



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

**PETITION NO 221 OF 2013**

**ENGINEER CHARLES OKELLO MWANDA.....**  
**.....PETITIONER**

**VERSUS**

**THE ETHICS AND ANTI-CORRUPTION**

**COMMISSION.....1<sup>ST</sup>**  
**RESPONDENT**

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

**THE SPECIAL MAGISTRATE ANTI-CORRUPTION.....3<sup>RD</sup>**  
**RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION.....4<sup>TH</sup>**  
**RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner seeks orders stopping his prosecution in Criminal Case Nairobi ACC No 4 of 2013. He alleges that his prosecution in the said case is unconstitutional and a violation of his constitutional rights. Interim orders were granted by this Court (Majanja J) on 29<sup>th</sup> of April 2013. The petition was heard before me on 19<sup>th</sup> December 2013.

**The Petition**

2. In the petition dated 24<sup>th</sup> April 2013, the petitioner seeks the following orders:
  1. *That this Honourable Court be pleased to order and restrain the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents jointly and severally or any other person whatsoever, whatsoever from recommending the suspension, interdiction and/ or suspending the petitioner from his duties as a director of Regional Development in the Ministry of Regional Development Authorities in as far as such recommendation relate to or arise from the alleged abuse of office to improperly confer a benefit on Iota Excavations and Rentals Limited, Heavy Equipment and Machinery Limited and Henkan Contractors Limited by allegedly irregularly awarding a tender for the*

*provision of Machinery and Equipment without approval of the Tana and Athi River Development Authority Tender Committee.*

2. *That this Honourable Court be pleased to order AND restraint the respondents jointly and severally from charging, prosecuting and/ or arraigning the petitioner in court and/ or accepting charges on counts forming part of the proposed charges registered in court by the 1<sup>st</sup> Respondent on the 17<sup>th</sup> April 2013 vide Court file number ACC 4/2013 or any other Court file number in as far as such charges relate to or arise from the alleged abuse of office to improperly confer a benefit on Lota Excavations and Rentals Limited, Heavy irregularly awarding a tender for the provision of Machinery and Equipment without approval of the Tana and Athi River Development Authority Tender Committee.*
3. *That this Honourable Court be pleased to issue a declaration that the intended charges, prosecution and/ or arraignment in Court of the Petitioner in as far as such charges, prosecution and/ or arraignment in Court relate to or arise from the alleged abuse of office to improperly confer a benefit on Lota Excavations and Rentals Limited, Heavy Equipment and Machinery Limited and Henkan Contractors Limited by allegedly irregularly awarding a tender for the provision of Machinery and Equipment without approval of the Tana and Athi River Development Authority Tender Committee is unlawful, null and void.*
4. *That this Honourable Court be pleased to issue a declaration that the intended charges, prosecution and/ or arraignment in Court of the Petitioner in as far as such charges prosecution and/ or arraignment in court relate to or arise from the alleged abuse of office to improperly confer a benefit on Iota Excavations and Rentals Limited, Heavy Equipment and Machinery Limited and Henkan contractors Limited by allegedly irregularly awarding a tender for the provision of machinery and Equipment without approval of the Tana and Athi river Development authority tender committee is an affront to the Petitioner's right to a fair trial.*
5. *That this Honourable Court be pleased to issue any other orders or directions it may deem fit and just to grant.*
6. *That the costs of this application be borne by the Respondents.*

### **The Petitioner's Case**

3. The petitioner's case is set out in the petition dated 24<sup>th</sup> April 2013, the verifying affidavit of the same date, and an affidavit headed 'Supporting Affidavit' sworn on 20<sup>th</sup> September 2013. The petitioner also filed written submissions dated 20<sup>th</sup> September 2013.
4. The basis of the petitioner's claim is that the respondent had, by a letter dated 6<sup>th</sup> August 2012, indicated that it had absolved him from criminal responsibility with regard to alleged abuse of office involving what the 1<sup>st</sup> respondent refers to as '*illegal, irregular and fraudulent procurement of heavy machinery and misappropriation of public funds at Tana & Athi River Development authority (TARDA).*' Consequently, in view of the letter absolving him from criminal responsibility, it is the petitioner's case that the subsequent charges preferred against him in Criminal Case Nairobi ACC No 4 of 2013 is an abuse of the Court process and a violation of his constitutional rights.
5. In his submissions on behalf of the petitioner, Learned Counsel, Mr. Wathuta, submitted that the intended prosecution of the petitioner is an abuse of the court process. He alleged that the investigating authority, the 1<sup>st</sup> respondent had, by its letter dated 6<sup>th</sup> August 2012, absolved the petitioner from criminal responsibility; that having been absolved of responsibility, he justifiably ceased keeping most of the evidence he intended to rely on during trial; that between the time that

he was cleared and the time he was arraigned in court, a period of 6 months had elapsed and he had not during this period prepared for any proceedings that may be instituted on matters on which he has been cleared.

6. Mr. Wathuta conceded that the petitioner had indeed filed another petition, being **Charles Okello Mwanda vs. The Attorney General & 2 Others, High Court Petition No. 95 of 2011** in which he sought orders similar to the ones sought in this petition, which petition was dismissed on 30<sup>th</sup> March 2012. He submitted that by the time the said petition was dismissed, the petitioner had not been formally cleared by the 1<sup>st</sup> respondent, and that upon being cleared, he filed the present petition. He submitted therefore that this petition cannot be said to be an abuse of the court process.
7. Counsel submitted with regard to the letter dated 6<sup>th</sup> August 2012 which the petitioner alleges absolved him of any wrongdoing that the 1<sup>st</sup> respondent later disowned the letter despite having had knowledge of its existence and later lodged a complaint with the police as a consequence of which the petitioner was now facing charges of uttering a false document. Mr. Wathuta submitted that before the issue of whether or not the petitioner had uttered a false document was resolved by a court of law, it cannot be said that the letter did not emanate from the 1<sup>st</sup> respondent.
8. The petitioner relied on the decision of the High Court in **Githunguri vs Republic (1985) KLR 91** and urged the Court to find that the proceedings against him by the 1<sup>st</sup> and 4<sup>th</sup> respondents are an abuse of process.
9. With regard to the want of an affidavit in support of the petition and the argument by the respondents that the petition was consequently defective and ought to be struck out, Counsel took the view that there is a supporting affidavit sworn on 20<sup>th</sup> September 2013, and that once an affidavit is filed subsequent to the proceedings with the leave of the Court, it cures any defect in the pleadings. He relied in support of this proposition on the decision in the case of **Communication Commission of Kenya vs Royal Media Services HCCC No 316 of 2002**. He contended also that the provisions of Rule 13 and 14 of the Gicheru Rules which require that a petition be supported by an affidavit were silent with regard to whether the two should be filed together; but that in any event, the timing of the filing of a supporting affidavit would qualify as a technicality which the court should not pay undue regard to.
10. Counsel also contended, with regard to the powers granted to the 4<sup>th</sup> respondent under Article 157(11), that in exercising his power the 4<sup>th</sup> respondent must have in mind the matters set out in Article 157(11) especially abuse of legal process. Mr. Wathuta therefore prayed that the petition be allowed for violation of the petitioner's rights under Article 50; that the safeguard of a fair trial guaranteed under Article 50 of the Constitution are not exhaustive; that Article 50(2) includes trials which will result in abuse of process under which the criminal proceedings sought to be stayed fell; and that the prosecution of the petitioner should therefore not be allowed to proceed.

### **The 1<sup>st</sup> Respondent's Case**

11. In presenting the 1<sup>st</sup> respondent's case, Learned Counsel, Mr. Rinkanya, relied on Grounds of Opposition dated 26<sup>th</sup> July 2013, a replying affidavit sworn by **Mr. Gideon Mokaya** on 30<sup>th</sup> July 2013; as well as written submissions dated 19<sup>th</sup> December 2013.
12. The 1<sup>st</sup> respondent opposed the petition on four main grounds. The first related to the lack of an affidavit in support of the petition. Counsel submitted that there was no supporting affidavit when the petition was filed; that the petitioner filed a petition and an interlocutory application; that there was an affidavit in support of the application but none in support of the petition; and that the petitioner had filed an affidavit dated 20<sup>th</sup> September 2013. Mr. Rinkanya submitted that the affidavit filed on 20<sup>th</sup> September 2013 cannot cure the defect resulting from the absence of an

- affidavit in support of the petition; that the petitioner had sought and was granted leave to file a supplementary affidavit, which can only supplement what is on record.
13. Counsel submitted that there was mischief on the part of the petitioner as he had filed a supporting affidavit while what he had sought leave to file was a supplementary affidavit; that the said affidavit was filed after most of the parties had filed their replies and submissions; and that the petitioner was in breach of rules 12, 13 and 14 of the Gicheru Rules which were then in force with regard to the filing of constitutional petitions; that Rule 13 is clear that the Petition under rule 12 shall be supported by an affidavit, while rule 14 requires that documents relied on are annexed to the affidavit. Counsel pointed out that the documents attached to the petition are not marked as they were not annexed to any affidavit, and he submitted that the petition was therefore incompetent.
14. Mr. Rinkanya submitted further that the petitioner was challenging the investigations and prosecution by the 1<sup>st</sup> respondent, a challenge that was, in the view of the 1<sup>st</sup> respondent, based on 3 grounds. With respect to the 1<sup>st</sup> ground which was premised on the letter dated 6<sup>th</sup> August 2012, it was the 1<sup>st</sup> respondent's position that the letter was forged; that the alleged author of the letter had denied ever writing the letter; and that the letter was also subjected to analysis by the Forensic Document Examiner who confirmed that the alleged author had not written the letter as the signature is not his. Counsel submitted that the petitioner, who had already been charged with forgery in respect of the letter, could not therefore rely on a forged document to stop a criminal case against him.
15. To the petitioner's second ground, that the investigations and prosecution against him had been carried out in breach of a Court order as the Court in **High Court Misc. Civil Application No. 236 of 2011, Republic -v- PS, Ministry of Regional Development Ex Parte Engineer Charles Okello Mwanda** had ordered that the investigations against the petitioner should be completed within 4 months, the 1<sup>st</sup> respondent contended that the 1<sup>st</sup> respondent was not a party to the suit, that the orders of the Court were that any investigations should be commenced and completed within 4 months of the judgment, and that the date of judgment was 30<sup>th</sup> March 2012. Counsel submitted that while the petitioner alleged that the investigations took a period in excess of 4 months, it was the 1<sup>st</sup> respondent's case that by the time judgment in the case was delivered, investigations were already complete and the file forwarded to the DPP on 23<sup>rd</sup> December 2011.
16. To the petitioner's contention that the 1<sup>st</sup> respondent was not properly constituted at the time of the investigation of the petitioner as it had no Chairman, Counsel relied on the decision of the Court in **Thuita Mwangi -v- EACC High Court Petition No 153 of 2013** in which the Court held that the absence of a Chairman did not affect the operations of the 1<sup>st</sup> respondent.
17. Finally, it was the 1<sup>st</sup> respondent's contention that the petition before the Court did not disclose any violation of a constitutional right; that a reading of the petition revealed no single mention of the Constitution except in the heading; and that the petitioner had not said what Article of the Constitution had been violated nor shown how it had been violated as required by the decision of the Court of Appeal in **Anarita Karimi Njeru -v- R (1976-80) 1 KLR 1272**. He therefore asked that the petition be dismissed, emphasising that the petitioner had already been before the Court with the same allegations in **Petition No 95 of 2011**, and had not filed an appeal against the decision, as a result of which the present petition offended the doctrine of *res judicata*.

### **The Case for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent**

18. In presenting the case for these respondents in opposition to the petition, Learned Counsel, Mr. Mohamed, relied on the Grounds of Opposition dated 4<sup>th</sup> June 2013 and written submissions of the same date.
19. Mr. Mohamed submitted that while the petition is said to be brought under several Articles of the

Constitution which are set out in the heading to the petition, there is no proper petition alleging violation of constitutional rights and nothing had been presented to the Court to show how the Articles set out in the heading to the petition had been violated.

20. Mr Mohamed pointed out that the petitioner's Counsel had made reference to Article 50 from the Bar, alleging that the petitioner's rights under Article 50 would be prejudiced if the trial in the lower court was allowed to proceed. It was the respondents' view, however, that one could not allege that a trial which had not even started will be an unfair trial.
21. Mr. Mohamed also agreed with Counsel for the 1<sup>st</sup> respondent that this petition is *res judicata* as the same issues and prayers that it raised were determined by Majanja J in Petition No 95 of 2011.
22. Finally, with regard to the letter from the 1<sup>st</sup> respondent allegedly absolving the petitioner of any criminal liability, it was the position of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that, even assuming that this is what the 1<sup>st</sup> respondent had done in the letter in question, which it had denied, the 1<sup>st</sup> respondent has no mandate to absolve anyone of criminal liability. The respondents therefore prayed that the petition be dismissed with costs.

### **The 4<sup>th</sup> Respondent's Case**

23. Counsel for the 4<sup>th</sup> respondent, Mr. Okello, opposed the petition and agreed with the submissions of Counsel for the 1<sup>st</sup> -3<sup>rd</sup> respondents. He relied on an affidavit sworn on 29<sup>th</sup> July 2013 by Mr Victor Mule, submissions dated 20<sup>th</sup> September 2013 and a list of authorities dated 12<sup>th</sup> November 2013.
24. Counsel submitted that the petitioner had not demonstrated how the Articles cited in his petition had been violated; had not filed any affidavit in support of the petition; and there was no mention or demonstration of how the rights cited in the heading of the petition have been violated.
25. Counsel submitted, however, that even assuming that the affidavit sworn by the petitioner on 20<sup>th</sup> September 2013 and filed in Court on 30<sup>th</sup> September 2013 was in support of the petition, there was nothing in its contents that suggested that it was in support of the petition. According to Mr. Okello, the affidavit is a reply to the affidavit of Mr Victor Mule on the charges that the petitioner was facing in Criminal Case No 143 of 2013 in Kibera; and that the filing of this petition was an abuse of the court process by a suspect facing a case of forgery.
26. Counsel submitted further that the letter allegedly absolving the petitioner of criminal liability was a ploy by the petitioner to stop the charges against him; that even assuming that the petitioner was absolved by the 1<sup>st</sup> respondent, it was still within the mandate of the 4<sup>th</sup> respondent to move to prosecute if satisfied that there is sufficient evidence so to do; and that the 4<sup>th</sup> respondent can overrule the 1<sup>st</sup> respondent when it comes to prosecution.
27. It was Counsel's submission with regard to the orders sought by the petitioner that the mandate of the 1<sup>st</sup> and 4<sup>th</sup> respondents are very clear and the Court cannot give directives to them on how to conduct their mandate; and that the petitioner had not sought orders of prohibition which he had done in the earlier petition No. 95 of 2011, which petition the court had dismissed.
28. With regard to the orders made in JR 236 of 2011, it was the 4<sup>th</sup> respondent's case that the 4 month period given for investigations was not directed at the 1<sup>st</sup> respondent but at the Ministry of Regional Development which was carrying out its own investigations, and that one cannot put a time limit to criminal investigations.
29. Finally, with regard to the petitioner's reliance on Article 50, Mr. Okello referred the Court to,

among others, the decision in **Francis Anyango Juma -v- DPP & Another High Court Petition No. 160 of 2012** for the holding that the guarantees under Article 50 relate to proceedings during the trial and until the trial commences, any allegations of violation of a fair hearing has no basis; that while the petitioner had been charged, the trial has not yet commenced; that the petitioner's case was that he has done nothing wrong and should therefore not be charged, which the 4<sup>th</sup> respondent submitted was evidence that can only be tendered before the trial court. The 4<sup>th</sup> respondent therefore prayed that the petition be dismissed with costs.

### **Determination**

30. From the pleadings and submissions of the parties, two main issues arise for determination. The first is whether there has been an abuse of the Court process in the arraignment of the petitioner before the Chief Magistrate's Court. The second, which arises from the first, is whether there has thereby been a violation of the petitioner's constitutional rights. Closely interlinked with these issues are several subsidiary issues which I shall deal with in the course of dealing with the main issues.

### **Whether the Petition is Incompetent**

31. The first of these subsidiary issues relates to the question of the competency of this petition. The respondents submit that the petition was filed without being accompanied by a supporting affidavit in breach of Rules 13 and 14 of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 (The Gicheru Rules)** which were then in force. I have perused the pleadings and noted that indeed the petition only has a verifying affidavit, and the documents in support of the petition are not attached to any affidavit in which they would be identified and marked.

32. Rules 12, 13 and 14 of the Gicheru Rules are in the following terms:

*12. An application under rule 11 shall be made by way of a petition as set out in Form D in the Schedule to these Rules.*

*13. The petition under rule 12 shall be supported by an affidavit.*

*14. If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit.*

33. Counsel for the petitioner argues that the rules do not say that the petition and the affidavit should be filed together, and that in any event, the requirements in the rules are technicalities which the court should not be bound by. It is indeed true that the Constitution at Article 22 enjoins the Court, in dealing with matters pertaining to violation of fundamental rights, and at Article 159(2) (d) in administering justice, not to pay 'undue' regard to procedural technicalities. The question is whether the requirement that a petition be accompanied by an affidavit in support, to which the documents a party wishes to rely are annexed, is a 'procedural technicality' which the Court should not pay undue regard to.

34. An affidavit in support of a petition contains the evidence that a party wishes to rely on in support of his case. Without an affidavit in support of a petition, there would be no evidence before the Court on the basis of which a party can maintain his claim. Consequently, the requirement that the petition be supported by an affidavit is not a procedural technicality but relates to the very substance and core of a petitioner's claim.

35. In the present case therefore, the petition before the Court is indeed incompetent as the allegations contained in it are not supported by any evidence. The verifying affidavit annexed thereto does not meet the requirements of rule 13 of the Gicheru Rules, and the documents that the petitioner relies

on are not properly before the Court.

36. The petitioner also contends that the Gicheru Rules did not require that the affidavit in support of the petition should be filed together, and that it is therefore in order for the petition to be filed first, and the affidavit in support later. As I have already observed, the intention behind requiring an affidavit in support of a petition be filed together with the petition is so that the Court will have before it the evidence that a party intends to rely on in support of its claim. It would defeat logic if one were to make allegations of violation of rights, then file, months later, the evidence in support. The option open to a party who fails to file an affidavit in support, which the petitioner in this case did not exercise, is to seek leave to amend the pleadings. That he filed an affidavit in September 2013 to support the petition pursuant to leave obtained in May 2013 to file a supplementary affidavit with respect to the interlocutory application does not really assist him.

37. The above findings notwithstanding, this Court shall in due course examine the matters presented by the petitioner to establish if there is indeed a violation of rights as alleged.

#### **Whether the Present Petition is Res Judicata**

38. Before dealing with the alleged violation of the petitioner's rights, however, I will deal first with the question whether the matters raised in this petition are res judicata.

39. The petitioner concedes that he had filed High Court Petition No. 95 of 2011, which was heard and determined in a judgment dated 30<sup>th</sup> March 2012. I have read the judgment of the Court in High Court Petition No. 95 of 2011. It addresses itself to the alleged violation of the petitioner's constitutional rights arising out of his prosecution for the offence of abuse of office, the same claims that he makes in this petition. In the premises, in light of the judgment of the Court, I would answer the question of whether or not this petition is res judicata in the affirmative. The issues that the petitioner raises in this petition are *res judicata*, having been the subject of High Court Petition No. 95 of 2011 which was heard and determined, and no appeal lodged against the decision.

#### **Whether the 1<sup>st</sup> Respondent Can Absolve a Party from Criminal Liability**

40. The petitioner contends, however, that the matters raised in this petition are not *res judicata* as he had been absolved of responsibility by the respondent subsequent to the said judgment. He relies on a letter dated 6<sup>th</sup> August 2012, annexed to his 'Supporting Affidavit' sworn on 20<sup>th</sup> September 2013, which he alleges is from the 1<sup>st</sup> respondent and which he alleges absolves him from criminal responsibility.

41. I have read the said letter. It appears to be a response to a letter dated 24<sup>th</sup> July 2012 from the petitioner to the 1<sup>st</sup> respondent. The letter from the petitioner is in the following terms:

**Charles Mwanda**

**P. O. Box 10280-00100 Nairobi**

**Tel. 0722851919**

**C.E.O/Oblique Secretary**

**Ethics and Anti-Corruption Commission**

**Integrity House**

**NAIROBI.**

**Date: 24<sup>th</sup> July 2012**

Dear Sir,

**RE: REQUEST FOR CLEARANCE – ALELGAITRONS OF ABUSE OF OFFICE  
(KACC/F1/INQ/19/2011)**

I was suspended from office on the above allegations on 12<sup>th</sup> April 2011 by the Permanent Secretary, Ministry of Regional Development Authorities (Ref. No 84118534/13 attached). The suspension was later changed to interdiction (Ref.No1984118534/15 attached). The interdiction was lifted on 10<sup>th</sup> July 2012 (Ref. No. MRD/CONF/1984118534/(32), also attached).

**The purpose of this letter is to request for my clearance from your office.**

Yours Faithfully

Charles Mwanda

42.The purported response, which the petitioner relies on, is as follows:

EACC. 8/3/5/ VIL IV/(09)

6<sup>th</sup> August 2012

Charles Mwanda

P.O. Box 10280-00100

NAIROBI

Dear Sir,

**RE: ABUSE OF OFFICE CHARGES AGAINST CHARLES MWANDA**

Reference is made to your letter dated 24<sup>th</sup> July 2012 in which you had requested for clearance on allegations of office (sic) vide KACC/F1/INQ/19/2011.

The case was reported to this Commission for investigations. After conducting investigations, we have found that you were not involved in the said allegations

Yours faithfully

H. MWITHIA

**FOR: SECRETARY/CHIEF EXECUTIVE OFFICER**

HNM/hw

43.Two concerns arise with regard to this letter. First, the 1<sup>st</sup> respondent has denied on oath in the replying affidavit of Gideon Mokaya sworn on 30<sup>th</sup> July 2013 that the letter ever emanated from its office; it has averred that a Forensic Document Examiner has confirmed that the signature was not of the officer alleged to have signed it, and that it was a forgery. Indeed, the petitioner is facing yet another criminal prosecution in respect of this letter. In such circumstances, it is not possible for the Court to place any reliance on this letter as evidence of any matter whatsoever.

44.More important, however, even assuming that the letter in issue is genuinely from the 1<sup>st</sup>

respondent, is the question whether the 1<sup>st</sup> respondent can ‘absolve’ anyone of criminal responsibility and thereby stop the 4<sup>th</sup> respondent from carrying out his constitutional mandate of prosecuting offenders.

45. Ever since the decision in **Githunguri -v- Republic** (supra), many people facing criminal prosecutions have sought to defeat the criminal process by relying on the principles established in that decision even when the circumstances of their case do not merit the application of the said principles. In the present case, the petitioner contends that he was arraigned in Court six months after he had been ‘absolved’ by the 1<sup>st</sup> respondent; that he had therefore ceased to keep the evidence that he would require for his defence, had not prepared to face criminal proceedings, and that therefore his prosecution is an abuse of the Court process as found in the **Githunguri** case.

46. It appears from the evidence before me that the letter ‘absolving’ the petitioner may well have been originated in a bid to bring the petitioner within the **Githunguri** case. I do not believe, however, even if the letter had not been disowned by the alleged author, that it can properly fall within what is required to prevent the prosecution of a party. Parties seeking to rely on the **Githunguri** case, as has the petitioner in this case, often overlook the peculiar facts of the case: that the prosecution in the Githunguri case in respect of which orders of prohibition were sought was taking place nine years after the alleged offence, and four years after the Attorney General had publicly stated that he would not be proceeding with the prosecution, and the foreign currency that constituted the subject of the charge had been returned to the applicant and credited to his bank account.

47. I would also agree with the 4<sup>th</sup> respondent that the constitutional mandate under the 2010 Constitution with respect to prosecution lies with the 4<sup>th</sup> respondent, and that the 1<sup>st</sup> respondent has no power to ‘absolve’ a party and thereby stop the 4<sup>th</sup> respondent from carrying out his constitutional mandate. Article 157(10) is clear:

**(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.’**

48. The Court’s response to the second issue, inevitably, must be in the negative. The petitioner holds onto the somewhat uncertain straw presented by the letter allegedly absolving him from responsibility to claim that the issues that he has raised in this petition are not *res judicata*. However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4<sup>th</sup> respondent set out in Article 157(10) set out above, the 1<sup>st</sup> respondent has no authority to ‘absolve’ a person from criminal liability, assuming this is what the letter of 6<sup>th</sup> August 2012 sought to do. So long as there is sufficient evidence on the basis of which a criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4<sup>th</sup> respondent, the only proviso being that the 4<sup>th</sup> respondent must act in accordance with his constitutional mandate.

### **Whether There Has Been a Violation of the Petitioner’s Constitutional Rights**

49. The petitioner alleging a violation of constitutional rights has an obligation, as enunciated in the case of **Anarita Karimi Njeru -v- R** (supra) to demonstrate, with a reasonable degree of precision, the provisions of the Constitution which have been violated, and the manner in which they have been violated with respect to him.

50. As submitted by the respondents, aside from the mention of various Articles in the heading to the petition, namely Articles 25, 28, 29, 31, 35, 36, 47, 49 (1) (c) & 50 (2) (a) (b) (c) (j), no attempt has been made to demonstrate the nature of the violation in respect to the petitioner.

51. This deficiency is doubtless compounded by the failure on the part of the petitioner to file an affidavit in support of his petition, for this is where the alleged violations would be demonstrated by way of affidavit evidence. The contents of the affidavit sworn on 20<sup>th</sup> September 2013 do not really assist the petitioner, for it addresses itself primarily to the criminal case facing him in respect of the alleged forgery of the letter of 6<sup>th</sup> August 2012.

52. Counsel for the petitioner did attempt, from the Bar, to show violation of the petitioner's rights under Article 50. Aside from the fact that there must be evidence on record on the basis of which the Court can discern a violation of rights, the submissions of Counsel do not advance the petitioner's case at all. As correctly argued by the respondents, Article 50, specifically Article 50(2), guarantees an accused person's rights during the trial process. As there is no trial that is underway currently, there can be no basis for alleging violation of rights guaranteed under Article 50.

### **Composition of the 1<sup>st</sup> Respondent**

53. The petitioner has also challenged his prosecution on the basis that the 1<sup>st</sup> respondent was not fully constituted at the time the investigation of the petitioner was ongoing. This issue was fully addressed by Majanja J in his decision in the case of **Thuita Mwangi vs EACC (supra)**, a decision whose conclusions at paragraphs 106-108 I fully agree with:

**106. The 1<sup>st</sup> petitioner alleges that during the time the investigation was conducted, the EACC was not properly constituted as it neither had a Chairman and its officers had not been vetted. This question is partly answered by section 53 of the *Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)* which provides that;**

***53. Power of board, etc., not affected by vacancy, etc.***

***Where by or under a written law a board, commission, committee or similar body, whether corporate or un-incorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by—***

***(a) a vacancy in the membership thereof; or***

***(b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof.***

**107. The question of transition and composition of EACC was also dealt in the case of *Ruth Muganda v Kenya Anti-Corruption Commission and Director of Public Prosecutions* Nairobi HC Misc. Crim. Appl. No. 288 of 2012 where, in holding that the members of the secretariat of the Commission were properly in office, Achode J., held that, “[45].... Thus this Court is alive to the fact that the envisaged transitional period prescribed in the statute could not foresee all transitional challenges, bearing in mind possibilities of litigation as in the case here affecting the appointment of the chairman and therefore assumption of office by members of the Commission.. [46] A purposive approach to this issue requires the Court, in the spirit of the Constitution, to promote the continuing and intended objects and functions of the Commission throughout the transitional process as opposed to extinguishing its existence.” (See also *African Centre For International Youth Exchange (ACIYE) & 2 Others -v- Ethics And Anti-Corruption Commission & Another*, Petition 334 of 2012 [2012]eKLR).**

**108. It is clear the petitioners' argument regarding the alleged defect in composition of EACC is untenable. My reasoning is further buttressed by the fact that the decision to prosecute is an independent decision made by the DPP and whether there is a defect in the composition of the EACC, the DPP exercised his independent discretion to charge the petitioners.**

54. The upshot of my findings above is that this petition has no merit, and is an abuse of the Court process. It is hereby dismissed with costs to the respondents.

**Dated Delivered and Signed at Nairobi this 31<sup>st</sup> day of January 2014**

**MUMBI NGUGI**

**JUDGE**

**Mr Paul Kiragu Wathuta instructed by the firm of Simba & Simba Co. Advocates for the petitioner**

**Mr Edward M. Rinkanya instructed by the firms of Edward M. Rinkanya & Co. Advocates for the 1<sup>st</sup> respondent**

**Mr. Adow Deiss Mohamed instructed by the State Law Office for the 2<sup>nd</sup> & 3<sup>rd</sup> respondents**

**Mr. Edwin Okello instructed by the Director of Public Prosecutions for the 4<sup>th</sup> respondent.**