



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 420 OF 2015

TOM ONYANGO.....1ST PETITIONER
ZABLON OMONDI ONYANGO.....2ND PETITIONER
TOBIAS ODHIAMBO ONYANGO.....3RD PETITIONER
ISMAEL LEKUYE.....4TH PETITIONER
HELIDHA WERE.....5TH PETITIONER
CAROLINE NTHENYA MUINDE.....6TH PETITIONER

VERSUS

INDEPENDENT POLICE OVERSIGHT AUTHORITY.....1ST RESPONDENT
INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT
DIRECTOR, CRIMINAL INVESTIGATIONS DEPARTMENT.....3RD RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT
MIMOSA INVESTMENTS LIMITED.....(PROPOSED INTERESTED PARTY)

RULING

Introduction

1. The Petitioners through their Notice of Motion dated 1st October 2015 seek the following orders.
1. **THAT** an order do issue to call up and quash in total the Respondents decision to present charges of forgery and forcible detainer contrary to Sections 350 (1), 347 (d)(1), 349, 352(a) and Section 91 as read with Section 36 of the Penal Code, Cap 63, Laws of Kenya in City Court Criminal Case No. 432 of 2013, 537 of 2013 and 901 of 2013.
2. **THAT** orders do issue to restrain the Chief Magistrate Court Nairobi and any other Magistrate

from admitting onto its record or entertaining any criminal charges and evidence thereto similar to the charges made out against the 1st – 6th Petitioners in Criminal Cases No. 432 of 2013, 537 of 2013 and 901 of 2013 consolidated in case no. 432 of 2013 or any other charges based on the same facts alleging forgery and forcible detainer.

3. **THAT** *an order do issue to demand fresh, impartial and independent investigations to be carried out by each and all the Respondents as against the alleged charges leveled against the 1st – 6th Petitioners.*
 4. **THAT** *the law firm of the Chairman of the 1st Respondent in the name and style Messrs. Macharia Mwangi & Njeru Advocates be restrained from watching brief in the criminal proceedings on behalf of the complainants in the criminal cases no. 432 of 2013, 537 of 2013 and 901 of 2013 all consolidated in 432 of 2013.*
 5. **THAT** *the 1st-6th Petitioners fundamental rights including rights to equality before the law, freedom from discrimination, right to human dignity, right to freedom and security, right to fair administrative action, rule of law and right to a fair hearing have been violated.*
2. The application was based on the various grounds stated on the face thereof and also on the Supporting Affidavits of the 1st Petitioner and Francis Njeru sworn on behalf of all the other Petitioners on 1st October 2015. The 1st Petitioner also swore and filed a Further Affidavit on 23rd October 2015. All the affidavits were relatively prolix.
 3. The application was duly contested by all the Respondents as well as the Interested Party, who all filed Replying Affidavits and in certain cases Grounds of opposition.

Petitioners' case

4. The Petitioners' case is that in 2013 they were arrested by the 2nd and 3rd Respondents' agents and subsequently in the same year arraigned in court to face criminal charges of forgery and forcible detainer. The charges concerned and touched on all that property known as Land Reference No. 1870/V/63 whose ownership was already the subject of contest in a civil suit. The Petitioners were charged separately. The 1st through 4th Petitioners were charged in Criminal Case No. 432 of 2013 before the Chief Magistrates' Court whilst the 5th and 6th Petitioners were charged in Criminal Case No. 537 of 2013 also before the Chief Magistrates' Court.
5. The Petitioners also contend that the manner of their arrest was only intended to frustrate, harass and intimidate them and deny them their right to freedom and security in violation of Articles 27, 28 and 29 of the Constitution.
6. The Petitioners further accuse the Respondents of being partisan and selective. The Petitioners contend that the Respondents have simply favoured the complainants in the criminal cases and ignored all complaints by the Petitioners even where such complaints are made by independent parties on behalf of the Petitioners.
7. The Petitioners also further contend that the 1st Respondent has not only failed to discharge its independent duties but has also now engaged itself in the criminal proceedings by allowing the law firm run by the 1st Respondent's chairman to be retained to watch brief for the Interested Party in the criminal proceedings.
8. The Petitioners finally state that the criminal proceedings against the Petitioners were instituted for a malicious and ulterior purpose other than to uphold the purpose of criminal law and further that the criminal proceedings are clear instances of abuse of the court process.
9. For the stated reasons the Petitioners seek orders for stay of and/or quashing of the criminal cases and for independent and or impartial investigations to be conducted on the charges leveled against the Petitioners.

1st Respondent's case

10. The 1st Respondent's ("IPOA's") case may be found in the Grounds of Opposition filed on 14th October 2015 as well as in the Replying Affidavits of Joel Mabonga and Macharia Njeru both filed on the same date.
11. The IPOA contends that the Petitioners have not shown any wrong doing on the part of the IPOA and further that the Petitioners have not raised any complaints with the IPOA. The IPOA also contends that it is statutorily barred from dealing with the matters raised in the application be dismisses as there is a misjoinder.
12. The IPOA states that its Chairman is not an executive chair and is not involved in the day to day administration or management of the affairs of IPOA. IPOA further contends that it does not investigate any criminal complaints or activities as this is done by the 1st and 2nd Respondents, the mandate of the IPOA being limited to matters relating to disciplinary and/or criminal offenses committed by members of the National Police Service.

2nd, 3rd and 4th Respondents' case

13. The case for the 2nd, 3rd and 4th Respondents is basically contained in the affidavit of PC Francis Mwendwa filed herein on 26th October 2015. Their case may be stated simply as follows.
14. The said Respondents state that the 3rd Respondent commenced investigations into the veracity of the title documents presented by both the Petitioners and the Interested Party in a civil dispute which was ongoing before the courts. That the Respondents became keen in the documentation after the said registry had declared the documents availed by the Petitioners as forgeries.
15. The Respondents then state that there was sufficient evidence to have the Petitioners arraigned before the criminal trial court. For the adequacy of evidence to procure, the Respondents referred the court to an affidavit filed in an earlier court matter being JR. Misc. Application No. 393 of 2013. The Respondents also availed copies of the proceedings before the criminal trial court to demonstrate that the criminal case against the Petitioners has been stagnated by the Petitioners.

Interested Party's Case

16. The Interested Party is the complainant in the criminal case. Through its director, on Atulesh Jayantilal Partel, the Interested Party filed an affidavit herein on 14th October 2015.
17. The Interested Party contends that it is the registered owner of Land Reference No. 1870/V/63 which is also indirectly the subject matter in Criminal case no. 432 of 2013 where the Petitioners are charged with forcible detainer and forgery.
18. The Interested Party contends that the orders sought by the Petitioners herein are merely intended to undermine the criminal justice system. The Interested Party further states that the civil suit being NBI. ELC No. 812 of 2012 filed by the Interested Party against the 1st Petitioner was independently filed of the criminal proceedings. The latter proceedings, according to the Interested Party were only commenced following evidence of forgery on the part of the Petitioners.
19. The Interested Party further contends that it had for many years engaged the said firm of Macharia Mwangi & Njeru Advocates and in engaging the said law firm to watch brief in the criminal proceedings involving the Petitioners the Interested Party was simply continuing a long standing relationship. The Interested Party, like the Respondents also blame the Petitioners and their defense counsel for the stagnation of the criminal case.

20. The Interested Party states that the Petitioners right to a fair trial cannot be interfered with in anyway by the presence of the law firm of Macharia Mwangi & Njeru Advocates or the existence of the civil case. The Interested Party states that in any event the court in ELC No. 812 of 2012 has already founded in favour of the Interested Party as the true owner of the suit property and that the Interested Party is in possession.

21. The Interested Party then urges the court to avoid making any orders which might interfere with the independence and constitutional mandate of the 2nd, 3rd and 4th Respondents.

Arguments in court

22. The parties made oral submissions before me for two days.

Petitioners' submissions

23. Arguing that the court has jurisdiction under Article 165 (3) & (b), 22 and 23 of the Constitution to grant the conservatory orders, Ms. Celestine A. Opiyo for the Petitioners submitted that the court had a duty to ensure that the Respondents performed their respective statutory and constitutional mandates without any form of abuse.

24. Ms. Opiyo argued that in the instant case the 4th Respondent in preferring the criminal proceedings against the Petitioners after the complainant had filed a civil claim was completely abusing his powers. Counsel stated that there had never been any issue of fraud or forgery in the civil case yet after the parties filed their pleadings the Petitioners were arrested on allegations of forgery.

25. Ms. Opiyo also urged the court to find that on the basis of the facts before the court, the 1st Respondent had failed to perform its duties. The complaint is that the 1st Petitioner lodged complaints of harassment, threats and intimidation by members of the National Police Service, including threats of death but the 1st Respondent has failed to investigate the same. Counsel added that even an independent investigator in Nduku Investigations Bureau has made a report to the 1st Respondent to no avail.

26. Counsel then submitted that in a law firm associated with the 1st Respondent's chairperson being engaged and allowed to watch brief in the consolidated criminal case No. 432 of 2013, there was an obvious conflict of interest as the 1st Respondent ought to have been investigating the officers who arrested or investigated the Petitioners, who are the accused persons in the said criminal case.

27. Counsel then wound up by stating that the proceedings in the consolidated criminal case No. 432 of 2013 were an abuse of the process of the criminal justice system. Counsel pointed out that the Petitioners' rights under Article 50(2) (a) (g) and (j), were being violated and further that the Petitioners' rights to fair administrative action had also been violated.

28. Counsel relied on various cases and pointed out in particular the case of **Githunguri –v- Republic [1986] KLR 1** as well as the case of **Investments & Mortgages Bank Ltd –v- Commissioner of Police & 3 others [2013]eKLR**. Counsel also availed to the court the recent decision of the court in **Muchanga Investments Ltd –v- Habanya Holdings Ltd & 13 Others NBI ELC 1180 of 2014**. All the cases were referred to for the proposition that where there is abuse of the process through a criminal trial the court has an inherent jurisdiction to stop such abuse. Ms. Opiyo also referred to the decision in the case of **Musyoki Kimanathi –v- Inspector General of Police & 2 Others HCCP No. 442 of 2013** which related to current dispute and wherein the court stayed the criminal proceedings against the Petitioners' advocate.

The 1st Respondent's submissions

29. Ms. M.W. Mwangi advocating for the 1st Respondent argued that the Petitioners had not shown that the 1st Respondent had violated any of the Petitioners rights. The 1st Respondents submitted that Petitioners had not presented any factual basis upon which the court could make a determination whether or not there had been any violation and neither had the Petitioners pin pointed the rights and the Articles under the Constitution which had been violated. For this proportion the 1st Respondent relied on the cases of **Mathew Okwara –v- Minister of Health and Medical Services & 3 Others [2013] e KLR** and **Bethwel Allan Omondi –v- Telkom (K) Ltd & 9 Others [2013] eKLR**.

30. The 1st Respondent also submitted that under Section 26 of the Independent Policing Oversight Authority (Cap 88), the 1st Respondent was barred from investigating the complaints if any lodged by the Petitioners so long as there was pending in court a civil or a criminal proceedings. Ms. Mwangi added that the 1st Respondent was an independent body and not even its chair could influence its decisions and further that the chairperson never gets involved in any of the individual cases.

The 2nd, 3rd and 4th Respondents' submissions

31. Ms. Kithiki argued the 2nd, 3rd and 4th Respondents case.

32. Counsel submitted that the prayer to quash the criminal proceedings only suitable for consideration at the hearing of the Petition and not as an interim order. Counsel further submitted that the application had been overtaken by events as the criminal case had proceeded for quite some while now and various witnesses had testified. Ms. Kithiki added that the Petitioners were simply abusing the court process having sought to stay the proceedings vide a judicial review application in JR. Misc. Application No. 393 of 2013 which was however withdrawn by the Petitioners without good cause.

33. On the criminal case itself, Ms Kithiki submitted that the 4th Respondent was simply exercising his mandate under Article 157 of the Constitution and this was only done once the 4th Respondent was satisfied that there was adequate evidence to warrant the Petitioner's prosecution. Counsel also faulted the Petitioners conduct before the criminal trial court stating that the Petitioners have variously been guilty of absenteeism leading to warrants of arrest in counsel's submission, not deserving of the court discretion.

Interested Party's submissions

34. Mr. Mwangi for the Interested Party contended that the Interested Party had all the rights to choose the law firm wherein the chairperson of the 1st Respondent is a partner to represent the Interested Party's interest. Counsel stated that the Interested Party had been a long standing client of the said law firm of Macharia -Mwangi & Njeru Advocates. Counsel added that in any event, by the time the law firm was engaged in July 2013 the Petitioners had already been charged in court through the instance of the 4th Respondent who must have been satisfied with the process.

35. Mr. Mwangi then pointed out that the complaint by the Interested Party to the Police to investigate criminal activities was in the year 2010 whilst the Civil suit was filed in the year 2012.

36. Counsel then wrapped up by stating that the Petitioners had not shown that any of their rights had been violated.

Petitioner's rejoinder

37. In a brief rejoinder, Ms. Opiyo stated that the court had an inherent jurisdiction to intervene and further that the Petitioners right to fair trial is under jeopardy. Counsel drew similarity with the

case of **Muchanga Investments Ltd -v- Habenga Holdings Ltd & 13 Others [ELC 118 of 2014]** where the court held that the civil dispute was ongoing and the criminal process commenced after the dispute had been filed was an abuse of the process. Counsel concluded that the 1st Respondent was enjoined under the provisions of the Independent Policing Oversight Authority Act to investigate the complaints by the Petitioners.

Analysis and Determination

38. Before proceeding to resolve the issues raised herein which the court may in summary state to be, firstly, whether the Petitioners are entitled to the conservatory orders sought. Secondly, is whether the court ought to make the two substantive orders of quashing the criminal proceedings in Cr. Case No. 432 of 2013 and/or restraining the law firm of Macharia- Mwangi & Njeru Advocates from watching brief in the said criminal proceedings?
39. It would however be appropriate to first lay out some guiding principles on the grant of conservatory orders and also on the powers of the court in staying criminal proceedings commenced by the 4th Respondent.

Guiding General Principles I: Conservatory Orders

40. It is clear that the court under Article 23(3) of the Constitution as read together with Rule 23(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 has powers to grant conservatory orders. A series of cases have laid out the general guiding principles applicable to the court when determine such applications.
41. In the case of **Koech Kemboi -v- Halake Waqo & 2 Others HCCP No. 456 of 2015 [2015] eKLR** the court citing the case of **Kenya Small Scale Farmers Forum -v- Cabinet Secretary, Ministry of Education Science and Technology HCCP No. 399 of 2015 [2015] eKLR** stated as follows:

“[30]... the principles which govern a court considering an application for interim or conservatory relief [are considered] to be the following:

- The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others -v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi -v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others -v- Attorney General & Others HCCP No. 7 of 2011.*
- The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others -v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba -v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.*
- If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora -v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.*
- The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya’s decision in Gatirau Peter Munya -v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.*
- The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see Centre for Human Rights and Democracy & 2 Others -v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman -v- Amboseli Resort Ltd [2004] 2 KLR 589.*

42. It, of course, would be appropriate that whilst exercising the discretion the court also balances the conflicting positions taken by the parties and if necessary also invoke the doctrine of proportionality: see **Kevin K. Mwiti & 2 Others -v- Kenya School of Law & 2 Others [2015] eKLR.**
43. It is to be pointed out also that the principles outlined above need not be proven singularly and in category. Once there is a demonstration of a prima facie case with a likelihood of success, the principles should emerge with ease. Yet too even when a prima facie case is not shown or the court is not certain due to the conflicting positions of the parties and facts appear even, the court is still possessed with the discretion to grant the conservatory order. At that point other factors such as where the higher risk of injustice lies may influence the court. Whether the application has also been brought to court with reasonable promptitude also counts.
44. It is also important to point out that the court at this stage of the proceedings must bear in mind that it is not called upon to make any final or definitive findings of law or fact. The court must generally consider the facts as placed before it by the parties without any conclusive findings on the same. The same applies to the law laid before the court in stirring points of contest.

Guiding General Principles II- Prohibiting Criminal Trials

45. Various, the court has been called upon to consider whether or not to grant orders prohibiting the prosecution of accused persons. In so doing various principles have evolved and I now state the same generally.
46. For starters, the court ought not usurp the Director of Public Prosecutions (“**the DPP**”) powers as enshrined under both the Constitution and the Office of the Director of Public Prosecutions Act No.3 of 2013 (“**the ODDP Act**”).
47. The DPP is enjoined to order investigations into any alleged criminal conduct or activities. Under Article 157 of the Constitution he may direct the 2nd Respondent to undertake the investigations. The DPP also has power to institute, continue, take over and or discontinue any criminal proceedings. His powers under both the Constitution and the ODDP Act are wide and discretionary. The court has to consequently exercise restraint and avoid interfering with such constitutional powers: see **Kenya Commercial Bank Ltd & 2 Others -v- Commissioner of Police & Another HCCP No. 218 of 2011 [2013] eKLR** and also **Republic -v- Commissioner of Police & Another Ex parti Michael Monari & Another [2012]eKLR.**
48. As was also stated by the court in the case of **Diana Kethi Kilonzo -v- IEBC & 2 Others NBI HCCP No. 359 of 2013:**

“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

49. It is thus critical that the court’s supervisory and inherent jurisdiction under Article 165 to interfere with the exercise of powers by other Constitutional bodies and Independent offices is sparingly exercised. There ought to be vacillation and reluctance. The power ought to be exercised in exceptional circumstances to ensure that other constitutional organs perform and undertake their mandates without the thought of or fear of big brother unnecessarily watching over them.

50. In the realm of public prosecution the mere fact that a criminal trial is not bound to lead to a conviction should be no reason for the court to interfere and prohibit such prosecution mid-stream: see **Ex Parte Michael Monari & Another (supra)** and **Njuguna S Ndungu -v- Ethics & Anti-Corruption Commission & 3 Others HCCP No. 79 of 2015 [2014] eKLR**.
51. Likewise, the mere fact that the accused person turned Petitioner has a good defense to the trial, is not good enough to result in an order of prohibition or stay being issued. The challenge as to sufficiency or veracity of evidence or the submission of a good defense ought to be aired out before the trial court: see **Section 89(5) of the Criminal Procedure Code (Cap 75)** as well as the cases of **Meixner & Another -v- Attorney General [2005] 2 KLR 189** and **Joshua Kulei -v- Republic & 9 Others NBI HCCP No. 66 of 2012**. In short, the analysis and interrogation of evidence to ascertain guilt or innocence of accused or even the disclosure of an offence is a duty to be performed by trial court. As was held by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:
- “The court should not act as a Court of Appeal or the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...”*
52. Thirdly, the mere fact too that the facts constituting the basis of the prosecution and criminal case could also form or already form the basis of the civil case is also no bar to the criminal justice process: see **Section 193A of the Criminal Procedure Code (Cap 75)** as well as the case of **Republic -v- Chief Magistrate’s Court Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**. The reasoning in these respects ought to be simple. Our criminal justice process thus far has been concerned more with retributive and penal justice rather than restorative justice which the civil system seems to perfect.
53. Fourthly, the court has and always retains the inherent powers to interfere to ensure that the accused or the Petitioners rights and freedoms as guaranteed under the Constitution are not violated: see **Meixner & Another -v- Attorney General (supra)**, **George Joshua Okungu & Another -v- Chief Magistrate Anti-Corruption Court [2014] eKLR**, **Kuria & 3 Others -v- Attorney General [2002] 2 KLR 69**, **Ex Parte Michael Monari & Another (supra)**, **Joram Mwenda Quantai -v- Chief Magistrate’s Court Nairobi [2007] 2 EA 170 (CA)**, **Koinange -v- Attorney General [2007] 2 EA 256**.
54. The court will also interfere where the Petitioner shows that the criminal proceedings or intended prosecution are indeed an abuse of the process or are simply contrary to public policy. What is an abuse of the process is dependent on the facts of each case but it is enough for the Petitioner to demonstrate that the purpose of the prosecution is not intended to achieve the objectives of the criminal justice system, but rather another purpose. Likewise what is contrary to public policy is also dependent on the peculiar facts of each case: See for example **Githunguri -v- Republic [1986] KLR 1**.
55. In the end, the court whilst exercising its discretionary jurisdiction must not only take into account the needs of good administration but also balance the wider public interest of ensuring that persons accused of crimes are tried through a justice system with the same public interest which seeks to ensure that the criminal justice system is not abused and placed into disrepute by putting accused persons through an unjust and unfair process: see **Godfrey Mutahi Ngunyi -v- Director of Public Prosecution & 4 Others [2015] eKLR**.
56. From the foregoing general principles, it is not hard to conclude as did the Court of Appeal in **Manilal Jamnadas Ramji Gohil -v- Director of Public Prosecution NBI Criminal Appeal (APPL) No. 57 of 2013** that an order staying criminal proceedings should only be granted in the most exceptional circumstances: see also **Goddy Mwakio & Another -v- Republic [2011] eKLR** and **Director of Public Prosecutions -v- Humphreys [1976] 2 ALL ER 497**.

57. In the case of intermediary applications the burden appears even heavier as the court ought to be certain prior to interfering with the functions of prosecutors and or the trial court. Before the grant of any interim conservatory orders the Petitioner must establish exceptional circumstances: see **Mumbi Ngugi J in Michael Sistu Mwaura Kamau –v- Ethics and Anti-Corruption Commission & 3 Others HCCP No. 230 of 2015 [2015] eKLR.**
58. Have the Petitioners established a case to warrant the orders sought? Have they satisfied the criteria set out for the grant of conservatory orders?
59. I however hasten to first deal with certain prelude like issues raised by the Respondents.
60. Firstly, the Respondents especially the 1st Respondent took the view and argued that the Petition does not satisfy what the principles laid out in the case of **Anarita Karimi Njeru v Republic [1979] 1 KLR 154** as to what constitutes a constitutional petition. The dicta of Trevelyan J and Hancox J (as he then was) in **Anarita Karimi Njeru v Republic (supra)** need not be repeated verbatim. It was to the effect that a party ought to set out his case and claim of violation of his rights with a reasonable degree of precision and demonstrate the same. The court in *Anarita Karimi Njeru's case*, as was stated by this court in **Kevin Turunga Ithagi –v- Fred Ochieng & 5 Others [2015]eKLR**, never meant absolute precision. In approving and reaffirming the principle set out in *Anarita Karimi Njeru's case* the Court of Appeal in **Mumo Matemu –v- Trusted Society for Human Rights Alliance [2013]eKLR** also never stretched it to have stood for absolute precision in drafting.
61. I hold the view as did the court in **Kevin Turunga Ithagi –v- Fred Ochieng & 5 Others [2015]eKLR** that the principle and ratio of **Anarita Karimi Njeru –v- Republic (Supra)** ought to be applied with abundant caution. Where the pleadings take the trajectory of constitutional interpretation or application then there is no reason why the Petition, and by extension any application filed thereunder, should not be heard on its merits.
62. In the instant case, I confirm that I have read the Petition. The pleadings have not specifically pinpointed the Articles alleged to have been violated. The Petition however takes the trajectory of a constitutional application when the Petitioners complain that their prosecution is an abuse of the Respondents' constitutional powers and the further that their trial itself is an abuse of the process. I am also not convinced that the Petition is beyond repair through amendments.
63. Even though the Petitioner ought always to demonstrate his case through clear and concise pleadings and not merely through prayers for constitutional remedies, I am satisfied that in this case the court at this stage is well seized with both the Petition and the application and the constitutional issue(s) raised may be painlessly identified.
64. Secondly, the Respondents argued that some of the orders sought are not conservatory or interim in nature and ought only be entertained at the hearing of the Petition but not at the interlocutory stage. The Respondents pointed to prayers number 3, 4 and 5.
65. It is true that the prayers as crafted would, if granted bring an end in themselves. There would be no reason to pursue the same at the hearing of the Petition. A look at the ultimate reliefs sought in the Petition would reveal that the same orders are also sought though couched in different language and wording.
66. I am not particularly convinced by the Respondents' bare reasoning that the mandatory nature and finality of the prayers would bring an end to this court's remit and Petition as well.
67. Article 23(3) of the Constitution which grants the court the powers to issue conservatory order does not limit the orders or relief that the court is capable of granting to interim negative orders. Orders of a positive nature in the form of a mandatory injunction may also issue.

- 68.If the case is clear and or in special circumstances or where the court is of the view that the matter ought to be dealt with and ended at once, the court ought to be able to issue the orders. It may be an absolute misfortune if the court has to wait for determination of the Petition where it is clear that a party's fundamental right or freedom is being violated. In my view the court only need satisfy itself that to grant the mandatory orders sought would be appropriate in the special circumstances of the case and further that the court will be vindicated at trial that the order granted was properly and correctly so granted. Of course, the court must also weigh the hardships to be occasioned to either party by the issuance of the final-looking orders.
- 69.The Petitioners argue that they have been discriminated against. Unfortunately no satisfactory evidence has been tendered to illustrate that any of the Respondents or State organs has acted in a manner contrary to the provisions of Article 27 of the Constitution. I also did not hear the Petitioners' counsel as pursuing vigorously this line of argument. On this front consequently, I hold the view that the Petitioners have not established a prima facie case of being or having been discriminated against.
- 70.It was submitted by the Petitioners that their right to fair trial as well as a right to fair administrative action as provided for under Articles 50 and 47 of the Constitution are under threat. On this front the Petitioners argument is that the criminal trial was instigated by the Interested Party to simply have the 1st Petitioner submit and concede the contest that was already taking place between the 1st Petitioner and the Interested Party before the ELC court.
- 71.The case before the ELC court was instituted by the Interested Party. The Interested Party also happens to be the complainant in the criminal case facing the Petitioners. The contest was over the ownership of all that property known as LR. No. 1870/V/63 Nairobi. The Interested Party claimed that it was the registered proprietor, the Petitioner stated otherwise. The Petitioner stated that the subject property was owned by another individual. The matter was dealt with under the courts' summary procedure. The court (Mutungi J) heard the parties on 19th June 2013 and rendered himself on 20th September 2013. The court found as a fact that the Interested Party's position deserved to be vindicated and entered summary judgment in favour of the Interested Party. In the meantime, as the parties awaited the ELC Court's verdict, the criminal proceedings had been instituted in March 2013.
- 72.The Respondents have contended that there was sufficient evidence to cause the institution of the criminal proceedings. The Interested Party on its part states that it did what is expected of any person: report a criminal activity.
- 73.Even as independent offices, both 2nd and 4th Respondent in my view were enjoined under Article 252(2) of the Constitution to investigate the matter. They did not need to await any report or complaint. Neither can it be said that the ELC proceedings prohibited their offices from acting. At this stage of the proceedings, not enough material is before me to satisfy me, prima facie, that the criminal proceedings were commenced for any other reason other than to ensure that the criminal justice system took its course.
- 74.It is also to be noted that the proceedings before the ELC court were determined in favour of the Interested Party. Even though the 1st Petitioner has preferred an appeal, the same should have no bearing in my view on the criminal proceedings as I did not hear the Petitioners submit or contend that the result of the ELC court case was influenced by the criminal proceedings.
- 75.There is then the issue of watching brief by the law firm representing the Interested Party herein. The chairperson of the 1st Respondent also happens to be a partner in the law firm that is representing the interested party herein and is watching brief in the criminal case.
- 76.As I understand the concept of watching brief ,it is a method of representing clients who are not strictly parties to the proceedings. The counsel attorned follows the proceedings . He is like an

observer. He does not participate in the proceedings . Though developed in the old England's coroner's courts it was ultimately not confined to that court. The practice spread to other courts including the criminal courts: see generally **Halsbury's Laws of England 4th Ed Vol 3 Page 621**. The legal position is that participation in proceedings by the use of watching brief is not a right but is at the discretion of the court: see **Moscatt v Lawson [1835]Mood & R 454**.

77.This authority of the court through discretion is itself , in my view, an adequate safeguard to the rights of any accused person.

78.Consequently where an accused person is of the view that his rights are likely to be interfered with the appropriate forum is the trial court to be drawn into the conflict and after weighing facts the counsel seeking to watch brief or already watching brief may be barred by the trial court.

79.In the instant case, that ought ideally to be the approach especially at this interim stage. The application to bar the law firm of Macharia- Mwangi & Njeru Advocates if at all from watching brief in the criminal case where the Petitioners are the accused persons ought to be made before the trial court. Considering too the fact that the Interested Party also has the right to choose its own legal advisor and further that the Chairperson of the 1st Respondent is not an executive chairperson, I would not deem it that there is any conflict when the law firm he is involved with watches brief in a criminal case.

Conclusion

80. I am satisfied that in the totality of the material availed before me, the Petitioners have not established a prima facie case to entitle them to the orders sought at this intermediary stage of the proceedings. There are no exceptional circumstances to warrant a stay or prohibition of the on going criminal proceedings.

81.Besides, the Petitioners also delayed in seeking the orders they beseech the court to grant. The criminal process has been on going for nearly two years and no explanation has been advanced for the delay in filing the Petition. My view, is that public interest would be better served in the circumstances of this case if the trial was allowed to continue and none of the interlocutory prayers granted for now.

Disposal

82.I answer the core question as to whether the Petitioners are entitled to the orders sought in the Notice of Motion dated 1st October 2015 in the negative. The application is dismissed.

83.The costs will however abide the outcome of the Petition

Dated, signed and delivered at Nairobi this 14th day December, 2015

J.L.ONGUTO

JUDGE