



**Njogu v Kuria & 3 others (Constitutional Petition E007 of 2022)  
[2023] KEHC 3790 (KLR) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3790 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CONSTITUTIONAL PETITION E007 OF 2022  
RN NYAKUNDI, J  
APRIL 19, 2023**

**BETWEEN**

**GEORGE NJOROGE NJOGU ..... PETITIONER**

**AND**

**GEORGE KARANJA KURIA ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

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

**JUDGMENT**

1 The petitioners approached this court vide a petition which was amended on 22<sup>nd</sup> November 2021 seeking the following orders;

1. A Declaration be and is hereby issued that the 1<sup>st</sup> Respondent's conducts and actions which are complained of in the petition contravene *the constitution* and/or are likely to contravene or infringe upon the petitioner's fundamental rights and freedom guaranteed under articles 25(a), 27(1) & (2), 29 (a,b,c,d) and 28 of *the constitution* of Kenya 2010.
2. A Declaration be and is hereby issued that the 1<sup>st</sup> respondent's conducts and action which are complained of in the petition against the petitioner are oppressive, unfair, unreasonable, irrational, illegal and an illegal process.
3. An order of prohibition directed to the 1<sup>st</sup> Respondent prohibiting him from further status Quo on matters of transfers of deed of parcel of lands that the petitioner claims to have bought from him.



4. A declaration be and is hereby issued that the 2<sup>nd</sup> Respondent's conduct and actions which are complained off in the petition contravenes *the constitution* and/or are likely to contravene or infringe upon the petitioner's fundamental rights and freedoms guaranteed under article 25(a), 27(1) & (2), 29 (a,b,c,d) and 28 of *the constitution* of Kenya 2010.
5. A declaration be and is hereby issued by the 2<sup>nd</sup> Respondents conduct and actions which are complained of in the petition against the petitioner and oppressive, unfair, unreasonable, irrational, illegal and an abuse of power and the criminal justice system and process.
6. A declaration be and is hereby issued that the 2<sup>nd</sup> Respondent investigations pertaining to land ownership documents of the petitioner are tainted with illegality, mala fides and are being and/or have been conducted with and/or for an ulterior or extraneous purpose.
7. An order of prohibition directed to the 2<sup>nd</sup> Respondent prohibiting it from carrying out and/or proceeding with and further and/or investigations pertaining to land ownership documentation of the petitioner.
8. This honourable court be pleased to assess general and punitive damages arising from the violation of the petitioner's fundamental rights and freedoms as enshrined in *the constitution* and to compel the respondents to pay the same.
9. Respondents to bear the costs hereof.
10. Any other relief that this honourable court may deem fit and just to grant in the interest of Justice.

### **Petitioner's Case**

- 2 The petitioners' case is that the 1<sup>st</sup> Respondent sold two parcels of land to the 1<sup>st</sup> respondent on 24<sup>th</sup> March 1998 vide his agency trading by the name Bennjons Commercial Agencies but has since refused and or declined to issue the petitioner with title deeds of his two plots. Further, that the 1<sup>st</sup> respondent has colluded with the 2<sup>nd</sup> respondent to purport to investigate the matter and therefore violating his constitutional rights. He stated that on 15<sup>th</sup> February 2022, the 2<sup>nd</sup> Respondent took from the petitioner his original receipts and certificates of his two plots for investigation. Further, on 8<sup>th</sup> March 2022 the 2<sup>nd</sup> respondent arrested and detained the petitioner with a view to prosecute him purporting to have concluded the investigation against the petitioner only to release him later.
- 3 The 2<sup>nd</sup> Respondent has no reason as to why it didn't prosecute the petitioner in the 1<sup>st</sup> instant having arrested and detained him purporting to have completed the investigation. The petitioner had been subjected to psychological torture, mental anguish and is living in constant fear of losing property through acts of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and being arrested and or detained by officers from the 2<sup>nd</sup> Respondent office on what he believed to be on contrived and false allegation.
- 4 The petitioner's case is that the particulars of the violation of his constitutional rights by the respondents include subjecting the petitioner to psychological torture contrary to Articles 29 of *the constitution* of Kenya 2010, Failing to abide by chapter six and article 73 of *the constitution* of Kenya 2010, Perpetrating acts that are flagrantly in human, discriminative and saddled with unfair administrative actions contrary to Articles 27 and 47 of *the constitution* of Kenya 2010, Abuse of public office and that as a result of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's actions, the petitioners has suffered and continues to suffer immense injury, loss and damage hence rendering it necessary for the honourable court to intervene and redress to protect, promote and safeguard the petitioner's fundamental rights and freedoms.



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

- 5 The respondent filed a response to the petition and stated that the petition does not raise any constitutional issues. That the petitioner has merely cited a litany of constitutional provisions without pegging them on ascertainable set of facts in support of the Amended Petition. As such the mere recital of provision of *the constitution* does not in itself raise a constitutional controversy between them and the Petitioner to warrant intervention of the honourable court. Counsel relied on the case of Trusted Society of Human Rights Alliance v Attorney General and 2 other (2012) eKLR in support of this submission.
- 6 The respondent counsel Mr. Nyachiro submitted that the court ought to dismiss this petition on the incontestable facts that an individual cannot maintain an action for against another individual for breach of fundamental rights provision of *the Constitution*. The rights and duties of individuals are regulated by private law. He urged that the alleged contravention emanates from a government institution and the attorney general is the apt party to sue. He stated that the subject suit land known as Sergoit/Koiwoptai/Block 11 does not exist and as such the petition cannot be sustained in support of the dismissal learned counsel placed reliance on the following authorities: Trusted Society of Human Rights Alliance v Attorney General and 2 Other (2012) Kenya Bus Service Ltd & 2 Others vs the Attorney General & 2 Others (2005) eKLR, Civil Appel No.110 of 2001 Bashid Odhiambo Aloggoh & 245 Others vs Hacco Industries Ltd (unreported) Teitiwinnang And Ariong & Others (1987) L.R.C Const. 517 AT PAGE 599 , RE Application by Hahadur (1986) L.R.C (cost) 297AT 298.
- 7 Counsel urged the court to dismiss the petition with costs.

## Analysis And Determination

- 8 Upon considering the petition, the responses thereto and the submissions filed, the following issues arise for determination;
1. Whether the petition meets the threshold for a constitutional petition
  2. Whether the orders sought should be granted

### **Whether the petition meets the threshold for a constitutional petition.**

- 9 The threshold as to what constitutes a Constitutional Petition was established in the case of Anarita Karimi Njeru -vs- The Republic (1979) eKLR which principle was later restated by the Court of Appeal in the case of Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR. The principle established in the Anarita Karimi Njeru case (supra) was that a Constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed. The Mumo Matemo case (supra) reaffirmed the principle in the Anarita Karimi case when the Court at paragraph 44 of the judgment stated as follows:-

- (44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short comings, it was not enough for



the superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive or elegant drafting , without remedy by the 1st respondent”

- 10 The petitioner has stated that he has been subjected to psychological torture contrary to article 29 of *the Constitution* of Kenya. However, he has not provided any evidence to support the said violations and as such has not set them out to a reasonable degree of precision.
- 11 The petitioner claims that the 1<sup>st</sup> and 2<sup>nd</sup> respondent failed to abide by article 73 and chapter six of *the constitution*. Chapter six does not create any constitutional rights that the petitioner is entitled to, from the 1<sup>st</sup> respondent who is a private person. Questions may arise as to whether prerogative orders against the respondents are being sought prematurely and whether it would be appropriate to allow the decision maker to reach a decision which could if appropriate be the subject of declarations under Article 23 of *the constitution*. Public bodies like the Director of Criminal Investigations and office of the Director of Public Prosecutions may not be under a duty to act, but may be given a discretion as to whether or not to act. Such bodies under *the constitution* have a duty to consider whether or not to exercise their discretion to investigate commission of a crime which forms the basis of initiating a prosecution against those found culpable. There are rare occasions when if all the circumstances point to a discretionary power being exercised in a particular way the court may regard the public body as being under a duty to exercise discretion so long as the act is not ultra-vires. It is also relevant to note circumstances that the courts do exercise a supervisory jurisdiction over criminal proceedings intended or started in the Magistrate’s court. The extent of such jurisdiction is better explained in the following case law:
- (ii) Prohibition will not be granted where the applicant can, by alternative means (other than by recourse to the lost evidence in question) make the point in his defence that he wishes to make (McFarlane –v Director of Public Prosecutions<sup>7</sup> and PH -v- DPP8 ).
  - (iii) It is not enough for the applicant to identify a possible area of difficulty, said to arise on foot of the lost evidence. He must show that, because of the loss of the evidence, there is now a real risk of an unfair trial. (DC -v- DPP9 , Braddish -v- DPP10, Z -v- DPP11 and D - v- DPP12).
  - (v) Where a Court is asked to prohibit a trial on the grounds that there was an alleged failure to seek out evidence, it would have to be shown that any such evidence would be: (a) clearly relevant, (b) that there was at least a strong probability that the evidence was available, and (c) that it would have a real bearing on the guilt or innocence of the accused person.  
  
It would also be necessary to demonstrate that its absence created a real risk of an unfair trial. (DC -v- DPP15).
  - (vi) The threshold that an applicant must meet is a high one. Such an application may only succeed in exceptional circumstances. (Z -vDPP16 and DC -v- DPP17) <sup>7</sup>
  - (vii) In general, prohibition will not be necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. It should be assumed that the trial judge will conduct the proceedings fairly, and will give all necessary rulings and directions to ensure a fair trial. (DC -v- DPP18 and Blanchfield -v- Hartnett<sup>19</sup>).
- 12 As may be seeking to challenge the validity of the decision to be investigated and prosecuted for cognizable offence properly defined in any of our penal code or other statute. The issue here is concerned the circumstances in which Goerge Njorge the Petitioner and George Karanja the 1<sup>st</sup> Respondent transacted on matters to do with purchase of Land in which he is yet to be issued title documents. The approach of the court is based on what the court is stated in Kuria & 3 Others. Kuria & 3 others –vs- Attorney General (2002) 2 KLR 69. “ The court has power and indeed the duty of



prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underline the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individuals vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the courts) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the court indeed the entire system constitutionally mandated to administer...it would be a travesty to justice, a sad day for justice should the procedure or the process of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arm and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decision to prohibit ...The intrusion of judicial review remedies in criminal proceedings would have the effect or requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court. As is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the of the system of the administration of justice and ensure that justice is not only done but is seen to be done by staying and or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its process and therefore the use of court procedure for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affect the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse. It matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court is such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced because already it has it can still order that the continued implementation of that decision be stayed...there is nothing which can stop the court from prohibiting further hearing and/or prosecution of criminal case, where the decision to charge and / or admit the charge as they were have already been made.”

- 13 Did the decision by the Respondents create a risk of systemic illegality against the petitioner? What was required of the petitioner is to satisfy the criteria outlined in *Associated Provincial Picture House Ltd v. Wednesbury Corporation* (1948) 1 KB 223, in that the decision was so unreasonable that no reasonable decision maker would ever consider making it: or as Lord Diplock put in *CCSU v. Minister for the Civil Service* (1985) AC 374 410g the decision was so outrageous in its defiance or logic or of accepted moral standards that no sensible person who had applied his mind to be question to be decide could have arrived at it.;



- 14 From the petition there is no evidence that the decision complained of by the Petitioner against the Respondents, can qualify to be irrational. At the heart of the petitioners petition at the succinct of the Rule of Law by Edwin Yoder Jr, who gave the expression of the rule of law in the following language “ The law will protect the good man and the righteous cause only if it also extends an even hand to the evil and iniquitous as well. That lesson had to grasp and still harder for most of us embrace, is the heart of the Rule of Law”
- 15 In my judgement the petitioner’s grounds of challenge of the decision ought to have rested upon a factual foundation which is not fundamentally flawed and substantially disputed by the respondents. I have had a fuller evaluation and scrutiny of the evidential material non fits the critical policy to impugn or review the decision taken by the 2<sup>nd</sup> 3<sup>rd</sup> & 4<sup>th</sup> Respondents to initiate an investigation which finally culminates in the prosecution of the petitioner. If you accept the imperatives of Article 25 (A) 17, 29 (A) (B) (C) (D) and Article 40 of *the Constitution* as integral values in Kenyan Society essential to maintaining the worthy, equality, dignity, freedom from torture and right to ownership to property we must then move to consider on how best they could be best protected. The notion that a constitutional petition is the only forum of convenience with the ability to place significant remedies of fundamental importance to the citizens as adverted to by the petitioner is to me a moot question. As much as I appreciate that the lawful instruments for the criminal law cannot be entrusted to a single constitutional organ or functionary it is also true that any supervisory jurisdiction under Article 165, (6) & (7) of *the Constitution* be invoked as a last resort. The most staring principles which renders this petition really difficult for this court to grant a remedy is to be found in the case of Teitiwunnang and Ariong & Others (1987) L.R.C Const.517 at page 599 stated as follows: “Dealing now with the question can a private individual maintain an action for declaration against another private individual on individual or individual for breach of the fundamental rights provisions of *the Constitution*. The right and duties of individuals and between individual are regulated by private law.
- The constitution* on the other hand is an instrument of Government. It contains rules about Government of the county. It is my view therefore that the duties imposed by *the constitution* under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual so as to give rise to an action against the fundamental rights provisions of *the Constitution*, no action for a declaration that there has been a breach of duty under the provision can be or be maintained in the case before me, and I so hold.”
- 16 It was interesting to note that *the constitution* as a Supreme Law of the Republic does not take away the application of other legal framework in the various statute as to jurisdiction and subject the matter adjudication.
- 17 Further, he has not demonstrated any violation of the said provisions. His allegations are couched in generalities and therefore, as the article refers to a state officer, it is untenable to claim that there has been failure to abide by the provisions and not list the particulars of the officers who have violated *the constitution*. With regard to the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondent allegations for the petitioner, it is now trite that supervisory jurisdiction by the court over other constitutional organs decision making process should be exercised sparingly. The court in the case of Paul Ng’ang’a Nyaga vs Attorney General & 3 others (2013)eKLR where the court held that: “ This court can only interfere with and interrogate the Acts of other constitutional bodies if there’re is sufficient evidence they acted in contravention of *the constitution*.”



- 18 The test before the objectionable verdict is rendered, the task of the court is to lay down principal types of inquiry which must be answered in so far as to affect the substantive rights of the petitioner. Let us take the commonest guidelines set out extensively in Section 7 of the fair Administrative Actions Act which provides as follows:- A Court or tribunal under subsection (1) may review an administrative action or decision if-
- i. Was not authorized to do so by the empowering provision
  - ii. Acted in excess of jurisdiction or power conferred under any written law:
  - iii. Acted pursuant to delegated power in contravention of any law prohibiting such delegation
  - iv. Was biased or may reasonably be suspected of bias: or
  - v. Denied the person to whom the administrative action of decision relates, a reasonable opportunity to state the persons case
- b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with:
  - c) the action or decision was procedurally unfair
  - d) the action or decision was materially influenced by an error of law:
  - e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant
  - f) the administrator failed to take into account relevant considerations
  - g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions
  - h) the administrative action or decision was made in bad faith
  - i. The administrative action or decisions is not rationally connected to
    - i. The purpose for which it was taken
    - ii. The purpose of the empowering provisions
    - iii. The information before the administrator, or
    - iv. The reasons given for it by the administrator
  - (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law
  - (k) the administrative action or decision is unreasonable.
  - (i) the administrative action or decision is not proportionate to the interest or right affected
  - (m) the administrative action or decision violates the legitimate expectations of the persons to whom it relates
  - (h) the administrative action or decisions is unfair, or
  - (o) the administrative action or decision is taken or made in abuse of power



9 I have considered the prayers sought by the petitioner and the allegations set out in both the petition and the supporting affidavit and it is my considered view that the petition is incompetent as it does not provide sufficient particulars to which the respondents can reply to. The petition has failed to meet the threshold of a constitutional petition and is dismissed with costs to the respondent. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 19<sup>TH</sup> DAY OF APRIL 2023**

In the Presence of

M/S Bonareri for the 1<sup>st</sup> Respondent

Mr. Mugun for the 4<sup>th</sup> Respondent

The Petitioner present in person.

**R. NYAKUNDI**

**JUDGE**

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