



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.357 OF 2013**

**BETWEEN**

**ISAAC MATHENGE MWANIKI.....PETITIONER**

**AND**

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

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

**IRENE MUTHONI MURICHU.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. Isaac Mathenge Mwaniki, the Petitioner herein, is the accused person in **Kangundo SPM Court's Criminal Case No.284 of 2013** where he is charged with the offence of obtaining by false pretences contrary to **Section 313** of the **Penal Code**. It is alleged on 13<sup>th</sup> October 2003 he falsely pretended that he was in a position to sell six plots of land at Mavoko Town being Block 20/460, 461, 494, 495, 534 and 535 to Irene Muthoni Muruchi, the 3<sup>rd</sup> Respondent.
2. By the Petition dated 10<sup>th</sup> July 2013, he has sought the following orders;

***“(a) A declaration that the Respondents have contravened the Petitioner’s rights under Articles 27, 29, 31, 47, 48, 49 and 157(6) of the Constitution.***

***(b) An order that the criminal proceedings in Kangundo Criminal Case No.284 of 2013, Republic vs Isaac Mathenge Mwaniki be stayed permanently.***

***(c) As an alternative to 3 above, an order of certiorari do issue to remove from the Kangundo Criminal Case No.284 of 2013, Republic vs Isaac Mathenge Mwaniki and bring to this Honourable Court for quashing the charges preferred against the Petitioner. (sic)***

***(d) An order of prohibition stopping the prosecution of the Kangundo Criminal Case No.284 of 2013, Republic vs Isaac Mathenge Mwaniki. (sic)***

(e) *That the cost of this Petition be provided for.*

(f) *Any other orders that this Honourable Court may deem fit to grant.”*

### **Petitioner’s case**

3. From his Petition, Supporting Affidavit sworn on 10<sup>th</sup> July 2013 together with its annexures, Further Affidavit sworn on 28<sup>th</sup> may 2014, and Submissions filed on 4<sup>th</sup> July 2014, the Petitioner has urged the point that his prosecution ought to be quashed because its continuation would not serve the administration of justice at all.
4. He also stated that on the facts, he admits that on 13<sup>th</sup> October 2003 he had entered into a sale agreement with the 3<sup>rd</sup> Respondent and it was agreed that he would sell and she would buy the above mentioned parcels of land. Since the lands were charged to Barclays Bank to secure a loan he had taken, upon receipt of the purchase price, he paid off the loan and discharged the titles. He thereafter procured all necessary documents to ensure a smooth transfer to the 3<sup>rd</sup> Respondent but the latter disappeared until the year 2011 when she resurfaced and refused to renegotiate the transaction. That they mutually resolved to have a refund of the purchase price but she later reneged on that agreement and instead caused the arrest and prosecution of the Petitioner.
5. It was his also contention that in the circumstances, his rights under **Article 48** (to access to justice) and his right to the protection of the law, have been impeded as the Respondents have used the criminal process to coerce him to settle a non-contractual obligation as well as to settle a civil dispute.
6. He has further claimed at paragraphs 38-40 of his Petition that his rights under **Articles 27, 29, 31(a), 47,49(10(a)(b)(c)(d)** have similar been violated. At paragraphs 3-13 of the Petition, the rights enshrined in these Articles have been summarized but I should state that their application and import to the present dispute have not been given. I also note that in his submissions, Mr. Thuku did not address those Articles at all. I will revert to my findings in such a situation later.
7. In addition to the above, Counsel for the Petitioner submitted that the dispute between the Parties should be tried and ventilated in a civil Court rather than a Criminal Court. That where therefore a remedy lies elsewhere in law, a party ought to pursue that remedy and on that proposition he relied on the decision in **R vs Commissioner of Police ex Parte Tarus & Co Advocates [2003] KLR 582**.
8. Further, relying on the decision in **Musyoki Kimanathi vs Inspector General of Police, Petition No.442 of 2013**, he submitted that where the Director of Public Prosecutions abuses his discretion to institute criminal proceedings, the High Court ought to interfere. That the same principle was applied in **Rosemary Wanja Mwangiru & 2 Others vs AG & 3 Others, Petition No.165 of 2011**.
9. On the issue of alleged delay in commencing the prosecution against the Petitioner, Mr. Thuku submitted that by doing so more than ten years after the contract between the Parties, the DPP acted with ulterior motive and not in the genuine pursuit of a criminal. In that regard, he relied on the decisions in **Josephine Akoth Onyango vs DPP, Petition No.471 of 2013** and **George Joshua Olongu vs Chief Magistrate’s Court & 20 Others, Petitions Nos.227 and 230 of 2009** to make the point that such an action amounts to abuse of the process of the Court and this Court can terminate the criminal case against the Petitioner.
10. For the above reasons, the Petitioner seeks orders elsewhere sought above.

### **1<sup>st</sup> Respondent’s case**

11. The 1<sup>st</sup> Respondent in response to the Petition filed a replying Affidavit sworn on 10<sup>th</sup> October

2013 by No.80524 P.C Simon Wanjohi Muchuri, the Investigating officer in the criminal case aforesaid. In that Affidavit, he deponed that upon the 3<sup>rd</sup> Respondent making a complaint to his superior, SP Erastus Gichuhi, he was directed to investigate that complaint.

- 12.He initially took a preliminary statement from the 3<sup>rd</sup> Respondent, asked her to obtain searches relating to the parcels of land in question and upon his own investigations, he decided to charge the Petitioner with the offence of obtaining by false pretences because he had reason to believe **“that the Petitioner obtained money by false pretences by failing to transfer the suit property to the complainant as agreed and further by proceeding to sell the two said plots and charging one plot to secure a loan”** and that the evidence he had gathered was sufficient to support a prosecution.
- 13.He further deponed that no constitutional rights have been shown to lead to a conclusion that such rights have been violated and that by dint of **Article 157(6) and (10) of the Constitution**, the DPP is empowered to institute and undertake criminal proceedings against any person in respect of an offence alleged to have been committed after investigations have been lawfully conducted. That under **Article 157(11)** it is also in the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process that such prosecution should be conducted.
- 14.Lastly, that the fact that the dispute in issue may have civil law elements does not mean that concurrent proceedings in criminal law, by dint of **Section 193A of the Criminal Procedure Code**, cannot be undertaken.
- 15.The 1<sup>st</sup> Petitioner, for the above reasons, seeks that the Petition herein be dismissed with costs.

### **3<sup>rd</sup> Respondent’s case**

- 16.The 3<sup>rd</sup> Respondent filed a Replying Affidavit sworn on 20<sup>th</sup> March 2014 while written submissions were filed by her Counsel on 31<sup>st</sup> July 2014. Her case is simply that the prosecution against the Petitioner was warranted by his own conduct which led her to make a complaint to the police who upon investigating that complaint decided to charge the Petitioner with the offence of obtaining by false pretences.
- 17.In her Affidavit aforesaid, she gave a chronology of events starting from the time she was introduced to the Petitioner by her brother-in-law, Daniel Wanyoike Gatoto in 2003, and the subsequent discussions leading to the conclusion of a sale agreement in respect of the land parcels elsewhere mentioned above.
- 18.She deponed further that having done all that she was required to do under the agreement and having signed all necessary documents to enable transfer of the titles to her, she was surprised when the Petitioner and her brother-in-law both became slippery and the latter also started avoiding her. After a lull, she visited the plots in 2013 and noticed that the fence she had erected had been pulled down and two plots had been fenced afresh. She then made a report to the police and upon investigations, the Petitioner was arrested and charged with the offence of obtaining by false pretences.
- 19.It is her further case that the Petition is an abuse of Court process and she is entitled to protection from the Petitioner’s actions.
- 20.In submission, her Counsel submitted that there was no delay in prosecuting the Petitioner because the 3<sup>rd</sup> Respondent only realized that there was trespass into her property in 2013 and she immediately took action as did the police.
- 21.That for the ten preceding years, the 3<sup>rd</sup> Respondent had waited, patiently, for the Petitioner to

transfer the plots to her, having taken possession of the same and the Petitioner cannot now benefit from his own unlawful actions.

22. Relying on the decision of Mulwa J in **Kuria & 3 Others vs AG (2002) 2 KLR 69**, Counsel added that for an accused person to stop on-going criminal proceedings, he ought to establish that the criminal proceedings were commenced with malice, in excess or want of authority, harassment and/or intimidation which factors do not exist in the present case.

23. For the above reasons, the 3<sup>rd</sup> Respondent prays that the Petition be dismissed with costs.

### **Determination**

24. Elsewhere above I indicated that although loosely pleaded, **Articles 23, 27, 29, 31, 47 and 49** of the **Constitution** also feature in prayer (a) of the Petition. **Article 23** as read with **Article 165** to the extent that it grants this Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights is relevant to the present Petition. **Article 27** deals with freedom from discrimination. How it applies to the present Petition was a question that the Petitioner and his Counsel failed to tell this Court. Similarly, **Article 29** on freedom and security of the person, **Article 31** on privacy, **Article 47** on fair administrative action and **Article 49** on rights of arrested persons received no attention at all from the Petition. In dismissing all claims under those Article, I will only cite the oft-quoted statement in **Annarita Karimi Njeru vs Republic (1976-1980) 1 KLR 14**, that a party alleging violation of fundamental rights and freedoms is expected, at the very least, to state with a measure of particularity (not necessarily mathematical precision), the right allegedly violated, the manner of such violation and the remedy sought. The allegations with regard to **Articles 27, 29, 31, 47 and 49** of the **Constitution** do not meet that test and are dismissed.

25. That then leaves me with only **Article 48** of the **Constitution** to address as well as the powers of the DPP to institute criminal proceedings against the Petitioner. **Article 48** provides as follow;

***“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”***

26. I am at a loss as to how this Article either applies to the Petition before me or in any case in which a person has been arrested and is facing criminal charges such as the Petitioner. How has his right to access justice been impeded? In his Petition, he claimed at paragraph 34 as follows;

***“Under Article 48 guarantees the Petitioners enjoyment of the right to access to justice and not to be impeded in the exercise of the right to the protection of the law. The Petitioners contend that-***

- i. ***The use of the criminal process to compel a citizen to settle a civil dispute, as dictated by the complainant in a criminal case, is not only an abuse of the criminal, a process but also a contravention of the Petitioner’ right under Article 48 of Access to justice;***
- ii. ***The use of criminal or civil process to coerce the Petitioners to settle non-contractual obligations is a contravention of the Petitioners’ right of access to justice under the said Article 48.”***

27. How then can above averments be said to form the basis for a complaint under **Article 48**? Access to justice, as I understand it, is both the right to access Courts and litigation and the much broader right to the protection of the law and that rights are meaningless and worthless unless they be enforced by Courts such as this one as well as other bodies with an obligation to do so. The importance of this right was well captured by Italian jurist Macro Capallet, who in the 1970s directed a research funded by the Ford Foundation, on **“Access to Justice in Modern Societies”** said;

***“The right to ‘effective’ access to justice has emerged with the new social rights. Indeed it is of paramount importance ...Effective access to justice can be seen as a basic requirement, the most basic human right of a system that guarantees legal rights.”***

28. I am persuaded by the above statement but it is obvious to me that the Petitioner should have pegged the substance of his Petition on **Article 49** (rights of arrested persons) and **Article 157(11)** (powers of the DPP – which he has done) and not **Article 48** *per se* which I am certain does not apply in any specific sense to his predicament.

29. The above then would lead me to the only other issue to be determined;- whether the DPP exercised his powers lawfully in deciding to prosecute the Petitioner. In addressing that issue, not being the trial Court, I will steer clear of any attempt at determining any aspect of the merits of the criminal case. I say so because all the parties spent considerable energy justifying why either the case is so weak as to be incapable of being sustained or so strong that it must lead to a conviction.

30. **Article 157(11)** provides as follows;

**“(11) In exercising the powers conferred by this Article, the**

***Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”***

31. The above provision must be read with **Article 157(10)** which provides as follows;

**“(10) The Director of Public Prosecutions 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.”**

32. What is the Petitioner’s compliant as regards the powers of the DPP to prosecute any suspected offender under **Article 157(6)** as read with the above Articles?

33. In my reading of the pleadings and submissions, only two issues emerge;

- i. That the prosecution was mounted to settle scores in a purely civil dispute.
- ii. That the delay in commencing the prosecution is inexcusable.

34. On the civil aspect of the dispute, the law is clear on the subject. **Section 193A** of the **Criminal Procedure Code** provides as follows;

***“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.”***

35. In upholding the above provision, the High Court has variously held that this is not an idle provision and the Court can only ignore it if it is obvious that the dispute is purely civil and has no criminal element in it.

36. In the context of the present Petition, I am of the firm view that the fact that a contract in civil law exists between the Petitioner and the 3<sup>rd</sup> Respondent does not mean that a criminal element cannot be deduced from relevant facts of that contract and issues surrounding its execution and implementation. It is also my view that the Petitioner can properly raise that issue as a defence before the trial Court which can then determine it in the context of the whole criminal case. Suffice it to say that I am not prepared to accept the Petitioner’s arguments to the contrary.

37. On the alleged delay in commencing his prosecution, contrary to the DPP's submissions, I understood the Petitioner to be complaining that the sale agreement between him and the 3<sup>rd</sup> Respondent was executed in the year 2003 and yet he was arrested and charged in 2013, ten years hence. In that regard, it is now well accepted that whereas there is no limitation of time for commencement of any criminal proceeding, the decision in **Githunguri vs R [1986] KLR 1** laid down one fundamental principle; that where the power to prosecute is clearly abused, the Court can step in and check/balance that action.

38. In saying so, it is important to note that in **Githunguri**, the circumstances were unique since assurances of non-prosecution had been made and that is why the Court stated thus;

***“We are of the opinion that to charge the Applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the Court will be within a reasonable time as required by Section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General. It was a case which had received notable publicity, and the matter was considered important enough to be raised in the National Assembly.”***

39. The context of any decision to prosecute must therefore be taken into account and so should the need to ensure that every criminal is apprehended and fairly tried by a competent Court. That is why in **Zanzibar vs DPP 2006(2) SACR 45 (SCA)2 all SA 588**, the Court stated thus;

***“The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It also instills public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime ... Clearly, in a case involving a serious offence such as [murder], the societal demand to bring the accused to trial is that much greater and he Court should be that much slower to grant a permanent stay.”***

40. The Court then concluded as follows;

***“Although the time period was central to the enquiry of whether it was unreasonable, the fact of a long delay cannot of itself be regarded as an infringement of the right to a fair trial but must be considered in the circumstances of each case. The accused must show definite and not speculative prejudice.”***

41. I am in agreement with the above reasoning and in the circumstances of the present Petition, the 3<sup>rd</sup> Respondent explained why she chose to complain in 2013 and not sooner. From my reading of the opposing views on that issue, to say that the Petitioner was to blame for the delay in finalizing the transfer of the parcels of land would pre-judge an important component of his criminal trial. To accept his complaint would also prejudice the case against him.

42. The issue in the unique circumstances of this case would best be left for the trial Court to determine if it is minded to do so. Suffice it to say however that I decline the invitation to say that any delay in the commencement of the criminal trial prejudiced the Petitioner at all.

43. In effect, having found no single ground advanced in favour of the Petitioner it follows that the Petition must fail.

## **Disposition**

44. I have said enough to show that the Petition before me has no merit. As regards costs, the Parties

are still embroiled in the criminal process. I see no reason to tax any of them with costs.

45. In the event and for the above reasons, the Petition dated 10<sup>th</sup> July 2013 is dismissed. Let each Party bear its own costs.

46. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Miron - Court clerk

Mr. Thuku for Petitioner

Mr. Murang'a holding brief for Mr. Ndege for 1<sup>st</sup> Respondent

Mr. Kinyua for 3<sup>rd</sup> Respondent

**Order**

Judgment duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**17/9/2015**