



**REPUBLIC OF KENYA**

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

**CR. CONSTITUTION PETITION NO. 1 OF 2015**

**CYRUS NJERU IRERI.....1ST PETITIONER**

**NYAGA KIANYA.....2ND PETITIONER**

***VERSUS***

**REPUBLIC..... RESPONDENT**

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

1. This is the petition dated 3/2/2015 seeking for orders that the respondents appeal be dismissed with costs and that there be a declaration that the respondent lacks the right to prosecute the petitioner under Article 23(3)(a) of the Constitution. The petition is supported by the affidavit of Cyrus Njeru Ileri.
2. In the supporting affidavit, it is stated that the 1<sup>st</sup> petitioner and the complainant one Njeru S. Kathuri had a sale agreement which the complainant later repudiated. The complainant filed two civil suits against the petitioner and caused him to be arrested by the police. The petitioner applied and was issued with an injunction in Embu HCC No. 74 of 2006 restraining the complainant from harassing and arresting him together with his witnesses. The respondent in an act of impunity arrested the petitioner and his witness and put them in remand. The petitioner was charged with fraud while his witness was charged with conspiracy to defraud. The court acquitted the petitioner on grounds that he had no case to answer.
3. The petitioners argue that the prosecution by the respondent was an abuse the due process of the court. On 21/6/2013 after full hearing of the respondent's application to appeal out of time, the court dismissed the application stating that it was not merited. The respondent made another application and the court allowed it. The petitioners state that they was denied their right to a fair trial and that they are entitled to redress for violation of human rights or threat to a fundamental right under article 25 and 50 of the constitution. Article 159 requires that justice be administered without undue regard to procedural technicalities.
4. In a replying affidavit the respondent's counsel stated that the petitioners were charged with the offence of forgery in Embu Cr 1070 of 2010. The court acquitted both petitioners under section 210 of the CPC. The respondent filed an application no 44 of 2011 seeking leave to file an appeal out of time on 4/11/2011 which was allowed.
5. The respondent erroneously filed another application on 26/11/2010 seeking extension of time within which to file an appeal on grounds that the respondents file could not be traced. The application was dismissed by the court. The matter was later taken over by counsel who erroneously filed appeal No. 34 of 2013. The appeal was however withdrawn by a notice dated 5/7/2013. At the time of filing Appeal No. 34 of 2013 as well as the application to enlarge time for filing appeal on 26/11/2012, there was already valid appeals numbers 56 and 57 of 2012 filed earlier by the respondent.

6. The respondent filed another application dated 15/5/20 explaining the errors made by its office which application was allowed on 18/7/2014. In July 2014 the petitioners served the respondents with a notice of appeal dated 31/7/2014 where the petitioners intended to lodge an appeal against the ruling delivered on 18/7/2014.

7. The respondent argues that the petitioners have been involved in the hearings and that there is no violation of human rights to warrant dismissal of appeals 56 and 57 of 2012. The respondent argues that it has a constitutional mandate to prosecute appeals Nos. 56 and 57 of 2011 under Article 157. The respondent dismisses the grounds in the petition as a misrepresentation on the part of the petitioners for the reason that the orders cited emanate from a civil case between the petitioners and the complainant in Criminal case No. 1079 of 2010 where the respondent was not a party.

8. The petition was disposed off by way of written submissions.

9. The petitioners in their submissions stated that on 1<sup>st</sup> petitioner was buying land from the complainant. The petitioner paid the complainant money in consideration but the complainant later denied having received the consideration. The matter of forgery of the agreement and transfer was reported to the police by the complainant. The complainant then filed two civil suits and got the petitioners arrested on false allegations.

10. The petitioners sought for help from the court and the high court on 2/12/2009 issued an injunction restraining the complainant from trespassing the suit land or getting the police to harass the petitioners. The order was duly served on the complainant. The complainant in contempt of the said orders got the petitioners arrested and remanded in custody.

11. The petitioners were then tried in the criminal case and acquitted on no case to answer under Section 210 of the Criminal Procedure Code. Despite this, the DPP appealed against the ruling on no case to answer. The civil cases against the petitioners by the complainant were never prosecuted. The DPP did not appeal within time.

12. The petitioners stated that the 2nd application for extension of time was dismissed. It was agreed that there is no provision for review of an order made under Section 348 of the CPC. Under Article 23(1)(b) of the Constitution, the court has power to deal with an application concerning redress denial, violation and infringement of freedom or right. He cited and attached the authority of **UNITED INSURANCE VS STEPHEN NGARE NYAMBOKI Civil Application No. 295 of 2001 Kisumu** where the court granted stay pending appeal as the appeal would have been rendered nugatory.

13. The Counsel for the respondent submitted that the the respondents appealed after the petitioners were acquitted on no case to answer by the lower court. The respondents filed an application No. 44 of 2011 for leave to appeal out of time. The respondent successfully applied to the court for an order that appeals No. 56 and 57 of 2012 to be deemed as duly filed. The respondent then erroneously filed another application seeking extension of time to file an appeal after the matter was taken over by a different state counsel. The application was dismissed and the appeal No. 34 of 2013 later withdrawn through a notice dated 5/7/2013.

14. The respondent later filed an application dated 15/5/2014 where the state counsel explained the errors which had occurred. The application was allowed by the judge who held that Criminal Appeals No. 56 and 57 of 2012 be deemed as duly filed and served. The petitioners thereafter served the respondent with a notice of appeal with the intention to appeal to the Court of Appeal. The respondent contends that it has a constitutional mandate under Article 157 (6)(a) of the Constitution and also under Section 23(1) of the Director of Public Prosecution Act to prosecute the pending appeals. The orders issued on 2/12/2009 in HCCC No.74 of 2012 prevented the complainant from getting police to harass or arrest the 1<sup>st</sup> petitioner but did not affect the respondent in its independent investigations. The orders were interim orders pending hearing of the main suit. The petitioners did not tell this court the outcome of civil suits Embu HCC 74 of 2006 and Runyenjes SPMCC No. 4 of 2009 both of which are complained of. The respondent further argues that appeals No. 57 and 56 of 2012 have a high chances of success and

should not be dismissed. Further that the petitioner does not indicate which individual rights have been violated by the respondent.

15. The law applicable in this petition is Articles 157(6), 25, 23, 159 of the constitution and section 348 A of the criminal Procedure Code. The petitioners have a right under Article 22 of the constitution to bring a petition of this nature and this court has the mandate under Article 165(3) to determine the petition concerning alleged violation of any right or fundamental freedom.

16. The respondent filed an application dated 15/5/2014 whose ruling was delivered on 18/7/2014. The court set aside the orders extending time to appeal made on 22/3/2012 in Misc. Criminal Application No. 44 of 2011. The court then ordered that leave to file appeals Nos. 56 and 57 out of time be granted and that the petitions be deemed as duly filed and served.

17. The court orders made by Ong'udi, J. have not been set aside by way of either appeal or review and are still in force. The respondent annexed to the replying affidavit annexure CM 8 which is a notice of appeal to the Court of Appeal against the ruling delivered on 18/7/2014. However, it appears that no appeal was lodged despite the filing and serving of the notice.

18. The Appeals No. 56 & 57 of 2012 are against the ruling on no case to answer in CM Criminal case No. 1079 of 2009 delivered on 14/10/2012. The mandate of the respondents to handle criminal proceedings emanates from the following provisions of the law:-

Article 157(6) of the Constitution. The section provides that;

*The Director of Public Prosecutions shall exercise State powers of prosecution and may—*

*(a) 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;*

*(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and*

*(c) subject to clauses (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).*

19. Section 23(1) of the Office of the DPP Act provides that;

*(1) Notwithstanding the provisions of any other law, it shall be the function of the Director to —*

*(a) decide to prosecute or not to prosecute in relation to an offence;*

*(b) institute, conduct and control prosecutions for any offence;*

*(c) carry out any necessary functions incidental to instituting and conducting such criminal prosecutions; and*

*(d) take over and conduct a prosecution for an offence brought by any person or authority, with the consent of that person or authority.*

**20. THUITA MWANGI & 2 OTHERS VS ETHICS & ANTI-CORRUPTION COMMISSION & 3 OTHERS [2013]** eKLR where the court held that;

*The State's prosecutorial powers are vested in the DPP under Article 157 of the Constitution, the pertinent part which provides as follows;*

(6) *The Director of Public Prosecutions shall exercise powers of prosecution and may—*

*a. 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.*

21. Section 348A of the Criminal Procedure code provides that;

*When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law.*

In the case of **REPUBLIC V ROSE ODHIAMBO OMBEWA & ANOTHER [2015] ECLR** the court held that;

*As a matter of information, I wish to draw attention to the fact that during the pendency of these proceedings, Section 348A of the Criminal Procedure Code was amended by the Security Laws (Amendment) Act, 2014. this section now allows the Director of Public Prosecutions to appeal against an acquittal on the basis of fact and law. It provides as follows:-*

*348A. (1) when an accused person has been acquitted on trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.*

23. The issues relating to the duplication of the application to appeal out of time and the filing of a second appeal No. 34 of 2013 (which was later withdrawn) were dealt with in the ruling of Ong'udi, J. in Misc. Criminal Application No. 56 of 2012. In her ruling, the Judge said that when the court was hearing Misc criminal Application No. 44 of 2011, it was not informed that appeals No. 56 and 57 had already been filed and as such the Judge proceeded to make orders allowing the respondent to appeal.

24. In the same ruling delivered on 18/7/2014 the judge observed that Appeals Nos. 56 and 57 had been filed out of time with 6 days. She granted extension of time and validated the petitions of appeal. The appeals were consolidated and are now pending hearing.

25. The petitioners are required to demonstrate in this petition that their rights were violated in the prosecution in Criminal case No. 1079 of 2009. It was argued there was an injunction restraining the respondent from harassing or arresting the petitioners. However, the annexed order issued in HCCC No 74 of 2006 show that the parties were one Njeru S. Kathuri as the plaintiff and 1<sup>st</sup> petitioner as the defendant. The 2<sup>nd</sup> petitioner was not a party to that case and neither was the Director of Public Prosecutions who is the respondent in this case.

26. The said order therefore did not protect the 2<sup>nd</sup> petitioner from being arrested and charged in Criminal case No. 1079 of 2010 since he was not a party. The respondent herein was not a party and could not be affected by the order. In any way If the 1<sup>st</sup> petitioner intended to have the respondent bound by the order he should have an independent suit against the respondent. The suit in which the order was issued was between the complainant Njeru S.Kathuri and the 1<sup>st</sup> petitioner. As such the order issued could only bind or protect the parties in the suit. The orders were actually directed to the complainant.

27. On the allegations that the petitioners rights were violated, the petitioners have not demonstrated which rights were violated or how they were violated. The Criminal trial where the petitioners were represented proceeded to conclusion without the petitioners opposing the trial or instituting a constitutional petition to have the charges quashed. The two were acquitted of the charges and one asking this court to dismiss the appeal. it is not procedural for the petitioners to ask this court to stop the hearing

of the appeal when they did not oppose the criminal trial.

28. As I have said earlier, the respondent has a right of appeal against a ruling of no case to answer. The respondent acted within his mandate under Article 157(6) in prosecuting the petitioners. The prayers to dismiss the appeal cannot be granted in this constitutional petition. For the appellate court should proceed to hear the appeal and either allow it or dismiss it. The petitioners should let the appeal be heard on its merits.

29. It is my considered opinion that the petitioners have failed to satisfy this court that their rights were violated by the respondent herein.

30. In view of the foregoing reasoning, the upshot is that this petition has no merit and it is hereby dismissed.

31. The parties to meet their own costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF DECEMBER, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Both petitioners present**

**Mr. P.N. Mugo for petitioners**

**Ms. Nandwa for Respondents**