



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL PETITION NO. 39 OF 2016**

**STEPHEN NDAMBUKI MULI.....1<sup>ST</sup> PETITIONER**

**GEORGE NZOMO NZIOKA..... 2<sup>ND</sup> PETITIONER**

**ERIC MUTINDA MUTISYA..... 3<sup>RD</sup> PETITIONER**

**UKAMBA AGRICULTURAL INSTITUTE LTD..... 4<sup>TH</sup> PETITIONER**

**VERSUS**

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

**ATTORNEY GENERAL..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. In their petition dated 3<sup>rd</sup> February 2016, the petitioners seek orders to stop their prosecution in Criminal Case No. 2021 of 2015 pending before the Milimani law Courts in Nairobi in which they are charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. They contend that the prosecution of the 1<sup>st</sup> -3<sup>rd</sup> petitioners, who are directors of the 4<sup>th</sup> petitioner, is discriminatory and in violation of their rights under, inter alia, Article 50 of the Constitution. They ask the Court to grant them the following orders.

***1) A declaration that the 1<sup>st</sup> respondent's action to charge the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners in criminal case No 2021 of 2015 at Milimani law Courts Nairobi – Republic vs Stephen Ndambuki Muli. 2) George Nzomo Nzoka and 3) Eric Mutinda, Mutisya violates Articles 50 of the Constitution and the Charges are null and void.***

***2) That the Interim conservatory orders do issue against the respondents, their agents and/ or servants and / or any or any person or persons claiming through them to restrain them from prosecuting and/ or continuing any criminal charges against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners in Milimani Law Court's CMCR Case No 2021 of 2015, on 10<sup>th</sup> February 2016 and/or on any or any other date thereafter, ending the hearing and determination of this petition.***

**3) General damages for illegal confinement and prosecution and breach of the 1<sup>st</sup> and 3<sup>rd</sup> petitioners' constitutional rights under Chapter 4 of the constitution.**

**4) That the respondents do pay costs of this petition on the Higher Scale, because of their abuse and breach of the provisions of constitution of Kenya.**

**5) That this Hon. Court do grant to the petitioners such further and / or other order or orders as it may deem fit and just to grant in the circumstance of the case.**

2. In his affidavit in support of the petition sworn on behalf of the petitioners on 3<sup>rd</sup> February 2016, the 1<sup>st</sup> petitioner, Mr. Stephen Ndambuki Muli states that he is the Chairman of the 4<sup>th</sup> petitioner, the Ukamba Agricultural Institute Ltd (UKAI), a private limited liability company. He was arrested on 22<sup>nd</sup> December 2015 and charged with six counts alongside the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners, George Nzomo Nzoka and Eric Mutinda Mutisya the treasurer and secretary of the 4<sup>th</sup> petitioner, respectively.
3. Mr. Muli deposes that all the charges brought against him are illegal unlawful and/or improper as the 4<sup>th</sup> petitioner and the 2<sup>nd</sup> and 3<sup>rd</sup> accused in the criminal case are described as the complainants. He also avers that the complainants in the second and third count are also described as witnesses in the case, thus converting the complainants to witnesses instead of letting them be complainants as they should.
4. It is his averment further that the charges against him are incurably defective and cannot be maintained. He deposes that in respect to the count of obtaining money by false pretences, on the day they were supposed to have committed the offence against the complainant, Melanine Limited by falsely pretending that that they were in a position to sell to it property known as L.R. 209/10350, they had signed an agreement for sale for the said land for the price of Kshs60,000,000, and the amount of Kshs6,000,000 represented 10% of the purchase price. He therefore avers that there was no question of obtaining the said amount by false pretences.
5. The 1<sup>st</sup> petitioner similarly explains the payment of money by Dubai Bank, and avers that there was no question of obtaining money by false pretences from the Bank.
6. With respect to the charges of stealing from the 4<sup>th</sup> petitioner, his deposition is that the 1<sup>st</sup> -3<sup>rd</sup> petitioners are directors of the 4<sup>th</sup> petitioner. They have not complained to the police against themselves for having stolen Kshs.44,100,000/= from its account with Co-operative Bank of Nairobi. He asserts that the third count against them is unmaintainable as it is a duplication of counts 1 and 2, is meaningless, and that it is oppressive and unreasonable to convert counts 1 and 2 to a 3<sup>rd</sup> count at the whim of the prosecution. The 1<sup>st</sup> petitioner further explains why the other counts against them are unlawful and unsustainable.
7. According to the 1<sup>st</sup> petitioner, after his arrest on 22<sup>nd</sup> December 2015, he was not formally charged on 23<sup>rd</sup> December 2015 as the charge sheet was very defective even though he had spent the previous night in police custody at Muthaiga Police Station. He was released on police bail of Kshs.100,000/= and formally charged on 29<sup>th</sup> December 2015, and was then released on bail of Kshs.500,000/=, with the alternative of a personal bond of Kshs.5,000,000/=
8. The 1<sup>st</sup> petitioner further alleges that when he was arrested on 22<sup>nd</sup> December 2015, he was informed that he was being arrested for failing to attend court on 8<sup>th</sup> December 2015 pursuant to a warrant of arrest that had been issued against him. He contends that he had never been charged before the 8<sup>th</sup> of December 2015 in any court and failed to appear in court. He alleges that he had been in constant communication with the Directorate of Criminal Investigations almost on a daily basis and he had never been informed that he had been charged in court. He terms it a breach of

his constitutional rights to lure him to the Criminal Investigations Department to make clarification on some documents only for the police to arrest and lock him up.

9. Mr. Muli further avers that thereafter, the 3<sup>rd</sup> petitioner was arrested on 22<sup>nd</sup> January 2016 at 6.00 am in the morning. He was not charged in court on that day but was kept in custody for 96 hours or 4 days contrary to Article 49 of the Constitution. He was charged in court on Monday, 25<sup>th</sup> January 2016 and was admitted to bail but was unable to meet the bail terms until 4.10 pm on 26<sup>th</sup> January 2016.
10. According to the petitioners, Dubai Bank filed suit on 22<sup>nd</sup> March 2012 against the 4<sup>th</sup> petitioner, being HCCC NO 172 of 2012, claiming, inter alia, a vesting order to vest title in the property in Dubai Bank or its nominee, and an order for specific performance of the contract for sale of Land Parcel No. LR. 209/10350. The petitioners therefore contend that having filed suit and obtained adverse orders against the 4<sup>th</sup> petitioner there was no question of their having obtained money from Dubai Bank by false pretences.
11. They are also aggrieved that having signed the sale agreement to Dubai Bank with one Jonathan Kithusi Nzioka, the said Nzioka should not have been left out when the 1<sup>st</sup> -3<sup>rd</sup> petitioner were charged with criminal offences, but should have been charged along with them. They accuse the respondents of selective charging for a criminal offence, assert that it shows that the case is baseless, and accuse the said Jonathan Kithusi Nzioka of being on a revenge mission for having been removed as a director of the 4<sup>th</sup> petitioner in 2012.
12. The petitioner makes further averments with respect to the agreements for sale of the property in respect of which the charges against them arose. They then assert that in light of the said facts and correspondence between them and the Melanine Limited and Dubai Bank, the charges against them are unmaintainable. It is also their assertion that the matter is purely civil in nature and is being addressed by a civil court in HCCC No. 172 of 2012. They therefore ask that the prosecution should be stayed until the final determination of the civil proceedings in that court where all the issues being raised in the charges against them are already being addressed by a court of competent jurisdiction.
13. In his further affidavit sworn on 13<sup>th</sup> March 2016 in support of the petition, Mr. Muli avers that there was a resolution by directors of the 4<sup>th</sup> respondent to sell the property. He also makes responses to the averments of fact by I. P. Peter Obonyo on behalf of the respondents which I need not reproduce. He also repeats his earlier averments with respect to his arrest, his being held in custody, and his release on police bond and subsequent charging in court, as well as his release on bail subsequent to his being charged.
14. Mr. Muli further deposes that following the preferment of charges against him and the 3<sup>rd</sup> petitioner, the 2<sup>nd</sup> petitioner suffered a massive stroke and was admitted in Machakos Level 5 Hospital. He was treated and discharged, but had to be re-admitted to hospital. The 1<sup>st</sup> petitioner avers that due to his illness, the 2<sup>nd</sup> petitioner is not fit to stand trial. He states that the petitioners are therefore seeking an order from this Court to stop the 1<sup>st</sup> respondent from arresting and charging the 2<sup>nd</sup> petitioner since he is in such a devastated condition that he may not survive a trial.
15. Mr. Muli further avers that the 4<sup>th</sup> petitioner has held a meeting and confirmed that it has not complained against the petitioners to the police and have also confirmed that they have not committed any offence while acting as the 4<sup>th</sup> petitioner's directors. He relies in this regard on the Minutes of the annual general meetings of the 4<sup>th</sup> petitioner held on 30<sup>th</sup> May 2012. His contention is that the charges against them are untenable as they are not at the behest of the 4<sup>th</sup> petitioner who should be the complainant in the case against them.

16. In his submissions on behalf of the petitioners, Learned Counsel, Mr. Gaturu, submitted that the court has power to order conservatory orders where it appears that the rights of the petitioners are being violated and the prosecution amounts to abuse of process. He reiterated the facts set out above and submitted that by prosecuting the petitioners and stating that the 10% deposits received in the transactions involving Melamani Limited and Dubai Bank amounts to obtaining money by false pretences, the respondents are in violation of the petitioners' rights. His submission was that the first three petitioners were acting as agents of the 4<sup>th</sup> petitioner, which is a limited liability company, has corporate personality and can only act through its agents. He also submitted that the 1<sup>st</sup> -3<sup>rd</sup> petitioner had the authority of the 4<sup>th</sup> petitioner to sell the land.
17. Mr. Gaturu further submitted that the prosecution of the petitioners is selective. The agreements at issue had been signed by four office bearers, but the fourth, Mr. Nzioka, had not been charged with the other three.
18. Mr. Gaturu also referred to the 1<sup>st</sup> petitioner's averments with respect to his arrest and submitted that he had been arrested after a warrant of arrest to appear on 8<sup>th</sup> December 2015 was issued. His submission was that the 1<sup>st</sup> petitioner had not been served with summons and was not aware that he was to appear in court. He also drew attention to the averments that the 2<sup>nd</sup> petitioner is bedridden with a massive stroke and submitted that if he is arrested, he may suffer an early death. His submission was that the petitioners had put sufficient material before the Court to establish violation of their rights, and he urged the Court to grant the orders sought in the petition.

## **The Response**

19. The respondents oppose the petition and rely on an affidavit sworn on 29<sup>th</sup> February 2016 by IP Peter Obonyo. They also filed submissions dated 31<sup>st</sup> March 2016.
20. In his affidavit, IP Obonyo states that he is the lead investigating officer stationed at the DCI Headquarters, Investigations Branch, Nairobi. His testimony is that a complaint was made on 7<sup>th</sup> December 2012 by South Eastern University College (SEUCO), now South Eastern Kenya University by its officials, that the Ukamba Agricultural University (UKAI) officials sold their land LR 209/10350 situated within Upperhill Area Nairobi prompting investigations and later filing of charges at Milimani Law Courts Nairobi.
21. The complaint was further to the effect that SEUCO was established through a Legal Notice No.102 of 15<sup>th</sup> July 2010 as a constituent college of the University of Nairobi taking all the assets of UKAI, the 4<sup>th</sup> petitioner. The parcel of land in contention, according to IP Obonyo, is registered in the name of the Ukamba Agricultural Institute and has original no LR 209/10350, according to the grant letter which he annexes to his affidavit.
22. He further deposes that on 16<sup>th</sup> February 2011, the three directors of UKAI namely Chairman, Stephen Ndambuki Muli, Secretary Eric Mutinda Mutisya and Treasurer George Nzomo Nzioki sold a portion of the land LR 209/10350 measuring 0.8 acres to Melamani Ltd at a price of Kshs.60,000,000. 10% of the sale price of Kshs.60 million was paid to the three directors i.e. Kshs6,000,000. He states that the sale did not proceed as the other directors distanced themselves from the deal.
23. IP Obonyo further deposes that on 2<sup>nd</sup> August 2011, the three directors of UKAI namely Chairman Stephen Ndambuki Muli, Secretary Eric Mutinda Mutisya and Treasurer George Nzomo Nzioki again sold the same land which they had sold to Melamani Limited, being LR 209/10350, to Dubai Bank Ltd at a price of Kshs 254,000,000
24. He further deposes that the trio then sought to be issued with a provisional title sometime in June 2011 through a letter to the Chief Land Registrar. That they claimed that the original title of the

land LR 209/10350 was lost yet they knew the title was kept in the bank by South Eastern University College officials who were also claiming the ownership of the said land.

25. IP Obonyo further avers that the 1<sup>st</sup>-3<sup>rd</sup> petitioners, being directors of UKAI stole and converted various motor vehicles, the properties of UKAI and NIC Bank Ltd, to be used as CATINA TOURS AND CABS LTD, their personal company.
26. It is his deposition therefore that on the evidence obtained in the course of his investigations, he charged Stephen Ndambuki Muli, George Nzomo Nzioka and Eric Mutinda Mutisya with the offences of obtaining money by false pretences contrary to section 313 of the Penal Code, stealing by directors contrary to section 282 of the Penal Code, fraudulent appropriation by directors contrary to section 328 (a) of the Penal Code as well as giving false information to a person employed in the public service contrary to section 129 of the Penal Code. This case, according to IP Obonyo, is pending before Milimani Law Courts vide Milimani Criminal Case Number 2021 of 2015.
27. The 1<sup>st</sup> respondent avers that the petitioners have not demonstrated that in executing their constitutional mandate, the respondents acted without or in excess of the powers conferred by law, or that they acted maliciously, infringed, violated, contravened or in any manner failed to comply with or respect and observe the Constitution.
28. It is also the 1<sup>st</sup> respondent's averment that the petitioners have failed to demonstrate that the respondents has not acted independently or has acted capriciously, in bad faith or abused the legal process in a manner to trigger the High Court's intervention. The 1<sup>st</sup> respondent therefore urged the Court to dismiss the petition with costs.
29. In her submissions on behalf of the respondent, Learned State Counsel Ms. Ombogo submitted that the petitioners had not, as required under the **Anarita Karimi Njeru vs Republic (1976-80) 1 KLR 1272** principle, demonstrated how their rights have been violated. The 1<sup>st</sup> respondent also relied on Article 160 of the Constitution, which provides for independence of the judiciary, to counter the petitioners' allegation that they will not receive a fair hearing.
30. With respect to the allegations by the petitioners that the charges were defective, the response from the 1<sup>st</sup> respondent is that this does not interfere with the substance of the charge, relying in support for this proposition on the decision in **William S. K Ruto vs AG Civil Suit No 1192 of 2005**.
31. It was also the DPP's submission that the petitioners had not shown that the DPP, in making the decision to prosecute them acted in excess of their powers. Further, that the accuracy and correctness of the evidence can only be assessed by the trial court. Counsel further relied on section 193A of the Criminal Procedure Code in response to the allegation that there were pending civil proceedings to submit that the existence of such proceedings is not a bar to criminal prosecution.
32. In the 1<sup>st</sup> respondent's view, granting a permanent injunction as prayed by the petitioners should only be done in exceptional cases, and in his view, this petition is not exceptional. The DPP therefore urged the Court to dismiss it with costs to the respondents.
33. The 2<sup>nd</sup> respondent, the Attorney General, did not participate in the hearing of the matter.

## **Determination**

34. I have read and considered the pleadings and submissions of the parties in this matter. The sole issue for consideration, in my view, is whether there has been a violation of the petitioners' rights under the Constitution. In his submissions in reply to the submissions by the 1<sup>st</sup> respondent, Mr.

Gaturu, Counsel for the petitioners, submitted that they were alleging violation of Articles 49 and 50 of the Constitution.

35. The petitioners have relied on various decisions of the Court to support their contention that the Court should grant conservatory orders prohibiting their prosecution. They rely on the case of **Ronald Leposo Musengi vs DPP-Petition No. 436 of 2014**, in which Odunga J found that to prosecute the petitioner after three years, and after assuring him that no prosecution was forthcoming, was unjustifiable.
36. They further rely on **Josephine Akoth Onyango & Another vs DPP High Court Petition No. 471 of 2013 and CACA N. 56 of 2012-Commissioner of Police & AG vs KB Limited, David Kiprop Sang, Muiru Coffee Estates Limited and Benjoh Amalgamated Limited** to submit that continuing with the prosecution against them will amount to an abuse of the process of the Court. They assert that this is so because one Jonathan Kithusi Nzioka, who signed the agreements for sale with the petitioners, has been left out of the prosecution.
37. The petitioners further submit that saving the 2<sup>nd</sup> petitioner's life, on the basis that he has suffered a massive stroke and is at risk of imminent death if the prosecution continues, is a good reason for the prosecution to be stayed.
38. The petitioners have alleged violation of Article 49 and 50 of the Constitution. Article 49 sets out the rights of arrested persons as follows:

**49. (1) An arrested person has the right—**

**(a) to be informed promptly, in language that the person understands, of**  
—

**(i) the reason for the arrest;**

**(ii) the right to remain silent; and**

**(iii) the consequences of not remaining silent;**

**(b) to remain silent;**

**(c) to communicate with an advocate, and other persons whose assistance is necessary;**

**(d) not to be compelled to make any confession or admission that could be used in evidence against the person;**

**(e) to be held separately from persons who are serving a sentence;**

**(f) to be brought before a court as soon as reasonably possible, but not later than—**

**(i) twenty-four hours after being arrested; or**

**(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;**

**(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and**

**(h) to be released on bond or bail, on reasonable conditions, pending a**

*charge or trial, unless there are compelling reasons not to be released.*

*(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.*

39. The petitioners' complaint with regard to this Article is that the 3<sup>rd</sup> petitioner was arrested at 6:00 am on Friday the 22<sup>nd</sup> day of January 2016 at his house, and was never presented to Court for plea until the 25<sup>th</sup> day of January 2016. A look at the calendar indicates, as the 1<sup>st</sup> petitioner avers, that 22<sup>nd</sup> of January was a Friday, and that 25<sup>th</sup> January was a Monday. Thus, the 3<sup>rd</sup> petitioner was presented to court within the period prescribed under Article 49, and there is therefore no violation demonstrated.

40. With respect to the 1<sup>st</sup> petitioner, he avers that he was arrested on 22<sup>nd</sup> December 2015, and was presented to court the following morning. While he is aggrieved that he was informed that he was going to make clarifications on some documents and was then arrested, and that he had not been aware that he had been charged in court, I can find no violation of the provisions of Article 49 with respect to him either.

41. The petitioners also allege violation of Article 50. For present purposes, the relevant sub-article is 50(2), which guarantees the rights of accused persons in the following terms:

*(2) Every accused person has the right to a fair trial, which includes the right—*

*(a) to be presumed innocent until the contrary is proved;*

*(b) to be informed of the charge, with sufficient detail to answer it;*

*(c) to have adequate time and facilities to prepare a defence;*

*(d) to a public trial before a court established under this Constitution;*

*(e) to have the trial begin and conclude without unreasonable delay;*

*(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*

....

42. As is evident from the pleadings of the petitioners, their trial has not yet started. As was held in the case of **Julius Kamau Mbugua vs Republic Court of Appeal Civil Appeal No. 50 of 2008**, the rights guaranteed under Article 50(2) are trial related. Should any of these rights be violated in the course of the trial, then the petitioners would be entitled to relief. Such relief, however, is in the form of damages: it does not amount to a right not to be tried. As the court stated in the **Julius Kamau Mbugua** case:

*“Had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised if by the time an accused person makes an application to the court, the right has already been breached and the right can no longer be enjoyed, secured or enforced, as is invariably the case....”*

43. That being the case, this Court cannot prohibit the prosecution of the petitioners unless they are able to show that the prosecution is indeed an abuse of the court process.

44. It must be observed that the decisions in which the Court has prohibited prosecutions have circumstances which clearly illustrate that for the prosecution to proceed would be an abuse of the Court process. This is certainly so in the case of **Githunguri vs Republic**, as well as that of **Ronald Musengi vs DPP**. In the case of **George Joshua Okungu and Another vs Chief Magistrate Court Anti-Corruption Court Nairobi and Another**, **Petition Nos 227 & 230 of 2009**, the Court observed as follows:

*[77.] "Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable."*

45. I am unable to find in this case any circumstances that would justify the prohibition of the prosecution of the petitioners. In relation to the facts which they have sought to present in this case, those are matters for the trial court, and the petitioners are at liberty to present them in their defence. As the Court (Warsame J (as he then was)) observed in the case of **Michael Monari & Another vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011**:

*"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."*

46. With respect to the alleged defects in the charge sheet, that is also a matter that is within the mandate of the trial court, which has power to allow amendment thereof if need be.

47. With respect to the allegation that there has been discriminatory prosecution, as this Court observed in the case of **Hon James Ondicho Gesami vs The Hon. Attorney General and 2 Others**, **Petition No 376 of 2011**:

*[68] "The petitioner also argues that there has been failure of legal process and discrimination against him as he has been singled out for prosecution yet under Section 23(1) of the CDF Act, the Member of Parliament is only one member and should not be singled out for criminal prosecution. He also argues that such failure of legal process is manifested by his prosecution for the same offence that he is a witness to in Nyamira Criminal Case No 190 of 2011 Republic v Gilbert Ateyi Onsomu.*

*[69] With respect, I do not find anything discriminatory in the preferment of criminal charges against the petitioner. The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mugirango Constituency be prosecuted for alleged misappropriation of funds unless there was*

*evidence against them.*

*[70] Further, the existence of criminal charges in the Nyamira court against another accused person and the fact that the petitioner may be a witness in that case does not in itself render the charges against him in the Kisumu court unlawful. I would agree with the respondents in their submission that in law, it is possible for accomplices to be charged jointly or severally without violating any law.” (Emphasis added)*

48. Similarly, in *Joshua Kulei and 5 Others vs Attorney General and 4 Others* Petition No. 66 of 2012, the court made the observation that:

*“[90] I am certain therefore that there cannot be discrimination arising from the fact that the Police in their investigation and decision to charge, did not take action against other persons whom the Petitioner deems should have been taken action against. It is not in the place of the Petitioner to decide who should be charged or not. The AG and now the DPP have the discretion to prefer charges against any person in respect of whom they find sufficient evidence to prefer charges and omissions to charge individuals persons perceived by the Petitioners as co-accused persons is not fatal to the criminal proceedings against him neither is it discriminatory.”*

49. In *Godfrey Mutahi Ngunyi vs Director of Public Prosecutions and 4 Others*, Petition. No. 428 of 2015, the Court, in dismissing a petition seeking to stop the prosecution of the petitioner, observed that:

*[51] “Secondly, the Applicant alleged selective and discriminatory prosecution. The Applicant has however not stated how discrimination comes forth. During oral submissions, I however understood counsel for the Applicant Mr. Conrad Maloba in his endeavour to demonstrate discrimination, to reason as follows. That the Applicant is not the first to make comments or express views, the likes of which he is now being indicted. Others have done so previously and are yet to be charged, including those who posted and re-posted or reacted to the Applicant’s tweets. To the Applicant that amounted to discrimination under Article 27 of the Constitution.*

*[52] I am not aware of any law that dictates that all participants in a twitter trail must be charged together. In the absence too of any specifics and particulars of those selectively not prosecuted, I am not satisfied that the Applicant has, on a prima facie basis, demonstrated any favoritism or discrimination.*

*[53] Besides, the 1<sup>st</sup> Respondent only has the liberty to prefer charges against a party in respect of whom he finds sufficient evidence.” (Emphasis added)*

50. In my view, and as the cases set out above illustrate, it is within the mandate of the DPP to elect whom to prefer charges against, and this Court has no jurisdiction to direct him with respect thereto. More importantly, the decision to prefer charges against one person as opposed to another is not of itself, without more, sufficient to lead to an order of prohibition against a prosecution.

51. The petitioners have also argued that the illness of the 2<sup>nd</sup> petitioner is sufficient reason to stop the prosecution against them. With respect, and while the court does sympathize with the plight of the 2<sup>nd</sup> petitioner, I do not think that this is a tenable argument. The court seized of the matter has the jurisdiction to determine how best to deal with an accused person who is ailing. It is not a basis for issuing prohibitory orders stopping the prosecution of the ill accused person and his co-accused.

52. As for the existence of a civil case, filed by Dubai Bank, I need not reiterate the provisions of section 193A of the Criminal Procedure Code.

53. In the circumstances, I find no merit in this petition. It is hereby dismissed, but with no order as to

costs.

**Dated, Delivered and Signed at Nairobi this 19<sup>th</sup> day of May 2016**

**MUMBI NGUGI**

**JUDGE**

**Mr. Gaturu instructed by the firm of Evans Thiga Gaturu & Co. Advocates for the petitioners.**

**Mr. Ombogo instructed by the office of Director of Public Prosecutions for the 1<sup>st</sup> respondent.**

**No appearance for the Attorney General.**