



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CONSTITUTIONAL PETITION NO. 14 OF 2019

ALFRED NYANDIEKA.....PETITIONER

VERSUS

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

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. **Alfred Nyandika**, the Petitioner, is an advocate of this court. The 1st respondent is the Director of Public Prosecutions, a constitutional office established under Article 157 of the Constitution with the mandate to commence and maintain, take over or discontinue criminal prosecutions. The 2nd respondent is the Inspector General of Police, head of National Police Service an office established under Article 243 of the Constitution. Its mandate is provided for under Article 244 and the National Police Service Act. The 3rd respondent is the Attorney General, an office established under Article 156 of the Constitution, with mandate to represent the national government in civil proceedings in which it is a party and has the mandate to promote, protect and uphold the rule of law and defend public interest.

2. The Petitioner avers in his petition dated 18th July 2019 and deposes in his supporting affidavit filed together with the petition, that at all times material to this petition he represented **Penwel Nyamweya**, an accused in **criminal Case No. 1310 of 2013** before Mavoko Principal Magistrates Court where his client is the 6th accused.

3. The petitioner further avers that he has also on several occasions held brief for counsel representing the other accused persons in that criminal case. The accused in that case are charged with offences of conspiracy to defraud, forgery, giving false information and abuse of office contrary to various provisions of the Penal Code offences which involve **parcel No Kajiado/Mailua/1226**.

4. The petitioner states that the 1st accused in that criminal case lives on the disputed parcel of land with his family and the criminal case is still pending before court. It is the petitioner further case that counsel representing the other accused persons, were not regularly attending court and the accused persons requested him to continue representing them which necessitated the petitioner to go and take statements from his clients' witnesses in preparation for their defence.

5. The petitioner also states that on 4th April 2019, he went to one of the accused persons' home for purposes of meeting potential witnesses and taking instructions and statements. He used a tax hired to take him to the home where he interviewed and identified potential witnesses after which he left.

6. It is the petitioner's case that he later learnt that his client and the witnesses he had identified had been arrested and charged with trespass on the land the accused lives and where he met the witnesses, namely; **parcel No Kajiado/Mailua/1226**.

7. The petitioner goes on to state that on 12th July 2019, two persons, one of whom identified himself as **CPL Okore** from Central Police Station, visited chambers purporting to have an arrest warrant they wanted to execute against him for trespassing onto the disputed parcel of land on which his client resides. The petitioner avers that he has since perused the criminal case file and established that there is no arrest warrant issued against him in that file.

8. According to the petitioner, the police action follows the earlier one where his client and his witnesses were arrested and charged with trespass as a way of intimidating them to co-operate with the respondents and not testify on behalf of his clients in the case pending before Mavoko Magistrate's Court.

9. The petitioner also avers that there have been further proceedings before the Magistrate's Court Criminal Case No. 494 of 2011 against the

same client with the same complainant where he has again acted for the accused; Kibera Criminal Case No. 4517 of 2020 against Sironka for causing disturbance and that there is a suit, ELC No. 652 of 2017 pending at Kajiado, instituted by the same complainant against his client whom he again represents in that case.

10. Based on these facts, the petitioner avers that the respondents are victimizing him for performing his professional duties, thus threatening and intimidating him for pursuing justice for his clients over **LR No. Kajiado/Mailua/1226**. He believes that this is a violation of his fundamental rights and freedoms and professional undertaking.

11. The petitioner therefore sought the following reliefs:

i. A declaration that the arrest and or intended arrest and arraignment and or intended arraignment of the petitioner in relation to his handling of the issues surrounding Land Parcel Number Kajiado/ Mailua/1226 as an advocate of the High Court of Kenya is an infringement and affront to the constitution of Kenya, 2010 and an infringement of the petitioner's rights under Articles 27(1); 28;29;43; 48 and 50 of the constitution of Kenya, 2010

ii. An order of prohibition does issue against the respondents together with their agents preventing them from intimidating, harassing, and threatening to arrest and arraign in court for a charge of trespass the petitioner in relation to his handling of the issues surrounding Land Parcel Number Kajiado/ Mailua/1226 as an advocate of the High Court of Kenya and as counsel on (sic) the parties to the suits relating to the said parcel of land.

iii. An order for compensation does issue for the infringement of the petitioner's rights under Articles 27(1); 28;29;43; 48 and 50 of the constitution of Kenya, 2010

iv. An order for compensation of the petitioner for general damages for the distress and mental anguish caused by the infringement of his fundamental rights and freedoms

v. An order for exemplary and punitive damages does issue against the respondents

vi. An order awarding costs of the petition to the petitioner

vii. Any other relief or further orders, writs and directions the court considers appropriate and just to grant for the purpose of the enforcement of the petitioner's fundamental rights and freedoms

1st Respondent's response

13. The 1st respondent has filed a replying affidavit by **CPL David Nthiga**, the investigating officer, sworn and filed on 14th November, 2019. He deposes that **Parcel No. Kajiado/Mailua/1226** was initially owned by John Kariro Ole Nakukeja, who transferred it to George Ndula Mentei, (the complainant), and that Kuya Nairina was allocated parcels adjacent to each other.

14. He further deposes that investigations revealed that Keya Nairina and others conspired to defraud John Kariro his parcel No. 1226 which led to institution of Criminal Case No. 1310/2013 against him and others at Mavoko Law Courts which is still pending.

15. The deponent again deposes that on 30th April 2014 the current owner of parcel No. 1226 reported that Kuya Nairina had forcibly entered and settled on his land; that he followed up the matter with the investigating officer CPL Francis Nzenga and established that a complainant had indeed been registered under **OB No. 12/30/3/25/4** but was not followed up. However, a new report was made vide OB No. 18/16/4/2019 which CPL Nzenga investigated and established that parcel No. 1226 belonged to George while parcel No. 1227 belongs to Keya. He also established that the two parcels are adjacent to each other. Keya was therefore charged with trespass and malicious destruction of property in Kajiado Criminal Case No. 494 of 2019.

16. CPL Nthiga deposes that on 14th April 2019 the petitioner with others went into the complainant's land in motor vehicle KBF 041W; that the petitioner took several photographs using his cell phone and that held a meeting on the land as leader of the meeting but not as a by-stander; that the petitioner was inciting the people present.

17. According to the deponent, the petitioner has all along known that the complainant is the owner of the land and he had no right to hold a volatile meeting on the land; that the petitioner was angry and charged and that there is sufficient evidence to charge and prosecute him.

18. He further states that he briefed the OCS who ordered that the petitioner be arrested and requested the OCS Central Police Station, Nairobi to arrest the appellant since he resides in Nairobi. According to the deponent, CPL Okore of Central Police Station informed him that he visited the petitioner's chambers but did not find him.

19. He deposes that his investigations were conducted in good faith and that the other persons who trespassed on the land have been charged in Criminal Case No. 503 of 2019 at Kajiado. He believes that allegations made by the petitioner amount to a defence which should be ventilated before the trial court.

3rd respondent's response

20. The 3rd respondent has filed grounds of opposition dated 24th July 2019 and filed on 9th August 2019. He contends that; the petition as

drawn and filed seeks to curtail the authority and exercise of powers and functions of the offices of the 1st and 2nd respondents under Articles 157, 245 (4) and 259 (3) of the Constitution; and that the petitioner has not demonstrated that the respondents are acting *ultra vires* their investigatory powers and the intended prosecution.

21. The 3rd respondent contends that the 1st respondent's mandate can only be interfered by the court under Article 157(ii) if shown that he has violated the principles in that sub Article; that the petitioner is merely apprehensive and has failed to show that if charged, the trial court will not be fair and dispense justice in his cases; that the petitioner has filed the petition to frustrate and halt further investigations and any prosecution against him and that the orders sought, if granted will be detrimental to the determination of investigation and any likely prosecution against the petitioner.

Petitioner's submissions

22. The petitioner submits relying on his written submissions dated and filed on 4th February 2020, that his intended arrest and arrangement is unconstitutional and lacks proper factual and legal basis. He argues that the respondents' action is an affront to the independence of the Bar, the role of an advocate as an officer of the court. He argues that his role in the administration of justice as an advocate cannot be victimized for undertaking his statutory duties as an officer of the court.

23. According to the petitioner, he was at all material times, acting in his capacity as an advocate in preparation to defend his clients in Criminal Case No. 1310 of 2013 and he was taking statements from witnesses in that case. He further argues that the validity of title number Kajiado/Mailua/1226 has not been determined as the case is pending before court and that his client, the accused in case No. 1310 of 2013, also claims ownership of the same parcel of land.

24. In that regard, the petitioner contends that he is being victimized for defending his clients which is a violation of his right as an advocate to represent his client. He relies on the Supreme Court decision in *Republic v Ahmad Abolfathi Mohammed & Another* [2019] eKLR on the role of an advocate as an officer of the court.

25. The petitioner further relies on an Article by *Adama Dieng; The role of Judges and Lawyers in defending the rule of law*; Fordham International Law Journal, Volume 21, Issue 2 1997 Article 27. Page 553, for the submission that a legal profession which is controlled, manipulated or intimidated cannot effectively carry out its duty of sustaining the independence of the administration of justice. He also relies on the same Article page 550 for the argument that lawyers should preserve the independence of their profession, assert the right of the individual under the rule of law and insist that every accused is accorded a fair trial.

26. The petitioner again relies on Article 50(2) (9) of the Constitution for the argument that every accused person has a right to a fair trial which includes the right to be represented by an advocate of his choice and to be informed of this right promptly; Article 25(c) which declares the rights to fair trial as one of the rights that is non derogable and Article 49(c) (1) (c) on the rights of an arrested person which includes the right to communicate with his advocate. He argues that his intended arrest and prosecution will violate these rights.

27. On misuse of discretion, the petitioner submits that Article 157(11) prescribes how the 1st respondent should exercise his mandate. that is; he should act in a manner that upholds public interest, interests of administration of justice and the need to prevent abuse of the legal process. In this regard, the petitioner argues that the 1st respondent is bound by the Constitution.

28. He further submits that the 1st respondent is obliged to abide by and uphold Constitutional principle. He relies on *Heshon Ongetta Momanyi t/a O H Momanyi & Co. Advocates v Director of Public Prosecutions* [2018] eKLR. He also relies on *Mohamed Feisal & 19 Others v Henry Kandie, Chief Inspector of Police OCS, Ongata Rongai Police Station & 7 Others, National Police Service Commission & another Interested Party* [2018] eKLR.

29. Further reliance is placed on *Akusala A. Borniface v OCS Langata Police Station & 4 Others* [2018] eKLR (paragraph 24 and 25); and *Rondel v Worsley* [1966]3 All ER 657 where *Lord Denning, MR.* emphasized that defence lawyers owe allegiance to a higher cause, namely; truth and justice.

30. On improper exercise of powers, the petitioner submits that the intended arrest and prosecution lacks factual and legal foundation; lacks good faith and has unclear motive as can be seen from the 1st respondent's replying affidavit. He relies on *Stephen Juma Ndida v Inspector General of Police & Others* (Ref. No. 258 of 2014) for the submission that a criminal prosecution commenced without a proper factual and legal foundation or basis is always suspect of ulterior motive.

31. The petitioner further relies on *Republic v Attorney General Ex parte Kipng'eno Arap Ng'eny* [2001] eKLR (Civil Appl. No. 406 of 2001) on the same principle, as well as *Thomas Nyakambi Maosa & Another v Kibera Chief Magistrate's Court & 3 Others* [2015] eKLR (JR Misc. Appl. No. 303 of 2013) for the submission that police officers and prosecutors who fail to act in good faith or are led by pettiness chancery or malice in initiating prosecution cannot be allowed to ensconce themselves in judicial immunities.

32. It is the petitioner's case that the court's jurisdiction is wide and unlimited and ought, in the circumstances of the present case, to investigate whether the police and the 1st respondent exercised their discretion and powers in good faith as demanded of them.

33. The petitioner argues that there is likelihood of breach of both Articles 27 and 50 of the Constitution. According to him, the persons who were potential witnesses have either been charged or turned into prosecution witnesses. This, he argues, is because one of the people he represents lives on the land with his family and the issue is pending in court.

34. The petitioner also argues that his right to equal protection of the law is being infringed. He contends that he was acting on instructions and, therefore, the respondents' action is discriminatory. He relies on *George Joshua Okungu & Another v Chief Magistrate Court &*

Another [2014] eKLR (paragraph 70) and Bitange Ndemo v Director of Public Prosecutions & 4 Others [2016] eKLR. He urges the court to allow the petition.

1st and 2nd Respondents' submissions

35. The 1st and 2nd respondents rely on their written submissions dated 4th February 2020 and filed on 5th February 2020. They argue that the petitioner had a duty to show that their actions are *ultra vires*, unlawfully or are made in bad faith which he has failed to demonstrate.

36. They also argue that Article 157 gives the 1st respondent mandate to determine whether or not to prosecute and decide the offences to prefer. In their view, the petitioner has failed to show that the 1st respondent acted *ultra vires* his powers, unlawfully, is biased or acted against public policy.

37. According to the 1st and 2nd respondents, the 1st respondent exercised his constitutional and statutory mandate under Article 157 and, therefore, this court should not exercise its supervisory authority over the 1st respondent and prohibit him from his constitutional mandate with regard to his duty to enforce the purpose of Articles 157 and 50 of the Constitution. They rely on Republic v Director of Public Prosecutions & 3 Others Ex parte Bedan Mwangi Nduati & Another [2015] eKLR.

38. The 1st and 2nd respondents further submit that the 2nd respondent is mandated under Articles 238, 239, 243 and 247 to enforce the purpose of Articles 244 and 50; sections 5 and 9 of the Victims Protection Act and the National Police Service Act which the 2nd respondent executed during investigations.

39. The two respondents further rely on David Ndulo Ngali & 2 Others v DPP & 4 Others [2015] eKLR citing Erick Kibiwott & 2 Others v Director of Public Prosecutions & 2 Others (JR No. 89 of 2010) for the submission that the police have a duty to investigate any complainant once made. They argue that constitutional and statutory provisions ought to be left to perform their functions and execute their lawful mandate.

40. The 1st and 2nd respondents again rely on Republic v Chief Magistrate's Court Nairobi & 3 Others Ex parte Stephen Oyugi Okero [2015] eKLR to argue that the trial court is the best arena to canvas and challenge evidence of the respondents in order to accord all parties a fair trial. They urge the court to dismiss the petition.

3rd respondent's submissions

41. The 3rd respondent has not filed submission or at least his submissions are not on record.

Determination

42. I have considered this petition, responses thereto and submissions by the parties. I have also considered the authorities relied on. The issue arising for determination is whether the respondents acted properly in their attempt to arrest and prosecute the petitioner.

43. The facts of this petition are not in dispute. The petitioner is an advocate of this court. He represents several clients charged in Criminal Case No. 1310 of 2013 which is pending at the Mavoko Law Courts. One of the accused persons in that case is said to be the purchaser of parcel No. 1227. However, according to the 1st respondent's replying affidavit, the person resides on parcel No. 1226 which belongs to the complainant in that case.

44. Sometime on 14th April 2019, the petitioner went to the land his client resides on to meet his client's witnesses and prepare their defence. This incident was reported to the police who went looking for the petitioner with an intention of arresting and prosecuting him for the offence of trespass. According to the petitioner, and this has been confirmed by the 1st and 2nd respondents in their response, several other people, including the petitioner's client who hosted him, have been arrested and charged with trespass.

45. At the same time, both the petitioner and the respondents agree that several cases are still pending in court some directly relating to the disputed parcel of land. Further, from the averments and documents filed in this petition, there is dispute over ownership over Parcel No. 1226. There is also a case pending before the ELC Kajiado. Pleadings in a suit filed at Machakos annexed to the petition show that there is a claim for money which this court cannot address in this judgment being a matter in a different court. The petitioner is acting for the defendants in that suit.

Whether the respondents' acted properly by purporting to arrest and prosecute the petitioner

46. The 1st respondent holds a constitutional office established under Article 157 whose mandate is stipulated under that Article. Article 157 (10) states that in the exercise of his mandate, the 1st respondent does not have to seek permission, direction or consent from any person or authority. Admittedly and as correctly submitted by the 1st and 2nd respondents, the 1st respondent acts independently when executing his mandate. There are many decisions in this regard and both the petitioner and the respondents have referred to them.

47. It is important to appreciate, however, that the 1st respondent's mandate is not absolute discretion. The Constitution itself places a caveat on his mandate. Article 157(11) provides that in exercising the powers conferred on him the 1st respondent shall have regard to the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. This is a constitutional command that the 1st respondent must always have in mind whenever exercising his constitutional mandate.

48. Courts have also stated in many decisions that whereas the constitution confers on the 1st and 2nd respondents mandate to institute prosecution and investigate respectively, they must act in good faith lest the court will interfere with their mandate.

49. In Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission and 3 Others [2013] eKLR and Republic v Commissioner of Police and Another ex parte Michael Monari & Another [2012] the court addressed itself on the mandate of the police to mount investigations and stated:

“The police have a duty to investigate on (sic) any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason 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 intervene.” (Emphasis)

50. In Republic v Director of Public Prosecutions & another ex parte Patrick Ogola Onyango & 8 others [2016] eKLR, the court again stated:

“[118][T]he courts have also been consistent that a prosecution which lacks a foundational basis must not be allowed to stand. The DPP is not supposed to simply lay charges but must determine on sound legal principles whether the evidence can sustain a charge prior to instituting the prosecution.”

51. In Republic v Attorney General Ex parte Kipngeno Arap Ngeny (supra), the court observed that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for the ulterior or improper purpose. Before instituting criminal prosecution, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”

52. in Njuguna S. Ndungu v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR, the Court of Appeal held as follows:

“[23]... 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 show 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”

The Court of Appeal was of the view that when called upon to decide whether or not to interfere with the discretion of the 1st respondent to prosecute, the High court should make a tentative and objective finding on the legality of the charges and the prospect of a conviction.

53. In Diamond Hasham Lalji & another v Attorney General and 4 others [2018] eKLR, the same court stated that:

“[42] The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”

54. In Jago v District Court (NSW) [1989] HCA 46: (1989) 168 CLR 23 (12 October 1989), **Brennan, J** stated at page 47-48:

“An abuse of process occurs when the process of court is put in motion for purposes which in the eye of the law, it is not intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in a conduct which amounts to an offence and on that account is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process.”

54. The jurisprudence flowing from the above decisions is that whereas the 1st and 2nd respondents have mandate to discharge and that they act independently, they should act in good faith devoid of malice and ulterior motives. The court will in appropriate cases halt prosecution if instituted for reasons other than pursuit of justice.

55. The petitioner is an advocate. He was discharging his professional duties by representing clients in a criminal case in which they are charged with an offence relating to a parcel of land on which one of the accused resides. According to the 1st respondent’s own affidavit, one of the accused entered the land and resides thereon and that was where the petitioner went as an advocate to meet his client and witnesses.

56. The petitioner argues that he went to take instructions, meet witnesses and prepare his clients’ defence. He was therefore on that land for purposes of preparing for his clients’ case in the cause of his duties as an advocate in pursuit of justice for his clients in the criminal case pending in court.

57. Article 50(2) of the Constitution guarantees every accused person the right to a fair trial. That right includes to be presumed innocent until the contrary is proved; to have adequate time and facilities to prepare his defence and to choose, and be represented by, an advocate,

and to be informed of this right promptly. In other words, the petitioner's clients had a right to be represented by an advocate of their choice, and they appointed the petitioner as such advocate. The right to fair trial is one of the rights that are non derogable under Article 25 (c) of the Constitution.

58. According to the petitioner, he was not on the land for any other reason but to prepare for his clients' defence in the pending trial as a right. There is no suggestion by the respondents that the petitioner was not on the land where his client resides to meet witnesses for that trial. There is also no suggestion that the petitioner was not on the land in his capacity as an advocate. There is not even a suggestion that there was any court order barring his client from staying on that land, pending the determination of the criminal cases; the ELC case or any other case. As it is the evidence shows that the petitioner went to the land where his client resides and met witnesses.

59. I have perused the respondents' replying affidavit and the annexes to that affidavit. The annexes include witness statements recorded by the police over the incident that occurred on 14th April 2019 involving the petitioner. The witness statement of **Parmeres Ole Nins Lalogo**, states that he witnessed the petitioner meet the people and heard one of them ask whether they had sent money to the advocate. This shows clearly that the petitioner was there in his capacity as an advocate and was meeting his clients.

60. Further Joshua **Lengete Sarbabi** another prosecution witness (an accused in the Mavoko case) and whose statement is annexed to the replying affidavit, confirms that the major aim of the meeting was to mobilize people who were to be their witnesses to meet the petitioner who was their advocate in the criminal case at Mavoko where they had been put on their defence. He also confirms in his statement that his co accused had been informed that the advocate would come to take statements from their witnesses. This is a further confirmation of what the petitioner is saying.

61. Taking all this into account, I am of the considered view, that the respondents did not exercise their mandate in a manner that accords with the Constitution and the law. The petitioner as an officer of the court was performing his professional duties when he went to the land where his client resides to meet witnesses and prepare for their defence. He could not be prevented from doing so yet the respondents expected him to discharge his professional duties without fear or favour and assist the court render justice in that case.

62. In **Jago v District Court(NSW)** (supra), **Deane, J.** stated at 56-57 that:

"It is fundamental to the legal system that an accused be given a fair trial according to the law. The accused has 'a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial'."

Allowing the respondent's quest to arrest and prosecute the petitioner for performing his professional duties, is to countenance interference with the process of fair trial and independence of the Bar, a direct violation the rule of law.

63. An advocate does not take sides in a criminal trial. He acts on instructions, pleads his client's cause and assists the court do justice. The petitioner was not on the land to perpetuate a crime. He was there to prepare for his clients' defence. In other words, the petitioner was trying to ensure that his clients get a fair trial in the case he was representing them as required by the constitution and the law. In that respect, I do not think the respondents were acting in good faith when they purported to arrest and prosecute the petitioner for discharging his professional duties.

64. The court observed in **Republic v Attorney General Ex parte Kipngeno Arap Ngeny** (supra) that:

"It is an affront to our sense of justice as a society to allow the prosecution of individuals on flimsy grounds. Although in this application we cannot ask the Attorney General to prove the charge against the accused, there must be shown some reasonable grounds for mounting a criminal prosecution against an individual. There must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will achieve nothing more than embarrass the individual and put him to unnecessary expense and agony. The Court may, in a proper case, scrutinize the material before it and if it is determined that no offence has been disclosed, issue a prohibition halting the prosecution."

65. It must be appreciated that the role of an advocate in a trial is both constitutional and statutory. By seeking to prosecute the petitioner for visiting his client on the land he lives, although such stay may be under dispute, was also interfering with his clients' right to a fair trial which is a non derogable right. The petitioner's role was to assist the court do justice. He is not in the case as an inconvenience to the 1st respondent. He is obliged to assist the court get the truth in the case. It was in that regard that **Lord Denning** stated in **Rondel v Worsley** (supra), that:

"It is a mistake to suppose that [the advocate] is the mouthpiece of his client to say what he wants or him to do what he directs. He is none of those things. He owes allegiance to a higher cause. It is the cause of truth and justice." (Emphasis)

66. The petitioner's visit to his clients must also be seen from the context of the right of access to justice. The petitioner had an option to wait for his clients and witnesses in his chambers. He however opted to go where the witnesses were so that he could take their statements in preparation for his clients' defence. His chambers being in Nairobi, it would have required his clients to take the witnesses to Nairobi which would certainly cost them more money to travel to and from Nairobi, without being sure that some of the people would indeed be witnesses. By deciding to go where the witnesses were, the petitioner acted in the best interest of his clients and should not have been victimized for performing his professional duties. The clients' right to prepare for their defence and access to justice should not also be violated or compromised.

67. The 1st and 2nd respondents' intention to arrest and prosecute the petitioner was an attempt to interfere with the administration of justice and the rule of law, a fundamental value in criminal justice. The petitioner, as an advocate, was discharging his professional duties to

enhance criminal justice. He could not be considered a criminal while acting in the course of his duties. The 1st and 2nd respondents being active players in the cases the petitioner is involved in on behalf of his clients were attempting to steal a march against the petitioner's clients in those cases which amounted to improper motive.

68. The 1st and 2nd respondents' conduct was not only a violation of the petitioner's clients' right to be represented in a criminal trial by an advocate of their choice, but also interference with Petitioner's right to effectively represent his clients which he could not do without adequate preparations including taking statements from witnesses.

69. Jurisprudence shows that the court in determining whether or not to stop prosecution it should consider evidence from the prosecution and be satisfied that there was a foundation or basis for the case although it should not make conclusions on that evidence as that is the preserve of the trial court.

70. As already alluded to, I have perused some of the witness statements by the prosecution witnesses in the intended trial. There is evidence by some of those witnesses that they were meeting the petitioner so that he could take witness statements. This is in agreement with the petitioner's assertion that he went to meet his clients and witnesses in his capacity as an advocate to prepare for their defence for the criminal case pending before Mavoko Law courts.

71. In that regard, the advocate's right to visit a client cannot and must not be turned into a criminal act capable of sustaining a criminal prosecution against the advocate performing his duties under the constitution and the law. Allowing this to happen, is to allow the 1st and 2nd respondents to intrude the advocate's right to prepare and properly defend his client, and the client's right to a proper and sound legal representation.

72. In the circumstances, I do not see why the 1st and 2nd respondents were in a hurry to attempt to arrest and prosecute the petitioner for trespass when the issue of ownership of **Parcel No. 1226**, if any, had not been resolved, thus putting the cart before the horse.

73. But more fundamentally, there is the question of whether the 1st respondent approved arrest and prosecution of the petitioner. Although the mandate to commence criminal prosecution rests with the 1st respondent, a perusal of the replying affidavit filed on behalf of the 1st respondent shows that the deponent who investigated case was directed by the OCS of Namanga police station to arrest the petitioner.

74. There is no deposition that the investigation file was forwarded to the 1st respondent for consent to prosecute and he exercised his independent constitutional mandate and authorized the petitioner's prosecution. Only the 1st respondent can authorize criminal prosecution which would then lead to an arrest. The OCS of Namanga Police station could not on his own order arrest and prosecution of the petitioner. Such attempt was unconstitutional given that the petitioner was not arrested while committing an offence.

75. It is in situations like this that the court had in mind when it held in ***Kuria & 3 others v Attorney General*** [2002] 2 KLR 69, that:

“The court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform....where the prosecution is an abuse of the process of court as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and or prohibiting prosecutions brought to bear for ulterior and extraneous considerations.”

76. And in the words of **Mason, CJ.** in ***Jago v District Court (NSW)*** (supra):

“To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences.”

77. I have carefully considered the petition; the responses; submissions and the authorities relied on by parties and those cited by the court. I have also considered the material placed before court, the constitution and the law. The conclusion I come to is that there was no basis for attempting to arrest the petitioner with a view to prosecuting him given that he was discharging professional duties as opposed to deliberately committing a criminal offence. The 2nd respondent's officers' conduct was unlawful and reproachable in the circumstances of this case. The 1st respondent could not support their actions without appearing to compromise the petitioner's clients' right to a fair trial.

78. The petitioner has also prayed for damages for various violations of his fundamental rights and freedoms. I am not persuaded that he is justified in seeking such damages. There is no evidence that he was arrested or prosecuted. There was only a visit to his chambers with the intention to arrest him and no more given that the police did not find him. There would be no basis or justification for awarding damages in the circumstances of this case.

79. In the end, this petition succeeds and I make the following orders which I find appropriate:

a) A declaration is hereby issued that the intended arrest and arraignment of the petitioner in relation to his visiting his clients on Parcel Number Kajiado/ Mailua/1226 as an advocate, is an infringement and affront to the petitioner's right to represent his clients and prepare for their defence contrary to Article 50(2) of the constitution

b) An order of prohibition is hereby issued prohibiting the 1st and 2nd respondents together with their agents from arresting and prosecuting the petitioner in relation to his visiting his clients on Land Parcel Number Kajiado/ Mailua/1226 as an advocate and

counsel of the accused in criminal cases relating to the said parcel of land.

c) This being a constitutional petition, each party shall bear own costs

Dated, Signed and Delivered at Kajiado this 23rd day of October 2020.

E. C. MWITA

JUDGE