



**REPUBLIC OF KENYA**

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

**PETITION NO. 1 OF 2015**

**IN THE MATTER OF ARTICLES 22 (1), 157 (6) AND 165 (6) OF THE CONSTITUTION OF KENYA 2010**

**INT HE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OF FUNDAMENTAL FREEDOMS UNDER ARTICLE 50 (1)**

**BETWEEN**

**L K K (Suing as the next friend of**

**J M (Minor))..... PETITIONER**

**AND**

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

**JAMES MUTHENGI.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. J M (hereinafter "*the Petitioner*") is minor studying at [particulars withheld] Primary School. His parents P M K and S K M are said to have passed on in 1999 and 2007, respectively. In or about June, 2013, his next friend, L K K lodged in [particulars withheld] in Meru the Environment and Land Case No.169 of 2013 against, amongst others, Muthengi M'Mwathi Muthigu (hereinafter "the Meru ELC case") claiming ownership on behalf of his late father the property adjacent to land parcel No. South Tharaka/Tunyai [particulars withheld].

2. On 29<sup>th</sup> October, 2013, the Petitioner was arraigned before the Principal Magistrate's Court, Marimanti with the offence of creating a disturbance in a manner likely to cause a breach of peace contrary to Section 95 (1) (b) of the Penal Code. It was alleged that on the 12<sup>th</sup> October, 2013 in Tharaka South District within Tharaka Nithi County, the Petitioner created a disturbance by threatening to shoot James Muthengi Mwathi (the 2<sup>nd</sup> Respondent") with an arrow. The Petitioner denied the charge whereby the case came up for hearing on several occasions but did not proceed. On the said 31<sup>st</sup> January, 2014, the trial court gave the prosecution in that case a final adjournment and directed that the case proceeds on 25<sup>th</sup> April, 2014. On the said 25<sup>th</sup> April, 2014, the matter proceeded whereby the prosecution presented three (3) witnesses and then applied for adjournment to call other witnesses. The court declined to grant the adjournment sought.

3. In declining the adjournment, the court held:-

***"This matter came up for fixing this date on 31/1/14 at that time, the prosecutor had no file. It was in this court that the court gave an order for a last adjournment. I have also noted that, we had to wait for the file to come from Tunyai and this is around 3.30 p.m. It seems that the prosecutor is not serious with this matter. It is true that justice delayed is justice denied. The application for an adjournment bearing in mind the interest of the minor is denied. Case to proceed."***

Upon the court declining the adjournment, the prosecutor applied to withdraw the charges against the Petitioner under section 87 (a) of the Criminal Procedure Code which was allowed by the court. With that, the Petitioner was discharged of the offence. However, on 6<sup>th</sup> May, 2014, the state once again arraigned the Petitioner before the same court for the same offence and for the same facts in Marimanti PM CCr. Case No. 269 of 2014 Republic -vs- J M (hereinafter "the Criminal proceedings.")

4. Aggrieved by that decision, the Petitioner approached this court by way of Petition alleging that the said proceedings relate to land parcel S.Tharaka/Tunyai [particulars withheld] which is the subject of the Meru ELC case and in respect of which the Petitioner had already obtained orders to restrain the father of the 2<sup>nd</sup> Respondent from interfering with it. The Petitioner alleged that the said criminal proceedings were meant to threaten and exert pressure on him to leave the suit property and defeat the civil suit; that his right to fair hearing under Article 50 (1) of the Constitution was in danger of being breached if the said proceedings were continued with and that the criminal process was not being used for bona fide purposes but capriciously, arbitrarily and unfairly. He therefore sought to, inter alia, permanently stay those criminal proceedings.

5. At the hearing, Mr. Mwanzia learned counsel for the Petitioner submitted that the dominant purpose of the criminal proceedings was to evict the Petitioner from the suit property and thereby assist the father of the 2<sup>nd</sup> Respondent get an upper hand in the civil case; that the disturbance is alleged to have occurred on the suit land where the parents of the Petitioner are buried and there is an injunction in favour of the Petitioner. Counsel submitted that although the 1<sup>st</sup> Respondent is the sole custodian of the power to prosecute, that power is qualified by Article 157 (11) of the Constitution. He further submitted that the said proceedings at Marimanti were contrary to public interest and the interests of justice; that the Petitioner's right to fair judicial process has been breached and that the dispute having arisen from the act of grazing goats on the disputed land, the proper arena was in the Meru ELC case. Counsel relied on the cases of **Musyoki Kimanthi .v. A.G & 2 Others (2014) eKLR, Patrick Kinyua Munyito .v. R & Anor H.C Misc.251 of 2011 (VR) and the Anarita Karimi Case [1979] eKLR.**

6. The state opposed the Petition through the Replying Affidavit of Henry Namada sworn on 9<sup>th</sup> November, 2015. The Deponent swore that the Petition lacked merit, was an abuse of the court process and fatally defective; that the prosecution applied to withdraw the original criminal proceedings because the investigations officer was bereaved; that the 1<sup>st</sup> Respondent was entitled in law to re-institute the subject criminal proceedings under Article 157 (6) of the Constitution and section 87 (a) of the Criminal Procedure Code; that the aforesaid proceedings did not breach any law or legal principle. He further swore that since the Petitioner's act was criminal in nature. The existence of the civil case was no bar to the said proceedings. He denied that the proceedings were commenced with ulterior motive and any nexus between the Meru ELC case and the criminal proceedings. He contended that there should be a balance between the right of the complainant in the criminal proceedings and those of the Petitioner.

7. At the hearing, Mr. Ongige appearing for the Respondents submitted that the Meru ELC case does not disclose the Petitioner as a beneficiary; that the disputed land is not the subject matter of the case facing the Petitioner; that there was no evidence to show that the Petitioner was a minor; that section 87 (a) permitted the action taken by the 1<sup>st</sup> Respondent; that the order made in the Meru ELC case does not mention or relate to the 2<sup>nd</sup> Respondent and that the petition falls foul with the holding in the **Anarita Case** in that, it does not specify under what provisions of the constitution it has been brought and specific rights of the Petitioner that have been breached. He

urged for the dismissal of the Petition.

8. In rejoinder, Mr. Mwanzia clarified that there was a typographic error in paragraph 7 of the plaint in the Meru ELC case which had referred the Petitioner to as J M instead of J M; that this fact had not been denied in the Replying Affidavit and that the prosecution was aware of the existence of the Meru ELC case through cross-examination by PW1 in the criminal proceedings, counsel urged that the petition be allowed.

9. This court has carefully considered the Affidavits on record and the able submissions of learned counsel. The issues that arise for determination are; whether the petition is fatally defective and therefore an abuse of the court process; whether the existence of the Meru ELC case is a bar to the Marimanti criminal proceedings and whether the application has any merit in the light of Article 157 (6) of the Constitution and section 87 (a) of the Criminal Procedure Code to bring and continue the Marimanti PM CCr. Case No. 269 of 2014.

10. Before considering the said issues, I think it is important to determine certain preliminary issues that arose from the submissions of learned counsel. These are whether the Petitioner was a minor; whether the Meru ELC case relate to the Petitioner, and/or concerns the 2<sup>nd</sup> Respondent and whether the suit land in Meru ELC case relate to the criminal proceedings.

11. It was contention of the Respondents that there was no evidence that the Petitioner is a minor; that the Petitioner was not a beneficiary in the Meru ELC case; that the 2<sup>nd</sup> Respondent was not a party in the Meru ELC case and that the land in the Meru ELC case was not the subject of the criminal proceedings. The Petitioner submitted otherwise.

12. In the original charge sheet, the prosecutor indicated that the apparent age of the Petitioner was "Tharaka". In the latter charge sheet that commenced the criminal proceedings the subject of this Petition, the prosecutor outrightly failed to indicate the apparent age of the Petitioner. My view is that, a charge sheet which is the principal document that originates a criminal proceeding should be properly filled. By misleading the court that the apparent age of the Petitioner was "Tharaka" and later fail to make any disclosure, the prosecution was not acting in good faith. The court has seen the court proceedings of 29<sup>th</sup> October, 2013, when the Petitioner took the original plea. He is recorded to have told the court that he was a student at [particulars withheld] Primary School. The court confirmed this fact on 25<sup>th</sup> April, 2014 when it rejected the prosecution's application for adjournment by holding that the Petitioner was a student in a primary school and that he was a minor. Accordingly, on the basis of the evidence on record, the court is satisfied that the Petitioner is a minor.

13. As regards the Petitioner's position in the Meru ELC case, the Respondents did not dispute the facts deponed to in the Affidavits by L K K to the effect that the Petitioner was one of the beneficiaries. In this regard, I will accept the explanation by Mr. Mwanzia that the reference in paragraph 7 (d) of the plaint produced as "LKK3" to J M was a typo error and that it was meant to refer to J M, the Petitioner herein. As regards the allegation that the 2<sup>nd</sup> Respondent is not a party in the Meru ELC case and that the land in dispute is not a subject matter of the criminal proceedings, the answer is contained in the proceedings in the **Marimanti PMC Cr. Case No.594 of 2013 Republic- .v. J M** and the order made in the Meru ELC case on 8th April, 2014. In his testimony, the 2<sup>nd</sup> Respondent told the court as follows:-

***"On 21/10/13, at about 10.00 a.m, I was looking after my goats next to my shamba..... the problem is about that piece of land it belongs to the accused person..... it is true that we have a conflict with him over the piece of land..... There is a case which the (sic) of the accused person has filed at High Court refer to court H.C 169/13 in High Court Meru..... The case involves a piece of land which is in 107 of my father."***

14. In its order of 8<sup>th</sup> April, 2014, the ELC Court, Meru ordered, inter alia:-

**"3 THAT there do issue temporary orders of injunction restraining the 1st Defendant, their agents, servants, employees and whomsoever acting on their behalf or instructions from entering, selling alienating, evicting, destroying crops, cutting trees, trespassing or in any way dealing with land parcel NO. SOUTH THARAKA TUNYAI/[particulars withheld]."**

15. In the plaint filed in the Meru ELC case and produced as "LKK3", the Plaintiff therein, suing for and on behalf of the beneficiaries of the estate of the late P M K, alleges that the father of the 2<sup>nd</sup> Respondent had fraudulently annexed the property belonging to the deceased and which was adjacent to property No. South Tharaka/Tunyai [particulars withheld]. In my view, taking the contents of the plaint and the testimony of the 2<sup>nd</sup> Respondent before the trial court into consideration, one cannot fail to see that the land in dispute, wherein the alleged disturbance took place which the 2<sup>nd</sup> Respondent himself referred to as belonging to the Petitioner, is one and the same in respect of which the court in the Meru ELC case made on 8<sup>th</sup> April, 2014, restrained not only the father of the 2<sup>nd</sup> Respondent, but also his agents or others acting on his behalf. I believe as a son of the 1<sup>st</sup> Respondent in the Meru ELC case, although not a direct party, the 2<sup>nd</sup> Respondent in this Petition has an interest in the outcome in the Meru ELC case. In this regard, all the said objections by the Respondents are hereby rejected. Let me now address the main issues.

16. The first issue was that the Petition was fatally defective as it fell short of the requirements of the **Anarita Karimi Case** (supra). Firstly, this court entertains doubt if the **Anarita Karimi Case** is still good law having in mind the coming into operation of our robust liberal and rights friendly 2010 Constitution. That case was decided in the light of the 1969 Constitution which strangely expressed the bill of rights in negative terms. That is not the case with the 2010 Constitution. The court in the **Anarita Case** interpreted the law i.e constitution reference in a very restrictive manner. I doubt whether that case can stand in the face of Articles 22 sub-article 3 (a) (b) and (d) and Article 159 (2) (d) of the Constitution of Kenya 2010. In my view, it is the duty of the court before which an allegation of breach of the fundamental freedoms and rights is made to seek to discover the same from material presented before it. Unless the allegations are made. So in an incoherent manner, that the same cannot be pinned on my fundamental freedom or right known under Chapter 4 of the Constitution, no court should peremptorily reject a Constitutional petition alleging breach of or violation or threatened breach or violation of a fundamental right or freedom. I believe this duty arises from the dictates of Article 159 (1) of the Constitution which decrees that judicial authority has been donated by the people of Kenya to the courts. In this regard, my view is that in the exercise of that power, the court should not do so restrictively but liberally with a view to remedy any breach of such a right if it is revealed in the pleadings filed before it by a party.

17. If I am wrong on the foregoing, which I believe I am not, the **Anarita Karimi Case** held that an Applicant must set out with a **reasonable degree of precision** that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be breached. In the present case, the petition states that the Petitioner's right to fair hearing under Article 50 (1) was in danger of being infringed. That the recharging of the Petitioner was the manner of such breach. In my view, the right allegedly being infringed was disclosed, the provision was set out in paragraph 12 of the Petition and the manner of infringement was clearly stated in the Affidavits sworn in support of the Petition. In this regard, the court finds that the Petition was not defective in any manner whatsoever.

18. The second issue was whether the existence of Meru ELC case, which is a civil proceeding, is a bar to the criminal proceedings. Section 193 'A' of the Criminal Procedure Code provides:-

**"193 A Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."**

From the foregoing, it is trite that the fact that the issue of the land in the Meru ELC case is a subject matter in the criminal proceedings is not a bar in itself to the Respondent's pursuing the said criminal proceedings against the Petitioner. In this regard, this court agrees with Mr. Ongige that the mere existence or pendency of the Meru ELC case can not per se be a bar to the impugned criminal proceedings.

19. The last issue was whether by virtue of Article 157 (6) of the Constitution and Section 87 (a) of the Criminal Procedure Code, the 1<sup>st</sup> Respondent was in order in re-instituting the Marimanti PMC Cr. Case No. 259 of 2014. Article 157 (6) provides:-

**“6 The Director of Public Prosecutions shall exercise state powers of prosecution and may-**

**c) Subject to clause (7) and (8), discontinue at any stage before Judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”**

20. On the other hand, section 87 of the Criminal Procedure Code provides:-

**“ 87. In a trial before subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from prosecution of any person, and upon withdrawal.”**

**(a) If it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;**

From the two provisions aforesaid, it is clear that the 1<sup>st</sup> Respondent has wide powers in the institution, prosecution and discontinuance of criminal proceedings within the Republic. The only fetter is to be found in Article 157 (11) of the Constitution. That sub-Article provides:-

**“11 In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.”** (underlining mine).

21. The question for determination therefore is, whether in the circumstances of this case, the fetter in sub-article 11 of the Constitution is applicable. Before answering this question, it will be in order to review some of the instances when the powers of the 1<sup>st</sup> Respondent under Article 157 (6) have been challenged.

22. In *Musyoki Kimathi .V. Inspector General of Police & 2 Others [2014] eKLR*, after setting out the provisions of Article 157 (4) (6) and (11) of the Constitution, Majanja J held:-

***“In light of the mandate conferred upon the DPP in Article 147 (sic) of the Constitution, the High Court therefore ought not to interfere with the above mandate unless cogent reasons are given thus, that the DPP has acted without due regard to public interest, against the interest of the administration of justice and has not taken account of the need to prevent and avoid abuse of the court process. Although the D.P.P. has the discretion to determine which complaint should lead to criminal prosecution, the High Court may intervene where that discretion has been abused or where the effect of the proceedings results in the abuse of the court process.”***

23. In *John Muritu Kigwe & Anor.v.The A.G & Anor HCCC No. 223 of 2000* (UR), Rawal J, as she then was, delivered herself thus:

***“ Over the period this court has established a well considered dictum of law to govern this kind of application. It is to find out what is the predominant purpose in the institution and prosecution of criminal proceedings. If the predominant purpose of the other party in using the***

***legal process has been one other than that for which it is designed the court will intervene.”***

24. In Vincent Kibiego Saina .v. A.G HC Misc. Application Nos. 839 & 1088 of 1999, Kuloba J held that, if criminal proceedings are instituted with the intention of achieving:-

***“Some collateral underserved advantage beyond that which the law properly offers, or if they result in exerting pressure to effect an object not properly within the scope of the process of the law and the judicial system, the court will prevent such proceedings being commenced or continued.”***

Finally, in Samuel Kamau Macharia & Anor.v. AG & Anor, H.C Misc, Application No.356 of 2000 (UR), a three bench of this court, Mwera, Mitey and Rawal JJ, as they then were, terminated criminal proceedings upon finding out that the same was being used to exert pressure upon the applicants to settle two (2) civil cases. They resoundly held that:-

***“ the prosecution of the applicants was an abuse of the criminal process of the court; that the prosecution of the applicants amounts to harassment is contrary to public policy....”***

25. From the foregoing, it is quite clear that the powers of the DPP under Article 157 (6) of the Constitution is not absolute. The exercise of his discretion therein can be fettered once it is found that it is not being exercised properly. The general principle is that courts should not readily interfere with the exercise of the power given to the DPP under Article 157 (6) of the Constitution. The court will however, interfere if the DPP acts without due regard to public interest, against the interest of the administration of justice or its exercise will amount to an abuse of the court process, or its exercise is abused. Some of these instances are where the criminal proceedings are brought for other purpose other than that which the legal process is meant for; where the proceedings are meant to exert pressure on an Applicant to effect an object not properly within the scope of the legal process like to settle or defeat a civil process amongst others. I will also add that if the criminal proceedings are commenced, continued or discontinued against the law or public policy, the court will readily interfere with the DPP’s exercise of his powers under Article 157 (6). Of course, each case will be dealt with according to its own peculiar circumstances.

26. The Petitioner’s contention was that his right to a fair hearing under Article 50 (1) was in danger of being breached if the criminal proceedings against him were continued with; that the commencement and prosecution of the said proceedings was meant to put pressure on him to vacate from the suit property and thereby grant the 2<sup>nd</sup> Respondent’s father advantage in the Meru ELC case. I have already found that the Petitioner has an interest in the Meru ELC case as the same is brought for his benefit. I have also found that the 2<sup>nd</sup> Respondent has an interest in the outcome of the Meru ELC case in that in the event his father succeeds, he also stands to benefit. Indeed he told the trial court that the land belonged to the Petitioner and there was a bitter dispute between the Petitioner and his father with regard to that land. That notwithstanding however, it was not clear from the Petitioner’s submissions how the continuing of the criminal proceedings against him would negatively impact the Meru ELC case. Indeed, it was not suggested that the said proceedings were meant to put pressure on the Plaintiff in the Meru ELC Case either to compromise the said case or settle the same. In any event, although the Petitioner has an interest in the Meru ELC case, he is not the Plaintiff therein. There are six (6) other interested persons like him. In this regard, it was not clear to the court how the said proceedings were meant to lead to his eviction from the suit land.

27. Be that as it may, the court noted that although the alleged offences occurred on 12<sup>th</sup> October, 2013, the case came up for hearing on several occasions when the prosecution was not ready. On 8<sup>th</sup> April, 2014, the Environment and Land Court in Meru made an order that restrained the 2<sup>nd</sup> Respondent’s father and his agents and servants from interfering with the land in dispute. On 25<sup>th</sup> April, 2014, the 2<sup>nd</sup> Respondent told the court that the Plaintiff in Meru ELC case sought to have his father jailed for disregarding the order of 8<sup>th</sup> April, 2014. This court notes that after the

order 8/4/2014, the prosecution was ready to proceed with the prosecution.

28. On the second ground, the Petitioner contended that his right to a fair hearing would be breached if the DPP was allowed to continue the said criminal proceedings. As already noted, before 31/1/2014, the case had come up severally but for various reasons, the prosecution was unable to proceed with the same. This prompted the court to make a final order of adjournment on 31/1/2014. When the matter came up for hearing on 25/4/14, the prosecution delayed in having the matter commence as the police file delayed from Tunyai Police Station. The prosecution paraded three (3) witnesses and then applied for adjournment. The record shows that at the time, there was no reason given by the prosecution for the adjournment and the court declined the same. The prosecution has now attempted to give the reasons of the adjournment in Mr. Namada's Replying Affidavit as being the bereavement of the investigation officer.

29. In declining the adjournment, the trial court noted that the Petitioner was a minor; the case had come up severally and the prosecution seemed lethargic in proceeding until a final order of adjournment was made on 31/1/14. Faced with court's tough stand to protect the minor's rights, the prosecution opted to withdraw the case under section 87 (a) of the C.P.C. They now argue that both the Constitution and the law (S 87 (a) of the C.P.C) allows the DPP to reinstitute the criminal proceedings. One of the Constitutional tenets of a fair hearing is that one's case should begin and be concluded without unreasonable delay as set out in Article 50 (2) (e). In rejecting the adjournment sought, the trial court considered that the Petitioner's right as a minor was being infringed by adjourning the matter. Public policy and public interest demands that the law should be upheld by public officers and public bodies. Section 186 (c) of the Children's Act, Chapter 141 Laws of Kenya provides:-

***“186 Every child accused of having infringed any law shall-***

***(c) have the matter determined without delay.”***

30. This court takes cognizance of the fact that the trial court was mindful that there had been delay in the prosecution of the previous proceedings. That is why the court not only gave a last adjournment order but also denied the adjournment sought on 25<sup>th</sup> April, 2014. To this court's mind, it must not have been the intention of the framers of our law that by enacting S 87 (a) of the C.P.C, the DPP was being granted a Cart Blanche licence to terminate and re-institute criminal proceedings against accused persons at his whims. The intention and spirit of S 87 (a) of the C.P.C in my view, is to allow the DPP to take advantage of the same for the ends of justice. For example, it is meant to allow the DPP to withdraw a case where there is no sufficient evidence; Once the DPP ties the loose ends of the case, he can then re-institute the same. To allow the DPP to terminate a criminal trial in order to defeat an order or denial of an adjournment by exercising his discretion under Section 87 (a) of the CPC is an abuse of the criminal process. That is against public policy and public interest. Already the trial court had made a finding that the Petitioner's rights had been affected or breached by the delay in the prosecution of his case. He is accused of an offence allegedly committed in October, 2013, three (3) years ago. Allowing the D.P.P to pursue the re-instituted case will be to allow him to perpetuate the delay that the court had already frowned at and had sought to bar by denying the adjournment of 25/4/2014. Clearly, the DPP is seeking to exercise that power in bad faith and against the administration of justice.

31. Accordingly, I am satisfied that the Petitioner has satisfied this court that the petition has merit. I allow the Petition as prayed.

**DATED and Delivered at Chuka this 23<sup>rd</sup> day of June 2016**

**A. MABEYA**

**JUDGE**

**Judgment read and delivered in open court in the presence of the Respondent absence of the Petitioner's counsel. Date have been given in court.**

**A. MABEYA**

**JUDGE**

**-+23/6/2016**