



**Abdullahi v Director of Public Prosecutions & another; Director of Criminal Investigations & another (Interested Parties) (Constitutional Petition E102 of 2022) [2023] KEHC 19275 (KLR) (Constitutional and Human Rights) (23 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19275 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E102 OF 2022**

**LN MUGAMBI, J**

**JUNE 23, 2023**

**BETWEEN**

**BAKTASH TAREQ ABDULLAHI ..... APPLICANT**

**AND**

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

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

**AND**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... INTERESTED PARTY**

**NARGIS SHAUKAT ..... INTERESTED PARTY**

**RULING**

1. By a notice of motion application brought under rule 5 (d) (i) of the *Constitution of Kenya (Protection of Rights and fundamental Freedoms) Practice and Procedure Rules, 2013*, the 2<sup>nd</sup> respondent/applicant (The Hon Attorney General) sought the following orders: -
  - a. The respondent be struck out of the petition as it is not a necessary party to the suit.
  - b. Costs of this suit be provided for.
2. The application was based on the following grounds: -
  - i. That the petitioner does not disclose any claim against the 2<sup>nd</sup> respondent or the agencies it represents.



- ii. The 2<sup>nd</sup> respondent is not a necessary party and that its presence is not required to enable the court adjudicate upon and determine the issues in contention in the petition.
  - iii. The presence of the 2<sup>nd</sup> respondent has no legal basis or benefit to the honourable court neither are they crucial or necessary in order to enable the court effectively and completely determine the questions involved in the suit.
  - iv. The presence of the 2<sup>nd</sup> respondent has no legal basis or benefit to the honourable court neither are they crucial or necessary adjudicated upon and settle all questions involved in the suit.
  - v. There is no nexus between the 2<sup>nd</sup> respondent and petitioner's case as violations particularized in the petitioner's application and petition are not attributable to the 2<sup>nd</sup> respondent and/or its agencies.
  - vi. The petition does not allege any particular violation of the petitioners' rights and freedoms by the 2<sup>nd</sup> respondent.
  - vii. That it is in the interest of justice that the 2<sup>nd</sup> respondent be struck out from the subject suit.
  - viii. That the 2<sup>nd</sup> respondent has been improperly joined and not party to the suit this which has subjected them to unnecessary, expensive and tedious court process.
3. In addition to the above grounds, the 2<sup>nd</sup> respondent/applicant through state counsel M/s Ruth Wamuyu swore the supporting affidavit dated December 13, 2022.
  4. She deposed that this petition was filed to contest the 1<sup>st</sup> respondent's (Director of Public Prosecution) decision to prosecute the petitioner in a criminal case, which is a decision, the 1<sup>st</sup> respondent made independently in exercise of its constitutional mandate.
  5. She stated that the grievances raised are directly against the Office of Director of Public Prosecutions (1<sup>st</sup> respondent herein) which under article 157 of the Constitution independently exercises its mandate to institute and undertake criminal proceedings hence not attributable to the 2<sup>nd</sup> respondent/applicant or the agencies it represents.
  6. She thus prayed the 2<sup>nd</sup> respondent/applicant's be struck out from these proceedings for misjoinder.
  7. The petitioner filed grounds opposition dated January 31, 2023 and objected to the application of the following grounds: -
    - a. That 2<sup>nd</sup> respondent is mandated under article 156 (4) to represent the state: national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings: and
    - b. The instant suit is a constitutional petition predicated on the violation of the petitioner's constitutional rights 3 article 20 of the Constitution of Kenya 2010 provides that the bill of rights applies to law and binds all state organs and persons.
    - c. Article 21(1) of the Constitution of Kenya, 2010 provides that it is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights.
    - d. Article 156(6) of the constitution of Kenya. 2010 provides that the Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.



- e. Article 48 of the Constitution of Kenya, 2010 obligates the state to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

### Submissions by 2nd Respondent

8. In its brief submissions, the 2<sup>nd</sup> respondent/applicant narrowed its submissions to two issues, namely:
  - i. Whether the 2<sup>nd</sup> respondent is necessary party to the petition.
  - ii. Whether it should be struck out of the petition.
9. Ms Wamuyu argued that the Constitution under article 156 establishes the Office of Attorney General with a mandate that includes representing the National government in court or in any other legal proceedings in which National Government is a party other than criminal proceedings. In addition, there is also section 5(1) of the Attorney General Act No 49 of 2012 which provides *inter alia* that the Attorney General shall be responsible for representing the National Government in all civil and constitutional matters in accordance with Government Proceeding Act (cap 40).
10. In the present case, she stressed that the petitioner's claim is founded on criminal charges preferred against him by 1<sup>st</sup> respondent (Director of Public Prosecutions) in exercise of its independent constitutional mandate under article 157 of the Constitution. In addition, she pointed out that the petition does not demonstrate any involvement or the role played by the 2<sup>nd</sup> respondent or its agencies in the alleged violations. She thus contended it discloses no actionable claim against the 2<sup>nd</sup> respondent/applicant.
11. She relied on the authorities of Council of Governors & others v The Senate, Petition No 413 of 2014 where it was held that:

“The Constitution, 2010 allows the Attorney General the rights to represent the National Government in court proceedings but does not stipulate that the Attorney General should be sued in all instances when any organ of National Government has been sued”
12. Miss Wamuyu thus argued that since there was no nexus between the alleged violations and the 2<sup>nd</sup> respondent/applicant, the court ought to invoke rule 5(d) (i) of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 – and strike out the name of the 2<sup>nd</sup> respondent from this petition for being not a necessary party in the suit.

### Submissions By The Petitioner In Response

13. In his submissions, the petitioner briefly provided a background of the petition.
14. He submitted that the filing of this petition was informed by the action of 1<sup>st</sup> respondent (Director of Public Prosecution) to institute criminal prosecution against the petitioner in utter disregard of the findings and recommendation of the investigation officer's report.
15. The petitioner thus filed the petition on the basis that the foundation of the criminal charge is unreasonable, without basis and unlawful hence unconstitutional exercise of prosecutorial power by the 1<sup>st</sup> respondent.
16. He contended that the Attorney General (2<sup>nd</sup> respondent/applicant) is properly suited because as the legal advisor to the government, he is tasked with promoting, protecting and upholding the rule of law and defending the public interest within the meaning of article 156 of the Constitution.



17. The petitioner submitted that the instant suit is not just a private matter but also has a public interest implication because arbitrary prosecution of the petitioner exposes him to an unfair trial under article 50 of the *Constitution*.
18. He relied on the case of *Hussein Khalid and 16 others v Attorney General and 2 others* (2019) eKLR where the court quoted the case of *Kuria & 3 others v Attorney General* (2022) eKLR 69 in recognizing that a criminal case has both public and private interest combined.
19. Further, the petitioner was of the view that a constitutional violation is likely to attract damages as was held in *Gitobu Imanyara & 2 others vs Attorney General*, civil appeal No 98 of 2014 (2016) EKLK in order to vindicate the right violated and to deter any future infringement. Consequently, it was the submission of the petitioner that in view of such eventuality, it becomes necessary to join the Attorney General as party to ensure that he relays such information to the government so that the government is not burdened with damages for proceedings it was not party to.

### **Analysis and Determination**

20. Having reviewed the application together with the response thereto as well as the submissions herein, I am of the humble view that there is only one issue that falls for determination in this application, which is:

### **Whether This Application Has Merit.**

21. The 2<sup>nd</sup> respondent/applicant argued that neither the Attorney General nor the agencies it represents is in any way connected to the alleged wrongdoing forming the foundation of this petition hence the petition has not disclosed any cause of action to warrant the Attorney General being named as a respondent in this suit. It states that the grievance is founded on a decision that was taken by the Director of Public Prosecution to prosecute the petitioner in exercise its mandate which is required to be done independently and without any direction or control of any person or authority.
22. The petitioner opposed the removal of the Attorney General from this petition and cited article 156 of the *Constitution* and insisted that the Attorney General has a duty to safeguard public interest which every criminal case attracts.
23. The other point that the petitioner argued is that the petition might attract payment of damages and thus the presence of the Attorney General as a party becomes necessary at it would enable him to relay the information to the government instead of the government finding itself being overburdened with claims for payment of damages in matters it never took part in.
24. In this suit, the Attorney General is named as the 2<sup>nd</sup> respondent. The question then becomes, who qualifies to be named as a respondent in a constitution petition?
25. The answer lies in the definition of ‘respondent’ under rule 2 of *Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules, 2013*; which defines respondent as follows: —respondent means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom;
26. Consequently, in determining in determining this issue, it is important to carefully study the facts and all the relevant circumstances pertaining to the case, scrutinize the reliefs sought and answer the question as to whether the 2<sup>nd</sup> respondent fits this description as far as this petition is concerned. In instant petition, the right question to ask in relation to the 2<sup>nd</sup> respondent is whether its absence would prejudice the petitioner’s case in terms of settling all the issues in dispute or in regard to reliefs sought.



27. It is not in dispute that the Office of Director of Public Prosecution and that of the Attorney General are separate independent constitutional offices that the Constitution has created and assigned distinct functions under the national executive chapter, that is chapter 9 of the Constitution. It is also worth noting that each has its own statute that further elaborates on their respective roles and operations.
28. The Constitution at article 157 (10) categorically states that ‘the Director of Public Prosecutions shall not require the consent of any person or authority for commencement of criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority’.
29. In regard to the Attorney General, article 4 (a) states that he is the principal legal adviser to the government. However, in view of article 157 (10) above, the Attorney General cannot advise the DPP in a matter concerning the institution or undertaking criminal case. Article 4 (b) of the Constitution obligates the Attorney General to represent the National Government in court or in any other proceedings to which the national government is a party, other than criminal proceedings. Section 5 (1) (i) of the Attorney General Act No 49 of 2012 provides that the Attorney General shall be responsible for representing the national government in all civil and constitutional matters in accordance with Government Proceedings Act (cap 40).
30. It is undeniable that both the Office of the Director of Public Prosecutions and the Office of Attorney General are part and parcel of the national government.
31. As a creature of the Constitution and which is further complimented by the statute to wit, Office of the Director of the Public Prosecutions Act, the Office of the Director of Public Prosecutions can be sued in its own right, more so, by persons aggrieved by the decisions the DPP makes in exercise of his mandate.
32. If a grievance arises from the decision of the DPP therefore, it is the DPP who would be the primary party in that litigation, hence a necessary party.
33. That is what happened in the present case. The petition challenges the decision made by the DPP in authorizing his prosecution against the recommendation of the investigation officer.
34. Reading the entire petition, there is absolutely no wrong-doing alleged against the Attorney General or any agency he represents. In my view, despite the DPP, being part of National Executive, it would not augur well for a proper functioning criminal justice system if the Attorney General were to be seen defending DPP decisions. First, let me dissect the dichotomy between the Director of Public Prosecutions and the Office of the Attorney General in the functioning of our constitutional order a little bit further in order to disembark the thinking that the Attorney General can be answerable in respect of an independent decision taken by the DPP in a criminal matter merely because it is the Attorney General’s mandate to represent the national government in court or in any other proceedings to which the national government is a party and in civil and constitutional matters in accordance with Government Proceedings Act.
35. Although the DPP’s office falls within the national executive under the Constitution, in exercise of its mandate, he is given constitutional independence from ‘government of the day’ in making his decisions concerning institution and/or prosecution of criminal offences and those decisions made by the DPP in discharge of his constitutional mandate are ‘not government decisions’ but presumably be arrived at meticulously in public interest and as such, only the DPP is rightfully placed to provide defend his decisions when a challenge is raised.
36. Indeed, there is a potential risk that if the Attorney General were to be seen as defending DPP’s prosecutorial decisions, this might send wrong signals as to the independence of prosecutorial decisions



taken by the DPP leading to erosion of public confidence in the criminal justice system, especially if this were to happen in a politically charged environment. It is thus of paramount importance to maintain the health constitutional balance that separates the DPP from the Attorney General by also ensuring the DPP defends his professional decisions in order to protect and inspire faith in the criminal justice process hence the DPP must remain and appear independent both on paper and conduct, and that must include his appearance before the court.

37. Turning now to the inclusion of Attorney General in these proceedings, does anything complained of attach to his office or any agency he represents?
38. In an attempt to demonstrate that fact, the petitioner submitted that the Attorney General's inclusion as a party is to ensure he advises the government just in case damages are awarded in the petition. My view is that the Attorney General is not more of Government than the Director of Public Prosecutions. Both are Independent Offices within the Executive arm of Government and each has its own statute to guide its administrative operations.
39. Furthermore, under section 21 (1) of the *Government Proceedings Act*, where compensation or costs are awarded against the Government, the procedure is that a certificate to pay the costs or amount so awarded is extracted within 21 days and served on the accounting officer of the relevant government department and it directs such accounting officer to pay the amount stated therein. It is thus not necessary to make the Attorney General's a party in a suit when there is no wrongdoing alleged against him or any agency that he represents just to ensure enforcement of the money decree against the Government is implemented. It is to the accounting officer that such decree is directed, and in the instant case, under the ODPP Act, if it ever comes to that, it would have to be to the Director of Public Prosecutions as funds under the Office of the DPP are entrusted to him pursuant to section 40 (5) of the *Office of the Director of Public Prosecutions Act* No 2 of 2013 provides that: -

‘The director, subject to the law, shall be charged with the responsibility of accounting for state monies received or paid out or on account of the office’.
40. Having regard to the foregoing reasons, I find that the Attorney General is not a necessary party in this petition. The notice of motion application seeking to have the 2<sup>nd</sup> respondent struck out of this petition is allowed with no orders as to costs.

**DELIVERED, DATED and SIGNED at NAIROBI this 23rd day of June 2023.**

.....  
**L.N. MUGAMBI**

**JUDGE**

