 sought to do, but failed. Further, even were the court to find that this was a genuine attempt on the part of the limited liability company to protect its interests as a separate legal entity from its directors, I would still be constrained to find that the petition is *res judicata*. The parties to the petition are essentially the same, as are the facts relied on. The orders sought are essentially the same. The only difference is that in Petition No. 18 of 2018, the petition was by a director of the petitioner in her personal capacity. Nothing prevented the parties from raising the issues raised in this petition regarding the present petitioner before the court seized of Petition No. 18 of 2018. A determination of the issues raised was made by a court of competent jurisdiction. This petition falls afoul of the provisions of section 7 of the CPC. It cannot be sustained. It is my finding therefore and I so hold that this petition is *res judicata*.

55. That, in my view, is dispositive of the matter, and I therefore need not enter into an analysis of the question whether the petitioner has presented to this court a case that would justify the exercise of the court’s jurisdiction to prohibit its prosecution in Milimani Anti-corruption Case No. 8 of 2018. I will however, observe as follows. The jurisprudence that has emerged in our courts is that the court will interfere with the exercise of prosecutorial discretion only in the clearest of cases. In **Njuguna S. Ndung’u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR**, the Court of Appeal stated that:

**“[23] I have referred to the reasoning of the High Court in paras. 9, 10 and 11 above. It is apparent that the High Court left the matters raised by the appellant and the respondents to the trial court for determination without making any tentative and objective finding on the legality of the charges and the prospect of a conviction.**

**The jurisprudence shows that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise of discretion sparingly.** (Emphasis added)

56. In my decision in **Petition No. 33 of 2019-Philomena Kavinya Nzuki v DPP**, after considering a number of decisions on the circumstances under which the High Court may interfere with the exercise of the DPP’s prosecutorial discretion, I observed as follows:

**“75. The position in law, then, is that the court has the jurisdiction to inquire into the decision of the DPP to prosecute. Its inquiry, however, must be undertaken sparingly, in exceptional circumstances and in the clearest of cases. In order for the court to enter into such an inquiry, the petitioner must first satisfy it that there are reasonable grounds to believe that the proceedings the subject of challenge before the court are a vehicle for a purpose other than a true pursuit of criminal justice.**

57. See also **Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others [2019] eKLR** and **Diamond Hasham Lalji & Another v Attorney General & 4 Others (2018) eKLR**.

58. What the petitioner, Firstling Supplies Limited, has presented before me is that it should not be prosecuted because it is not the one that received funds from the NYS; that the funds were received by its Director, James Thuita Nderitu, trading as Firstling Supplies. This, it seems to me, is a distinction without a difference. Suffice to say that it does not demonstrate a failure on the part of the DPP to exercise his discretion in accordance with the dictates of the Constitution. Accordingly, I find that this Petition is *res judicata* and without merit, and it is hereby dismissed.

**Dated Delivered and Signed at Nairobi this 21<sup>st</sup> day of August 2020**

**MUMBI NGUGI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties electronically with their consent.

**MUMBI NGUGI**

**JUDGE**