



**Karanu v Director of Public Prosecutions & another; Mutonga & another (Interested Parties)
(Constitutional Petition 6 of 2022) [2023] KEHC 23055 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23055 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION 6 OF 2022
PM MULWA, J
OCTOBER 5, 2023**

BETWEEN

SAMUEL KANYOTU KARANU PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

AND

JACKLINE WANGUTHI MUTONGA INTERESTED PARTY

JACINTA MUTHONI KAHU INTERESTED PARTY

JUDGMENT

1. The Petition is dated 4th June 2019. It is supported by the Affidavit sworn on the even date by the Petitioner. In further support to the Petition, the Petitioner filed written submissions dated 18th May 2023 and a list of authorities.
2. In the main, the Petitioner prays for the following orders: -
 - i. A declaration be and hereby issued that investigations on the Petitioner by the Director of Public Prosecutions and the institution of criminal proceedings against the Petitioner in Criminal Case 1048 of 2017 Republic vs Samuel Kanyotu Karanu violates his constitutional rights, is an abuse of the process of the court and therefore unlawful, null and void ab initio.
 - ii. An order of prohibition be and hereby issued prohibiting the respondents from proceeding with the prosecution of Criminal Case 1048 of 2017 Republic vs Samuel Kanyotu Karanu or in any other proceedings commenced on the basis of the same compound.
 - iii. The costs of this petition be provided for.



3. Through the learned state counsel, Gachara Muriithi, the 1st Respondent filed a Replying Affidavit sworn on 27th September, 2022.
4. The 1st Respondent asserted that the criminal case is constitutional and lawful. They prayed that the Petition be dismissed and the criminal proceedings against the Petitioner be allowed to proceed to hearing and determination.
5. The 2nd Respondent and the 1st and 2nd Interested Parties as per court's record did not file grounds of opposition in respect of the Petition nor Replying Affidavit thereto.
6. I have considered the petition, the affidavits in support thereof, the affidavit in opposition to the petition and the submissions filed as well as the authorities relied upon in support thereof. I find that the germane issue for determination in this matter is whether the court should intervene and quash the criminal proceedings in Kiambu Chief Magistrate's Court Criminal Case No 1048 of 2017 against the petitioner.
7. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR the Supreme Court stated as follows: -

“Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”
8. In the case herein, the petitioner has been charged before Kiambu Magistrate's Court with five counts which include;
 - i. Obtaining land registration by false pretenses contrary to section 320 of the *Penal Code*,
 - ii. Making a document without authority contrary to section 357 (a) of the *Penal Code*,
 - iii. Making a false document contrary to section 347 (d) as read with section 349 of the *Penal Code*,
 - iv. Giving false information to a person employed in the public service contrary to section 129(a) of the *Penal Code* and;
 - v. Conspiracy to defraud contrary to section 317 of the *Penal Code*.
9. He contends that the charges have resulted into violation of their rights and fundamental freedoms; that his right to property under Article 40 of *the Constitution* was infringed by the 1st and 2nd Respondents since as the registered owner of the suit property, his title was indefeasible, a fact which the Respondents failed to take cognizance of considering that the Interested Parties and the Petitioner are involved in a civil litigation hence this prosecution was not initiated in good faith but with malice. To him, the criminal case is aimed at depriving him of his property contrary to Article 40 of *the Constitution*.
10. In considering this issue, I will deal first with the powers vested on the state to carry out prosecutions in criminal offences. The 1st Respondent exercises constitutional mandate under Article 157(6) of



the constitution. Under Article 157(10), the 1st Respondent exercises that mandate without consent or direction of any person or authority. The 1st Respondent must however exercise his mandate faithfully and in tandem with Article 157(11) so that in exercising the powers conferred by Article 157, the Director of Public Prosecutions should 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.

11. In that regard, therefore, this court may not interfere with the mandate of the 1st Respondent except where a petitioner demonstrates that the 1st Respondent is acting contrary to *the constitution* and the law and that he is violating rights and fundamental freedoms or is executing his mandate other than as required by Article 157(11) of *the Constitution*.
12. As was held in the case of *Republic vs Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another* [2015] eKLR the court stated;

“The Court ought not to usurp the constitutional mandate of the Director of Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings...However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim.”

13. Flowing from the above decision, it is clear that only where there is demonstration that the Director of Public Prosecution is using his mandate to achieve a purpose other than the course of justice or is using it to achieve ulterior motive or even to coerce the accused to settle some indebtedness as opposed to enforcing the law in pursuit of justice, this court will intervene to protect constitution and the law.
14. I have carefully read through the petition, the affidavits and the annexures. The Petitioner and the Interested Parties are involved in a civil suit where the ownership of Ruiru East/ Juja East Block 2/2341 is in dispute. I have also read the Replying Affidavit on behalf of the 1st Respondent and it is clear that after the 2nd Respondent (the investigating body) carried out investigations, the 1st Respondent was satisfied that there was a reasonable ground to charge the Petitioner. The 1st Respondent authorized prosecution leading to arrest and arraignment of the Petitioner before court. He therefore states that there were reasonable grounds to prosecute the Petitioner.
15. I have also perused the Petitioner’s grievance before this court and the contention that his fundamental rights and freedoms have been violated through this prosecution. I must however state that where a party pleads before that his rights and fundamental freedoms have been violated, or are being violated, he must demonstrate with certainty why and how that is so. It is not enough for a petitioner to come to court merely because he/she believes that his/her rights have been, or are being violated. He/she has a duty to show that this is the case before the court can intervene.
16. In the case of *Law Society of Kenya vs Office of the Attorney General & Another; Judicial Service Commission (Interested Party)* [2020] eKLR the court made reference to the case of *Centre for Rights*



eKLR while setting out the law on conservatory orders. It held as follows:

“A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of a pending case or petition.”

17. Since the 1st Respondent exercises constitutional discretion, that exercise of discretion must as a matter of fact be brought into doubt to enable this court intervene. In the present case, the Petitioner merely alleges without evidential proof that his rights and fundamental freedoms are being violated. He does not show how that is the case. It must also be borne in mind that Section 193A of the *Criminal Procedure Code* allows concurrent civil and criminal proceedings and therefore concurrent criminal and civil proceedings is not a bar.
18. Additionally, being arrested and being subjected to a lawful process on suspicion of crime is not a violation of constitutional right in itself. This is because, *the Constitution* has checks and balances as stipulated under Article 49 and 50 to ensure that the rights of every suspect are protected.
19. Further, this court as the guardian of *the constitution* and fundamental rights in the Bill of Rights will jealously guard *the Constitution* and the Bill of Rights where it is shown that they are under attack or threat, or are being violated. However, it will not aid a party in avoiding what appears to be a lawful process in execution of lawful constitutional or legal mandate.
20. The Petitioner is facing a criminal prosecution charged with five different counts. The trial court in the criminal case will have to determine whether indeed he is guilty of the offences or not. I also note that the petitioner has not challenged the constitutionality of the charges he faces but merely avers that the motive of instituting is malicious but do not show why and how this is so.
21. In my view, the Petitioner had a duty to show even as he contends that there was malice, that institution of the criminal charges was intended to achieve purposes other than the course of justice. He was to go further and show what this ulterior motive, other purposes and/or course was so that this court could properly apply its mind to that fact and determine whether the charges and attendant prosecution are within the ambit of Article 157(11) of *the Constitution*.
22. I have carefully considered this petition, the responses, submissions as well as the authorities. I have also applied my mind to *the Constitution* and the law over this petition. The conclusion I come to is that the Petitioner has failed to satisfy the court that the Respondents have violated his rights and fundamental freedoms and that he deserves the sought.
23. Consequently, the petition dated 4th June 2019 is declined and dismissed. I make no order with regard to costs.

JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU THIS 5TH DAY OF OCTOBER 2023

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P. MULWA

JUDGE



In the presence of:

Duale/Kinyua – Court assistants

Mr. Gacharia – for the Respondents

N/A for the Petitioner

