



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 461 OF 2011**

**BETWEEN**

**FRANCIS KIRIMA M'IKUNYUA,**

**PETER NDUNGU MUTIGA AND**

**GEORGE OMONDI OLUOCH suing as the**

**Chairman, Secretary and Treasurer on behalf of**

**ZIMMAN SETTLEMENT**

**SCHEME SOCIETY.....PETITIONER**

**AND**

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

**COMMISSIONER OF POLICE.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**ROBERT WAMITHI MUTAHI.....1<sup>ST</sup> INTERESTED PARTY**

**PATRICK GITHINJI.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The petitioners moved the court by a petition dated 10<sup>th</sup> October 2012 in which they seek the following orders;

*a) A declaration be made that the applicants' fundamental rights and freedoms under Articles 28,*

29c and d, 316, 40, 43, 47 and 48 of the Constitution have been contravened and or likely to be contravened and violated by the respondents herein by their being prosecuted in Criminal Case Number 1460 of 2012 and 1523 of 2012.

b) A declaration be made that the applicants have a right to a peaceful and quiet enjoyment of properties subject hereto.

c) An order of certiorari do issue removing to the High Court for purpose of being quashed the charge sheet dated 21<sup>st</sup> September 2012 in Criminal Case Number 1460 of 2012 and dated 2<sup>nd</sup> October 2012 in Criminal Case Number 1523 of 2012.

d) An order of prohibition do issue against the respondents and the commissioner of police from charging the members of the respondent or evicting, harassing, intimidating the applicant's Vis a Vis at the subject properties.

e) Conservative and interim orders of stay of all criminal proceedings, evictions, eviction proceedings, intended, recommended instituted by the respondents and or intended for the eviction of the petitioners herein.

f) An order that the Government of Kenya do compensate the petitioners for any loss that they might incur if evicted from the said parcels of land.

g) Any further order, direction or writ as the Honourable Court deems fit, just and appropriate to grant.

h) Cost of this suit.

2. As is clear from the prayers I have set, the petitioners' case is that they seek to stop certain criminal proceedings. In **Criminal Case No. 1460 of 2012** Peter Ndungu Mutiga and George Omondi Oluoch have been charged with the offence of forcible detainer contrary to **section 91 of the Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charge are that, "On or before 2<sup>nd</sup> December, 2003 in Kasarani within Nairobi County with others not before the court, without colour of right held possession of parcels of land known as Nairobi Block 123/1 – 279 in a manner likely to cause breach of peace against a group known as 'Muigai and Others' who are entitled in law to possession of the said land."

3. The same charges are brought against Francis Kirima M'Ikunyua in **Criminal Case No. 1523 of 2012** and the particulars are that, "On or before 2<sup>nd</sup> December, 2003 in Kasarani within Nairobi County with others not before the court, without colour of right held possession of parcels of land known as Nairobi Block 123/1 – 279 in a manner likely to cause breach of peace against a group known as 'Muigai and Others' who are entitled in law to possession of the said land."

4. The petitioners seek to stop their prosecution on the grounds that the charges violate their fundamental rights and freedoms. The charges against petitioners are instituted on the basis of complaints lodged by a partnership referred to as 'Muigai and Others' comprising several persons among them Robert Wamithi Mutahi and Patrick Githinji, the interested parties. They are also the principal witnesses named in the charge.

5. At the heart of this matter is a parcel of land known as **Nairobi Block 123/1-279 (formerly L R No. 57/26)** situated in Kasarani, Nairobi ("the suit property"). This property has been the subject of litigation in the courts and I think it would be important to lay out the issues that have arisen before by way of background.

## **Background**

6. The suit property is contested by two groups of persons. On the one hand is the partnership of *Muigai*

and Others who according to the material before court, acquired for valuable consideration the suit property from Kentiles Limited (In liquidation) on or about the 8<sup>th</sup> October 1977.

7. *Muigai and Others* subsequently applied for and were granted a change of user of the suit property from agricultural to commercial use. They also surrendered to the Commissioner of Lands the title to the suit property for purposes of subdivision. After the subdivision, new titles were issued, that is, **Nairobi Block 123/1-279**. Some of the plots were subsequently sold to third parties for value and some of them retained by the partners.

8. Following Government's efforts to improve the country's infrastructure through the expansion and rehabilitation of Thika Highway, some of the plots were acquired and their owners compensated by the Government on 8<sup>th</sup> December 2008.

9. The acquisition and ownership of the suit property has not been peaceful. It has been contested by another group of persons who claim ownership of the property and who claim that they have settled on the property for a long period of time. They are represented by the Zimman Settlement Scheme Society.

10. It is this contentious issue of who is the right owner of the suit property that Has occupied judicial time through suits, counter suits and criminal cases. I shall try and summarise the cases and resulting decisions and they are follows.

(i) In ***Makadara Criminal Case Number 10630 of 1993*** one Shadrack Nzuki alias Nzau Mwalimu Nzau, one of the persons occupying the suit property and claiming adverse possession Was charged with the offence of trespass and was convicted on his own plea of guilt for trespass over the suit property.

(ii) In ***HCCC No. 1035 of 2003 (OS)***, Zimman Settlement Scheme through Gladys Nyokabi, Joseph Nyakabi, Joseph Weru and Edwin Odallo sued East Africa Sisal Estates Limited and *Muigai and Others* claiming a right to the land by way of adverse possession. Hon. Justice Ojwang' heard the matter and by a judgment delivered on 16<sup>th</sup> July 2004, found that the plaintiffs were entitled to be registered as proprietors of 12 plots of the suit property. The judgment and resultant decree were subsequently set aside on application of the respondents by Hon. Justice Ransley on 27<sup>th</sup> October 2005 and the suit dismissed.

(iii) In ***Nairobi HCCC No. 897 of 2003***, Zimman Settlement Scheme together with 172 other persons occupying the land sued *Muigai and Others*, the Commissioner of Lands and East African Sisal Estates Limited claiming that they were entitled to the suit by way of adverse possession. This suit was dismissed by Hon. Justice D M Rimita on 17<sup>th</sup> October 2003.

(iv) In ***Nairobi HCCC No. 346 of 2012***, *Muigai and Others* decided to go on the attack. They sued the representatives of Zimman Settlement Scheme at this time, John Wainaina, John Gathimu and Nzau Mwalimu Nzau. The Plaintiffs claimed that they owned the suit property having purchased it from Kentiles Limited (In liquidation) and sought orders to remove the defendant from the property. In the course of determination of the matter, the plaintiff filed an application for restraining and mandatory injunction. Hon. Justice Rawal considered the arguments and issued a mandatory order by a ruling dated 11<sup>th</sup> April 2002.

(v) One of the officials of Zimman Settlement Scheme Mwalimu Nzau Mwalyo filed ***Nairobi HCCC No. 558 of 1999 (OS)*** against *Muigai and Others* claiming ownership of part of the suit property by way of adverse possession. In that case, it was contended that he had lived on the property since 1959 and that he was given the property as a gift by a European, by the name Mr Moore. After hearing the application, Hon Justice Kuloba dismissed his case on 2<sup>nd</sup> July 2001.

(vi) The said Mwalimu Nzau Mwalyo also filed ***Nairobi HCCC No. 1249 of 2005*** against Joseph Weru, Edwin Odallo, Mr Muigai and East Africa Sisal Estate Limited. In the course of those

proceedings, he applied for an injunction seeking to restrain the defendants from interfering with his use and occupation of part of the suit property. By a ruling dated 7<sup>th</sup> November 2005, Hon. Justice Njagi declined to grant the orders on the basis that the matters in dispute were subject to the other proceedings relating to the suit property between the same parties and which had not been disclosed by the plaintiff to the court.

(vii) Another suit namely **Nairobi HCCC No. 661 of 2005 (OS)** was filed by Gladys Nyokabi and Others against East Africa Sisal Estates Limited.

11. In the thick of the civil suits, on or about 12<sup>th</sup> January 2010, Robert Wamithi Mutahi was arrested based on a complaint lodged by Francis Kirima M’Ikinyua, one of the petitioners in this matter and member of the Zimman Settlement Scheme Society on allegations of having forged the conveyance and transfer, which conveyed the suit property to *Muigai and Others* in 1977. He was thereafter charged with the offence of forgery contrary to **section 349** of the **Penal Code**.

12. Wamithi thereafter filed a petition against the State, being **Nairobi Petition No. 13 of 2010** alleging that his fundamental rights and freedoms had been violated by his arrest and subsequent prosecution. In a judgment delivered on 2<sup>nd</sup> June 2011, Hon. Justice Gacheche quashed the decision to charge the Wamithi and the other partners. She concluded that, “[w]here it is so obvious that the petitioner and his partners acquired the subject land legally, would any court allow the continuation of his prosecution on the alleged charges of forgery, which charges would be based on investigations, which are in my view not only flawed but and distorted evidence, and which again clearly smirks of malice? I think not, for to do so would be tantamount to encouraging the respondent’s officers to abuse and misuse their power in a most vexatious and oppressive manner. Needless to say the intended action by the respondent’s officers taken after a period of 30 years would be an abuse of the court process for it is trite that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court, otherwise it would be an act that would be contrary to the Constitution in which is enshrined the fundamental rights, which this petitioner pleads hereinabove.”

13. In the judgment the court also declared that, “**the applicant has a right to peaceful and quiet enjoyment of the properties known as Nairobi Block 123/1-279 (formerly LR No. 57/26).**” This finding aggrieved the Francis Kirima M’Ikinyua and he applied to review the judgment on the basis that he was not given an opportunity to be heard yet he and other members of Zimman Settlement Society had an interest in the suit property.

14. I heard the application for review and by a ruling dated 15<sup>th</sup> April 2013, I allowed the application only to the extent of setting aside the part of the judgment dealing with the declaration on the right to peaceful and quiet possession. In coming to my decision I stated as follows, “[28] **In this case, I find that the applicant was not given an opportunity to be heard on the issue of quiet possession of the suit property before the same was made subject of the orders in the Judgment. The petitioner’s argument that the applicant was not party to the criminal case does not hold water. The relief sought in the petitioner were not only in reference to the criminal proceedings but also dealt with the issue of quiet possession of the suit property. What is in issue is whether the applicant had an opportunity to be heard on the matter affecting his interest, however weak or fanciful. The right to be heard is a fundamental and basic right and cannot be taken away however hopeless one’s case is. It cannot be cured by holding that the decision would be right or proper.**”

15. Having regard to the history of the suit property and the matters that were determined in court, I stated as follows, “**Before I conclude, I would like to note that this is a typical case where parties fighting over land open several war fronts to litigate their issues including the criminal process.**”

### **The Petitioner’s Case**

16. At same time I was dealing with the application for review in **Nairobi Petition No. 13 of 2010**, the officials of Zimann Settlement Scheme had also filed this petition seeking to stop criminal proceedings, which I have outlined above, from proceeding against them. I informed the parties that I would give my

directions on the matter after I delivered the ruling in *Nairobi Petition No. 13 of 2010* since this case and the earlier petition arise from the same substratum of facts; that is the suit property. Since the arguments and facts in this petition are similar to those in the earlier matter all the parties confirmed that I could proceed and issue a decision and they all agreed to abide by the court's decision on the matter. I agree that this is an appropriate course to take.

17. The facts leading to the petition are set out in the affidavit of Francis Kirima M'Ikinyua sworn on 10<sup>th</sup> October 2012. The petitioners claim that their fundamental rights and freedoms have been infringed by the agitation of the criminal proceedings against them. They had first complained about the criminal conduct of the partners of *Muigai and Others* about the conveyance that was executed in 1977 and after conducting investigation, the Police were sufficiently convinced that there was reasonable evidence to charge them. It is resultant criminal charges that were quashed by the judgment of Hon. Justice Gacheche. The petitioners aver that in a shocking and surprise turn of events they have now been charged with forcible detainer of the land which they claim belongs to them and without new evidence being brought to light. They contend that the attempt to charge them is a way of *Muigai and Others* taking possession of the land which they have occupied over the years by using the criminal law process.

18. The respondents, through the replying affidavit of Francis Mwenda, a police officer, sworn on 5<sup>th</sup> November 2012, state that they have now investigated the matter and have come to the conclusion, in light of the several cases, that *Muigai and Others* are the genuine owners of the suit property.

19. The interested parties, assert that they are the lawful owners of the suit property, having purchased the same lawfully. They point to the judgment of Hon. Justice Gacheche in *Nairobi Petition No. 13 of 2010* as a validation of their right to the suit property.

### **Determination**

20. This case cannot be determined without having regard to the litigation history which I have endeavoured to outline above. The issue in contest is the suit property and I think the criminal cases are another battle front for the struggle to assert their respective claims. I wish to point out that in fact the petition in this matter is a mirror of the previous petition filed in *Nairobi Petition No. 13 of 2010*. In this petition, the petitioner in prayer (b) is attempting to have the court assert their rights to quiet possession of the property, a matter which they complained about when they sought to have Justice Gacheche's judgment reviewed.

21. In considering this matter I am alive to the Constitutional mandates of the Director of Public Prosecutions and the Police. Both institutions are independent institutions and their decisions to investigate and prosecute offences ought to be given due deference unless it is shown that the exercise of their mandates contravene the Constitution and particularly the Bill of Rights or constitute an abuse of the court process. (See also *Hon. Chirau Ali Mwakwere v Robert Mabera and Others, Nairobi Petition No. 6 of 2012 (Unreported)*, *William S. K. Ruto and Another v Attorney General and Another Nairobi HCCC No. 1192 of 2004 (Unreported) [2010] eKLR*, *Bryan Yongo v Attorney General Nairobi HCCC No. 61 and 196 of 2006 (Unreported)*, *Elory Kranveld v Attorney General Nairobi Petition No. 153 of 2012 (Unreported)*).

22. Article 157(11) provides that, ***"In exercising the powers conferred by this Article, 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."*** Whether the power is properly exercised may be assessed on an objective basis and it must be remembered that even where the power is properly exercised, the court still has the authority to ensure that the court processes are not abused in any way. The latter power is an inherent power of the court to prevent abuse of its process and to do justice according to the law in all cases.

23. Returning to the matter at hand, it is very clear that the criminal process and the resultant court proceedings are being used to settle what is an otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the

criminal process to score points against each side in order to assert the rights of ownership.

24. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate in criminal matters. It is not difficult to see why. In criminal cases the State's coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent.

25. This is not to say that the same facts cannot yield both criminal and civil claims. The law recognises that in fact and in *Kenya Commercial Bank Ltd and 2 Others v Commissioner of Police and Another Nairobi Petition No. 218 of 2011 (Unreported)* I observed, “[23] Although this matter is not one where criminal proceedings have not been commenced, it is one where the risk of criminal proceedings hangs over the heads of the petitioners. It is recognized even in light of **section 193A** of the Criminal Procedure Code, the High court may stop proceedings where such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of fundamental rights and freedoms. This power though must be exercised sparingly as it is in public interest that crime is detected and those suspected of criminal conduct are brought to face the consequences the law prescribes.”

26. What the court is required to do is to consider the facts of each particular case. This matter is like a game of chess, each party trying to game the system to gain advantage over each other. The civil cases I have outlined have dealt with some of the issues and if there are any pending cases they must be taken to their logical conclusion so that the issues that underlie ownership of the suit property are finalised once and for all.

27. Judicial resources are not infinite. Judges and magistrates have limited time to allocate to each and every case that comes before them and give each case such attention as meets the Constitutional objective dispensing justice without delay articulated in **Article 159** while giving effect to the right of access to justice protected by **Article 38**. A multiplicity of cases, dealing with the same parties and issues, are a waste of judicial resources and impose direct and indirect costs on the parties and the body politic.

### **Conclusion and disposition**

28. It is against this background and in order to ensure that parties' grievances are dealt with expeditiously and conclusively without the threats of State sanctions through the criminal process on either side that this matter must be determined. Continued criminal proceedings in light of the existing court decisions concerning the suit property and between the same parties or parties claiming through them is an abuse of the court process in these circumstances and any further action on that front must be halted. This order I intend to make does not limit the action of the police to maintain law and order on the suit property where necessary. The order is limited to matters concerning investigation of the conveyance that was executed to transfer the suit property to *Muigai and Others*.

29. The parties and their legal counsel also bear the responsibility to see that any pending suits are prosecuted so that the issues of ownership are resolved once and for all without diverting attention to other forums that do not settle the underlying issues. I would also add if the court, hearing the matters, has reason to suspect criminal culpability on the part of any person involved in the proceedings, it is free to recommend investigation and prosecution of that person by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

30. In view of what I have stated I hereby make the following orders;

(a) I hereby quash and set aside the charges against the petitioners in criminal proceedings in **Nairobi Criminal Case No. 1450 of 2012 and 1523 of 2012**.

(b) The Director of Public Prosecution and the Inspector General be and are hereby restrained from investigating or in any way dealing with allegations of forgery or fraud relating the Conveyance dated 8<sup>th</sup> October 1977 from Kentiles Limited to *Muigai and Others* or title to properties known as **Nairobi Block 123/1-279 (formerly L R No. 57/26)** situated in Kasarani, Nairobi unless otherwise

directed by the Court.

(c) There shall be no order as to costs.

**DATED** and **DELIVERED** at **NAIROBI** this 19<sup>th</sup> day of April 2013.

**D.S. MAJANJA**

**JUDGE**

Mr Kenyatta instructed by Kenyatta Odiwuor and Company Advocates for the petitioner.

Mr Njogu, Prosecution Counsel, instructed by the Directorate of Public Prosecutions for the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

Mr Murugu instructed by Murugu and Rigoro Advocates for the interested parties.