



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 550 OF 2014

BETWEEN

BISHOP ZECHARIA MAGONDU KIMANI PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

ROSE MILLICENT ATIENO..... 4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioner, Bishop Zecharia Magondu Kimani, has filed the petition dated 6th November 2014 to challenge the decision of the respondents to prosecute him with the offence of forcible detainer contrary to section 91 of the Penal Code in Kibera Chief Magistrate's Court Criminal Case No. 3844 of 2014. The proceedings relate to the alleged forcible detainer of land parcel. L. R. No. Kabete/KabeteT.253 which the petitioner alleges is the subject of ELC Case No.1014 of 2012 – Zechariah Magondu Kimani vs Rose Millicent Atieno.
2. The petitioner is an official of the African Holy Ghost Church, a religious society registered under the provisions of the Societies Act. He alleges violation of his constitutional rights by the respondents as a result of the institution of the said criminal proceedings against him in light of the existence of a civil case in which he and the complainant in the criminal proceedings are parties. He asks the Court to stop the criminal proceedings and to grant him the following orders:

a. A declaration that the respondents herein have contravened Article 10 of the Constitution in that the national values and principles of governance set out have not been observed and that the decision relating to the institution of criminal proceedings against the petitioner vide Chief Magistrate's Court at Kibera Criminal Case No. 3844 of 2014 is an abuse of social justice.

b. A declaration that the respondents herein acted unlawfully when they arrested, arraigned and prosecuted the petitioner herein in the Chief Magistrate's Court at Kibera vide Criminal Case No. 3844 of 2014.

c. A declaration that the petitioner's rights to a fair trial have been violated.

d. An order to the effect that the criminal proceedings against the petitioner before the Chief Magistrate's Court at Kibera vide Criminal Case No. 3844 of 2014, are a nullity and should be quashed.

e. The respondents herein be restrained from prosecuting the petitioner and/his agents, church congregation and employees in respect of offences related to Milimani ELC Civil Suit, 1014 of 2012 and the suit property.

f. The respondents be restrained from intermeddling in the due process as regards Milimani ELC Civil suit 1014 of 2012.

g. Any further relief or orders that this Honourable Court shall deem just and fit to grant.

h. Costs of this petition.

Procedural History

3. The matter first came before the Court by way of an application for conservatory orders on 7th November 2014. The Court noted that the petitioner had been charged on 27th of August 2014, but had only approached the Court on 7th November 2014, four days before the date scheduled for the hearing of the criminal case. It therefore declined to issue conservatory orders and directed the petitioner to serve the application and petition for inter partes hearing on 21st November 2014. On that date, Counsel for the petitioner and the Director of Public Prosecutions (DPP) agreed to proceed with the main petition, and after giving directions on the filing of responses and submissions, the Court scheduled the matter for hearing on 20th January 2015.
4. The matter did not proceed on this date as the respondents filed their response late, and the matter was rescheduled to the 27th of January 2015, when the parties were again not ready to proceed. In granting the time requested by the respondents, the Court, after considering the pleadings on record and a ruling delivered in ELC No 1014 of 2012 by Mutungi J on 31st January 2014, and noting that the petitioner's trial was set to resume on 10th February 2015, granted a conservatory order of stay of the proceedings in the criminal case pending hearing and determination of the petition.
5. On 17th March, 2015, when the matter was coming up for hearing of the petition, an application dated 5th February 2015 was also placed for hearing before the Court. The applicant was Ms Rose Millicent Atieno, the complainant in the criminal matter against the petitioner. She applied for joinder on the basis that she was directly affected by the petition as the land in question was in contention between her and the petitioner. She therefore sought and was permitted to participate in the proceedings as the 4th respondent, and was also granted time to file an affidavit in response to the petition and submissions in support of her case.
6. Though the hearing of the petition was adjourned a couple of times to accommodate the 4th respondent and her Counsel, as the record indicates, the 4th respondent only filed an affidavit in reply but did not file submissions in the matter, nor was she represented by Counsel on record at the hearing of the matter on 10th November 2015.

The Petitioner's Case

7. The petitioner's case is set out in his petition, the affidavit in support of the petition sworn on 6th November, 2014; his supplementary affidavit sworn on 26th January, 2015, and written submissions dated 26th January, 2015. It was presented by his Learned Counsel, Mr. Muhia.
8. The petitioner deposes that on 17th December, 2012, he and Zecharia K. Kuria and Peter Njihia, suing in their capacity as trustees of the African Holy Ghost Christian Church, filed a suit before the Environment and Land Court at Nairobi being Milimani ELC Civil Suit No. 1014 of 2012 against the 4th respondent, Rose Millicent Atieno. The basis of their suit was that the said Rose Millicent Atieno had alleged that the land on which their church stood was hers. They sought in their suit to restrain the 4th respondent, her servants and/or agents from evicting the church, entering the suit property or demolishing its buildings erected on the suit property pending the hearing and determination of the suit or further orders of the Court.
9. The petitioner further avers that on 16th May, 2014, the Hon. Mr. Justice Mutungi issued orders to the effect that the parties in the said suit maintain the status quo, and that no further constructions and/or transfer or disposition of the suit property should be undertaken by either party pending the hearing and determination of the suit.
10. However, in a blatant and complete disregard of the said order, and in a bid to use the court process improperly, dishonestly and without good faith, the 4th respondent proceeded to lodge a complaint with Kabete Police Station regarding the suit premises.
11. The petitioner has made further averments regarding correspondence between his advocates and those of the 4th respondent on the matter, but despite the 4th respondent acknowledging that she was aware of the existence of the orders of Mutungi J, she feigned ignorance and proceeded with the complaint by misinterpreting the law.
12. The petitioner avers that he was thereafter arrested on 26th August, 2014 and charged with the offence of forcible detainer contrary to section 91 of the Penal Code with the criminal case at the Chief Magistrate's Court at Kibera on 27th August, 2014.
13. In his supplementary affidavit sworn on 26th January, 2015, the petitioner challenges the replying affidavit sworn by Corporal Polycarp Magai on behalf of the respondents. He deposes that the affidavit is incompetent and should be struck out as it offends the rules relating to affidavits, noting that some of the averments therein are not factual dispositions but opinions. It is also his averment that the deponent, Cpl. Magai, deposes to matters that are at issue in the ELC case, which the respondents cannot prove.
14. The petitioner contends that land parcel No. Kabete/Kabete/T. 253 is the subject of the criminal proceedings instituted in Criminal Case No. 3844 of 2014 before the Chief Magistrate's Court at Kibera and for a charge of forcible detainer to stand, it is paramount for the true owner of the land in question to be established, which question is pending determination in the ELC suit.
15. In supporting his claim to the land, he avers that on 24th May, 1975, the African Holy Ghost Christian Church received a letter of allocation and authority from one E.K Karibo, the then County Clerk of County Council of Kiambu. In the said letter, the Council communicated its approval to the church to construct a prayer house on the said land. He alleges that it was in 2000 that he came across the information that the 4th respondent had purportedly acquired the said parcel of land sometime in 1992.
16. The petitioner therefore challenges the 4th respondent's title. He argues that the proceedings in the criminal case against him show that the former District Commissioner of Kiambu District, a Mr. Samuel Atieno, is the 4th respondent's husband. The petitioner therefore links her acquisition of the property in dispute to her husband's position.

17. The petitioner is also aggrieved that he is the only trustee of the church who has been charged in the criminal case while the African Holy Ghost Christian Church has other trustees.
18. In his submissions, the petitioner argued that the respondents did not act within their mandate. He contended that the Inspector General of Police carried out shoddy investigations, and the DPP erred when he relied on the shoddy investigations and ordered the petitioner's prosecution. He relied on the decision in **Musyoki Kimanthi vs Inspector General of Police and 2 Others, Petition No 1014 of 2012, and Joram Mwenda Guantai vs The Chief Magistrate, Nairobi, Civil Appeal No 228 of 2003** to support his submission that section 193A of the Criminal Procedure Code permits parallel proceedings involving the same subject matter, but this prerogative of the police is not absolute and must be exercised responsibly, in accordance with the law and in good faith.
19. He also relied on the decision in **Mohammed Gulam Hussein Fazal Karmali and Another vs The Chief Magistrate's Court, Nairobi, Miscellaneous Civil Application No. 367 of 2005** to argue that in as much as section 193A of the Criminal Procedure Code allowed for civil and criminal proceedings based on the same subject matter to run concurrently, the court is bound to ensure that its process is not abused and also to protect itself against the abuse of its process by litigants. It was his submission that his right to a fair trial has been and continues to be infringed upon by the respondents due to their recklessness and lack of integrity in discharging their duties.
20. According to the petitioner, calling in aid the decisions in **Investments and Mortgages Bank Ltd vs The Commissioner of Police and the Director of the Criminal Investigations Department and 2 Others, Petition No. 104 of 2012**, and **Stanley Munga Githunguri vs Republic [1985] KLR 91**, this Court should intervene and stop his prosecution as the respondents had grossly abused their discretion and acted on the malicious and unfounded allegations of the 4th respondent.
21. It was his submission that the purpose of the criminal case at Kibera is to defeat the petitioner's rights conferred by Mutungi J. vide the orders he granted, and that the order of status quo confers the petitioner with the right to occupy the property without interruption.
22. The petitioner contended that the respondents have allowed their offices to be used and abused to settle matters that are presently before the High Court in ELC Civil Suit No. 1014 of 2012; that with due diligence, they should have been able to ascertain that the matter was before the High Court and was still under litigation, and they therefore had no right and acted in breach of the law in arresting and charging him in court; and further, that it was a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. He asked the Court to stop the proceedings in order to stop the violation of his constitutional rights by prosecuting him in respect of offences related to ELC Civil Suit No. 1014 of 2012.

The Case for the 1st and 3rd Respondents

23. Learned State Counsel, Ms. Wawira, presented the case for the Inspector General of Police and the Attorney General. She relied on Grounds of Opposition dated 23rd January, 2015 and submissions of the same date.
24. The AG argues that the present petition is incompetent, without merit, frivolous and an abuse of the court process. It is his further contention that the case does not disclose any constitutional violation by the respondents, and the petitioner cannot arrogate to himself the duty of determining the outcome of the case against him at the Kibera Chief Magistrate's Court.
25. Ms. Wawira relied on the provisions of section 193A of the Criminal Procedure Code to submit that there is no bar to civil and criminal proceedings on the same subject matter proceeding simultaneously. While the Court could, in clear cases where the criminal case is being maintained for the sole purpose of exerting pressure on the applicant to settle the civil case, be persuaded to

interfere with the criminal prosecution, the petitioner had a duty to show that the process of the court is being abused, which had not been done in this case. Her submission was that the petitioner was asking the Court to usurp the powers of the trial Court by assessing the sufficiency of the evidence. He had not shown how his right to a fair hearing was being violated, and if he was satisfied that the charge against him does not disclose a criminal offence he has sufficient safeguards in law.

26. The respondents relied on the decisions in **Hushi Muhamed S/C Rukan vs Suleiman Haji [1946] 22 (1) KLR 54; William S.K Ruto and Another vs Attorney General [2010] eKLR;** and **Republic vs Chief Magistrate Criminal Division and Another ex parte Mildred Mbuya Joel [2014] eKLR** to submit that the onus is on the person seeking to have criminal proceedings halted to justify the grant of such orders, which the petitioner in this case had not done.

27. He had also not demonstrated how his fundamental rights have been violated or that the 1st respondent acted in contravention of the law, breached rules of natural justice, considered extraneous matters, or was actuated by malice in making the decision to recommend the prosecution of the petitioner. Their submission was that the petitioner was seeking to interfere with the discretion of the 1st respondent to conduct investigations and recommend prosecution in the event that there is sufficiency of evidence. He was also asking the Court to usurp the functions of the trial court through the back door by determining the sufficiency or otherwise of the evidence that will be adduced at the trial court. The respondents therefore asked that the petition be dismissed with costs

The Case for the DPP

28. The 2nd respondent filed an affidavit sworn on 16th January, 2015 by Corporal Polycarp Magai, a police officer attached to the Directorate of Criminal Investigations Department. Learned State Counsel Ms Kihara presented the case for the DPP.

29. In his affidavit, Cpl. Magai deposes that the 4th respondent, Mrs. Rose Millicent Atieno, bought a piece of land known as Kabete/Kabete/T253 measuring 0.21 acres and was issued with a title deed by the Kiambu District Registrar on 19th June, 1992. She occupied it when it was vacant and with no developments on it, and she therefore fenced it. She thereafter travelled to the United States of America for a while, and when she came back in 2010, she found her plot unlawfully occupied by the petitioner. She tried to see how the matter could be sorted out amicably but her efforts bore no fruits, so she reported the matter to the Criminal Investigations Department Headquarters on 16th July, 2014 which prompted investigations on the matter.

30. Cpl. Magai further deposes that the 4th respondent availed her original documents to the police station, but when the petitioner was asked to bring documents showing his ownership of the land in dispute, he did not do so, and had not done so at the time that Cpl. Magai swore his affidavit in response to the petition.

31. According to Cpl. Magai, the documents produced by the 4th respondent were taken to the Land Registry in Kiambu to ascertain their authenticity. The results confirmed that the property belongs to the 4th respondent, and there were no records indicating that the said land had been given to the petitioner by the Kikuyu County Council as he had alleged.

32. It is also his averment that the petitioner had been given enough time to produce his ownership documents but had not done so, hence his arrest and prosecution.

33. The DPP argues that the petitioner has not demonstrated that in undertaking investigations and in making the decision to prosecute him, the respondent or any member of his office has acted without or in excess of the power conferred upon them by the law, or how they have violated the petitioner's rights.

34. It is averred on behalf of the DPP that he has independently reviewed and analysed the evidence contained in the investigations file compiled by the Directorate of Criminal Investigations including the witness statements, documentary exhibits and statements of the petitioner as required by the law, and on the basis of the review, given instructions for the prosecution. He contends that the decision was informed by the sufficiency of evidence on record and the public interests and not on any other considerations.

35. Ms. Kihara submitted on behalf of the 2nd respondent that the orders sought by the petitioner are unconstitutional as they seek to stop the 2nd respondent from exercising his mandate under the Constitution. Further, that the decision to prosecute is based on the sufficiency of evidence on record and not on any other extraneous factors or consideration. It was her submission further that the petitioner has failed to prove that the criminal proceedings have been instituted for other ulterior motives other than the honest enforcement of the criminal law.

36. Ms. Kihara submitted that the veracity of the facts raised by the petitioner can be raised at the trial court which is best placed to assess the sufficiency of the evidence on record, which can only be done at the trial. She relied on the decision in **Anarita Karimi Njeru vs Republic [1979] 1 KLR 154** to submit that where a party alleges breach of fundamental rights, he has an obligation to identify with precision the rights violated and how they have been violated, which the petitioner had not done.

The 4th Respondent's Case

37. The 4th respondent filed an affidavit sworn on 6th May, 2015 in which she urges the Court to dismiss the petition with costs and allow the prosecution to continue. The 4th respondent reiterates her claim to ownership of the land in dispute as set out in the affidavit of Cpl. Polycarp Magai. She deposes that the criminal proceedings against the petitioner originated from the office of the DPP, which was not a party to ELC Case No. 1014 of 2012, and is therefore not restrained by the orders made by Mutungi J in that case. Further, that the institution of the criminal proceedings does not in any way defy the orders given by the court in the ELC case since the orders were intended to maintain the status quo between the parties and were given to prevent either party from transferring or disposing of the suit property before the court had reached a final decision. In any event, according to the 4th respondent, the charges against the petitioner relate to the offence he is alleged to have committed, which has no bearing on the court orders.

Determination

38. The facts leading to the present petition are fairly straightforward. The petitioner asks the Court to stop his prosecution in Criminal Case No. 3844 of 2014 in which he is charged with the offence of forcible detainer. The offence arises out of a complaint by the 4th respondent, and relates to the ownership of title number Kabete/Kabete/T.523. Both the petitioner and the 4th respondent claim ownership of the property, the petitioner alleging that his church, the Africa Holy Ghost Church, was allocated the land by the then Kikuyu Town Council in 1975. The 4th respondent was allegedly allocated the land in 1992, but was away and returned to find the petitioner and his church in occupation of it.

39. In 2012, the petitioner and his fellow trustees filed **ELC Number 1014 of 2012** in the Land and Environment Court, and on 31st January 2014, the Court granted an order for the maintenance of the status quo.

40. Following a complaint by the 4th respondent, the petitioner was arrested on 26th August 2014 and charged in Court on 27th August 2014 with the offence of forcible detainer contrary to section 91 of the Penal Code, and it is this charge that has led to the present litigation.

41. In determining the matter, I believe I am called upon to determine one main issue: whether the prosecution of the petitioner amounts to a violation of his constitutional rights, and if so, whether the Court should stop the said prosecution.
42. Before dealing with this issue, however, let me dispose of the objection by the petitioner to the admissibility of certain averments by the 2nd respondent. The petitioner has objected to the affidavit sworn on behalf of the DPP by Cpl. Magai, his argument being that the deponent has deposed to matters of fact which are not within his knowledge.
43. In the case of **Pattni vs Ali and Others [2005] 1EA 339; [2005] 1 KLR 269** which was cited with approval in **Republic vs Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto Civil Misc. App. 666 of 2008** it was held that:

“An affidavit is a sworn testimony on facts and as such the provisions of the Evidence Act have been applied to affidavits and therefore rules of admissibility and relevancy apply. Hearsay evidence and legal opinions are for exclusion... the proviso to Order 18 rule 3 (1) which relates to interlocutory applications does not detract from the provision; in other words it is not permitted anywhere that a statement may be deposed to as being a fact when the source of that knowledge is information... what is permitted is that if the matter is deposed to on belief and the ground of that belief is information from a third party, that information is admitted, provided its source is specified... up to 1963 the strictures required that affidavits made on information should not be acted upon by any court unless, firstly, the sources of the information are specified, and secondly, if it is not stated in the affidavit what is deposed to form the deponent’s own observation and from what information and both these requirements the deponent has to state expressly or the entire affidavit is for rejection. After 1963, equitable principles were entertained in considering such affidavits and Courts were looking at the substantive, rather than the formal contents of the affidavit and the Courts henceforth said there was no obligation on the deponent to distinguish what he swears to on knowledge and what is on information and belief as the Court would itself examine the affidavit and determine from a clear reading of it, which averments emanate from what source and only the offending portions would be rejected.... Where the portions complained of are fraught with argumentative proportions and expressions of opinion, it would be oppressive to allow such matters to masquerade as factual depositions and since Order 17 rule 6 donate the power to strike out scandalous, irrelevant or oppressive matter and as the three categories are to be read disjunctively the said portions are struck out.”

44. The requirements with regard to affidavits are clear, and I need not labour the point. Thus, while not losing sight of the provisions of Article 159 (2) (d) of the Constitution which is to the effect that justice shall be administered without undue regard to procedural technicalities, I agree with the petitioner that the averments by Cpl. Magai with respect to the ownership of the disputed property which he has not indicated the sources of his information or basis of belief should be struck out.
45. The next question is whether the petitioner has made out a case of violation of his rights or abuse of the legal process that should lead to this Court prohibiting his prosecution in the criminal case that he now faces.
46. The law with regard to the circumstances under which a court can interfere with a prosecution has been well articulated over the years in various decisions, and I believe there is again not much dispute on this point. In **Gulam and Another vs Chief Magistrate's Court & Another [2006]eKLR**, the Court observed as follows:

“Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any prosecution which is vexatious, oppressive, malafides, frivolous or taken up for other

improper purpose such as undue harassment of a party or abuse of the process of court... 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 institution of criminal proceedings, there must be in existence material evidence on which the Prosecution can say with certainty that they have a probable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable... Prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest. The rationale for prohibiting such proceedings is that for a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the Court (of its inherent power to prevent abuse of its process). On the score of cost alone, the exercise of the power will protect the accused person from expenditure on a trial on indictment which he or she cannot recoup."

47. Similarly, in **Peter D'Costa vs Attorney General and Another, Petition No.83/2010 (U.R.)** the Court asserted the position that:

"The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is a breach of the petitioners' fundamental rights as the petitioner will not receive a fair trial. It is the duty of court to stop such abuse of the justice system."

48. In the case of **Michael Monari and Another vs Commissioner of Police and 3 Others Miscellaneous Application No. 68 of 2011**, in refusing to stop a prosecution against the applicant in the matter, Warsame J expressed the following view:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

49. I agree fully with the sentiments expressed by the Court in the above decisions, and I do not believe there is much contestation between the parties with regard to the law.

50. I have also considered the pleadings of the parties and the allegation by the petitioner that there has been violation of his rights under the Constitution. He cites Article 10 of the Constitution, which contains the national values and principles, but does not demonstrate how the acts of the respondents violate this Article, or how such violation amounts to a violation of his rights under the Bill of Rights. He has also alleged violation of his right to a fair trial. In light of the fact that his trial has not yet commenced, and the right to a fair trial guaranteed under Article 50(2) are trial related, I am unable to find a violation or threat of violation of his constitutional rights in the acts of the respondent.

51. However, the circumstances of this case call for some more consideration of the role of the Court, given the charges facing the petitioner in the matter.

52. According to the charge sheet, the petitioner is charged with the offence of forcible detainer, and

the charge sheet reads as follows:

“ZACHARIA MAGONDU KIMANI On diverse dates between 2010 to date at Lower Kabete in Kiambu District within Nairobi County, jointly with others not before court, being in possession of land KABETE/LOWER KABETE/253 measuring 0.21 of hectares of ROSE MILLICENT ATIENO without colour of right held possession of the said land in a manner likely to cause or reasonable apprehension of breach of the peace against ROSE MILLICENT ATIENO who was entitled by law to the possession of the said land. “

53. Section 91 of the Penal Code provides as follows:

“91. Any person who, being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanour termed forcible detainer.” (Emphasis added)

54. It is not disputed that the subject of the charge sheet is also the subject of the case before the Environment and Land Court in ELC No 1014 of 2012. Prior to the arrest of the petitioner on 26th August 2014 and his being charged in court the following day, the Environment and Land Court had, on 31st January 2014, issued an order for the maintenance of the *status quo*. The *status quo* was not defined, but the pleadings suggest that the petitioner and his church were in possession.

55. Thus, the charging of the petitioner on 27th of August 2014, after the issuance of the orders of *status quo* pending determination of the ownership dispute would seem to suggest that the question of the ownership of the land is clear, and that there is no dispute as to the ownership of the land. Yet, in order to establish the offence against the petitioner, the prosecution would have to establish the 4th respondent's title, the very same question that is before the Environment and Land Court, and which a judge in the said court had, eight months before the arrest of the petitioner, after hearing the petitioner and his co-plaintiffs and the 4th respondent in an interlocutory application, issued an order for maintenance of the *status quo*.

56. In **High Court Petition No. 161 of 2014 - Lee Mwathi Kimani vs The Director of Public Prosecutions and Others**, in a matter in which the petitioner had, in circumstances similar to what is now before me, been charged with the offence of forcible detainer, Majanja J, held as follows:

“[7]... In order to establish its case, the prosecution must of necessity prove ownership of the property which is the same issue that the interested party brought to the subordinate court for consideration.

[8.] I am aware that this court should be slow to intervene in the prosecution of cases before the subordinate court as the discretion and authority to prosecute offenders is reserved for the Director of Public Prosecutions under Article 157 of the Constitution. I am also alive to the provisions of section 193A of Criminal Procedure Code (Chapter 75 of the Laws of Kenya) that permit criminal cases and civil cases based on the same facts to proceed concurrently. However, even in such cases the court must have regard to the facts in each case and determine whether the petitioner's rights are violated or there is an abuse of the court process.”

57. Similarly, in High Court Petition No. 547 of 2014 - Jacqueline Wangu Kariuki and Another vs **The Director of Public Prosecutions and Others**, this Court took the following view:

“[45.] Having not found a violation of a constitutional right as alleged, yet having found that in the present case the prosecution against the 2nd petitioner may be

unsustainable, what is the Court to do? Should it allow the prosecution to continue when it is evident that the dispute will revolve around title- as the petitioners observed, the trial court had deferred the taking of a plea and requested both the petitioners and the complainant to produce their titles. This is clearly outside the jurisdiction of the trial court, but it demonstrates its own reservations about the case placed before it.

[46.] This Court has jurisdiction, under Article 23(3), to grant appropriate relief in matters brought under Article 22 of the Constitution. In my view, it would be to allow an abuse of the Court process if the proceedings against the 2nd petitioner, which are premised on the lawful entitlement of the 4th respondent, to proceed.”

58.As in the case above, I have considered the pleadings of the parties in this matter, and I have not been able to find a violation of the petitioner’s constitutional rights. I agree with the respondents that the DPP has the sole mandate to determine when to institute criminal prosecutions, and ordinarily, the Court should not interfere with such exercise of his mandate. However, in a matter such as is before me where the matter was already the subject of a civil dispute and orders issued by the Environment and Land Court for the maintenance of the *status quo*, it is not a proper use of the criminal justice system for the respondents to then charge one of the parties to the dispute with the offence of forcible detainer, which they would have to establish by establishing ownership by the 4th respondent.

59.For the above reasons, I am satisfied that the interests of justice demand that the criminal prosecution against the petitioner be stayed. My orders are therefore as follows:

i. That Kibera Chief Magistrate’s Court Criminal Case No. 3844 of 2014 be stayed pending the hearing and determination of Milimani ELC Case No. 1014 of 2012- Bishop Zecharia Magondu Kimani & Others Vs Rose Millicent Atieno.

ii. That each party bears its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 19th day of February 2016.

MUMBI NGUGI

JUDGE

Mr. Muhia instructed by the firm of S. M Muhia & Co. Advocates for the petitioner.

Ms. Wawira instructed by the State Law Office for the 1st and 3rd respondent.

Mrs. Kihara instructed by the Director of Public Prosecution for the 2nd respondent.

No appearance for 4th respondent.