



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 341 of 2012**

**FLORENCE DOROTHY**

**SEYANOI KIBERA MOSCHION .....1<sup>ST</sup> PETITIONER**

**JOHN WAMITI NJAGI ..... 2<sup>ND</sup> PETITIONER**

**VERSUS**

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

**COMMISSIONER OF POLICE.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR CRIMINAL INVESTIGATION DEPARTMENT .. 3<sup>RD</sup> RESPONDENT**

**THE CHIEF MAGISTRATE COURT MILIMANI ..... 4<sup>TH</sup> RESPONDENT**

**CONSTANTINE GEORGE SPHIKAS .....1<sup>ST</sup> INTERESTED PARTY**

**DEBORAH ACHIENG ADUDA .....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The petitioners are seeking in this petition orders to stop their prosecution in **Criminal Case No. 11233 of 2012 Republic –v-Florence Seyanoi Kibera Alias Dorothy Seyanoi Moschion** and in **Criminal Case No. 1134 of 2012- Republic –v- Florence Seyanoi Kibera Alias Dorothy Seyanoi Moschion & John Wamiti Njagi**. The basis of their application is that the prosecutions are an abuse of the criminal justice process and a violation of their constitutional rights.

2. The 1<sup>st</sup> petitioner avers that she is theregistered proprietor of the property known as L.R. No 5892/22 Karen comprising 35.5 acres. The 2<sup>nd</sup> petitioner, on whose behalf she also swears the affidavit in support of the petition, is an Advocate of the High Court of Kenya practicing as such in the name and style of Wamiti Njagi & Associates Advocates. The 2<sup>nd</sup> petitioner was acting for her in Criminal Case No. 946 of

2010 in which she had been charged with obtaining money by false pretences. She and her Advocate were arrested on 31<sup>st</sup> July 2012 after she had been discharged in the said case under Section 210 of the Criminal Procedure Code.

3. She alleges that her arrest and prosecution in the two criminal cases is malicious and an abuse of the criminal justice process as the complaints are strictly civil in nature and the subject of civil proceedings in Milimani HCCC No 340 of 2012 between herself and the Interested Parties, the complainants in the criminal cases.

### **The Petition**

4 In the Petition dated 6<sup>th</sup> August 2012, the petitioners seek the following orders:

**a) AN ORDER OF PROHIBITION prohibiting the respondents themselves, subordinates or otherwise from prosecuting the applicants for charges brought in Milimani Criminal Case 1133 of 2012, Republic -v- Florence Seyanoi Kibera and Criminal Case 1134 of 2012; Republic -v- Florence Seyanoi Kibera and John Wamiti Njagi and from further harassing, arresting, charging or bringing criminal charges against the petitioners based on the performance or otherwise of the Lease in respect of L.R No 5892/22, Karen between the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> interested party or the sale agreement in respect of L.R. No 5892/22, Karen between the 1<sup>st</sup> petitioner and the 2<sup>nd</sup> interested party**

**b) JUDICIAL REVIEW ORDER OF PROHIBITION prohibiting the respondents by themselves, subordinates or otherwise from harassing arresting, bringing criminal charges and/ or prosecuting the 1<sup>st</sup> petitioner on account of matters arising from or connected with the Lease Agreement in respect of L.R. No 38992/22 Karen executed between the 1<sup>st</sup> petitioner and the 1<sup>st</sup> interested party on 5<sup>th</sup> March 2012.**

**c) AN ORDER OF CERTIORARI removing to this Honourable court for purposes of being quashed the decision/ criminal charges brought by the respondents against the applicant in Milimani Criminal Case 1133 of 2012; Republic vs Florence Seyanoi Kibera and Criminal Case 1134 of 2012; Republic Vs Florence Seyanoi Kibera and John Wamiti Njagi.**

**d) AN ORDER OF DECLARATION declaring that the decision to charge and prosecute the 2<sup>nd</sup> petitioner in Criminal Case 1134 of 2012; Republic -V- Florence Seyanoi Kibera and John Wamiti Njagi is malicious and in violation of the 2<sup>nd</sup> petitioner's right under Article 47(1) of the constitution and an affront to the 2<sup>nd</sup> petitioner's career and status as an advocate of the High court.**

**e) AN ORDER OF DECLARATION declaring that the refusal by the police to release the petitioners on reasonable bail or bond terms following arrest violated the petitioners' rights under article 49(10)(h) of the constitution and an affront to the petitioners' right to personal freedom.**

**f) AN ORDER OF DECLARATION declaring that the application by the respondents of the criminal justice process to compel civil settlement between the Interested parties and the 1<sup>st</sup> petitioner herein is an abuse of the criminal justice process and a contravention of the petitioner's constitutional right to freedom and security of the person, right to freedom of movement, right to protection of property and right to secure protection of the law.**

**g) AN ORDER OF DECLARATION declaring that the bringing of criminal charge against petitioners on the circumstances of this matter is malicious and an abuse of court process.**

**h) AN ORDER OF DECLARATION declaring that the bringing of criminal charge against petitioners on the circumstances of this matter is, malicious and an abuse of court process.**

**I) general damages or compensation for violation of the petitioners' constitutional rights**

## **J) Costs**

## **K) Any other/further order or relief that this Honourable court may deem fit to grant.**

### **The Petitioners' Case**

5. The petitioners state that their case is based on Articles 22, 23, 47, and 50 of the Constitution. They contend that the Court should determine what is reasonable and fair in the exercise of the powers vested in the Director of Public Prosecutions under Article 157 of the Constitution.

6. According to the petitioners, the facts and circumstances giving rise to the two criminal cases that have given rise to this petition are civil in nature. With regard to Criminal Case No 1133 of 2012, they contend that the relationship between the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> interested Party is that of lessee and lessor; that there was a civil suit pending between the parties before the criminal process was instituted; that the sum in dispute in the civil case is prepaid rent; that rent is the entitlement of a landlord, and that therefore the matter belongs to the civil process and should not be the subject of criminal prosecution.

7. With regard to Criminal Case No 1134 of 2012, the petitioners submit that it concerns a contract of sale between the 1<sup>st</sup> petitioner and the 2<sup>nd</sup> Interested Party; that issues relating to enforcement of a sale agreement are to be determined as provided in the agreement for sale and are not matters to be subjected to the criminal justice process. She contends that the criminal process against her is a result of a personal vendetta against her by the Interested Parties.

8. The 1<sup>st</sup> petitioner states that she has entered into two separate contractual agreements with the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in relation to the same property. The first is a lease agreement over the entire property with the 1<sup>st</sup> Interested Party for a period of 10 years from the 5<sup>th</sup> of March 2012 for which she received a sum of Kshs 6m. The second is an agreement for sale to the 2<sup>nd</sup> Interested Party which she contends was to be completed in 10 years as the agreement was for payment of the purchase price in instalments.

9. The 1<sup>st</sup> petitioner denied that there had been any advertisement of the property on 30<sup>th</sup> June 2012 as alleged by the respondents, and with regard to the prosecution in Criminal Case No 946 of 2010 referred to in the further affidavit of the 1<sup>st</sup> Interested Party, she contended that the prosecution related to a different property, and that in any event she had been acquitted without being put on her defence.

10. Mr. Kaluma for the petitioners relied on, among others, the case of **Republic -v- Kipngeno Arap Ngeny** and urged the court to be guided by the principles set out in that case and find that the criminal prosecutions against the petitioners in this case were without merit and an abuse of the criminal justice system.

### **The Respondents' Case**

11. The respondents filed an affidavit in reply to the petition sworn by Henry Njeru, an Inspector of Police attached to the Criminal Investigations Department, Land Fraud Investigations Unit, on 2<sup>nd</sup> November 2011. The gist of their case is that the facts and evidence that they have shown that there were criminal offences committed, and that therefore the criminal prosecutions are justified and in accordance with the law.

12. According to Mrs. Obuo, State Counsel for the respondents, the petitioner sold the property in question to the 2<sup>nd</sup> Interested Party on 16<sup>th</sup> February 2012. On 5<sup>th</sup> March 2012, the property was leased to the 1<sup>st</sup> Interested Party. The property was again advertised for sale on 30<sup>th</sup> June 2012, and the respondents contended therefore that the petitioner was taken to court after proper investigations were carried out.

13. The respondents take the position that the criminal justice system has not been abused; that proper investigations were carried out and it was found that an offence had been committed before the petitioner was charged in court; that as the matter was before a competent trial court, it was that court which is best suited to deal with the evidence, and this court should not usurp the powers of the trial court.

14. On the contention that the matters at issue were the subject of civil proceedings, Mrs. Obuo submitted that Section 193A of the Criminal Procedure Code permits concurrent criminal and civil proceedings, and the existence of civil proceedings was thus not a bar to criminal proceedings.

15. The respondents argued also that the petition did not disclose any violation of the petitioner's constitutional rights. Allegations had been made against the Interested Parties, but none against the respondents who were independent of the Interested Parties.

16. Mrs. Obuo submitted that the case of Republic –v- Kipngeno Arap Ngeny relied on by the petitioner was distinguishable from the present case as there had been a delay of ten years in the prosecution of the petitioner in that case. She submitted that all the other decisions relied on by the petitioner supported the respondents' case that public interest demands that the cases against the petitioner be prosecuted. She urged the court to dismiss the petition and allow the prosecutions to proceed.

### **The Case for the Interested Parties**

17. The Interested Parties' case is set out in thereplying affidavits sworn on 4<sup>th</sup> October, 2012, the further affidavit of the 2<sup>nd</sup> Interested Party sworn on 27<sup>th</sup> November 2012, as well as written submissions and list of authorities dated 26<sup>th</sup> October 2012.

18. Mr. Oyomba, in presenting the case for the Interested Parties, supported the position taken by the respondents that the prosecution of the petitioners in both cases was proper and based on the evidence, and the matters before the criminal courts are bona fide criminal proceedings. He contended that the petitioners are seeking to demonstrate their innocence before a constitutional court; that the issues they were raising in this matter should properly be raised before the trial court as defences in the trial; that no violation or threatened violation of the petitioners' rights under the Constitution by the respondents had been demonstrated. Further, it had also not been shown that the trial court was acting in excess or without jurisdiction, or that the petitioners shall be denied due process in the trial.

19. On the facts giving rise to the criminal prosecution, Mr. Oyomba submitted that under Clause 8 of the sale agreement between the 2<sup>nd</sup> Interested Party and the 1<sup>st</sup> petitioner dated 16<sup>th</sup> February 2012, the portion being sold was to vest in the buyer on execution of the agreement. Barely a month later, the 1<sup>st</sup> petitioner leased the same property to the 1<sup>st</sup> Interested Party in vacant possession. Mr. Oyomba submitted that these conflicting provisions could not be reconciled without coming to the conclusion that the intention was to defraud the Interested Parties from whom the 1<sup>st</sup> petitioner had received Kenya Shillings 10 million and 6.9 million respectively.

20. According to Mr. Oyomba, the 2<sup>nd</sup> petitioner had acted for both the 1<sup>st</sup> petitioner and the 2<sup>nd</sup> Interested Party in the sale agreement while knowing full well that the intention was to defraud as he had acted for the 1<sup>st</sup> petitioner in an earlier, similar transaction resulting in another criminal prosecution, namely Criminal Case No. 946 of 2010. He submitted that one of the petitioners had demonstrated any violation of their constitutional rights, and he urged the court to dismiss the petition with costs to the respondents and Interested Parties.

### **The Issues**

21. The parties to this petition, particularly the petitioners and the Interested Parties, have made diverse and extensive allegations of fact against each other. The petitioners have averred that the respondents were acting at the behest of the Interested Parties in deciding to charge them; that they were being used to compel the 1<sup>st</sup> petitioner to settle a civil claim, and that they subjected the 1<sup>st</sup> petitioner to unnecessary suffering and loss of personal liberty at the behest of the Interested Parties.

22. On their part, the Interested Parties have set out a whole list of criminal charges which have been brought over the years against the 1<sup>st</sup> petitioner, and in which the 2<sup>nd</sup> petitioner, who also acted for the 1<sup>st</sup> petitioner in the two transactions that form the background of this petition, acted as her defence counsel. They describe the 1<sup>st</sup> petitioner as a serial offender who is in the habit of obtaining money from unsuspecting members of the public by pretending to be able to sell to them the land in dispute.

23. Whatever the truth of these allegations and counter-allegations, the business of this court is to examine whether there has been a constitutional issue raised by the petitioners that merits consideration and determination. From the pleadings and submissions before me, I believe the issue for determination in this matter is whether the prosecution of the petitioners in Criminal Case Nos. 1133 and 1134 of 2012 is a violation of their constitutional rights, and if it is, whether this court should quash the prosecutions.

24. The petitioners allege violation of their constitutional rights, relying on the provisions of Articles 22, 23, 47 and 50 of the Constitution. The 1<sup>st</sup> petitioner also alleges violation of her right to bail under Article 49 (1)(h) of the Constitution.

25. The law with regard to the obligation of a party alleging violation of his or her constitutional rights has been articulated in **Anarita Karimi Njeru –v- Republic (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012**. The petitioners have a duty to demonstrate, with a reasonable degree of precision, the Articles of the Constitution that have been violated, and the manner in which they have been violated.

26. Article 22 contains the constitutional provisions with regard to the lodging of petitions alleging violation of rights, and does not confer any substantive rights on the petitioners. Similarly, Article 23 contains no right capable of violation-it simply sets out the powers of the court and the reliefs that a court can grant when seized with a petition under Article 22 should it find that there has been a violation of rights. Article 47, 49 and 50 guarantee the petitioners' rights to fair administrative action, bail and fair hearing and I shall revert to them shortly.

### **The Facts**

27. As I stated above, the function of this court in dealing with a constitutional petition is to determine whether there has been a violation of the rights of the petitioners. It cannot properly be drawn to make findings of fact on the dispute. It can only consider whether, on the facts and pleadings before it, violation of any of the constitutional rights of the petitioners is disclosed.

28. The essential facts giving rise to the petition are undisputed. The petitioner entered into a lease agreement with the 1<sup>st</sup> Interested Party to lease all of that property known as Land Reference Number 5892/22 together with the improvements thereon for a term of 10 years pursuant to a lease agreement dated 5<sup>th</sup> March 2012. She received the sum of Kshs 6.9 million from the 1<sup>st</sup> Interested Party. About three weeks earlier, on 16<sup>th</sup> February, 2012, the 1<sup>st</sup> petitioner had entered into a sale agreement with the 2<sup>nd</sup> Interested Party for the sale of a 1 acre portion of land out of the same property, to the 2<sup>nd</sup> Interested Party. She concedes that she received Kshs 10 million from the 2<sup>nd</sup> Interested Party in respect of the sale. From the documents availed to the court, both possession on the sale and the lease were to take place immediately.

29. What happened thereafter, following the signing of the two agreements, is hotly contested. According to the Interested Parties and the respondents, upon discovering the facts set out above, the Interested Parties made complaints to the police, and following investigations which disclosed the commission of a criminal offence, the criminal cases against the 1<sup>st</sup> petitioner and her Counsel in the transactions, the 2<sup>nd</sup> petitioner, were instituted. From the evidence before me, though the prosecution have been instituted, the trials have not yet commenced.

30. The 1<sup>st</sup> petitioner presents a different version of events, alleging that the 1<sup>st</sup> Interested Party was a tenant who was in arrears of rent and who was seeking to defraud her of her land, while the 2<sup>nd</sup> Interested Party is a prospective purchaser who is in breach of her sale agreement and who also wishes to defraud her of her land. The respondents are being used, according to the petitioners, to compel the 1<sup>st</sup> respondent to transfer the 1 acre piece of land to the 2<sup>nd</sup> Interested Party and to give possession to the 1<sup>st</sup> Interested Party in accordance with the terms of the lease. It is not clear how these clearly conflicting interests of the Interested Parties would be reconciled in the alleged acts of the respondents to force the 1<sup>st</sup> petitioner to settle the civil claims. At any rate, the question for the court is whether the facts before me disclose violations of the petitioners' rights.

### **Violation of Article 47**

31 Article 47 of the Constitution is in the following terms:

**47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is**

**Likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

**(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall**

**(a) provide for the review of administrative action by a court or,**

**if appropriate, an independent and impartial tribunal; and**

**(b) promote efficient administration.**

32 In the present case, the respondents are exercising powers conferred under the Constitution: in the case of the 1<sup>st</sup> respondent, powers conferred under the provisions of Article 157 to direct investigations and carry out prosecutions. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents carry out their mandate on the instructions of the 1<sup>st</sup> respondent who is empowered, under Article 157(4), to

**‘direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.’**

33. In the case of the 4<sup>th</sup> respondent, it is carrying out its powers under the Constitution and statute to try the petitioners for offences recognised by law.

34. From the evidence before me, there is nothing to demonstrate that there has been a violation of any rights under Article 47. Indeed, the powers of the 1<sup>st</sup> respondent are to be exercised in accordance with Article 157, which provides, at Article 157(10), that

**‘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.’**

35. As this court observed in its judgment in **Francis Anyango Juma –v- The Director of Public Prosecutions and Another, Petition No 160 of 2012**, the powers of the DPP under Article 158(10) are intended to be exercised independently:

**28. Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under the Constitution, or violation of the Constitution itself.**

36. There is nothing presented before me by the petitioners that demonstrates any violation of the petitioners’ rights under Article 47 by the 1<sup>st</sup> to 3<sup>rd</sup> respondents. As correctly observed by Mrs. Obuo for the respondents, the petitioners’ complaint is against the Interested Parties, and there is nothing that shows that the respondents, aside from carrying out their mandate to receive and investigate allegations of criminal conduct, and to institute criminal prosecutions, did anything that even remotely violated the rights of the petitioners.

#### **Violation of Article 49(h)**

37. Article 49(h) of the Constitution guarantees an accused person the right to be released on bond or bail on reasonable terms pending trial. The 1<sup>st</sup> petitioner alleges that her rights under this Article were violated by the 4<sup>th</sup> respondent when it declined to grant her bail for a number of days. The basis of this contention

is what appears to be a one-sided conversation, allegedly overheard by the 1<sup>st</sup> petitioner, between the 2<sup>nd</sup> Interested Party and another, unnamed person. It would do great violence to the cause of justice to place any credence on such allegations, and I therefore make no findings with regard to this claim.

### **Violation of Article 50**

38. The petitioners allege violation of their rights under Article 50 of the Constitution. It is not, however, disputed that the trial of the petitioners has not yet commenced, and as held by the Court of Appeal in **Julius Kamau Mbugua -v- The Republic, Criminal Appeal No. 50 of 2008**, the right to a fair hearing under Section 77(1) of the former constitution, which is now guaranteed under Article 50, relates to proceedings at the trial. Until the petitioners' trial has commenced, any allegation of violation of their fair hearing guarantees under the Constitution has no basis.

### **Civil Proceedings**

39. The petitioners argue that the matters giving rise to their criminal prosecutions are civil in nature, and that there is pending before the High Court Nairobi Civil Suit No. 340 of 2012. However, as correctly pointed out by the respondents and the Interested Parties, Section 193 A of the Criminal Procedure court contemplates simultaneous and concurrent civil and criminal proceedings. There is nothing therefore that precludes the Interested Parties from pursuing a civil claim for recovery of the monies paid to the 1<sup>st</sup> petitioner as the state pursues its prosecution for whatever offences are found to have been committed by the petitioners related to the transactions with the Interested Parties.

40. In the circumstances, I find no merit in this petition and it is hereby dismissed with costs to the respondents and the Interested Parties.

**Dated at Nairobi this 14<sup>th</sup> day of March 2013**

**MUMBI  
JUDGE**

**NGUGI**

**Mr. Kaluma instructed by the firm of Lumumba Mumba & Kaluma Advocates for the petitioner.**

**Mrs Obuo instructed by the Director of Public Prosecutions for the Respondents**

**Mr. Oyomba instructed by the firm of Oyomba & Co. Advocates for the Interested Parties**