



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

PETITION NO. 206 OF 2015

BETWEEN

HASHAM LALJI PROPERTIES LIMITED..... PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

AND

ERIC KIBWOTT TARUS1ST INTERESTED PARTY

BENJAMIN KIPKORIR ROTICH..... 2ND INTERESTED PARTY

BENJAMIN KIPKORIR RUTO..... 3RD INTERESTED PARTY

KARIM LALJI

(for the Estate of the Late Esmail Lalji)4th INTERESTED PARTY

JUDGMENT

Introduction

1. In its amended Petition, the Petitioner, Hasham Lalji Properties Ltd describes itself as a family owned, limited liability company registered under the Companies Act, Cap 486, Laws of Kenya. It is a realtor within the Republic of Kenya. It has instituted the present proceedings against the Respondent, the Director of Public Prosecution (hereinafter “**the DPP**”), whose office is established under Article 157 of the Constitution and represents the Government of Kenya in criminal proceedings.

2. The Petitioner alleges various breaches of its constitutional rights and has hence sought for redress from this Court.

The Petitioner’s Case

3. Learned Counsel Mr.J.S. Kakhula argued the petitioner’s case.

4. The Petitioner’s case is contained in its amended petition dated 22nd September, 2015 supported by an

affidavit sworn on its behalf on 18th May, 2015 by its Director and Chief Executive Officer, Mr. Diamond Hasham Lalji, written submissions dated 16th October, 2015 and a supplementary affidavit sworn by the said Mr.Lalji on 16th October, 2015.

5. The Petitioner's case was that in the year 1964, through the Hasham Lalji family, it jointly acquired from a colonial settler the property known as Land Reference No 9723 Grant No. 15449 Sergoit River Farm (hereafter "the property") with one Nyongio Kimitei (deceased) who was the husband of Anne Kimitei the complainant in Criminal Case No. 1351 of 2012. That the said property was owned by it and Nyongio as tenants in common at the ratio of 60%: 40% respectively and that Diamond Hasham Lalji was to hold the said property in trust for the Petitioner.

6. Mr. Diamond Lalji deponed that the land was later fraudulently subdivided and transferred to several individuals including the accused persons and the Government of Kenya leading to the filing of Nairobi ELC Suit No. 90 of 2004 (O.S) in which the company seeks to be enjoined as a party to the proceedings.

7. Further, it was his deposition that he together with Anna Nyongio Kimitei reported the alleged fraudulent transactions on the property to the Criminal Investigations Department which resulted in criminal charges being preferred against the suspects involved through Nairobi Chief Magistrates Criminal Case No. 1351 of 2012. The 1st to 3rd Interested Parties are accused persons in the case.

8. It was Mr. Diamond Lalji's averment that when the said criminal case was commenced, he was one of the complainants but later, the charge sheet was amended on 3rd December, 2013 to remove his name as one of the complainants and that no explanation was offered by the respondent for the removal. Additionally, he contended that the investigation officer refused to accept his further statement that sought to clarify certain issues pertaining to the criminal case. He had complained on behalf of the Petitioner.

9. He contended that the matter proceeded with four witnesses giving evidence without his knowledge, which he averred he only discovered when he was summoned to attend court on 19th May, 2015 causing his advocates to peruse the court file. Additionally, that he was never summoned or informed by the DPP to attend court when the hearing commenced.

10. Further, that the Petitioner wrote to the DPP several times expressing its dissatisfaction in the manner in which the criminal case was being handled but no response was forthcoming.

11. According to the Petitioner, the DPP's conduct amounts to violation of its right under Article 47 of the Constitution especially in light of the fact that no reasons were given to it for amending the charge sheet to remove Mr. Diamond's name, violation of its right under Articles 48 and 50 (1) of the Constitution as the same amounts to stopping it from accessing justice thus adversely affecting its right to a fair trial, amounts to abdication of the DPP's duties under Article 157 of the Constitution, and that the failure to act on the complaint has resulted to a failure in the discharge of the DPP's constitutional mandate.

12. The Petitioner's case was further that the DPP's action amounts to an attempt to fetter its rights to have the dispute regarding the transactions involving the property resolved by a court of law as provided for under Article 48 and 50 (1) of the Constitution, the decision not to include it as a complainant in the criminal case may adversely affect its case in Nairobi ELC No. 90 of 2004 (O.S) wherein it is challenging the manner in which it was dispossessed of its share in the property. The Petitioner is apprehensive that if the orders it is seeking herein are not granted, its constitutional rights will be violated and it may never get justice.

13. As a result, the Petitioner seeks the following orders:

a) That a declaration do issue that the respondent's actions amount to a violation of the Petitioner's rights under Article 47, 48 and 50 (1) of the Constitution of Kenya.

b) That a declaration do issue that the respondent's actions amount to failure to discharge its constitutional mandate and/or an abdication of its constitutional mandate under Article 157 of the Constitution of Kenya.

c) That an order of Mandamus do issue directing the respondent to amend the charge sheet in Nairobi Chief Magistrate Court Criminal Case No. 1351 of 2012 to include the Petitioner as a complainant in light of the Petitioner's constitutional right to access justice.

d) That an order of Mandamus do issue directing the respondent to give reasons as to why it has refused to accept the Petitioner's further statements and/or in the alternative an order directing the respondent to admit the Petitioner's further statements.

e) That costs for this petition be provided for.

f) Any other orders that this Honourable Court may deem fit to issue in the circumstances.

The Respondent's Case

14. Learned State Counsel Mr. Bwire presented the DPP's case.

15. The DPP's case is contained in a replying affidavit sworn on his behalf on 29th July, 2015 by Senior Prosecution Counsel, Mr. Eddie Kadebe, and written submissions dated 10th November, 2015.

16. The DPP, while opposing the petition averred that the framing of charges is a prerogative of his office and is exercised in accordance to Article 157 of the Constitution and the Office of the Director of Public Prosecutions Act, No. 2 of 2013 and was done rationally, impartially, within the confines of the law and was made following proper procedures.

17. He contended that the criminal case was instituted against five persons who have been charged with the offence of conspiracy to defraud contrary to section 317 of the Penal Code among other charges such as abuse of office contrary to section 101 (1) as read together with section 36 of the Penal Code. That the case involves the suit property in which the Petitioner is alleging he has an interest.

18. According to the DPP, it is still in issue whether the Petitioner has an interest in the said property and the criminal case does not delve into the issue of the interest of the Petitioner, but primarily seeks to prosecute persons who committed various offences as aforesaid.

19. The DPP argued that the charge sheet in the criminal case discloses the registered owner of the suit property as Donald James Gear, an issue not in dispute by any party in court in the criminal case or elsewhere.

20. It was the DPP's contention that the Petitioner has come to Court with ulterior motives with intent to use the criminal case as a means to assert their claims to the property. In that regard, the DPP's argument was further that it is an abuse of the court process for the Petitioner to use a constitutional petition to seek orders of Mandamus to interfere with the independent functions of his office and also use the court process as a back door to assert a claim which he knows there is an on-going dispute in a civil process and where the other claimants are not party to the present proceedings.

21. The DPP argued further that the order of Mandamus sought by the Petitioner goes to the issue of a decision making process of his office and ought to have been canvassed at the Judicial Review forum. In the said criminal case, the principal complainant is the State while the Petitioner and others are witnesses, and that the provisions alleged to have been violated do not apply to the Petitioner in the present case and no violation of the Constitution has been shown by the Petitioner in accordance to the standards provided by the case of **Anarita Karimi Njeru -v- the Republic (1976-1980) 1 KLR 1272.**

22. Finally, the DPP's contention was that the Petitioner has hidden essential facts from the Court such as

that he was an interested party in Judicial Review Case No 89 of 2014 in which the accused persons in the criminal case lost their Application to have the case in the lower court stopped for any reason and he was therefore well aware of the updates of the criminal case.

The Interested Parties' Case

23. Learned Counsel Mr. Muraya presented the 4th Interested Party's case. The 1st through the 3rd Interested Parties did not participate in these proceedings.

24. The 4th Interested party filed grounds of Opposition dated 14th October, 2015 and written submissions dated 2nd November, 2015.

25. In its grounds of opposition, he contended that the petition as drawn and filed cannot succeed as it is misconceived and an abuse of process. He further states that the Court cannot grant the petition without first adjudging the right of ownership to land, a jurisdiction of the Environment and Lands Court and a matter already before the Court through ELC No. 90 of 2004, and that the Petition as filed and the prayers sought thereof are unmeritorious and ought to be dismissed with costs to it.

The Petitioner's Rejoinder

26. In its supplementary affidavit, the Petitioner refuted the respondent's position that this Petition seeks to assert its claim of ownership of the suit property. It was its argument that this petition seeks to interrogate the DPP's conduct of the criminal case in as far as its (Petitioner's) evidence and interest in the matter is concerned. Accordingly, that the DPP has not complied and/or supplied its Director's statement in the criminal case which action it contended, is a clear indication that the DPP is not taking its pursuit of justice seriously.

27. Further, that the evidence and findings of the court in the criminal case can be used as evidence in the ELC Civil Suit No. 90 of 2004 and thus its participation in the criminal case is paramount.

28. Finally, he averred further that the office of the DPP is a constitutional office and its operations are not supposed to be shrouded in mystery and must be accountable to the people of Kenya.

The Arguments in court

For the Petitioner

29. The Petitioner's submission was that the DPP's refusal to admit his statements and amending the charge sheet without giving it written reasons for its decision amounts to violation of his right to fair administrative action. Accordingly, it was its submission that under the law, a person who is aggrieved by the actions of another person, acts which are criminal in nature, has the right to report the incident to the police who will commence investigations and prefer criminal charges against the relevant person through the office of the DPP depending on the evidence that is available.

30. While relying on the decisions in **Stephen Nendela -v- County Assembly of Bungoma and 4 Others [2014]eKLR**, **Bidco Oil Refineries Limited -v- Attorney General and 3 Others [2013] eKLR**, **David Sifuna -v- Clerk, County Assembly of Trans Nzoia and Another [2014] eKLR**, and **Judicial Service Commission -v- Mbalu Mutava and Another [2015]eKLR**, the Petitioner's submission was that when the institution that is empowered under the Constitution to realize the rights under Article 48 and 50 (1) of the Constitution on behalf of the Kenyan people fails to discharge its duties in a transparent and accountable manner, this Court as the protector of the Constitution has no option but to make an inquiry as to whether the impeached constitutional body has acted in accordance with the tenets of the Constitution.

31. While placing further reliance on the decision in **The Premier, Province of Mpumalanga -v- Executive Committee of the Association of Governing Bodies of the State Aided Schools Eastern**

Transvaal [1999] (2) SA 91 (CC), the Petitioner submitted that Article 47 of the Constitution which is very similar to section 24 of the South African Constitution, 1993 Interim Constitution and section 33 of the South African Constitution, 1996, also requires an organ exercising administrative powers to act in a procedurally fair manner and that safeguards that are fundamental to fair decision making entail notice of the proposed action and the grounds asserted for it, an opportunity to present reasons why action should not be taken, an unbiased tribunal, and a statement of reasons. Additional reliance was placed on **Dupreez -v- Truth and Reconciliation Commission 1997, 3 SA 204 (A)** and **Administrator Transvaal -v- Traub 1989, 4 SA 731** in support of its arguments.

32. The Petitioner relied on the decisions in **Minister of Environment Affairs and Tourism -v- Phambili Fisheries (PTY) Ltd, 2003 (6) SA 40, 7 (SCA)** and **Ansett Transport Industries (Operations) Pty Limited -v- Wraith (1983) 48 ALR 500** and submitted that Article 47 requires an organ exercising administrative powers to give written reasons to a party whose rights under the Constitution may be adversely affected as a result of its decision.

33. Further, that the giving of reasons is one of the fundamentals of good administration as per Lord Denning MR in **Breen -v- Amalgamated Engineering Union [1971] 2QB 175**, and **R -v- Higher Education Funding Council Ex Parte Institute of Dental Surgery (1984) 1 ALL ER 651 (QB)** and that from a constitutional perspective, the provision of reasons is an important mechanism for making administrators accountable to the people they serve and for achieving a culture of justification.

34. While relying on the decisions in **Stanley Munga Githunguri -v- Republic [1986]eKLR, Investments and Mortgages Bank Limited (I & M) -v- Commissioner of Police and Others [2013] eKLR, Thuita Mwangi and 2 Others -v- Ethics and Anti-Corruption Commission and 3 Others [2013] eKLR** and **Republic -v- Director of Public Prosecutions and 3 Others ex parte Meridian Medical Centre Ltd and 7 Others [2015] eKLR**, the Petitioner took the position that this Court has the jurisdiction and mandate to interrogate the exercise of powers under Article 157 of the Constitution by the DPP.

35. Relying further on **Associated Provincial Picture Houses Limited -v-Wednesbury Corporations [1947] 2 ALL ER 680** and **R -v- Somerset County Council ex parte Fewings [1995] 1 WLR 1037**, the Petitioner's contention was that the Constitution, 2010 heralded the dawn of a new era in judicial review characterized by a major shift from the classical model of judicial review to a more liberal wider and penetrating judicial review model. That a major characteristic in the classical model was that grounds of review were restricted and grounded into simple ultra vires doctrine which means no more that a public body must not exceed or abuse its powers. Accordingly, that this was construed wherever possible in favour of public authorities to validate whatever can fairly be regarded as incidental to or consequent upon what the legislature has authorized.

36. The Petitioner's contention in that regard was therefore that there has been a shift from this traditional/classical model of judicial review towards a more liberal wider and penetrating model which in the Kenyan context has been influenced by express provisions under Article 47 of the Constitution, and so, this Court has to therefore look at the judicial review remedies under Article 23 (3) (f) of the Constitution from the foregoing context and depart from the narrow classical model of judicial review.

37. The Petitioner submitted therefore that it has shown and proved violations of its constitutional rights by the respondent and has satisfied the legal threshold set in the **Anarita Karimi Njeru's case** and so it urged the Court to allow the petition and grant the prayers sought therein.

For the Respondent

38. The DPP on his part controverted the Petitioner's assertions and submitted that the instant petition is an abuse of the court process as the main thrust of the petition is for the purpose of the Petitioner seeking the assistance of the Court to further a private gain using the criminal justice process and that the Petitioner is raising issues that it had an opportunity to raise in **Erick Kibiwott Tarus and 2 Others -v- Director of Public Prosecutions and 7 Others [2014] eKLR**. Accordingly, that the Petitioner is seeking

the intervention of the constitutional Court for orders of judicial review without leave of the Court disguising them as constitutional matters.

39. The DPP, additionally, took the position that it is trite law that the Court should not to usurp the constitutional mandate of his office to investigate and undertake prosecutions in the exercise of the discretion conferred upon him pursuant to Article 157 of the Constitution. He contended that the powers to institute prosecutions include the authority and power to draw up a charge and the discretion further extends to the manner of framing of the charges as long as the same is in accordance to the law and which witnesses to call or rely on, and in any event, that the authority is discretionary and not subject to consent by any party or Court.

40. According to the DPP, under section 137 of the Criminal Procedure Code, a charge or information subject to the Criminal Procedure Code is not open to objection in respect of its form or contents if it is framed in accordance with the Criminal Procedure Code. In that regard, the DPP argued that it is sufficient for him to mention one owner of the property and it is not a requirement that all owners be stated in the charge sheet for purposes of proving a charge. That the purpose of mentioning the owner or interested party of the property is merely to show that the accused persons' actions affected property that belonged to someone else and thus denying them the argument that they had authority to commit the actions that led to the offence.

41. That the charge sheet does not convey ownership of the property where none exists and the charge sheet may not be used as proof of ownership where none exists. Accordingly, that it is the 60% share of the property belonging to Nyongio that is in dispute between the Petitioner and other parties including the 4th interested party herein. Further that is incorrect for the Petitioner to claim that section 47A of the Evidence Act (Cap 80) may be interpreted against it in ELC Suit No 90 of 2014 as the section only deals with the culpability of the accused persons as conclusive evidence that the property is owned by anybody and in any event, that is the domain of the Environment and Land Court and not the criminal court.

42. While relying on **Republic vs Chief Magistrate's Court at Mombasa Ex parte Ganijee and Another [2002] 2 KLR 703**, the DPP's submission was that in insisting that the charge sheet be amended to reflect the Petitioner as the owner, the Petitioner is seeking the assistance of the Court for the purpose of a private benefit outside the realm of the criminal court and that when a remedy is provided elsewhere and available to a person, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement.

43. The DPP maintained that Articles 48 and 50 of the Constitution do not apply to the Petitioner as they relate to rights that are applicable to arrested persons and not witnesses or complainants and that its only mention on complaints is where Article 50 of the Constitution provides that a court may allow for an intermediary for a complainant in the interest of justice. Further, that the actions taken of amending the charge sheet to suit the prosecution case in the criminal trial does not in any way adversely affect any rights of the Petitioner as the intention of the criminal case is not to confer any rights where none exists or confirm any rights of any person, as such, Article 47 of the Constitution too, does not apply to the Petitioner and it cannot claim it has been infringed.

44. On the remedies sought by the Petitioner, the DPP expressed the view that the Petitioner is not entitled to the declaratory orders sought herein as no constitutional infringements have been shown or proved to have been committed and that it has discharged its duty in accordance with the Constitution and the law as applicable. Additionally, the DPP submitted that the prayers of Mandamus are not applicable to the Petitioner as it has erroneously sought for orders of Mandamus without the leave of this Court as required under Order 53 of the Civil Procedure Rules. For that proposition, the DPP relied on the decision in **Erick Kibiwott Tarus and 2 Others -v- Director of Public Prosecutions (supra)**.

For the 4th Interested Party

45. The 4th interested party on his part averred that the amended petition is wholly un-grantable and submitted that that the Petitioner, not being registered as owner on the title documents of the property

cannot be enjoined as a complainant in the criminal case and that this Court does not have the jurisdiction to order the DPP to enjoin anyone to any subsisting case as a complainant.

46. It was his position that the substratum of the amended petition is *sub judice* and the Petitioner, in egregious abuse of court process, now pleads to be enjoined as a complainant as it has similarly done in ELC Suit No. 90 of 2014. This according to the 4th interested party is *sub judice*, as the Petitioner has enjoined two courts of concurrent jurisdiction on the same issue.

47. According to the 4th interested party, the issues presented in the amended petition are a claim over interest in land and no wonder the Petitioner therein pleads historic fraud and other allegations of similar genre. In that regard, his argument was that this Court is being invited to adjudicate the factual correctness or otherwise of the allegations and making findings of which party is the right proprietor of the property in question. This, he argued, this Court does not have any such jurisdiction as contemplated under Article 162 of the Constitution, section 13 of the Environment and Land Court Act, and as was held in **Jefferson Kalama Kengha and 2 Others -v- Republic [2015]eKLR**, and therefore, the issues in the amended petition require a trail of facts by witnesses, before the Environment and Land Court and not this Court.

48. Further, that the amended petition cannot be granted before first adjudicating the issue of whether or not the Petitioner has an interest in the property in question and as it stands, this Court is being asked to jump the gun and hold, without evidence or any significant substance, that which the Environment and Land Court has been enjoined to do. In addition, the 4th Interested Party's submission was that the amended petition is an abuse of court process, the Petitioner has absolutely no interest in the property and hence filing the present suit is an egregious abuse of court process, and therefore the same ought to be dismissed, and that since Counsel have been engaged to the present matter, and remunerated at premium, so as to keep clear the dispute which involves over 700 acres of prime land, it urged the Court to dismiss the petition with costs on indemnity basis.

Discussion and Determination

49. Having read and considered the pleadings by the parties herein and having heard Counsel for the respective parties, the key question to be determined in the instant petition is whether there has been a violation of the Petitioner's rights as alleged. If this Court reaches the conclusion that there has been any such violation, I shall proceed on to determine the question of the remedies, if any, available to the Petitioner.

50. Before I address my mind to the key issue, I must dispose of the preliminary issue raised by the DPP that the present matter ought to have been filed in a Judicial Review forum.

51. In that regard, whereas the Petitioner is aggrieved by the decision of the DPP in regard to the conduct of the criminal case, that in itself does not deny this Court jurisdiction to hear and determine the present matter. I hold so, bearing in mind the provisions of Article 23 (3) of the Constitution which mandates this Court to grant appropriate relief in proceedings brought under Article 22 of the Constitution and such appropriate relief includes an order of judicial review. The argument by the DPP that this is not the appropriate forum to determine the matter must therefore fail.

52. I must also quickly add that through the provisions of Article 47 of the Constitution as now promoted by the Fair Administrative Action Act No 4 of 2015, the common law principles of administrative law in so far as they apply to the exercise of public power and judicial review have been subsumed by the Constitution. The court would be perfectly entitled to interrogate any such administrative action and grant remedies as may be appropriate including the traditional judicial review remedies. That new field of jurisprudence is now commonly known as constitutional judicial review.

53. The foregoing leads me to the substantive determination of the matter. The key question that I must answer is whether there has been violation of the Petitioner's rights as alleged.

54. In that context, I note that the powers in regard to institution of criminal proceedings are vested in the office of the DPP pursuant to Article 157 of the Constitution. It will be noted that under Article 157 (6), the DPP is to exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed. Furthermore, under sub-clause 10, the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority. Of great importance is that under sub-clause 11, in exercising the powers aforesaid, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

55. Over time, our courts have exercised their constitutional mandate and intervened where the DPP has acted in excess of his powers or in abuse of the court process: see, amongst other cases; **Stanley Munga Githunguri -v- Republic** [1986] eKLR, **Ronald Leposo Musengi -v- DPP & Others** [2015] eKLR, **George Joshua Okungu & Another vs. Chief Magistrate’s Anti-Corruption Court & Another** [2014] eKLR., **David Mathenge Ndirangu -v- Director of Public Prosecutions & 3 Others** [2014] eKLR, **Republic -v- Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another** [2002] 2 KLR 703, **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012** [2013] eKLR, **R- v- DPP & Others Exparte Qian Guo Jun & Anor** [2013] eKLR, **Joram Mwenda Guantai -v- The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003** [2007] 2 EA 170 and **Kuria & 3 Others -v- Attorney General** [2002] 2 KLR 69.

56. Can it then be said that the failure by the DPP to include the Petitioner as a complainant in the trial in Criminal Case No. 1351 of 2012 has resulted to violation of the Petitioner’s rights? In addressing this question, it must firstly be borne in mind that in criminal proceedings the key complainant is the State. This position was affirmed by the court in **William Ruto and Others -v-s Attorney General, High Court Misc App No. 1192 of 2005**.

57. Similarly in **Pharis Mutembei Mutegi -v- Republic**, Criminal Appeal No. 70 of 2000 it was opined that:

“At this stage and before I leave this part of this judgment, perhaps it is better to say who the “Complainant” is. The term “Complainant” may not sometimes be understood in Criminal proceedings and it has even been said that retrials are necessary so that interests of complainants are taken care of.

*Section 202 of the Criminal Procedure Code is the key provision. As the Court of Appeal in **Roy Richard Elirema** noted, there is no mention of a prosecutor, whether public or private. The parties named in section 202, for example, are the “complainant” and the accused person. If the “Complainant” is aware of the hearing date and is absent without explanation, the court may acquit the accused person, unless the court sees some other good reason for adjourning the hearing. The “Complainant” in this context has been interpreted to mean The Republic in whose name all criminal prosecutions are brought, and not the victim of crime who is merely the chief witness on behalf of Republic, and when a public prosecutor is present in a trial in the court, the “Complainant” is said to be present.*

When there is talk of the interest of the “Complainant” therefore, I take it to mean the interests of the victim and not the interests of the Republic who, through the Attorney General’s failure to comply with section 85(2) of the Criminal Procedure Code, has used unqualified persons as public prosecutors.” (Emphasis added)

58. In **Ruhi vs Republic** (1985) KLR 373 at 379, it was pointed out that:

“We must state at the outset that we are satisfied that the term “Complainant” in Section 208(1) of the Criminal Procedure Code includes the prosecution as well as the person so described in

the particulars of the charge. It is clear from section 26 (3)(a) and (b) of the Constitution that the state through the AG is or can become the Complainant in every criminal proceeding.”

59. The above authorities are indicative that in criminal proceedings, it is indeed the State that is the complainant and the person who lodges any such complaint remains one of the key witnesses of the State. There is no prejudice consequently where the State is indicated as the complainant. Likewise it would not amount to an abuse of the DPP's powers.

60. Applying the foregoing to the present case, it would thus appear that any person who lodges a complaint remains a key witness to the Prosecutor and as such the person takes part in the criminal trial through giving his witness statements and any such evidence when called upon. I am thus unable to reach the conclusion that the Petitioner's right to fair administrative action has been violated owing to the removal of his name as a complainant. I hold so bearing in mind that one of the Petitioner's principals herein is already a witness in the aforesaid criminal case and as such, the Petitioner will be accorded an opportunity to present its witness statements and evidence as it wishes. The omission to include his name cannot as well be said to impede its right to access justice, for as I have already stated, it will still participate in the criminal case and adduce its evidence if any.

61. I must at this juncture point out that this is not the appropriate time and forum to address the Petitioner's assertion that the Investigating Officer has refused to admit a further statement from him in regard to the criminal case (see para 14 of his amended petition). The nuances involved in the investigation and prosecution of offenders would dictate that the DPP be given the leeway to determine which statements and evidence to admit or take into account prior to making a final decision. The DPP must have a free discretion of some sort to be exercised in a reasonable and prudent manner. Where he discards evidence, it's a determination he should be entitled to make without much scrutiny unless there is patent abuse. Moreover, the criminal justice process also allows the court to invite any additional witnesses and evidence as may be deemed necessary.

62. In any event, I also agree with the DPP's argument that the framing of charges is within his prerogative and discretion as exercised under Article 157 of the Constitution. In that regard, it is upon the office of the DPP, after conducting investigations and reviewing evidence, to determine the relevant parties to be included in a particular case. This in my view is to be done while taking into consideration the circumstances of each case. It is therefore not within the purview of this Court to dictate to the DPP on who to include or omit in a charge sheet or a list of witnesses or evidence, for that matter.

Conclusion

63. In my view and based on my reasoning above, the inclusion or omission of a party's name as a complainant in a criminal case does not raise any constitutional issue. I hold so, bearing in mind that in the instant matter it is not in dispute that the Petitioner is a witness in the criminal case in question and as such, it shall have a chance in his witness statement or oral submissions to give the evidence it seeks to bring to the attention of the trial court. I further take the view that the inclusion of a party as a complainant in any criminal case does not confer on that party any proprietary rights as alluded to by the Petitioner herein.

Disposal

64. Based on my findings above, I am unable to reach a conclusion that there has been any violation of the Petitioner's rights and hence I must hereby dismiss the petition. The petition is dismissed.

65. Let every party bear their respective costs.

Dated, signed and delivered at Nairobi this 30th day March, 2016

J.L.ONGUTO

JUDGE