



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 2 OF 2017**

**IN THE MATTER OF ARTICLES 22, 23, 157, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**AND IN THE MATTER OF**

MICHAEL MATAZA.....1<sup>ST</sup> PETITIONER  
NELLY KAHINDI.....2<sup>ND</sup> PETITIONER  
ABDALLA KITL.....3<sup>RD</sup> PETITIONER  
SAMSON SAFARI KATANA.....4<sup>TH</sup> PETITIONER  
JOHN KALAMA JUBA.....5<sup>TH</sup> PETITIONER  
RAMA KATANA.....6<sup>TH</sup> PETITIONER  
NGOA MLANDA.....7<sup>TH</sup> PETITIONER  
JILANI MWATUA.....8<sup>TH</sup> PETITIONER  
ALLAN MWALUNE.....9<sup>TH</sup> PETITIONER  
JACOB GULANI.....10<sup>TH</sup> PETITIONER  
POLA KARISA.....11<sup>TH</sup> PETITIONER  
MARY CHANGAWA.....12<sup>TH</sup> PETITIONER  
MARGARET MNYAZI.....13<sup>TH</sup> PETITIONER  
JANET KADZO.....14<sup>TH</sup> PETITIONER  
RACHEL KAHASO.....15<sup>TH</sup> PETITIONER  
ESTHER CHARO.....16<sup>TH</sup> PETITIONER  
PURITY EMMANUEL NGUZO.....17<sup>TH</sup> PETITIONER  
AGNES KITSAO.....18<sup>TH</sup> PETITIONER  
JANE CHIRWA.....19<sup>TH</sup> PETITIONER

SAFARI KARISA.....20<sup>TH</sup> PETITIONER

JOE KAZUNGU.....21<sup>ST</sup> PETITIONER

VERSUS

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

OFFICER COMMANDING STATION KILIFI.....2<sup>ND</sup> RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS KILIFI..3<sup>RD</sup> RESPONDENT

JUDGEMENT

1. The 1<sup>st</sup> to 21<sup>st</sup> petitioners, Michael Mataza, Nelly Kahindi, Abdalla Kiti, Samson Safari Katana, John Kalama Juba, Rama Katana, Ngoa Mlanda, Jilani Mwatua, Allan Mwalune, Jacob Gulani, Pola Karisa, Mary Changawa, Margaret Mnyazi, Janet Kadzo, Rachel Kahaso, Esther Charo, Purity Emmanuel Nguzo, Agnes Kitsao, Jane Chirwa, Safari Karisa and Joe Kazungu have brought this constitutional petition under Articles 22, 23, 50, 157, 165, 258 and 259 of the Constitution. They have named the Director of Public Prosecutions, the Officer Commanding Kilifi Police Station and the Director of Criminal Investigations, Kilifi as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively.

2. The petitioners' main claim is that the criminal proceedings taken out against them by the respondents is in violation of their constitutional rights. They therefore pray for orders that:

**“(a) A declaration that the institution, maintenance and prosecution of Kilifi Chief Magistrate’s Court criminal cases No. 164 of 2016 between Republic versus Michael Mataza & 3 others, Kilifi Chief Magistrate’s Court Criminal Case No. 189 of 2016 between Republic versus Michael Mataza & another, Kilifi Criminal case number 181/2015 between Republic versus Rama Katana & 15 others and Kilifi criminal case No. 610 of 2015 between Republic versus Michael Mataza & 4 others against the petitioners is malicious, oppressive, an abuse of the court process and violates their right to secure protection of the law.**

**(b) An order of prohibition prohibiting the continuation of Kilifi Chief Magistrate Court criminal cases no. 164 of 2016 between Republic versus Michael Mataza & 3 others, Kilifi Chief Magistrate’s Court criminal case no. 189 of 2016 between Republic versus Michael Mataza & another, Kilifi criminal case number 181/2015 between Republic versus Rama Katana & 15 others and Kilifi criminal case number 610 of 2015 between Republic versus Michael Mataza & 4 others.**

**(c) Costs of the petition and general damages.”**

3. The facts relied upon by the petitioners are that while agitating for ownership of their ancestral land, L.R. No. 1705/233 (CR. 27002), they were also sued on 28<sup>th</sup> October, 2015 vide Malindi ELC No. 196 of 2015 by individuals laying ownership claim over the same parcel of land. It is their case that they filed a defence to the said claim and as at the time of filing the instant petition, the civil suit was yet to be set down for pre-trial conferencing and they had only been served with one court order directing maintenance of the *status quo*.

4. The petitioners plead that the Bill of Rights applies to all and binds all persons as per Article 20(1) of the Constitution and that the institution of criminal charges against them is discriminatory and selective thereby contravening Article 77 of the Constitution.

5. It is further pleaded that by dint of Articles 10, 73 and 232 of the Constitution, the respondents are bound to uphold the national values of governance, the proper standards of leadership that is selfless and aimed at public interest, constitutionalism and principles of public service.

6. The 1<sup>st</sup> Petitioner Michael Mataza, with the authority of the other petitioners, swore an affidavit in support of the petition. The 1<sup>st</sup> Petitioner is the chairman of an unregistered group pursuing claim to the land in question and is sued as a co-defendant in the land case.

7. It is the Petitioner’s contention that there have been several attempts to evict them from the land in question and an application to cite them for contempt had even been taken out by the plaintiffs. It is the petitioners’ case that prior to and during the pendency of the civil suit they were jointly and severally charged with criminal offences in Kilifi Chief Magistrate’s Court criminal case numbers 164 of 2016, 189 of 2016, 181 of 2015 and 610 of 2015.

8. The petitioners state that their pleas in criminal case No. 189 of 2016 was taken on 10<sup>th</sup> June, 2016 and the matter set down for hearing on 16<sup>th</sup> March, 2017. In criminal case No. 164 of 2016 only two witnesses had testified and the same was due for hearing on 21<sup>st</sup> March, 2017 while criminal cases numbers 181 of 2015 and 610 of 2015 were slated for hearing on 14<sup>th</sup> March, 2017.

9. It is the petitioners’ contention that the criminal proceedings were instituted out of malice to exert pressure upon them to stop defending the civil claim and to give undue advantage to the plaintiffs. Further, that the criminal proceedings are intended to humiliate and frustrate them.

10. It is the petitioners’ assertion that although a criminal matter can subsist simultaneously with a civil matter touching on the same subject matter, the criminal proceedings against them should not be sustained for the reasons that in a group of over 1500 people, they were

selectively charged; that the police have verbally threatened them with arrest telling them that they shall ensure they are incarcerated for a long time due to the land issue; that the plaintiffs have filed frivolous claims citing them for contempt and upon dismissal engaged the police to harass and intimidate them; that the police's action to charge them is a ruse to escape liability as they too had been cited for contempt by the same plaintiffs; that in instigating the criminal proceedings the respondents failed to take into account relevant matters such as the disputed ownership of the parcel of land in dispute; and that a criminal trial cannot determine ownership of land as the Environment and Land Court is yet to make such a determination.

11. The petitioners assert that the respondents infringed their right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action guaranteed by Article 47 by failing to record their statements during investigations and failing to disclose the existence of the civil suit. Further, that the respondents also breached Article 10 of the Constitution by making the decision to move to court and charge them prior to conducting impartial investigations.

12. In support of their pleadings, the petitioners have exhibited a copy of the plaint in the land matter, a court order issued on 30<sup>th</sup> January, 2017 directing maintenance of *status quo*, a ruling delivered on 27<sup>th</sup> May, 2016 dismissing contempt of court proceedings against the petitioners and the police, and charge sheets in respect of the criminal proceedings facing them.

13. The respondents filed a joint response through an affidavit sworn on 4<sup>th</sup> April, 2017 by Sergeant Christine Furaha, the investigating officer in Criminal Case No. 164 of 2014 Republic v Michael Mataza & 3 others. I note the correct case number should be 164 of 2016.

14. According to the respondents, the criminal cases were instituted after thorough investigations had been done, enough evidence collected, and the 1<sup>st</sup> Respondent found the evidence credible. It was the averment of the investigating officer that criminal cases are instituted and determined if the conduct of the accused persons amounts to an offence but not so as to intimidate them against defending a civil suit. According to the officer, the criminal cases were for different offences with criminal case number 164 of 2016 being for forcible detainer and trespass, 189 of 2016 being for attempted murder, 610 of 2015 being for malicious damage to property and 181 of 2015 being for trespass upon private land.

15. The investigating officer averred that criminal case number 164 of 2016 was slated for hearing on 16<sup>th</sup> March, 2017 but did not proceed due to the stay orders issued herein although the witnesses were present in court. Likewise, the other criminal cases did not proceed as they were also stayed.

16. As for the allegation that the respondents had selectively prosecuted the petitioners, the respondents contended that the petitioners committed the offences personally and that criminal liability is personal in nature. It is the respondents' averment that no evidence had been adduced to prove the alleged threats by the police thus making the same hearsay and an afterthought. It was further averred that the National Police Service is an independent entity mandated to protect all citizens and cannot be used to intimidate other civilians. Further, that statements had been recorded from key witnesses and failure to record statements from the petitioners was not prejudicial at all.

17. The respondents concede that there is indeed a pending civil case over the ownership of the land giving rise to some of the criminal charges. Annexed to the replying affidavit is a copy of an undated cover report for criminal case number 164 of 2016 and copies of investigation diaries for the rest of the criminal cases save criminal case number 181 of 2015.

18. The Petition was disposed of by way of written submissions. The petitioners in brief submitted that save for one of the criminal cases, the rest revolve around the land in dispute in the Environment and Land Court where the petitioners and their group is sued. According to them, the criminal cases were instituted out of malice with a view to exerting pressure upon them to stop defending the civil suit and give undue advantage to the plaintiffs.

19. The petitioners submitted that they were charged without being interviewed or interrogated and this in the face of the existence of the civil suit which should have been known by the respondents. The petitioners asserted that it is an abuse of the court process to use criminal trials to declare their occupation of the land illegal when the Environment and Land Court is yet to make a determination.

20. According to the petitioners, there is selective prosecution as it was only them, out of 1500 people on the land, who were arrested and charged for illegal invasion or the alleged attack. They asserted that the ruling which they annexed to the affidavit in support of the Petition indicated that there were other people on the land. Further, that they were simply arrested for belonging to the group sued in the civil case. They urged that the claim by the respondents that they were not aware of the group sued in the land claim buttresses the fact that no investigation was carried out and if any investigation was carried out then it was impartially done.

21. It was further the petitioners' submission that the sustenance of the criminal cases is a ruse by the police so that they appear to be working as they were cowed by pressure exerted on them by the complainants when they were cited for contempt. Also, that the police on several occasions, without court orders, attempted to evict the petitioners contrary to Articles 10 and 157 of the Constitution and Section 4 of the Office of the Director of Public Prosecutions Act. The petitioners asserted that the respondents always arrested and charged them whenever allegations of destruction or attacks on the disputed land were made. They urged the court to conclude that it is only fair that the impugned prosecutions be stopped. Reliance was placed on the decisions in **Samuel Roro Gicharu & another v OCS Nanyuki Police Station & another [2015] eKLR** and **Ronald Leposo Musengi v Director of Public Prosecutions & 3 others [2015] eKLR** in support of the petitioners' submissions.

22. In reply, the respondents submitted that an order of prohibition cannot issue as the decision to charge the petitioners was made after the Director of Public Prosecutions (DPP) weighed the evidence forwarded by the 3<sup>rd</sup> Respondent and determined that the said offences were committed. According to the respondents, the rights of the petitioners and the complainants are equally protected by Articles 25, 26, 29, 40 and 48 of the Constitution. It is the respondents' position that the DPP acted within his constitutional mandate under Article 157 and there is no evidence that there was malice on the part of the DPP.

23. It was additionally submitted that criminal cases numbers 610 of 2015 and 181 of 2015 were commenced, plea taken and some witnesses testified before the land case was filed hence the order of prohibition cannot apply. Further, that the petitioners were charged as individuals and they cannot hide behind collective criminal responsibility. According to the respondents, the decision to prosecute had already been made and an order of prohibition is not available as the event the petitioners seek to prohibit had already taken place.

24. Another point taken up by the respondents is that the prayers sought have far-reaching consequences to the administration justice and the doctrine of public interest would operate against the orders sought.

25. Finally, the respondents without offering any explanation, submitted that the petitioners are acting in bad faith and they have failed to disclose material facts to justify their claim. They asserted that the petitioners have not approached this court with clean hands and the remedies sought are thus not available to them. Further, that the petitioners have not shown that they will suffer any prejudice or demonstrated a breach of any right in order to warrant the issuance of the orders sought.

26. In support of their submissions the respondents placed reliance on the decisions in the cases of **Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge & 9 others Nairobi Civil Appeal No. 266 of 1996, Mombasa Constitution Petition No. 38 of 2013 Christopher Mbugua Kiiru v Inspector General of Police & others** and **Republic v Director of Public Prosecutions & 2 others ex-parte Francis Njakwe Maina & another [2015] eKLR**.

27. In a matter like the one placed before the court by the petitioners, the question to be decided by the court is whether the DPP exceeded his constitutional boundaries in having the petitioners charged.

28. It is not in issue that the DPP has powers under Article 157(6)(a) to institute and undertake criminal proceedings in respect of any offence alleged to have been committed against any person before any court, other than a court martial. In doing so, the DPP is bound by Article 157(11) of the Constitution and Section 4 of the Office of Director of Public Prosecutions Act which obligates him, in exercising his powers, to have regard for public interest, the interests of the administration of justice, the need to prevent abuse of the legal process and the promotion of constitutionalism.

29. The court has a duty to intervene in a criminal prosecution where it is established that the purpose for commencing the prosecution is not primarily aimed at achieving the ends of justice. In **Kuria & 3 others v 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.”**

30. The same sentiments are found in the case of **Republic v Attorney General ex-parte Kipngeno Arap Ngeny, High Court Civil Application No. 406 of 2001** where it was held that:

**“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, 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....”**

31. Despite the fact that Section 93A of the Criminal Procedure Code envisages and allows concurrent civil and criminal litigation touching on the same parties and subject matter, a criminal prosecution commenced with a view to derailing a civil case will be prohibited by the court. In **ex-parte Kipngeno Arap Ngeny (supra)**, it was stated that:

**“It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case.”**

32. This message was reiterated by the Court of Appeal in **Commissioner of Police & 2 others v Kenya Commercial Bank Limited & 4 others [2013] eKLR** when it was stated that:

**“it is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court.”**

33. In **Republic v Director of Public Prosecutions & 2 others ex-parte Francis Njakwe Maina & another [2015] eKLR**, G.V. Odunga succinctly captured the law on the interplay between civil and criminal litigation thus:

**“The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since the defence is open to the applicants in those proceedings. However, if**

**the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground of staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim.”**

34. A perusal of the petitioners’ petition and submissions discloses that their main complaint is that the respondents have commenced criminal proceedings against them despite the existence of a civil case concerning the same subject matter.

35. I have perused the evidence placed before the court by the parties and it is clear that the plaintiffs in Malindi ELC Case No. 196 of 2015 are seeking orders declaring them the bonafide owners of certain parcels of land in Mbuyuni Bofa area in Kilifi. According to the plaint dated 28<sup>th</sup> October, 2015 the defendants had attempted to invade the plaintiffs’ parcels of land and destroyed their properties in the process. The plaintiffs allege that they have ownership documents for their parcels of land.

36. On their part, the defendants through an undated amended statement of defence filed on 3<sup>rd</sup> October, 2016 claim ownership of the plaintiffs’ parcels of land on the ground that the said parcels of land were excised from their ancestral land.

37. A perusal of the exhibits placed before this court discloses that there was a consent order recorded by the parties on 28<sup>th</sup> October, 2015. It appears that the petitioners who are the defendants in the land case breached those orders resulting in the commencement of contempt of court proceedings against the petitioners. The contempt of court proceedings were dismissed on 27<sup>th</sup> May, 2016 by Angote, J. In doing so, the learned Judge made the following comments:

**“18. Although the plaintiffs also want this court to find that the Kilifi OCPD and OCS should also be committed to civil jail for not enforcing the orders of this court, the evidence before this court shows that some of the people who allegedly trespassed on the suit properties have been charged in court. That means the police are undertaking their duties by charging people who trespass on the land.**

19. ...

**20. The most I can do is to implore the police to maintain law and order and to protect the property of every person by arresting and charging people wherever they trespass on the suit property.”**

38. In order to dispense justice to all those who approach courts, the courts must work in tandem. This court will be working at cross-purposes with the Environment and Land Court were it to stop prosecution of those who allegedly commit crimes in respect of the suit properties. That court has clearly directed the police to proceed to arrest and prosecute those who commit crimes in relation to the suit land.

39. It is important to note from the pleadings that the plaintiffs who are the complainants in the criminal cases are the people in possession of the parcels of land which the defendants also lay claim to. Maintaining *status quo* would therefore mean allowing the plaintiffs to enjoy quiet possession as the court resolves the dispute. The fact that there is a civil case in court over land does not mean that the criminal law has been suspended. A party cannot be allowed to trespass upon the property of the other party or damage their property simply because there is an ongoing land case. Law and order must be maintained at all times.

40. I have perused the charge sheets submitted to this court by the petitioners and find that in Criminal Case No. 164 of 2016, some of the petitioners are charged with malicious damage to property contrary to Section 339(1) of the Penal Code. The crime is said to have been committed between 24<sup>th</sup> April, 2016 and 6<sup>th</sup> May, 2016. I am satisfied that these charges have nothing to do with the contempt of court application dated 11<sup>th</sup> April, 2016 which resulted in the ruling delivered by Angote, J on 27<sup>th</sup> May, 2016. It cannot therefore be said that the plaintiffs are trying to obtain what they did not get from Justice Angote through this particular criminal prosecution.

41. In Criminal Case No. 189 of 2016 the 1<sup>st</sup> Petitioner and one Mbindyo Nzava Nduka, who is not even a petitioner before this court, are alleged to have attempted to murder one David Taylor on 7<sup>th</sup> May, 2016. There is nothing placed before the court by the petitioners to show that this charge was brought in bad faith and is intended to intimidate them into surrendering their claim to their ancestral land.

42. As for Criminal Case No. 610 of 2015, the 1<sup>st</sup> Petitioner and others are charged with malicious damage to the property of Octovious Dumbe on 27<sup>th</sup> November, 2015. Again, I find no evidence that this particular prosecution was commenced with the aim of silencing the petitioners.

43. Finally, in Criminal Case No. 181 of 2015 some of the petitioners are charged with trespass upon private land. The offence was allegedly committed on 21<sup>st</sup> April, 2015 and the petitioners presented to the court the same day. This was way back before the civil suit was instituted against the petitioners. It cannot therefore be said that the case was commenced with a view to intimidating the petitioners.

44. The decision as to whether there is sufficient evidence to convict the petitioners is one that rests with the trial courts. The petitioners have not placed any evidence before me to support their allegation that their prosecution is selective. May be they are the only ones who are causing havoc. It could be they are the only persons the police managed to arrest. The fact that some suspects have not been brought to court is not a ground for terminating a criminal prosecution.

45. In conclusion, I find that the petitioners have not provided sufficient reasons to warrant the granting of any of the orders sought. Their

petition fails and the same is dismissed.

46. Considering that this is a matter touching on the enforcement of constitutional rights, I direct the parties to meet their own costs of the proceedings.

**Dated, signed and delivered at Malindi this 17<sup>th</sup> day of April, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**