



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO 389 OF 2016**

**EDNA SUDI KHAEMBA.....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE....2<sup>ND</sup> RESPONDENT**

**AND**

**COMMERCIAL BANK OF AFRICA LTD.....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The Petitioner, *Edna Sudi Khaemba*, is an Advocate of this Court. She acted for some clients in the course of her professional duties. She witnessed documents which enabled her clients conclude some transactions in relation to sale and purchase of land.

2. Later, issues arose and the transactions became the subject of police investigations and prosecutions. Some of her clients were arrested and charged in Criminal Case No 1419 of 2016. Attention of investigation turned towards the petitioner prompting her to file a petition before this Court challenging those investigations and possible prosecution.

**Petition**

3. In a Petition dated 20<sup>th</sup> September 2016, the petitioner sued the *Director of Public Prosecutions*, 1<sup>st</sup> respondent, and the *Inspection General of Police* as 2<sup>nd</sup> respondent. Also joined in the petition is the *Commercial Bank of Africa* as the Interested Party.

4. In her petition and supporting affidavit, the petitioner averred and deposed that her role in the conveyance did not involve drawing or preparing of sale agreements but merely execution. She deposed that various companies approached the interested party for a financial facility which was to be secured by some properties as collaterals. The petitioner further deposed that her professional role was limited to witnessing execution of various documents which had been prepared by the interested party's advocates, and that she was not involved in the submission of the documents for registration at the land registry.

5. The petitioner went on to averred that in view of the fact that the respondents had charged the Directors of **Glaret Kindergarten, Kinjunje Garden Ltd, Wardpa Holdings Ltd, Ndonga Limited and Gep Limited**, over the same transactions, she was apprehensive that the respondents would turn against her and therefore instituted this petition seeking the following reliefs:-

**a. A declaration that the respondents have contravened the petitioner's rights under Articles 27, 29, 31, 47, 48, 49 and 157(6) of the Constitution.**

**b. An order that any criminal proceedings against the Petitioner including intended arrest and prosecution in respect to transactions of Glaret Kindergarten, Kinjunje Gardens Limited, Wardpa Holdings Limited, Ndonga Limited and Gep Limited over various conveyance transactions on L.R. No Dagoreti/Riruta/2289, L.R No Dagoreti/Riruta/2290, L.R No.209/2489/34, L.R No 209/2489/32, L.R No 209/12513, L.R No 88323, L.R No 290/163/1/6, L.R No 209/1817 and L.R No 43306, L.R No 12948/214 and Kitengela/Kajiado/4260 be stayed permanently.**

**c. A prohibition Order to issue against the respondents, their agents, assigns or any person claiming through them to permanently restrain them from arresting , prosecuting or continuing any criminal charges against petitioner in relation to Glaret Kindergarten, Kinjunje Gardens Limited, Wardpa Holdings Limited, Ndonga Limited and Gep Limited over various conveyance transactions on L.R. No Dagoreti/Riruta/2289, L.R No Dagoreti/Riruta/2290, L.R No.209/2489/34, L.R No 209/2489/32, L.R No 209/12513, L.R No 88323, L.R No 290/163/1/6, L.R No 209/1817 and L.R No 43306, L.R No 12948/214 and Kitengela/Kajiado/4260.**

**d. That the costs of this petition be provided for.**

## **Responses**

6. The respondents filed grounds of opposition dated 25<sup>th</sup> April 2017 and filed in court on the same and a replying affidavit. It was stated that the 1<sup>st</sup> respondent had received the investigation file together with recommendations but would make an independent decision once he had analyzed the evidence in the investigation file.

7. It was stated that the decision whether or not to prosecute the petitioner would depend on the sufficiency of the evidence and public interest, that the petitioner had not demonstrated that in discharging his mandate under the Constitution, the 1<sup>st</sup> respondent would not do it in accordance with the law, and that the 2<sup>nd</sup> respondent had acted within the law in conducting investigations.

8. It was contended that the respondents were not acting under the direction of any person and further that the petitioner had not shown that the respondents were acting *ultra vires* their powers and that the petitioner had not proved violation of her rights and fundamental freedoms.

9. In the replying affidavit sworn on 29<sup>th</sup> September 2017, **Abdullahi Shuria** deposed that investigations began after a complaint was made by the interested party of loss of Ksh449,051,999/70 where the companies mentioned above were suspected to have been involved.

10. It was deposed that the fraud was most likely perpetrated by interested party's employees through use of forged title documents, that the petitioner's firm acted for the vendors Hackam Ltd and purchasers Kinjunje Gardens Ltd. It was also deposed that the petitioner's firm made several other sale agreements where forged documents were used and Ksh139,500,000 was transferred from the petitioner's firm's accounts to Ndonga Limited's account and Ksh20,000,000 to the account of Gitutho Gikonyo and further that the petitioner withdrew Ksh500,000/- in cash. He deposed that they forwarded the file to the 1<sup>st</sup> respondent with recommendations that the petitioner be charged and prosecuted.

## Interested Party's response

11. The Interested Party filed a replying affidavit sworn by Ronald Mworira on 24<sup>th</sup> November 2016 and filed in Court on the same day. He deposed that a criminal complaint was lodged because the petitioner's signature and stamp appear on agreement for sale dated 25<sup>th</sup> August 2013 in respect of **L. R No 209/12513** where the petitioner's Law firm acted for the purchaser, drafted the transfer documents and availed valuation and requisition for stamp duty form, stamp Duty declaration assessment and pay in slip together with RTGS slip for Ksh5,000,000/-.

12. He also deposed that there was transfer and charge on LR No 209/1817 – Kinjunje Gardens Ltd where the petitioner attested the signature on the charge documents, represented both vendor and purchaser in the transaction and received the balance of Ksh160,000,000/- on behalf of the vendor. Further deposition was that with regard to charge over **L.R No 209/2489134** – Ndonga Ltd, the petitioner represented the vendor in the sale and presented completion documents to the vendor's advocates, availed requisition for stamp duty declaration and other documents including RTGS slip to Ksh2,249,000/- and received balanced of the purchased price of Ksh56,000,000/-.

13. The petitioner is also said to have received Ksh25,800,000/- on behalf of Ndonga Ltd of balance of purchase price for LR 12948/2014. The interested party's contention is that the petitioner actively represented those who were vendors and who obtained money from the interested party for sale of properties and that the petitioner's culpability or otherwise can only be determined once subjected to a criminal trial.

## Petitioner's Submissions

14. **Mr Wandungi** leading **Mr Thuku** for the petitioner, submitted that the petitioner's rights are being violated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents who seek to prosecute her simply because she acted for clients in the course of her professional duties. Learned counsel submitted that the decision to prosecute the petitioner is malicious, discriminatory and unfair thus militates against the cause of justice. According to learned counsel, the petitioner acted for clients who applied for financial facilities from the interested party and certain properties offered as security. That the interested party lodged a criminal complaint against 3 parties the petitioner had acted for and directors of the companies the petitioner was acting for were arrested and arraigned in Court in criminal case No 1419 of 2016.

15. Counsel submitted that after arraigning the directors, in Court, the respondents summoned the petitioner and threatened her with prosecution alongside the director. This, counsel submitted, was despite the respondent stating that the perpetrators of the fraud were employees of the interested party. Learned counsel submitted that since the perpetrators were known and the petitioner is not one of them, the threat to prosecute the petitioner was malicious.

16. Learned counsel contended that the respondents had not controverted the petitioner's submission that she acted as an advocate and that this fact was confirmed by the interested party replying affidavit. Mr Wandungi further submitted that the petitioner did not conduct some transactions alleged in the interested party's replying affidavit. He submitted that the petitioner was being prosecuted for unjustifiable reasons.

17. Mr Wandungi further submitted that the case in which the petitioner was to be prosecuted with the directors she acted for was challenged in **JR No 429 of 2016** instituted by the directors of the companies the petitioner acted for. Learned counsel submitted that the Court in **JR 429 of 2016** found that the prosecution lacked malafides and stopped the proceedings until a civil suit filed at the commercial division was concluded.

18. Mr Wandungi urged the court to find that the criminal proceedings in CR 1419 of 2016 having been stayed, and those being the principles the petitioner acted for, the current proceedings are malafides and should be stopped. According to counsel, there is civil suits in **ELC No. 93 of 2016, 13 of 2016, 947 of 2016 and 941 of 2016** which are still pending over the same issues yet the petitioners was not included as a party to any of those cases.

19. He submitted that charging of the petitioner is not only unjust but militates against interest of Justice since the petitioner may end up being charged when the principles she acted for have a reprieve. Counsel relied on seven authorities in their list of authorities including; *Njuguna S Ndung v Ethics and Anti-Corruption & 3 others* [2014] eKLR, *Municipal Council of Mombasa v Republic ex parte Umoja Consultants Limited* [2014] eKLR, and *Joram Mwenda Guantai v The Chief Magistrate* [2007] 2 EA 170, among others.

### **Respondent's Submissions**

20. **Mr Ashimosi**, learned counsel for the respondents, submitted that the 2<sup>nd</sup> respondent investigated a complaint lodged with it and after investigation, made a conclusion to charge the several people in criminal case **No 1419 of 2016**. Learned counsel submitted that the petitioner was not and still is not one of those people charged in that case. According to learned counsel, upon conclusion of investigations, the police submitted a report with a proposal to charge the petitioner together with those already charged in criminal case **No 1419 of 2016**.

21. Learned counsel however, submitted that the 1<sup>st</sup> respondent was yet to make a decision whether or not to prosecute the petitioner. **Mr. Ashimosi** submitted that the 1<sup>st</sup> respondent has since been served with a copy of the judgment in JR 429 of 2016 prohibiting any prosecution until the civil suits are determined (paragraph 111 of the judgment). Learned counsel submitted that under Article 157(11) of the Constitution, the respondent is required to uphold the law and administration of justice.

22. Counsel further submitted that in making his decision, 1<sup>st</sup> respondent will take into account the judgments in JR No 429 of 2016. He concluded that the fact that the 1<sup>st</sup> respondent has not made a decision, the petitioner's allegations against him are unfounded. He contended that the petition is premature in so far as the 1<sup>st</sup> respondent is concerned, given that he has not acted on the recommendations.

### **Interested Party's Submissions**

23. **Mr Njuguna**, learned Counsel for interested party, submitted associating himself with submissions made on behalf of the 1<sup>st</sup> respondents, that the petition is premature. Learned counsel however added that some money was supposedly paid by the petitioner as stamp duty towards transfer of the properties the subject matter of the investigations. However, on investigations, it was established that the money was not paid but the documents were forgeries.

24. He submitted that the documents were provided by the petitioner and that the evidence in the documents is sufficient to sustain the charge. He urged that the Court should not rely on the Judgment in the Judicial Review decision to stop the intended prosecution. He relied on the decisions in *Republic v Inspector General of Police & another Ex parte Patrick Macharia Nderitu* [2015] eKLR and *Stephen Ndambuki Muli & 3 others v Director of Public Prosecutions, & another* [2016] eKLR

### **Determination**

25. I have considered the petition, responses and submissions by Counsel for the parties. I have also considered the authorities relied on. This petition presents only one question for determination; whether the respondents have acted in violation of the petitioner's rights and fundamental freedoms in recommending her prosecution.

26. The petitioner is an advocate and she acted in the course of her professional duties. The people she acted were investigated and recommendations made to prosecute them. They were indeed arrested and charged in Criminal Case No 1419 of 2016 before the Magistrate's Court at Milimani Law Courts.

Later on, the the petitioner was also investigated and a commendation made that she be prosecuted together with the directors of the companies, she is said to have acted for and who were subject of

criminal case No 1419 of 2016. The petitioner has not been charged yet but feels she may be arrested and charged at any time.

27. The petitioner in advancing her arguments against arrest and prosecution informed the court that the principals she acted for namely the directors of the various companies that obtained financial facilities from the interested party, had themselves obtained an order prohibiting their prosecution until some civil suits pending before the **Environment and Land Court** (E LC) are heard and determined. She feels she will be discriminated against if the Court does not stop the intended prosecution.

28. This court has been moved pursuant to its jurisdiction under **Article 165(3)(b)** of the Constitution to determine the question of **whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.** The petitioner has not been charged yet which means she is under apprehension that her rights and fundamental freedoms are under threat.

29. On the other hand, the 1<sup>st</sup> respondent, the **Director of Public Prosecutions** is an office established under **Article 157** of the constitution to exercise state powers of prosecutions in the country. He has power to institute and undertake criminal prosecutions against any person before any court in respect of any offence alleged to have been committed. This is a very expansive mandate that the Constitution has bestowed on the 1<sup>st</sup> respondent.

**30. Article 157(10)** of the **Constitution** is clear that the Director of Public Prosecution shall not require **consent of any person or authority** for the commencement of criminal Proceedings and in exercise of his or her powers or functions, **shall not be under the direction or control of any person or authority.** The 1<sup>st</sup> respondent has a wide constitutional mandate when undertaking his prosecutorial work.

**31. Article 157(11)** is also important for it states that in exercising powers conferred on him, , the Director of Public Prosecutions **shall have regard to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.** These are the guiding principles that the 1<sup>st</sup> respondent must bear in mind wherever he exercises his mandate under the Constitution.

32. I have gone through the record before me and what is clear is that the 1<sup>st</sup> respondent has not made a decision to prosecute the petitioner. What has happened is that he has only received the investigations file from the police with a recommendation to prosecute the petitioner.

33. Learned Counsel **Mr Ashimosi** admitted as much when he submitted that although the investigations file had been received together with recommendations, the 1<sup>st</sup> respondent was yet to exercise his discretion under the Constitution. He also admitted that they were aware of the **Judgment in Judicial Review No 429 of 2016** stopping prosecution in the criminal case and that while making his decision, the 1<sup>st</sup> respondent will take that judgment and the order of prohibition into account.

34. This Court has a very wide discretion when exercising its powers under Article 165(3)(b) of the Constitution as read with Article 23, to deal with allegations of violation of human rights and fundamental freedoms. However the Court must be cautious and avoid trampling upon the constitutional mandate of other Constitutional bodies. It must act where there is clear evidence of violation of the Constitution, the law, violation or threat of violation of rights and fundamental freedoms or wrong exercise of discretion by such bodies.

35. In the present petition, the 1<sup>st</sup> respondent is yet to exercise his discretion. This court cannot therefore make any findings on these effects at this stage. Moreover, there is already a judgment staying any criminal proceedings involving the people the petitioners is said to have acted for. That judgment has been brought to the attention of the 1<sup>st</sup> respondent and it is only fair to allow him make a decision in exercise of his constitutional mandate.

36. Once that is done, the petitioner will, if aggrieved, be at liberty to challenge that decision and the Court will be perfectly in order to examine the reasonableness of that decision in the circumstances of this

matter and make its pronouncement on it.

37. In *Meixner & Another vs. Attorney General* [2005] 2 KLR 189, the Court of Appeal referring to section 26 of the retired Constitution on the powers of the Attorney General to prosecute, stated;

**“The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution” (emphasis)**

38. In *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69, it was held 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...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta.”**

39. This Court would indeed not hastate to prohibit proceedings where it is plainly clear that they were instigated for improper purpose or that the criminal trial is for settling a personal score or vendetta.

40. On the other hand the 2<sup>nd</sup> respondent was merely performing their duties. Section 49 of the Police Service Act contains general powers of police officers which powers are subject to Article 244 of the Constitution and the Bill of Rights. Article 244 provides partly that ***the National Police Service shall (b) prevent corruption and promote and practice transparency and accountability; (c) comply with constitutional standards of human rights and fundamental freedoms***; A party would therefore have to show that in performing their duties the police violated the Bill of Rights, an integral part of our democratic state and the framework for social, economic and cultural policies.

41. From what I have seen on record, and given that the 1<sup>st</sup> respondent has not made a decision, I agree with **Mr. Ashimosi’s** submission that this petition is premature. Granting this petition at this stage would be to interfere with the Director of Public Prosecution’s constitutional mandate. When and if he makes a decision that goes against the principles set out in the Constitution, the petitioner will be at liberty to move the Court as appropriate. As for now, I see no reason to interfere.

42. In the circumstances, I find that the petition dated 20<sup>th</sup> September 2016 is premature and is hereby struck out with no order as to costs.

**Dated, Signed and Delivered Nairobi this 23<sup>rd</sup> Day of February 2018**

**E C MWITA**

**JUDGE**