



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 446 OF 2015

PAULINE ADHIAMBO RAGET.....1ST PETITIONER

VERSUS

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

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

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

AND

GEORGE TED OSEWE, NAFTALI ARODI OYUGI AND

CATHERINE ODERO as officials of LAKE WELFARE CLUB.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner seeks to challenge her intended prosecution by the 1st Respondent on behalf of the State.
2. It is claimed that the intended prosecution arose from a documented land transaction between the Petitioner and the Interested Party which fell through leading to amongst many events the Interested Party filing a civil claim to specifically enforce the completion of the land transaction and also the Interested Party lodging a complaint with the Respondents.
3. The Petitioner contends that the prosecution is malicious and without any basis as it is pegged on an alleged unsubstantiated criminal offence. The Petitioner consequently seeks a declaration that the investigations into the alleged criminal conduct by the Petitioner are irrational, unreasonable, unconstitutional and illegal. The Petitioner also seeks an order of prohibition directed to the Respondents to restrain them or any other person from prosecuting the Petitioner.
4. The Petition was contested by both the Respondents as well as the Interested Party.

Factual background and relevant chronology

5. The circumstances in which the matter came before the court appear in the Petitioner's affidavits filed

on 19 October 2015 and 9 November 2015 as well as from the Interested Party's Replying Affidavit filed on 2 November 2015. It may be necessary to state the facts in summary as follows.

6. As of September 2010, the Petitioner was the registered proprietor of land parcels Title No. Kisumu/Fort-Ternan/516 and Kisumu/Fort-Ternan/518. On 29 September 2010, the Petitioner agreed to sell to the Interested Party both parcels of land. A formal sale Agreement was drawn and executed. The agreed purchase price was Kenya Shillings 4,950,000/= for both parcels. The completion date was stated to be within ninety days of the date of the Agreement. The purchase price was payable in four installments, with the first installment of Kenya Shillings 2,400,000/= payable on execution of the Sale Agreement while the balance was to be paid in equal amounts. The Interested Party paid the deposit amount of Kenya Shillings 2,400,000/= on the due date. Various installments and disbursements were subsequently paid. As of 7 August 2013, the Interested Party had paid the sum of Kenya shillings 4,950,000/=-, inclusive of disbursements allegedly made on behalf of the Petitioner in the form of Land Control Board expenses and survey fees. The Land Control Board's consent to transfer was obtained by the Petitioner on 24 November 2010 for Parcel No 516 and, on 20 January 2011, for Parcel No 518. The Interested Party received possession of the original title deed for parcel No. 516 but not for parcel No. 518. The Petitioner also handed over to the Interested Party the executed transfer forms for both properties. The Petitioner however disputes ever having handed over to the Interested Party the original title deed for parcel No. 516.

7. The Petitioner then accused the Interested Party of being in breach of the Sale Agreement and on 17 December 2014 not only notified the Interested Party of the breach but also rescinded the Sale Agreement. By then the Petitioner had on 20 May 2013 transferred the two parcels of land to a third party and had also on 8 December 2014 refunded the Interested Party the sum of Kenya Shillings 4,905,000/=.

8. Events after 17 December 2014 then moved pretty fast. The Interested Party moved to court in Kisumu and filed civil suit number ELC 41 of 2015 on 19 February 2015. Before that though, the Interested Party had also lodged a complaint with the Ethics and Anti Corruption Commission regarding the alleged fraudulent sale of the two parcels by the Petitioner. The Commission however referred the matter to the 3rd Respondent.

9. Following investigations conducted by the 2nd and 3rd Respondents, it turned out that the Petitioner had indeed transferred the two parcels of land to a third party. The Petitioner had also reported that the original title deed for parcel No. 516 had gone missing, sworn an affidavit to like effect and caused the District Land Registrar to gazette the loss and subsequently issue the Petitioner with a new title deed. All this while, the Interested Party had been holding the original title deed for parcel No. 516 allegedly availed to the Interested Party by the Petitioner.

10. The 1st Respondent concluded, based on the investigations, that the Petitioner had committed the offence of giving false information to a person in public service contrary to Section 129 of the Penal Code (Cap 63) as well as false swearing contrary to Section 114 of the Penal Code. Accordingly, the Petitioner's prosecution was recommended and approved, prompting the Petitioner to move to court.

Petitioners' case

11. The Petitioner's case is rather straightforward.

12. The Petitioner contends that her rights as guaranteed under Articles 27,35,47 and 50 of the Constitution have been violated. More particularly, the Petitioner points out Articles 27(1)(4)&(5) as well as Articles 50(2) &(4) of the Constitution. The Petitioner also states that the Respondents have failed to observe the requirements of Article 157(11) of the Constitution.

13. The Petitioner who accuses the Interested Party of having breached the Agreement for Sale further contends that the Interested Party having already filed a civil suit being Kisumu ELC No. 41 of 2015 simply lodged complaints with the Respondents with a view to causing the settlement of the civil dispute. Accordingly, the Petitioner states that the Interested Party's complaint to the Respondents was tainted

with malice and was intended to occasion the Petitioner's malicious arrest and prosecution. The Petitioner adds that there is nothing that "divulges any ingredients whatsoever of any offence committed" by the Petitioner and the Respondents are in abuse of the powers under Article 157(6) of the Constitution.

Respondents' case

14. The Respondents' case is contained in the Replying Affidavit of Felix Nyamai, DCIO Muhoroni who was also the Investigating Officer involved in the matters related to this Petition. The Replying Affidavit was filed on 4 November 2015.

15. The Respondents contend that the Ethics and Anti Corruption Commission forwarded to the Respondents for investigation the complaint lodged by the Interested Party. That was in August 2014. The Respondents further state that investigations revealed the transactions and dealings between the Petitioner and the Interested Party leading to the payment of Kshs. 4,915,000/= by the Interested Party to the Petitioner as the purchase price of the two parcels of land which the Petitioner sold and transferred to a third party instead.

16. The Respondents state that the investigations were conducted within the confines of the law and that the investigations ultimately revealed possible criminal culpability on the part of the Petitioner following an independent analysis of the evidence collected. The Respondents also state that they are simply executing their constitutional mandate which the Court should be reluctant to interfere with.

17. The Respondents further deny that the intended prosecution of the Petitioner is baseless or unmeritorious.

Interested Party's case

18. The Interested Party filed a relatively detailed affidavit in reply to the Petition .

19. The Interested Party avers that it only lodged the complaint with the criminal investigations department after discovering that the Petitioner had sold the property to a third party yet the Interested Party had paid the full purchase price and was also holding on to one of the original title documents. The Interested Party also contends that the Petitioner never formally gave the Interested Party any notice to complete the transaction but only showed the Interested Party a letter from the Petitioner's spouse opposing the transaction in April 2013, yet at about the same time the Petitioner was secretly selling the property to a third party.

20. The Interested Party states that it filed the civil suit to preserve its civil interest and that the Petitioner has fully participated in the civil case.

21. The Interested Party denies influencing the Respondents in any way. For completeness, the Interested Party states that the Petitioner has not shown that any of her rights or freedoms have been violated.

Arguments in court

22. The Petition was prosecuted through the medium of written submissions filed and highlighted by the parties' counsel. Mr Musungu appeared for the Petitioner whilst Ms. Katherine Kithiki and Mr. Burugu appeared for the Respondents and the Interested Party respectively.

The Petitioner's submissions

23. Mr. Musungu submitted that the Petitioner's conduct , in particular the fact of obtaining a provisional title deed, did not in any way disclose any criminal offence as the Petitioner simply followed the prescribed process which included making a report to both the Kenya Police Service as well as the Land Registrar.

24. Counsel then continued that the fact that the Interested Party had filed a civil case before the Environment and Land Court at Kisumu and then head to Nairobi to make a complaint over the same dispute meant that there was no good faith on the part of the Interested Party. The two process could not run concurrently as they raised similar issues relating to fraud.

25. Mr. Musungu submitted further that the Petitioner's right to equal protection and benefit of the law as under Articles 27(1),(4)&(5) of the Constitution had been violated as the Respondents were enjoined not to discriminate against the Petitioner. Counsel then added that the Petitioner was being subjected to an unfair administrative action as the Respondents were aware of the existence of the civil case but were still determined to cause the Petitioner's arrest and prosecution.

26. It was also the Petitioner's submission that the evidence availed did not in any way indict the Petitioner with fraudulent acquisition of a new title deed. Counsel added that the Respondents were under an obligation to ensure that the investigations were reasonable and the prosecution only commenced if there was adequate evidence. In the absence of reasonable evidence the intended prosecution was merely aimed at subjecting the Petitioner to an unfair judicial trial. In these respects counsel relied on the case of **Ndarua -v- Republic [2002] 1 EA 205** for the additional legal proposition that where the prosecution amounts to nothing more than an abuse of the process of the court, the court had an inherent power to stop it. Counsel further noted that no report had been availed to the Director of Public Prosecutions and to proceed with any prosecution would be tantamount to subjecting the Petitioner to an unfair judicial process in total contravention of Article 50(2) and 50(4) of the Constitution.

Respondents' submissions

27. Urging the case for the Respondents, Ms. Kithiki submitted that the investigations into alleged criminal conduct and activities by the Petitioner were commenced following a complaint lodged on behalf of the Interested Party through the Ethics and Anti Corruption Commission. Counsel added that the elaborate investigations revealed that the Petitioner was culpable criminally and the offences were not civil in nature with the result that the civil case would not be affected at all. Counsel further submitted that the Petitioner had failed to demonstrate how the investigations had violated the Petitioner's constitutional rights. Counsel added that in conducting the investigations the Respondents were merely exercising a constitutional duty and that ultimately it would be for the Director of Public Prosecutions to evaluate the evidence and determine whether in light of the evidence available there was need to have the Petitioner arraigned in court to answer to criminal charges.

28. Ms. Kithiki added that the mere existence of a civil case did not bar the institution of criminal charges and prosecution of any of the parties. In this respect counsel referred the court to Section 193A of the Civil Procedure Code (Cap 75). Then referring to the cases of **William S.K Ruto & Another V Attorney General Civil Suit No. 1192 of 2005** and **Meixner & Another v Attorney General [2005]eKLR**, counsel submitted that the sufficiency of either the charges or the evidence was a matter to be dealt with by the trial court and that it was not the duty of the court in a constitutional petition to analyse the sufficiency of the evidence.

29. Ms. Kithiki concluded by submitting that the Petition was lacking in merits and that the Petitioner had failed to demonstrate how his constitutional rights had been violated pursuant to the provisions of the Evidence Act.

Interested Party's submissions

30. The Interested party, through Mr. Burugu, submitted that the Respondents were merely exercising powers donated to them under the Constitution and if the investigations revealed that an offence had been committed the Petitioner had to face the law. In the instant case it was the Interested Party's submissions that the offence which the Petitioner was scheduled to be charged with, if approved by the Director of Public Prosecutions, had been committed.

31. Counsel pointed out that the mere fact that the Interested Party had filed a civil suit against the

Petitioner was not a bar to the prosecution of the Petitioner. Counsel in this respects relied on the case of **Rosemary Wanjala Njau & 2 Others v Attorney General & 3 Others [2011]eKLR** as well as **Section 193A** of the **Criminal Procedure Code**.

32. While conceding that the Court could intervene in the public interest on good grounds, the Interested Party's counsel reiterated that in the instant case the Petitioner had failed to establish any good grounds and further the Petitioner had failed to demonstrate that her constitutional rights and freedoms as guaranteed under the Constitution had been violated.

33. Counsel for the Interested Party concluded his submissions by pointing out that there was no proof that the rights under Articles 27(1)(4)(5), 35(1), 47(1) and 50(2)(a) had been violated nor that the 3rd Respondent had abused his powers under Article 157(11) of the Constitution.

Analysis and Determination

34. The parties' pleadings are prolix. The submissions too, both written and oral, were extensive. Certain facts are not disputed, some are.

35. The basis of the Petition is that the investigations into alleged criminal conduct on the part of the Petitioner as well as the intended prosecution, if any ,are an abuse of the criminal justice system and a violation of the Petitioner's constitutional rights. The Respondents on the other hand, have set out two possible charges which the Respondents believe should be preferred against the Petitioner as the investigations according to the Respondents have revealed that the Petitioner is criminally culpable.

36. The allegations and counter allegations aside, the only business of the court , in my view, is to determine whether the Petitioner's rights have been infringed or violated or about to be violated. In these respects, the question available to the court now is whether the investigations by the Respondents into the alleged criminal activities or conduct on the part of the Petitioner and the impending prosecution amount to a violation of the Petitioner's constitutional rights.

37. The Petitioner has alleged violation of her rights as guaranteed by 27(1)(4)(5),Art 35, Art47(1) and Art 50(2)(4) of the Constitution. These Articles guarantee the Petitioner rights to equality and freedom from discrimination, right of access to information, right to fair administrative action and fair hearing respectively. I will revert to them shortly.

38. The Petitioner also alleged that the Respondents, particularly the 3rd Respondent, had failed to observe the provisions of Article 157(11) of the Constitution.

39. It is for the Petitioner to demonstrate how the rights or freedoms have been violated or infringed: see **Anarita Karimi Njeru v R [1976-80]1 KLR 1272** and **Matiba v Attorney General [1990] KLR 666**.

Facts

40. The facts relevant to the Petition and in particular the petitioners case are largely not in dispute.

41. It is not in dispute that the Interested Party and the Petitioner entered into a formal agreement for the sale and purchase of two parcels of land known as Title Numbers Kisumu/ Fort-Ternan /516 and Kisumu/ Fort-Ternan/ 518. It is also not in dispute that the transaction fell through, though there is controversy as to who was the party in breach of the transaction. The Interested Party , it is not contested, filed suit seeking specific performance of the now collapsed agreement and also vacant possession of the property. The suit was filed in Kisumu in the year 2015. It is also not in dispute that the Interested Party is the one who in 2014 instigated the investigation now the subject of this Petition. It is further not in dispute that the 3rd Respondent is yet to make a determination on whether the criminal charges ought to be preferred against the Petitioner.

42. In controversy however is whether the Petitioner actually rescinded the sale transaction and legally so.

In controversy too is whether the Petitioner has fully refunded the Interested Party the purchase amount paid to the Petitioner by the Interested Party. Additionally, in is whether there is sufficient evidence for the petitioner to be charged in a court of law with a criminal offence.

43. On the out-set, I must point out that in considering whether there has been a breach of or violation of the Petitioner's fundamental freedoms or rights, I only need to consider whether, on the facts and pleadings as laid before the court and duly explained by the parties, a violation of any of the Petitioner's constitutional rights has been demonstrated. The burden is to be discharged by the Petitioner on a preponderance of fact.

Violation of Article 27

44. Article 27 of the Constitution rails against discrimination as follows:

27.(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6)...

(7)...

(8)...

45. Apart from making reference to Article 27 at paragraphs 9 and 14 of the Petition, no particulars were availed by the Petitioner, either in the Petition or in the supporting affidavit as well as the further affidavits sworn by the Petitioner and filed in court, on how the rights guaranteed by this Article have been violated or infringed. The Petitioner did not attempt to demonstrate how there had been a violation of the rights under Article 27 even during the oral arguments in open court.

46. I have also been unable to see how in investigating an alleged criminal conduct or activity there could have been discrimination or a practice of inequality before the law. The Respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the Petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the Interested Party in this case. In so doing, it is a legal mandate they would be undertaking.

47. Submissions were made by the Petitioner that by the Respondents are insisting on prosecuting the Petitioner on the meager or no evidence at all incriminating the Petitioner, the Petitioner is being denied her right to equal protection of the law. It is clear from the evidence before me that the final decision to prosecute the Petitioner which lies with the 3rd Respondent is yet to be made. That aside, It is not for this court to sieve through the evidence and determine whether or not the Petitioner ought to be prosecuted. It would not only be speculative for the court to state that it is wrong to prosecute the Petitioner when the decision is yet to be made but also a usurpation of a role which has been exclusively reserved both by statute as well as by the Constitution for another office in the 3rd Respondent.

48. From the evidence before me as well as the parties' submissions, I am satisfied that the Petitioner has not demonstrated to the required standard that any of the rights under Article 27 have been violated. The Petitioner has not demonstrated that there has been any differentiation on the basis of any of the grounds listed under Article 27 or any other ground for that matter.

Violation of rights under Article 50

49. Article 50 guarantees every accused person the right to a fair trial. There are several facets of Article 50(2) of the Constitution, while Article 50(4) deals with evidence obtained in a manner inconsistent with the Constitution. The Petitioner alleges that there is no proof even on a balance of probabilities that the Petitioner obtained the provisional title for title No Kisumu/ Fort-Ternan/516 fraudulently. Once again, it would be important to point out, as was correctly submitted by Ms. Kithiki, that the weight and sufficiency of evidence in a criminal trial is a matter for the trial court and not this court whilst determining a constitutional petition alleging violations of fundamental rights and freedoms. That proposition in law now appears well established as may be gathered from the various decisions of both this court as well as the Court of Appeal. See for example the cases of **Thuita Mwangi & 2 Others v The Ethics and Anti Corruption Commission & 3 Others HCCP No. 369 of 2013, R Vs. Commissioner of Police and Another Ex parte Michael Monari & Another (2012) eKLR, Meixner and Another v Attorney General [2005]eKLR and Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2000**. Statute law also supports the same position: see **Section 89(5) of the Criminal Procedure Code (Cap 75)**. The court should not act as an appellate court to sieve through the evidence of a matter still before the Kenya Police Service or the Director of Prosecutions to determine whether or not the prosecution should be instituted. Even then, I am satisfied that from the investigations and the results thereof as detailed in the affidavit filed by the Respondents in reply, there appears to exist a factual foundation to enable one reasonably conclude that the Petitioner was involved in criminal activity.

50. I must also add that with regard to Article 50 the right to a fair hearing thereunder relate to where prosecution has been instituted and trial commenced. Fair trial rights ought to accrue when the object of the proceedings is to determine the guilt or innocence of an accused person. None of the Respondents determine guilt or innocence of any person. They have to treat any person under investigation, including the Petitioner in this case, as a suspect until they decide to formally arraign him in court to face any preferred charges. Until then, the Petitioner who is only a suspect and not an accused person may not claim to avail to herself the rights under Article 50(2) of the Constitution: see **Julius Kamau Mbugua v Republic Court of Appeal Criminal appeal No. 50 of 2008**

51. Allegations of violation of Article 50 rights, given that it is common ground that a final decision is yet to be made independently to have the Petitioner arraigned in court, are thus misguided and without foundation.

Violation of Article 35

52. Article 35 of the Constitution deals with the right of access to information. Under the Article, every citizen has the right to access information held by the State or by any other person if such information is to assist the citizen in the protection or exercise of any fundamental right or freedom.

53. This Article was once again mentioned in the Petition but the particulars were completely missing. I also did not hear the Petitioner's counsel pursue the same at all during the oral arguments. It is pretty safe to state that there is no evidence of any claim to any information held by any of the Respondents which has been sought or demanded and denied.

Of Articles 47 and 157 of the Constitution

54. Article 47 provides for the right to fair administrative action.

55. Article 157 on the other hand grants the 1st Respondent the Powers to direct investigations and also to

carry out prosecution of alleged offenders on behalf of the State. The 2nd and 3rd Respondents are also mandated under Article 245(4) of the Constitution to investigate alleged criminal activities or conduct. The powers of the Respondents to investigate, as was stated by this court in **Kenneth Kanyarati & 2 Others v The Inspector General of Police & 2 Others NBI HCCP No 379 of 2015** may also be said to be obtain under Article 252(1) (a) of the Constitution, which is to the effect inter alia, that each holder of an independent office may conduct investigation of its own initiative or on a complaint made by a member of the public.

56. The Petitioner did not contest, and rightly so, the Respondents' constitutional compulsion to investigate and institute prosecution. These powers are to be independently exercised without interference. The Petitioner however raised issue with the Respondents by alleging that they were not observant of the provisions of Article 157(11) of the Constitution which dictates that the Respondents , and in particular the 1st Respondent, in exercising his powers under Article 157 must have due regard to public interest, interest in the administration of justice and the need to avoid the abuse of legal process.

57. The three pronged attack ran as follows.

58. The Respondents were acting simply on the instructions of the Interested Party. There was abuse of the legal process in so far as there was no evidence or the evidence was insufficient to link the Petitioner to any criminal offence. Thirdly, in so far as the Interested Party had filed a civil suit alleging the same matters which constituted the alleged criminal offences the intended prosecution of the Petitioner would be an abuse of the process.

59. It must first be stated that the clear intention of the Constitution was to ensure that the office of the Director of Public Prosecutions was free of any interference or meddling. No person or body including the court ought to instruct or direct the 1st Respondent on how to conduct its business as to investigating crime and prosecuting offenders. Indeed, it is the 1st Respondent who is enjoined under Article 157(4) of the Constitution to direct the National Police Service to investigate any criminal activities. On the other hand members of the public are also morally obligated to report incidents of crime to the Respondents. Lodging complaints or reporting incidents of criminal activity does not equate giving directions to the Respondents or any of them. If it was so to be held then a grievant would never receive justice. The public would never report crime and the Respondents would also be under no obligation to act. But as was stated in the case of **R Vs. Commissioner of Police and Another Ex parte Michael Monari & Another (2012) eKLR** :

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges.”

60. I do not find that the Petitioner has shown that the Respondents were influenced in any way by the Interested Party in the exercise of their constitutional and statutory compulsions. Rather I find that the Interested Party as a grievant, lodged a reasonable complaint to the Respondents through the Ethics and Anti Corruption Commission which the Respondents were under a duty to act on.

61. On the issue of deficient evidence , it is foremost important to point out that the court should never involve itself in a minute and detailed analysis of facts and evidence to determine whether or not a criminal offence has been committed to warrant a return of the decision to prosecute. That truly is the reclus of the 1st Respondent and ultimately of the trial court. Even where the 1st Respondent is of the independent view that the prosecution ought to be instituted, the trial court may still under the Criminal Procedure Code return a verdict of no case to answer. It is enough for the Respondents to show that on the facts as investigated and returned, it is reasonable to conclude that an offence has been committed worthy of prosecution and worthy of closer interrogation by a court of law. The satisfaction must be with the 1st Respondent and not this court sitting as a constitutional court over a constitutional question.

62. The rationale is pegged to the basic constitutional principle that the court ought to be reluctant to

interfere with the undertakings of other constitutional organs.

63. In the instant case, a general overview of the evidence and facts as presented leave me with little doubt that the Respondents acted reasonably and had a right to investigate the alleged criminal conduct and make recommendations. As to whether or not the 1st Respondent ought to cause to be instituted a criminal case, that is a matter which must be left to the sole discretion of the 1st Respondent.

64. The third limb of attack on the Respondents in relation to Articles 47 and 157 was that the Respondents were oblivious to the fact that the Interested Party had already filed a civil suit against the Petitioner and other parties. Such oblivion was not in the interest of the public or administration of justice and any intended criminal prosecution to run concurrently with the civil case would be an abuse of the process. Further it was contended that the criminal justice process was being instigated to shove forth an agenda not close to achieving the aim and objectives of criminal law.

65. There is no doubt that the criminal justice system must never be used to further some other ulterior motive(s): see **Republic -v- Chief Magistrate's Court Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**. Where that is the case then it would be contrary to public policy and the court will not hesitate to intervene: see **Githunguri -v- Republic [1986] KLR 1**.

66. In the instant case it is not disputed that the Interested Party lodged its complaint with the Respondents in the year 2014. Then in the year 2015, the Interested Party proceeded to lodge the civil suit in court. The investigations have been ongoing. The civil suit too has been prosecuted without hindrance. Section 193A of the Criminal Procedure Code (Cap 75) contemplates a situation where civil and criminal proceedings may run and be prosecuted simultaneously.

67. Nothing consequently excluded the Interested Party from subsequently filing the civil suit for specific performance as against the Petitioner after lodging the complaint with the Respondents. Nothing too disqualified the Respondents from investigating the alleged criminal conduct once it was determined that the complaint warranted being pursued. I have also considered the fact that the Respondents have stated in their Replying Affidavit that the charges intended to be preferred against the Petitioner once approved by the 1st Respondent have no relation to the civil claim being pursued by the Interested party. Effectively, I do not see how the criminal justice system is being used for any other ulterior motive by the Respondents or the Interested Party.

Conclusion

68. This court has stated previously that it is always in the interest of the public that persons accused of criminal conduct are made to face the criminal justice process without hindrance. Further, that the same public interest also dictates that such offenders are fairly treated and not subjected to prosecutors' misconduct which would bring the criminal justice system to disrepute: see **Godfrey Mutahi Ngunyi v Director of Public Prosecutions & 4 Others [2015]eKLR**. I come to the conclusion that the wider public interest would favour the Petitioner facing the criminal justice system once the 1st Respondent gives his nod. I also hasten to add that the criminal justice system has enough constitutional and statutory safeguards to protect the Petitioner's rights even as the 1st Respondent institutes prosecution.

Disposal

69. In the end, I find that the Petitioner has not made a case for the reliefs sought.

70. I conclude by holding that the Petition has no merit. It ought to be dismissed and is hereby dismissed with costs to the Respondents as well as the Interested Party.

Dated, signed and delivered at Nairobi this 26th day of January 2016

J.L. ONGUTO

JUDGE