



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**PETITION NO 230 OF 2012**

**BILL KIPSANG ROTICH & ANOTHER .....PETITIONER/APPLICANT**

**VERSUS**

**COMMISSIONER OF POLICE & 4 OTHERS .....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By an application brought by way of Notice of Motion dated 30<sup>th</sup> May 2012, the petitioners sought orders restraining the respondents from, inter alia, summoning, arresting, charging or initiating criminal proceedings arising from disputes relating to directorship, shareholding, ownership or control of Metro Petroleum Limited pending the hearing and determination of this petition. Interim orders were granted in the matter by Ogola, J on 31<sup>st</sup> May 2012 and were thereafter extended pending the hearing and determination of this petition.

2. In the petition, which is dated 20<sup>th</sup> May 2012, the petitioners seek the following orders:

- a) *That the Respondents, whether by themselves, or by their servants, agents or any other persons whatsoever be restrained and prohibited by an injunction from summoning or harassing, intimidating, arresting, charging or initiating criminal proceedings or taking any other step infringing, charging or initiating criminal proceedings or taking any other step infringing on the liberty of the Petitioners in relation to matters their subject matter of the instant petition, to wit, the dispute relating to Directorship. Shareholding, ownership and./or control of Metro Petroleum Limited.*
- b) *An Order of Prohibition and or injunction do issue directed at the Respondents by themselves or through their employees or officers thereof, restraining them from re-opening, reviewing or and/ or otherwise dealing with any and all matters relating to the closed inquiry No. 35 of 2009.*
- c) *An order of Prohibition and or Injunction do issue directed at the Respondents restraining them from recording the Petitioners statements in respect of any and all matters related to the closed Inquiry No 35 of 2009.*
- d) *An order of Prohibition and or Injunction do issue retraining the respondents from interfering with the liberties of the Petitioners in respect of any and all matters related to the closed Inquiry No 35 of 2009.*
- e) *A declaration that the Petitioners' right to fair administrative action under Article 47 of the Constitution of Kenya has been denied violated and or infringed.*

- f) *A declaration that the 2<sup>nd</sup> Respondent's demand that statements relating to the concluded inquiry be taken is unconstitutional and in breach of the fundamental rights of 5th Petitioners to fair administrative action under Article 47 of the Constitution.*
- g) *An order of Certiorari to bring to this Honourable Court to be quashed the decision of the Respondents in the letter dated 12<sup>th</sup> April 2012 purporting to revisit the concluded Inquiry No 35 of 2009.*
- h) *An order of Prohibition directed at the Respondents by themselves or through any police station or police officer serving under the national Police serve or otherwise, from arresting, taking statements, investigating and/ or interrogating the Petitioners in regard to any issue relating to and/ or arising from the subject matter of the concluded Inquiry No 35 of 2009.*
- i) *An order of Mandamus directed at the Respondents to avail and / or produce all investigation notes, reports and/ or any decisions/directions thereof relating to Inquiry No 35 of 2009 to the Court and to the Petitioners.*
- j) *A Declaration that the purported and proposed further investigations or any further action of a criminal nature by the Respondents in a matter of civil nature currently pending determination before the High Court is an abuse of office, authority and due process of law and therefore null and void.*
- k) *Damages for contravention of the fundamental rights and freedoms of the Petitioners.*
- l) *Such further and other consequential orders, writs, declarations and directions as this Honourable Court may consider appropriate for the purpose of enforcing and securing the enforcement of the rights and fundamental freedoms of the Petitioners under the constitution of Kenya.*
- m) *Cost of the petition.*

### **The Facts**

3. The facts as they appear from the pleadings before me are that the petitioners had incorporated a company known as Metro Petroleum Company Limited sometime in 1999. At the time of its incorporation, the petitioners were the shareholders and directors. Sometime in 2003, the Interested Party acquired the 2<sup>nd</sup> petitioner's share and also became a director of the company. The 2<sup>nd</sup> petitioner ceased to be a shareholder or director.

4. It appears that at some point in 2007, disputes arose between the 1<sup>st</sup> petitioner and the Interested Party. The reasons for the dispute are contested: the petitioners allege that there was an agreement with the Interested Party that he should relinquish his shareholding and directorship in the company, while the Interested Party takes the position that he was fraudulently removed as a director of the company.

5. On 7<sup>th</sup> September 2009, the Interested Party filed a criminal complaint against the petitioners with the 2<sup>nd</sup> respondent alleging a fraudulent attempt to remove him as a director of Metro Petroleum Limited and unlawful conversion of the company's assets. Pursuant to this complaint, the investigations and intended prosecution by the respondents that form the basis of this petition began.

### **The Petitioners' Case**

6. The petitioners' case as presented by Mr. Ogeto is set out in the petition, the affidavit in support sworn by Mr. Bill Kipsang Rotich, the 1<sup>st</sup> petitioner, on 30<sup>th</sup> May 2012 and the written submissions dated 19<sup>th</sup> November 2012.

7. According to the petitioners, they were subjected to a detailed investigation by the respondents for three 3 years from 2009 to 2012. At the end of the investigations, the DPP directed that the investigations be terminated and no charges be brought against them. The decision to terminate the investigation was communicated to them in writing. They assert that the decision to terminate the investigations was not arbitrary but was based on a detailed opinion by the DPP justifying the termination, namely lack of evidence and existence of several civil suits over the subject matter. They allege that the DPP undertook not to further investigate the petitioners and communicated this decision in a letter dated 13<sup>th</sup> March 2012.

8. The petitioners allege that contrary to this decision, two months later, the DPP decided to revisit the investigations and sent a letter to this effect to the petitioners' Advocates. They allege that no reasons were given for the decision to revisit the matter, and that though they sought an explanation, none was forthcoming till the filing of this petition.

9. The petitioners submit that the decision to revisit the matter was arbitrary and unreasonable; that conflicting reasons were given for the decision, and that the CID Director had no mandate to review a decision of the DPP.

10. They aver that the explanation that the re-visiting of the investigations was based on an erroneous interpretation of the law is not tenable and cannot be a basis for re-opening investigations. They claim that the respondents had enough time to investigate properly and come up with the law; that the DPP is required to act expeditiously and accordingly, the re-opening of the investigations was a violation of their rights under Article 47.

11. The petitioners further argue that the issue before the court is not, as asserted by the respondents, that a crime has been committed; rather, the issue, in their view, is whether there has been proper exercise of the powers of the DPP. They referred to several decisions within this jurisdiction with regard to the exercise of powers of prosecution and asked the court to determine whether the respondents have exercised their powers reasonably and procedurally. They contended that, as in the case of Githunguri –vs- Republic Criminal Application No. 271 of 1985, the investigation in this case had taken 4 years and an undertaking from an important office such as the DPP ought to be taken seriously.

12. They relied on the provisions of Articles 22, 47 5o and 157 of the Constitution and submitted that while they were not challenging the powers of the DPP to prosecute, their position was that where an undertaking not to proceed with investigation or prosecution had been given, the DPP lost the power to review the decision in the absence of new and fresh evidence; that there was no demonstration of fresh evidence, and the DPP cannot purport to re-open the investigations on the basis of his broad powers under the Constitution as such powers are not absolute.

### **The Respondents' Case**

13. In opposing this petition, Ms. Kahoro for the respondents relied on the replying affidavit sworn by **Chief Inspector Adan Ahmed Hassan** on 28<sup>th</sup> June 2012, her own affidavit sworn on 5<sup>th</sup> November 2012 and written submissions dated 25<sup>th</sup> January 2013. The respondents take the position that this petition is without a legal basis or any merit and ought to be dismissed with costs.

14. According to the respondents, a complaint was made to the 2<sup>nd</sup> respondent regarding a fraudulent attempt to remove a director of a company and fraudulent conversion of company property. Investigations into the matter, which were complex and involved consultation between the 2<sup>nd</sup> and 4<sup>th</sup> respondents, commenced in 2009.

15. The respondents concede that by its letter dated 2<sup>nd</sup> February 2012, the 4<sup>th</sup> respondent recommended that the investigations be closed. However, on re-evaluation, the 4<sup>th</sup> respondent reconsidered its position and by its letters of 27<sup>th</sup> April 2012 and 28<sup>th</sup> June 2012 advised that the investigations and prosecution should proceed as they had disclosed the commission of offences under the

Penal Code, to wit forgery contrary to section 349 of the Penal Code; uttering false document contrary to section 353 and stealing by a director contrary to section 282 of the Penal Code.

16. The respondents contend that the basis of the re-evaluation of the decision to terminate the investigations was that there had been a misinterpretation of section 268 of the Penal Code as contained in the letter of 2<sup>nd</sup> February 2012. The interpretation given to the section in that letter is that a director of a company was not in a position to steal from a company by virtue of his position as a director. They argue that a company is a separate legal entity and so a director or shareholder can steal from it.

17. The respondents submit that by the letters of 27<sup>th</sup> April 2012 and 28<sup>th</sup> June 2012, the 4<sup>th</sup> respondent explained in detail the basis of the review, which was on a valid point of law; and that there was nothing unusual in reviewing a matter so long as this is done on the basis of the 4<sup>th</sup> respondent's constitutional mandate and the law.

18. With regard to the alleged contradiction between the two affidavits sworn on behalf of the respondents with regard to who had reviewed the decision to terminate the investigations and prosecution, the respondents submitted that the review was done by the 4<sup>th</sup> respondent on the basis of the evidence on record when weighed against the law and the 4<sup>th</sup> respondent's powers under Article 157(11). They submitted therefore that a party should not be permitted to have an unfair advantage based on a misinterpretation of the law that the DPP sought to remedy through a review.

### **The Interested Party's Case**

19. Mr. Kanjama for the Interested Party made oral submissions at the hearing of this matter and relied on the affidavit sworn by Pankaj Somaia, the Interested Party on 29<sup>th</sup> June 2012 in support of his application to be joined as a party to these proceedings. The Interested Party alleges that the petitioners had fraudulently removed him from his position as a director of Metro Petroleum Company Limited; and that through fraud and forgery of company documents, the petitioners stole oil products from the company in which he and the 1<sup>st</sup> petitioner were shareholders and directors.

20. Mr. Somaia avers that following his complaint and follow-up to find out what the position with regard to his complaint was, he was informed that the petitioners could not be charged as they were directors of the company. He asserts that this was a clear misdirection on the law, and he therefore asked for re-consideration of the issue.

21. Mr. Kanjama submitted that there was no contradiction in the Interested Party asking for reconsideration and the 4<sup>th</sup> respondent undertaking an independent review; that the fact that the 4<sup>th</sup> respondent had mistakenly communicated that there was no evidence and then had reviewed his decision did not mean that the petitioners would be subjected to double jeopardy which would warrant protection under Article 50(2)(o); and that the rule of double jeopardy did not apply to police investigations.

22. Mr. Kanjama argued that the only duty placed on the DPP under Article 157(11) is to bear in mind, among other things, the public interest. It was the Interested Party's position therefore that the DPP was acting in the public interest in seeking to institute proceedings; that there was no violation of the fundamental rights of the petitioner which could not be safeguarded by the criminal trial process; and he asked the court to balance the rights of the petitioners and those of the Interested Party to access justice under Article 48, 50 and 25(c), as well as the public interest which generally falls in favour of having crimes punished.

### **Determination**

23. The petitioners and the Interested Party in this matter have made detailed averments of fact in their respective affidavits. However, it is important to remind the parties that this petition is not about the dispute between the petitioners and the Interested Party, and the court cannot inquire into or comment upon the facts in that regard as it would be prejudicial to any pending litigation between the parties.

24. What falls for determination by the court is whether there is a violation or threatened violation of the petitioners' constitutional rights under Articles 22, 47 and 50 as alleged following the decision of the 4<sup>th</sup> respondent to re-evaluate its decision not to continue with the investigation and prosecution of the petitioners.

25. From the facts, it appears that following the Interested Party's complaint with regard to the changes of directorship and shareholding of Metro Petroleum Company Limited, in which the 1<sup>st</sup> petitioner and the Interested Party were directors and shareholders, they found that there had been such changes and loss of the company's property, which they attributed to the petitioners. However, in the letter dated 2<sup>nd</sup> February 2012, the DPP's office wrote to the CID indicating that as the 1<sup>st</sup> petitioner was a director of the company, he too was entitled to the stock of the company. The letter also indicated that though there was evidence of forgery, there was insufficient evidence to form a prima facie case against the petitioners. The DPP's office therefore advised that the investigations be terminated and the parties advised to resort to other lawful means to resolve their grievances.

26. According to the respondents, this was an erroneous interpretation of the law. They submit that Section 282 of the Penal Code provides that where the offender is a director of the company, and the thing stolen is the property of the corporation or company, the offender is liable to imprisonment for 7 years. They therefore submit that it was erroneous for the DPP to interpret the provision as he did in the letter of 2<sup>nd</sup> February 2012: the 1<sup>st</sup> petitioner, as a director of the company, had no right to the stock of the company, and section 282 of the Penal Code made it an offence to appropriate its property. They therefore assert that the 4<sup>th</sup> respondent was fully entitled to re-evaluate its decision as he did and re-open the matter.

27. On their part, the petitioners claim that the DPP had no right to re-evaluate its decision; that it gave conflicting reasons for the re-evaluation, and that this case was on a par with, among others, the case of Githunguri -vs- Republic. They ask the court to grant the orders sought and prohibit the DPP from investigating or prosecuting them.

28. In determining this matter, the starting point is the constitutional mandate that the 4<sup>th</sup> respondent is given. Article 157 (10) and (11) of the Constitution, which are relevant to the proceedings now before this court provide as follows:

***(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.***

***(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.***

29. Given the above provisions, the argument by the petitioners that the 4<sup>th</sup> respondent had no right to review the decision contained in the letter of 2<sup>nd</sup> February 2012, and that this case is on a par with the Githunguri case is, in my view, unsustainable. First, the provisions of Article 157(10) cited above are clearly intended to give the office of the DPP the unfettered mandate to make decisions on whether or not a prosecution should be initiated. As I observed in the case of **Florence Dorothy Seyanoi Kibera Moschion -vs- The DPP and Others High Court Petition No. 341 of 2012** and in **Francis Anyango Juma -v- The Director of Public Prosecutions and Another, Petition No 160 of 2012**, the powers of the DPP under Article 157(10) are intended to be exercised independently, and unless there are very cogent reasons that demonstrate the violation of a right or of the Constitution itself, should not be interfered with:

***'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.'***

30. In my view, the exercise of the DPP's mandate requires that, where the need arises, he should be free to reconsider a matter and give the right directions and advice should an erroneous interpretation of the facts or the law have occurred.

31. This, I believe, is the situation in this case. I have considered the contents of the letter of 2<sup>nd</sup> February 2012 and the subsequent letters of 27<sup>th</sup> April 2012 and 28<sup>th</sup> June 2012. A cursory glance at the letter of 2<sup>nd</sup> February indicates that the conclusions reached in that letter are not supported even by the provisions of the Penal Code cited in the letter. To hold that the DPP is bound by the erroneous decision reached by an officer within his office, even where such errors are discovered and corrected within a reasonable period of two months or so, would amount to placing a great fetter on the office of the DPP, and would, in my view, work against the public interest.

32. The petitioners submit that their position is the same as that of the applicant in the case of **Githunguri -vs- Republic** (supra). In that case, there was a delay of 4 years after the A.G had decided not to prosecute, and another five years since the start of the investigations. This case differs considerably from the Githunguri case. Unlike the Githunguri case in which the investigations had been conducted nine (9) years before, and an assurance given that the state would not prosecute, the matters in question in this case took place over a matter of months. The period between the communication of the decision by the CID on 13<sup>th</sup> March 2012 and the decision to re-open the matter was less than two months. There can be no argument in this case that evidence was destroyed due to the lapse of time, and that the petitioners will therefore be prejudiced as they will not have witnesses and evidence available.

33. The petitioners have also placed reliance on the cases of **Kipng'eno Arap Ngeny -vs- R Misc. Civil Application No. 406 of 2001** and **Jared Benson Kangwana -vs- Attorney General High Court Misc. Civil Application No. 446 of 1995**. I have read the decisions in these cases, and the point that emerges with regard to the provisions of Section 26 of the former Constitution is that the court will stop prosecutions where there is clear violation of fundamental rights or where there is an extraneous purpose for the prosecution. Evidence of an extraneous purpose, in the view of the court in the Kipng'eno Arap Ngeny case, will be presumed where ***'the prosecution is mounted after a lengthy delay without an explanation being given for that delay.'*** In this case, not only is the period in question a mere two months, but a clear explanation with a clear legal basis has been proffered.

34. The petitioners have also submitted that there are civil proceedings now pending between the parties. However, as submitted by Mr. Kanjama in reliance on the Kangwana case, criminal and civil proceedings can be concurrent so long as the criminal proceedings are not being used to intimidate the suspect in what are bona fide civil debt claims. Further, the **Criminal Procedure Code** expressly provides at section **193A** that the pendency of civil proceedings is no bar to criminal prosecutions. This section is in the following terms:

***193A. Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.***

35. In my view, it would be contrary to public interest to allow circumstances such as those presented by this case to enable parties avoid prosecution. In the absence of clear breaches or threat of infringement of the petitioners' rights under the Constitution, which I am unable to find in this case, I am unable to find that there is any violation or threat of violation of the petitioners' constitutional rights. In addition, the criminal justice process has very clear safeguards for parties, safeguards that are underpinned by the Constitution.

36. In the circumstances, I find no merit in this petition. It is hereby dismissed, but with no order as to costs.

37. The respondents are at liberty to carry out such investigations and prosecution as the DPP deems necessary in accordance with his mandate under Article 157 of the Constitution.

**Dated, Delivered and Signed at Nairobi this 23<sup>rd</sup> day of May 2013**

**MUMBI NGUGI  
JUDGE**

**Mr. Ogetto instructed by the firm of Ogetto Otachi & Co. Advocates for the Petitioners**

**Ms. Kahoro instructed by the Director of Public Prosecutions for the Respondents**

**Mr. Kanjama instructed by the firm of Muma & Kanjama Advocates for the Interested Party.**