



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC PETITION NO. 31 OF 2018

DR.SALOME MUNUBLI.....PETITIONER

VERSUS

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

ABIGAIL MBAGAYA MUKOLWE.....2ND RESPONDENT

BRIAN IKOL.....3RD RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....4TH RESPONDENT

BENARD NZAU.....5TH RESPONDENT

TOM KONYIMBIH.....6TH RESPONDENT

NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY

KENYA RAILWAYS CORPORATION.....2ND INTERESTED PARTY

FRANCIS KARIMI MUGO.....3RD INTERESTED PARTY

ATANAS KARIUKI MAINA.....4TH INTERESTED PARTY

VICTOR WAHOME KARIUKI.....5TH INTERESTED PARTY

TOM AZIZ CHAVANGI.....6TH INTERESTED PARTY

MOHAMED ABDALLA SWAZURI.....7TH INTERESTED PARTY

ELIJAH MWENDA NYAMU.....8TH INTERESTED PARTY

JOHN MWANGI MWANIKI.....9TH INTERESTED PARTY

DAVID BARNO SOME.....10TH INTERESTED PARTY

ESTHER FURAH SOME.....11TH INTERESTED PARTY

DASAHE INVESTMENT LIMITED.....12TH INTERESTED PARTY

KEIBUKWO INVESTMENT LIMITED.....13TH INTERESTED PARTY

JUDGMENT

1. Dr. Salome Munubi herein referred to as the petitioner, was together with 14 others among them the 3rd – 11th interested parties arraigned before the Nairobi Anti-Corruption Chief Magistrate’s Court on 13th August 2018 vide ACC No. /18 R vs Muhamed Swazuri Abdallah and others facing various charges relating to corruption. Upon entering a plea of not guilty, the case was scheduled for hearing.

2. Aggrieved by the investigation, recommendation to prosecute and the ongoing prosecution, the petitioner filed a petition dated 23rd October 2018 pursuant to Articles 1, 2, 20, 22, 23, 24, 29, 50, 157 (ii) and 236 of the Constitution seeking various reliefs as hereunder:

(a) A declaration that the initiation, maintenance and prosecution of the petitioner, or the petitioner and the 3rd - 14th Interested Parties, in Milimani Chief Magistrate’s Anti-Corruption Court Case No. 33 of 2018. Republic vs Professor Muhammad Abdalla Swazuri & 16 Others is an abuse of the court process and contravenes Article 157 (11) of the Constitution.

(b) A judicial review order of certiorari quashing Milimani Anti-Corruption Case No. 33 of 2018, Republic vs Prof. Abdalla Swazuri Mahammud & 16 others.

(c) An appropriate order to be issued towards the 1st respondent requiring the 1st respondent to direct the Inspector General of Police to investigate an offence of perjury on the part of the 2nd and 3rd respondents over false statements made for the purpose of initiating the impugned criminal proceedings.

(d) An order of compensation for violation of each of the above rights more so for subjecting the petitioner to an unfair trial and for an affront on her dignity and security of person courtesy of the respondent’s unconstitutional decision and actions.

(e) That the costs of this suit petition be borne by the respondents.

(f) Any other/further relief that this honourable court may deem fit to grant.

3. The application is predicated upon grounds set out on the face of it and an affidavit in support sworn by the petitioner on 23rd October 2018. Contemporaneously filed with the petition is a notice of motion of even date seeking:

(a) That the instant application and petition filed herewith be certified as urgent and service thereof be dispensed with in the first instance.

(b) That pending the hearing and determination of this application interpartes, this honourable court be pleased to issue conservatory orders prohibiting/restraining the 1st respondent from continuing with the prosecution of the petitioner in Chief Magistrate’s Court at Milimani AAC. No. 33/2018 R vs Muhammad Abdalla Swazuri and others.

(c) That pending the hearing and determination of the petition filed herein, this honourable court be pleased to issue conservatory orders restraining/prohibiting the 1st respondent from continuing with the prosecution of the petitioner in Chief Magistrate’s Court at Milimani ACC No. 33/2018 R vs Muhamed Abdala Swazuri and others.

(d) That further to (a) and (b) above, this court be pleased to suspend the application of Section 62 of the Anti-Corruption and Economic Crimes Act with the effect that the petitioner’s suspension be lifted.

(e) That this honourable court do issue such orders as it may deem fit in the interest of justice.

(f) That an earlier date be set for the hearing of the petition.

4. In response to the notice of motion, the 1st respondent filed a replying affidavit deponed on 30th October 2018 by M/s Annette Wangia senior prosecution counsel office of the DPP opposing the application. In further response to the petition, the 1st respondent filed a replying affidavit sworn on 19th November 2018 by Anne Pertet challenging the petition.

5. The second respondent also filed a replying affidavit sworn on 14th November 2018 by Abigael Mbagaya Mukole Vice Chairman National Land Commission thereby supporting the petition. The 3rd respondent one Brian Ikol Acting Director Legal Affairs and Enforcement National Land Commission Committee on review of grants and disposition also filed a replying affidavit sworn on 14th November 2018 and filed on 16th November 2018 supporting the petition.

6. On the other hand, Charity Muniu an investigator with the 4th respondent swore an affidavit on 31st October 2018 in response to the petition defending their investigation and recommendation for the petitioner’s prosecution.

7. The 5th respondent responded by filing a replying affidavit sworn on 16th November 2018 and filed on 21st November 2018 thus supporting the petition. The 6th respondent Dr. Tom Kanyimbih responded as well through his replying affidavit sworn on 14th November

2018 thereby supporting the petition.

8. On their part, the interested parties equally filed their respective replying affidavits (responses) basically supporting the petition and also exonerating themselves from culpability in relation to the charges facing them together with the petitioner.

9. On 31st October 2018, the Notice of Motion dated 23rd October 2018 was compromised by consent in favour of the hearing of the main petition. Parties agreed to dispose of the petition by way of written submissions.

Parties

10. The petitioner herein who brings this petition on her behalf and on behalf of the 3rd – 14th interested parties is a Director of Land Valuation and Taxation at National Land Commission.

11. The second respondent is a Constitutional Office holder established under Section 157 of the Constitution charged with the responsibility for instituting and undertaking criminal proceedings against any person in respect of any offence alleged to have been committed. The second respondent is the Vice Chairperson of National Land Commission whereas the 3rd respondent is the Secretary of Review of grants and disposition committee of National Land Commission.

12. The 4th respondent is a body established under Section 3(1) of the Ethics and Anti-Corruption Commission Act pursuant to Section 79 of the Constitution (EACC). The 5th respondent was a Deputy Director at National Land Commission who prepared valuations in respect of the land the subject of the criminal proceedings.

13. The 6th respondent is a Commissioner of National Land Commission and the chair of both the Land Administration and the Land Acquisition and Compensation committee. The 1st interested party is a constitutional commission established under Section 67 of the Constitution charged with the mandate of managing public land on behalf of the National and County Governments (National Land Commission).

14. The 2nd interested party is a public corporation established under the provisions of the Kenya Railways Corporation Act Chapter 397 of Kenya (KRC). The 3rd-14th interested parties are charged alongside the petitioner in ACC No. 33/2018 R vs Muhamed Abdallah Swazuri and others.

The Petitioner's Case

15. It is the petitioner's case that, in October 2016, the 2nd interested party presented a list to the National Land Commission of the property that it wanted to compulsorily acquire for purposes of constructing Standard Gauge Railway line (SGR). Among the properties listed for acquisition was LR No. 9084, 9085, 9086, 9087 and 9088 as per the gazette notice marked SMI subject to approval by the 2nd interested party's surveyors and designers.

16. That upon receipt of the said list, the National Land Commission deployed its valuation team and surveyors to the field to confirm the acreage and beneficiaries in conjunction with the KRC. He averred that before payment could be done, the Railways Development Company Committee comprising of PS Treasury, PS in charge of transport and infrastructure and the KRC approved the process. She averred that when the list was presented for compulsory acquisition, titles to the subject properties had not been issued and the owners could not be established through the usual searches.

17. To verify the genuineness of the properties, she raised a memo dated 27th April 2013 to the Chief Executive officer seeking to know the validity of the listed properties and the owners.

18. That sometime in April 2017, she was shown minutes of the National Land Commission Committee in review of grants and dispositions which allegedly convened a meeting on 22nd July 2015 in which it was decided that titles to all the properties that were along the railway reserves should be revoked. According to her, no such meeting ever took place as claimed. She claimed that the minutes of 7th October 2018 were forged as the minutes of that day are similar to those of the meeting held on 22nd July 2015 and that they were not properly confirmed since there was no proposer nor seconder. She blamed the 2nd and 3rd respondents for the said forgery and that the decision was not gazetted as required in law nor was it communicated to her, KRC or the land registry.

19. She further averred that titles to the subject properties were issued on 16th September 2015 and that at the time the commission was making its resolution on 22nd July 2015, no title had been issued capable of cancellation.

20. She stated that, following the illegal revocation of titles, an appeal was lodged by the affected parties before the 2nd respondent who together with the 3rd respondent prepared a determination dated 11th October 2016 thus issuing instructions for her (petitioner) to proceed to issue a letter of award for compensation (annexure SM-14).

21. She claimed that sometime in May 2015, the 4th respondent raided her house and confiscated a sum of Kshs.1,000,000/= together with an additional sum of USA Dollars.168,900/= which money belonged to her husband who had borrowed the same from her daughter Risper P. Bwari. She pleaded innocence claiming that her prosecution is a violation to her rights, dignity and abuse of office and that it is intended to justify the 4th respondent's action against her in ACC No. 16/18 where she has been charged of influencing fictitious compensation.

The 2nd Interested Party's Response

22. Through its principal land surveyor, Erastus Mwangi, the 2nd interested party (KRC) filed a replying affidavit on 16th November 2018 basically stating that their role was to identify land for acquisition for railway construction subject to National Land Commission determining ownership. In response to the petitioner's affidavit, paragraph 7 and 8, he stated that the corporation had mapped out the area and parcels were identified for the railway corridor though the owners were not known hence National Land Commission was to determine.

23. He averred that, on 22nd July 2016 Kenya Railway Corporation issued a letter claiming that the titles the subject of this case were revoked for being on the road reserve but upon checking, they could not find any evidence that they were on the railway reserve. According to him, the properties were part and parcel of Embakasi Township hence compensation was required to the owners just like other parcels on that land. He categorically denied that the property belonged to KRC nor were there documents to show that it was a railway reserve.

24. He further stated that L.R. Nos. 9084, 9086, 9087 and 9088 have not been within the corporation's reserve either through vesting or acquisition. He attached survey maps (EM2) as proof that the affected properties were private properties.

The 3rd Interested Party's Response

25. In his supporting affidavit sworn on 18th November 2018, in his capacity as the Director Finance and Administration National Land Commission and also the 4th accused in ACC No. 33/18, he confirmed that on 15th December 2016 he received an internal memo of even date from the petition containing a schedule of affected parcels by the SGR for compensation totalling to Kshs 825,496,663. That the memo had an endorsement from the chairman National Land Commission approving payment. That in obedience to his bosses' instructions he confirmed that funds were available and then paid. He denied that he had responsibility to determine availability of land and their status.

The 5th Respondent's Response

26. The 5th respondent a surveyor with KRC and a custodian of the survey plans of the properties belonging to the KRC supported the averments of the 2nd interested party. He stated that the properties in question were not railway reserves but rather individual plots belonging to private persons. He stated that Kenya railways does not and has never owned a railway reserve affecting the properties in question. He termed that criminal proceedings as an abuse of the court process.

The 7th Interested Party's Response

27. As the Chairman National Land Commission and also the 1st accused in ACC No. 33/18, he swore an affidavit on 20th November 2018 affirming that L.R Nos 9084 – 9088 were never part of the railway reserve. He stated that the documents attached by Charity Muniu's replying affidavit to the petition as EACC No.1 were manufactured and the same will be demonstrated when testifying. He accused the 2nd respondent his deputy of peddling lies against him with malice. He however averred that he may have signed the minutes of 7th October 2015 by mistake confirming the minutes of 22nd July 2015 due to pressure of work.

28. He denied the assertion that the National Land Commission had on 22nd August 2015 revoked titles of the subject properties. He denied ever signing those minutes as the same were a forgery. He admitted that, he presided over an appeal seeking to set aside the commission's property revocation of titles on 22nd July 2015 and was so persuaded that there was no good cause for revocation, set them aside and ordered for compensation of the owners.

29. He fully apportioned blame on his deputy who was hell bent to take over chairmanship while subjecting him to unnecessary prosecution and mental torture.

The 10th to 14 Interested Party's Response

30. On behalf of the 10th to 14th interested parties, David Barno Some swore an affidavit on 23rd November 2018 stating that he and the 11th interested party were directors to the 13th and 14th interested parties. They claimed that they are the registered owners of LR No. 9085, 9087 and 9088 owned by the 12th interested party and L.R. 9086 owned by the 14th interested party.

31. They stated that all the said properties were private land and have never been public land – belonging to any public body. He revealed that, when the commission revoked their titles, they appealed against the decision and the same was reversed. It was his claim that compensation was properly made to them as the lawful owners of the properties in question which titles have never been cancelled up to now.

The 1st Respondent's Response

32. Vide a replying affidavit sworn by Anne Pertet, the 1st respondent stated that the petitioner was a member of the National Land Commission's committee which recommended non compensation of some properties whose ownership was questionable. That the petitioner went ahead and ordered for compensation for the affected properties while well aware that no appeal for the revocation had been preferred and determined. That by the petitioner's letter dated 24th December 2016, she authorized for irregular payment thus ignoring the National Land Commission CEO's memo requesting National Land Commission to withhold payment in respect of those properties.

33. She averred that the petitioner's action was a decision made while on duty which led to loss of public funds. That upon independent review of the evidence produced by EACC, the DPP independently decided to charge the petitioner.

The 2nd Respondent's Response

34. The 2nd respondent through her replying affidavit sworn on 14th November 2018, averred that in October 2014, the 2nd interested party forwarded a list of properties that required National Land Commission to compulsorily acquire on its behalf for construction of SGR. That after gazettelement, the petitioner did a memo dated 27th April 2015 seeking confirmation on the validity of titles of the affected properties. That upon inviting all interested property owners for a public hearing between 8 – 10th June 2015, the 10 – 14 interested parties appeared as owners of LR 9084 – 9088 the subject of these proceedings.

35. That it emerged that L.R Nos. 9084 – 9087 had unlawfully been acquired after being excised from the railway reserve which constitutes public land. Consequently, in a meeting held on 22nd July 2015, the National Land Commission under minute No. 04/22/07/2015 directed that all the affected titles be revoked by the Chief Land Registrar. That she was later surprised that there was an internal memo issued on 14th December 2016 by the petitioner authorizing payments in respect of the revoked titles.

36. She denied participation in a purported meeting held and which purported to review an appeal challenging the resolution revoking the titles in question. She wondered how a review on appeal could be conducted in her absence yet she was supposed to chair the review of grants and disposition secretariat.

37. It was her averment that, a decision made under Section 14 of the National Land Commission Act, is appealable only to the environment and land court or by way of Judicial review before a court. That the law does not provide for an appellate mechanism within the same institution that rendered the decision. She dismissed the petitioner's claim that due process was followed.

The 3rd Respondent's Response

38. Brian Ikol the Deputy Director legal affairs National Land Commission, averred that following a request from KRC to identify land for compulsory acquisition for construction of the SGR, he caused the gazettelement of the affected properties. His reply is a replica of the 2nd respondent's response. He in a nutshell stated that the compensation expenses in respect of the properties in question was irregular.

The 4th Respondent's Response

39. Through an affidavit sworn by Charity Muniu, the 4th respondent stated that following receipt of a complaint that National Land Commission was engaged in fraudulent compensation for land compulsorily acquired for construction of SGR, they mounted investigations pursuant to Article 252 of the Constitution.

40. They averred that in 1990, an area within Embakasi Township was planned for an investment promotion centre zone vide part development plan (DPP) No. 42/14190/2A approved on 22nd August 1999. That the said PDP provided for a valid reserve bordering Embakasi Station and marshalling yard.

41. That in the year 2000, in complete disregard of the approved PDP, one David Barno Some engaged one Obadiah Mbugua Wainaina a licensed surveyor, to undertake sub-division of the railway reserve into five portions giving rise to LR 9084 – 9088. He claimed that the said survey was done without an approved PDP and letter of allotment as evidenced by a letter authored by the Assistant Director cadestral (EACC 3).

42. That to fill in the gap and cover up the fraud, a fresh PDP No. 42/14/91/03 was created and attached to survey maps leading to one John Mwangi Mwaniki the then head of authentication at survey to approve the same. That vide a letter dated 10th September 2013, the National Land Commission through the Director Physical Planning Mr. Jumba sought verification whether the allotment letters in respect of LR parcel No. 9086 – 9088 were genuine and PDP No. 42/14199/03 was authentic. That in response, a letter purportedly authored by a Mr. Achoki on behalf of the Director confirmed in the affirmative only for Mr. Achoki to learn that he never authored the letter of Confirmation (See letter marked EACC 6).

43. Subsequently, another letter purported to have been written by a Mr. Limo on behalf of the Commissioner of Lands confirming the allotment dated 20th September 2013 was subsequently disowned by Mr. Limo as the signature thereon was not his.

44. The deponent averred that letters of indent sought from the National Land Commission on 30th October 2013 were issued much earlier before that letter was written thus confirming that the survey and the purported approval were incorporated by interested parties to suit their interest. That the issuance of leases in respect of the affected plots was done even before verification process for deed plans was done.

45. Touching on the issue of compensation, the respondent restated the averments made by the 2nd, 3rd and 5th respondents to the extent that the petitioner made compensation contrary to the commissioner's resolution that the land in question was excised from public land and that the commissioner (7th interested party) unilaterally lifted the revocation resolution without involving the required member of commissioners. She attached several witness statements from some of the commissioners marked EACC No. 18 confirming that they never sat in any committee regarding the revocation of title. The commissioner stated that the prosecution was properly recommended and that there was no malice nor abuse of powers of office.

The 5th Respondent's Response

46. As the Director of Valuation and Taxation, National Land Commission, Mr. Benard Nzau confirmed that he was tasked to undertake a valuation of LR Nos 9084 – 9088 for purposes of ascertaining the value for compensation for construction of SGR. That after valuation, he prepared a compensation schedule and forwarded it to the petitioner with a note that some of the parcels had validity issues ranging from lack of legal ownership documents to multiple claimants.

47. He denied issuing any awards in respect of the parcels in question. He was surprised later to hear that the parcels of land he had flagged as having question marks had been cleared and payment made. He supported the action taken in charging the petitioner.

The 6th Respondent's Response

48. As the chair of the land acquisition and compensation committee he denied having sat in the committee that revoked the title deeds nor the one that rescinded the revocation.

Petitioner's Submissions

49. Through his written submissions filed on 14th December 2018, Mr. Okubasu counsel for the petitioner principally reiterated the averments contained in the affidavit in support of the petition and the annexures thereof. Counsel cited two issues for determination as follows:

(a) Whether this court has the powers to review the decision to prosecute.

(b) Whether there is sufficient reasons and evidence to review the decision.

50. On the power to review, Mr. Okubasu urged the court to find that a decision to prosecute must be halted if it amounts to an abuse of the court process. To support this position, counsel referred the court to numerous authorities among them Stanley Munga Githunguri vs R (1986) eKLR, Samuel Rono Gicheru and Another vs OCS Nanyuki Police Station and another Misc Cr. Application No. 22/14 Nyeri, George Joshua Okungu and Another vs The Chief Magistrate's Court ALC Nairobi and Another (2014) eKLR, Kuria and 3 others vs Attorney General (2002) 2 IKR 69.

51. It was counsel's submission that, there are good grounds to justify review of the decision to prosecute. He invited the court to consider both substantive and procedural grounds to quash the prosecution herein. To support this proposition counsel referred the court to the decision in the case of R vs Director of Public Prosecutions and another Exparte Patrick Ogola Onyango and 8 others (2016) eKLR.

52. In factual issues, Mr. Okubasu averred that the 1st and 10th respondents had not proved that the properties in question belonged to the 1st interested party (KRC) a fact that the compensation officials have all disowned. Regarding the claim that the commission revoked the title deeds, counsel submitted that the minutes of 22nd July 2015 and 7th October 2016 were fabricated.

53. Learned counsel contended that the petitioner has been charged as the director of Land Valuation and Taxation Committee a committee which does not exist hence counts VII – XI cannot stand. Regarding Count I on conspiracy, the petitioner is charged with conspiracy for the period starting 1999 much earlier even before the National Land Commission was formed out of 2010 Constitution hence a procedural defect to warrant prosecution as the petitioner was not in employment of the National Land Commission.

54. Mr. Okubasu submitted that the petitioner was selectively charged claiming that other "members of the committee who recommended for payment among them the 5th respondent were never charged hence preferential treatment. To buttress this position, the court was referred to the decision in the case of Ronald Leposu Musegi vs Director of Public Prosecutions and 3 others (2015) eKLR. He urged that this court should not allow prosecution to degenerate into tasks for settling personal scores or vilification and personal vendetta. Reference was made to the decision in the case of Kuria and 3 Others vs Attorney General (2002) e KLR 69.

55. Lastly, Mr. Okubasu pleaded for damages considering that the petitioner has been subjected to unfair trial which amounts to breach of her rights and dignity.

The 1st Respondent's Submissions

56. Through their written submissions filed in court on 20th November 2018, the 1st respondent pointed out three issues for determination as follows:

(a) Whether or not the decision to charge the petitioner and 15 others amounted to an abuse of the court process;

(b) Whether the petitioner's prosecution amounts to a violation of the petitioner's right to dignity, equality and fair administrative action and or breached Articles 25, 56 and or 356.

57. It is their submission that the DPP arrived at the decision to charge the petitioner and her colleagues independently without any ill will, influence nor direction pursuant to Section 157 (II) of the Constitution. It was submitted that a court can only interfere with the decision of the DPP as an independent constitutional body except where there is proof of contravention of the Constitution and breach of fundamental rights. Counsel relied on the decision in the cases of Paul Ng'ang'a Nyaga vs Attorney General and 3 others (2013) eKLR and Francis Anyango Juma vs Director of Public Prosecutions and Another Petition No. 100/2012, Kenya Commercial Bank Ltd and 2 others vs Commissioner of Police and Another (2013) eKLR.

58. Mr. Kinyanjui holding brief for M/s Nyamosi submitted that the existence of a civil suit and the mere fact that a criminal proceeding has a likelihood or bound to fail is not a ground to halt criminal prosecution now. To support this proposition, the court was referred to the decision in the case of **George Joshua Okungu and another vs Chief Magistrate Court Anti-Corruption Court at Nairobi and another (2014) eKLR.**

59. Counsel submitted that there is no reasonable cause established to warrant review and that there are sufficient measures to safeguard the interest of the petitioner before the trial court. Touching on discrimination under Article 27 of the Constitution that the petitioner was discriminated against, the DPP contended that the same was not proved and that failure to charge all suspects does not alone translate to discrimination. Reliance was placed on the decision in the case of **Ibrahim Wako Boru vs Ethics and Anti-Corruption Commission and Another (2018) eKLR.**

60. He urged the court to find that insufficiency of evidence and or lack of merits of the case will be a matter for the trial court to determine. Counsel relied on the decision in the case of **Eric Kibiwott Tarus vs Director of Public Prosecutions and 7 others (2014) eKLR.**

61. Mr. Kinyanjui contended that the prayers sought are of Judicial Review in nature and not matters of constitutional violations. That Judicial Review is concern with decision making process and not the merits of the decision. That the issues being raised will best be ventilated as her defence during the trial. Lastly, counsel submitted that the respondent had not demonstrated how her rights have been violated.

The 2nd, 3rd and 6th respondent's submissions

62. Mr. Mbutia appearing for the 2nd, 3rd and 6th respondents basically adopted the averments contained in their replying affidavit. It was counsel's submission that the DPP cannot be directed on what to do or who to charge and who not to charge. In support of this proposition counsel referred the court to the decision in the case of **Douglas Maina Mwangi vs Kenya Revenue Authority and another Constitution Petition No. 528/2013.**

63. Mr. Mbutia submitted that the statements recorded in respect of this matter were factual based on the prevailing evidence hence no malice against the petitioner. Counsel supported the recommendation to prosecute the petitioner arguing that she had defied the commission's recommendation revoking the title deeds.

The 4th Respondent's Submissions

64. Appearing for the 4th respondent, M/S Regina Jemutai filed their submissions on 22nd February 2019 adopting the contents of the affidavit in reply arguing that the decision to charge the petitioner was made in good faith and that the petitioner's prosecution does not amount to an abuse of office and that the DPP cannot be directed on who to charge and who not to charge. She urged the court to be slow at reviewing a matter which should be determined upon full trial.

65. On damages, counsel submitted that one must prove infringement of one's rights under the Constitution. She referred the court to the decision in the case of **Irene Wangari Gacheru and 6 others vs AG Constitutional reference No. 376/2014 (2017) eKLR.**

Submissions by the 1st Interested Party

66. The 2nd interested party filed his submissions on 1st February 2019 literally restating the averments contained in his replying affidavit.

5th Interested Party's Submissions

67. Through his submissions filed on 12th February 2019, he submitted that his prosecution was without any factual or proper basis and therefore malicious. Reference was made to the court's decision in **R vs Attorney General EX Kipngeno Arap Ngeny High Court Civil Application No. 406/2001.**

7th Interested Party's Submissions

68. The 7th interested party filed his submissions on 27th February 2019 stating that his prosecution was actuated with ulterior motive and without proper factual foundation. The court was referred to the decision in the case of **Kuria and 3 others vs AG (Supra).** He contended that the title deeds presented for compensation were clean titles in compliance with Section 24, 25 and 26 of the registration of the lands Act.

10 – 14th Interested Party's

69. Through the firm of Senteu and Ndungu Advocates, the 10th – 14th interested parties adopted the contents contained in their replying affidavit to the petition. They submitted that they followed due process in the acquisition of LR 9084 – 9085 and that they were procedurally compensated. They claimed ownership of the land in question and that charging them and the petitioner was being malicious.

Determination

70. I have considered the petition and responses thereto plus rival submissions by counsel. Issues that crystallize for determination are:

(a) Whether the recommendation to prosecute and subsequent prosecution of the petitioner amounts to abuse of office by the 1st and 4th respondents.

(b) Whether the prosecution of the petitioner amounts to a violation of her constitutional rights.

(c) Whether the reliefs of prohibition and certiorari can issue.

(d) Whether the award of damages can apply in the circumstances of this case.

(e) Whether costs should be awarded to the petitioner.

(f) Whether the petitioner was discriminated against by being charged alone leaving the 2nd and 3rd respondents.

(a) Whether the 1st and 4th respondents abused their powers in recommending the petitioner's prosecution and, whether such recommendation violated the petitioner's rights.

71. Considering that issue No.1 and 2 are intertwined, I will deal with them jointly. The petition herein is hinged on the allegation that the petitioner's constitutional rights were violated for being prosecuted for an offence she did not commit and that the 4th respondent abused their mandate by recommending her prosecution. That the DPP improperly acted on the recommendation and commenced prosecution without proper and independent analysis of evidence.

72. Under Article 22 (1), every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed, or is threatened. Where a party pleads that such rights or fundamental freedoms are at stake, this court is enjoined under Article 23 (3) of the Constitution to grant appropriate reliefs including:

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights and is not justified vide Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

73. Under Article 2 (1) of the Constitution, all persons or state organs at both levels are bound by the Constitution which is the supreme law of the land. It therefore leaves no doubt in my mind that, this court by dint of the above-mentioned constitutional provisions is properly seized of this matter and if the violation alleged is proved, then the court will not hesitate to grant the appropriate orders.

74. Did the 1st and 4th respondents abuse their offices by recommending the prosecution of the petitioner? The mandate of the EACC pursuant to Article 79 of the Constitution is well spelt out and actualized under Sections 11 (1) (A), 13(2) (C) EACEA and Section 23 and 35 of ACECA. Under Section 11 (1) (a) the commission has powers to investigate and recommend to the DPP for prosecution of any person for any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the Act, ACECA or any other law enacted pursuant to Chapter six of the Constitution.

75. In exercise of their duties, the commission is duty bound to act independently and without any influence, direction or consideration of any extraneous matters. Equally, the DPP is clothed with constitutional authority under Article 157 (10) of the Constitution to commence any criminal proceedings against anybody without seeking anybody's consent or authority and shall act independently without being directed or controlled by any person or authority.

76. However, in exercise of those powers, there is a caveat imposed upon the DPP under Article 157 (11) which provides that, in exercise of his powers, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

77. The powers conferred upon the two offices are so immense and therefore must be exercised with sobriety so as to serve society effectively. The same should not be used as a tool to settle personal scores or vendetta. Where such powers are applied in a manner that offends the clearly spelt out provisions of the Constitution, courts will not hesitate to question such actions and set them aside.

78. However, a court must also act cautiously not to whimsically interfere with the mandate of other independent state agencies or office holders so as to enable them discharge their duties effectively. In the case of **ACEC Petition No. 23 of 2018, Peter Nganga Mburu and 3 others vs DPP (2018) eKLR** the court held that:

“the DPP in directing that investigations be undertaken is not subject to the direction and control of any person, body or authority. If it is however shown that the decision made is against the tenets of the Constitution and has been made in bad

faith the same can be reviewed”.

79. Similar position was held in the case of **Paul Nganga Nyaga vs Attorney General and 3 others (2013) eKLR** where the court stated that:

“This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution”.

80. It is upon the petitioner to prove with reasonable degree (precision) the extent of rights violated and the injury suffered or likely to be suffered, or threatened, or infringed and the jurisdictional basis for it (**see Anarita Karimi Njeru vs R (1979) NO1 eKAR**).

81. In the instant case, the petitioner is alleged to have approved an award for compensation for four properties namely LR 9084 – 9088 which were allegedly irregularly excised out of railway reserve and that despite the revocation of those titles by the National Land Commission, the petitioner ignored the same and authorized payment.

82. According to the EACC (4th respondent), the excision of the four properties was irregularly and fraudulently done in collusion with survey, valuation and lands office. They attached a number of letters which were allegedly forged to regularise the process which the purported authors disowned. They alleged that the PDP referred to as No. 42/14/90/03 was fraudulently prepared. The second respondent further confirmed that by National Land Commission meeting held on 22nd July 2015 the titles were revoked and the revocation confirmed on 7th October 2018. She claimed that the petitioner was fully aware of the revocation arrangement and that given time they shall prove that the land belonged to the KRC railway reserve.

83. Although the petitioner claimed that the 22nd July 2015 and 7th October 2015 minutes were a forgery, she admitted that she had earlier questioned the validity of those titles through her memo dated 27th April 2015. She further stated that she made payment on the strength of her bosses, instructions.

84. Whereas there is evidence that even the chairman of the National Land Commission Prof. Swazuri confirmed signing the minutes of 7th October 2015 confirming the minutes of 22nd July 2015, he denied participation claiming that he by mistake signed the minutes due to pressure of work.

85. Interestingly, the 3rd interested party KRC Principal Land Surveyor and 5th interested party a surveyor also with KRC disowned the land in question saying that they have never been part of the railway reserve.

86. This is contrary to the 1st, 2nd and 4th respondents claim. The 4th respondent gave a chronology of events as to how the land was fraudulently converted from railway reserve to private land without subjecting it to due process. Some of the issues bordering on fraud are matters of fact and cannot be fully appreciated unless subjected fully to admission of evidence. For the issues to come out clearly they must be subjected to a full trial and cross examination.

87. All that the respondents need to demonstrate is that they have a prima facie case with a probability of success. At this stage they do not need to prove their case beyond reasonable doubt. The outstanding issues are quite weighty requiring parties to ventilate the same before a trial court which shall then determine in detail whether; there was such railway reserve in the first place; who converted it into private property; when and under what circumstances and the law applicable.

88. This court is duty bound to maintain proper boundary as to the role of a constitutional court and a trial court. What belongs to a trial court should aptly be left for the trial court to determine. That does not mean that even hopeless cases must be subjected to the rigours of a criminal trial.

89. In arriving at the above finding, I am guided by the decision in the case of **R vs Commissioner of Police and another exparte Michael Monari and another (2012) eKLR and William Ruto and another vs Attorney General HCC No. 1192/2004** where it was held that analysis of evidence should be before the trial court and not the constitutional court.

90. Criminal prosecution does not necessarily translate to a violation of one’s constitutional rights nor breach of one’s fundamental freedoms. Prosecution is not a constitutional as well as a statutory legal process unless proved that it is intended to punish or frustrate the applicant based on bad faith, malice, ill motive, or a breach of the principles of natural justice.

91. From the evidence adduced by both sides in support of their pleadings, one could obviously make a grave mistake and therefore commit a grave injustice if it were to be held that the 1st and 4th respondents abused their offices. From the materials placed before me, they were under obligation to do what the law permits them to do and which in my opinion was rightfully executed hence no proof of malice, abuse of office, ill will or ultravires action. For those reasons, the ground of abuse of office fails.

(b) Whether the orders of prohibition and certiorari can apply

92. The applicant sought for judicial review orders with the purpose of stopping the ongoing prosecution of the petitioner and then quash the same. For an order of judicial review to apply, one must prove that there was something wrong with the process and that there was abuse of discretion, irrationality, excess of jurisdiction, improper motive, failure to exercise discretion, abuse of the rules of natural justice, fettering of discretion or error of the law (**See R vs Judicial Service Commission HC Misc. Application No. 1025/2003 and R vs Kenya Revenue Authority Exparte Yaya Towers Ltd (2008) eKLR**).

93. As stated above, the applicant has not proved that the respondents breached any of the above elements to warrant judicial review orders. The standard of review of the discretion of the DPP to prosecute or not to prosecute is high and courts will interfere with the exercise sparingly. **(See Prof. Njuguna S. Ndungu vs Ethics and Anti-Corruption Commission (EACC) and 3 others Civil Appeal No. 333/2018.**

(c) Whether the petitioner was discriminated against

94. Touching on discrimination, the petitioner stated that by charging her and sparing the 2nd and 3rd respondents amounts to discrimination thus offending Article 47 of the Constitution. Whereas it is the discretion of the DPP to decide on who is to be charged and not to charge, he must exhibit a high degree of neutrality and impartiality without giving in into preferential treatment of suspects. However, there is no law prohibiting him from treating some suspects from being prosecution witnesses especially where co-suspects' evidence would be necessary to prove a case. In any event, she has not proved that the 2nd and 3rd respondents equally took part in validating the illegality complained of. I do not find her claim tenable hence no proof of discrimination.

Whether the order prohibiting the petitioner from accessing her office during the pendency of her trial was illegal

95. The petitioner claimed that after taking plea she was directed not to access her office during the pendency of criminal proceedings so as not to interfere with witnesses. The orders made by the trial court were pursuant to Section 62 of the Leadership and Integrity Act which prohibits state officers from holding office during the pendency of the criminal proceedings. This issue was however not prayed for as a relief in the petition. It was one of the prayers in the application which was abandoned. I cannot therefore make any substantive finding on it. However, as an orbiter, an answer can be found in the recent decision in the case **of Moses Kasaine Lenolkulal vs Director of Public Prosecution Cr. Revision No. 25 of 2019 Nairobi** where the court held that **an order for a state officer not to go back to the office while criminal proceedings are going on is not the same as vacating office hence not unconstitutional.** Guided by this decision I find that the petitioner's rights have not been violated in any way as she is still an employ of the NLC.

Whether the interested persons' claim can stand

96. In every case where there is an interested party, his interest is principally pegged on the success of the principle parties' primary issues or claim. An interested party cannot pursue a claim on his or her fresh issues. If the principle party on whose case his or her interest depends on fails, he/she too must fail. They did not file any independent petition seeking their independent reliefs. They basically depended on the case of the petitioner which if it fails their interest also fails. In the case of **Francis Karioko Muruatetu and another vs R consolidated with Nos 15 and 16 of 2015 (2017) eKLR** the court held that:

"...therefore in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principle parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination..."

97. From the foregoing, upon the petitioner's failure, the interested parties equally fails. Accordingly, the petition herein dated 23rd October 2018 is dismissed.

Award for Costs

98. Ordinarily an award for costs is at the discretion of the court. Considering circumstances under which this petition was filed and the prevailing criminal trial pending before the lower court, it will be punitive to award costs against the petitioner. I do therefore order that each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF AUGUST, 2019.

J.N. ONYIEGO

JUDGE