



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MILIMANI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 137 OF 2018

MOHAN GALOT.....PETITIONER

VERSUS

KAMAU ERNEST KAKA.....1ST RESPONDENT

KENYATTA AGGERY ODIWUOR.....2ND RESPONDENT

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

JUDGMENT

1. Through the petition dated 12th April, 2018 the Petitioner, Mohan Galot, brings to this Court a dispute arising out of the conduct of a criminal prosecution by the 3rd Respondent, the Office of the Director of Public Prosecutions.

2. The Petitioner's case is that on 19th February, 2018 the Learned Magistrate Mr. Andayi allowed an application by one Pravin Galot to participate in the proceedings in **Criminal Case No. 1554 of 2012, Republic v Mohan Galot & Santoshi Galot**. It is the Petitioner's case that on the same day of the ruling he was informed that he was going to be taking plea in a new case being **Criminal Case No. 276 of 2018**. The plea taking was, however, put off.

3. According to the Petitioner, the issues in the charge sheet in the new case are the same as those that were subject to **Criminal Case No. 1554/2012, Criminal Case No. 1555/2012 and Criminal Case No. 482/2014**, which had all been stayed by the High Court in **HCCC No. 430 of 2012**. It is the Petitioner's argument that the 1st Respondent, Kamau Ernest Kaka, and the 2nd Respondent, Kenyatta Aggrey Odiwuor, and their clients have deliberately influenced and abused the mandate of the 3rd Respondent by taking active roles in the criminal cases and in essence prosecuting the matter on behalf of the officers of the 3rd Respondent.

4. It is the contention of the Petitioner that Article 10 of the Constitution, as well as the Petitioner's rights to fair administrative action under Article 47, have been infringed upon by the decision to continue instituting fresh criminal prosecutions against him despite court orders staying such proceedings. He avers that the result of the unfairness of the administrative action by the 3rd Respondent under the direct influence of the 1st and 2nd respondents has infringed upon his right to a fair hearing and there is a clear threat of further violation.

5. The Court is therefore asked to grant the following reliefs:

- a) **A Declaration that the 3rd Respondent has violated the Petitioner's right to fair administrative action;**
- b) **A Declaration that the 3rd Respondent has violated the Petitioner's right to a fair hearing;**
- c) **A Declaration that the role of watching brief as established under the Victim Protection Act No. 17 of 2014 does not replace the 3rd Respondent's constitutional mandate;**
- d) **An Order of Prohibition directed to the 1st and 2nd Respondents and their instructing clients from interfering with the conduct of proceedings involving the Petitioner;**
- e) **An Order compelling the Respondents to ensure strict compliance to the parameters of fair trial as established in law;**

f) Costs of the Petition; and

g) Any other orders that the Honourable Court may deem just and fit to grant.

6. The 2nd Respondent opposes the petition through his replying affidavit sworn on 29th October, 2018. The 2nd Respondent swore the affidavit on his own behalf and on behalf of the 1st Respondent.

7. It is the 2nd Respondent's averment that the Petitioner is a vexatious litigant who has been filing the same application under different guises with the aim of embarrassing the respondents herein. He claims that the Petitioner has opted to file several applications before several courts in order to muddle up the issues and frustrate the criminal proceedings before the lower court.

8. It is deposed that the petition is an attempt to curtail the complainants' rights to be heard and to be represented by an advocate in criminal proceedings. It is averred that the 1st and 2nd respondents have instructions from Mr. Pravin Galot and Mr. Narendra Galot, who are two of the complainants in the criminal trials, to represent them in those cases. According to the 2nd Respondent, the purported rights the Petitioner is trying to enforce are not clearly defined or outlined in the petition.

9. The 1st and 2nd respondents therefore ask the Court to dismiss the petition with costs.

10. The 3rd Respondent did not participate in the proceedings despite service by the Petitioner.

11. The Petitioner in his written submissions dated 2nd July, 2019 argues that the ceding of the 3rd Respondent's constitutional responsibilities to the 1st and 2nd respondents is a violation of the Constitution and by extension a violation of his rights. It is the Petitioner's case that Articles 10 and 47, which require the 3rd Respondent to dispense its duties in a lawful manner and in adherence of the principles of governance, have been infringed by allowing the 1st and 2nd respondents to influence and steer the prosecution of the Petitioner.

12. The Petitioner also posits that when the Victim Protection Act, 2014 came into force, and particularly Section 9(3), it did not amend or revoke Section 88 of the Criminal Procedure Code, Cap. 75 on the parameters by which the complainants can bring in the 1st and 2nd respondents to watch their brief. Reliance is placed on the decision in **Joseph Lendrix Waswa v Republic [2019] eKLR**.

13. The 1st and 2nd respondents filed submissions dated 2nd April, 2019 stating that the Petitioner should have challenged the decision of the lower court through an appeal or an application for review by the High Court. They refer to sections 347, 362 and 364(1) of the Criminal Procedure Code on the rights of appeal and review. They further refer to Article 165(3) of the Constitution on the appellate jurisdiction of the High Court.

14. On the allegation of the infringement of Article 47 of the Constitution, the 1st and 2nd respondents submit that according to Section 9 of the Fair Administrative Action Act, 2015, which operationalises Article 47, the jurisdiction of this Court to hear the petition in the first instance is ousted as the Court may only review an administrative action or decision under the Act once the internal mechanisms for appeal or review and all remedies available have been first exhausted. This argument is supported by the decisions in **Republic v National Environment Management Authority [2011] eKLR**; **Speaker of the National Assembly v Njenga Karume [2008] 1 KLR 425**; and **Francis Gathungu v Kenyatta University [2018] eKLR**.

15. The 1st and 2nd respondents further submit that Article 50(7) & (9) of the Constitution and sections 4(2)(b), 9 and 13 of the Victim Protection Act, 2014 recognise and allow complainants and victims to participate in criminal proceedings. Therefore, they are properly before the trial courts in the criminal cases facing the Petitioner. The 1st and 2nd respondents rely on the decisions in **IP Veronica Gitahi & another v Republic [2016] eKLR**; and **Leonard Maina Mwangi v The Director of Public Prosecutions & 2 others [2017] eKLR** in support of their submission.

16. The 1st and 2nd respondents contend that the petition does not disclose any violation of the Petitioner's rights under the Constitution. Further, that the Petitioner has failed to lay any basis for the intervention of this Court. The Court is therefore urged to dismiss the petition with costs to the 1st and 2nd respondents.

17. After careful consideration of the parties' pleadings and submissions, I have identified that the only issue for determination is whether the Petitioner's rights have been infringed by the appearance of the 1st and 2nd respondents on behalf of the complainant in the criminal proceedings.

18. The Petitioner has alleged that Articles 10 and 47 of the Constitution have been infringed by the actions of the 1st and 2nd respondents appearing on behalf of their clients in **Criminal Case No. 1554 of 2012**, as consolidated with other criminal cases. The Petitioner has not established how the 3rd Respondent has violated his right to fair administrative action. As already indicated, the decision to allow the 1st and 2nd respondents to appear on behalf of their clients was made by the Chief Magistrate's Court and not the 3rd Respondent. Furthermore, the Petitioner has not shown how the appearance of the complainants through their counsel amounts to the 3rd Respondent relinquishing its prosecutorial duties.

19. In his decision, the Chief Magistrate stated that:

"I therefore find that the issue of the participation of Pravin Galot and by extension Narendra Galot was finally adjudicated

upon and a decision made thereon by this court that they will participate where necessary with the leave of the court. The only clarification I will make here is that their participation was determined to be as that of interested parties and not complainants or victims. The complexity of these matters as indicated above dictates that this court refrains itself from delving into the issue of whether or not the two are complainants or victims in these proceedings.”

20. The ruling above reveals that the Chief Magistrate’s Court had limited the manner in which the 1st and 2nd respondents are to represent their clients in order to ensure that there is no interference with the proceedings against the Petitioner. The decision did not in any way limit the 3rd Respondent’s authority to prosecute the cases. I am therefore not convinced that there has been or there is a risk of harm to the Petitioner’s case from the 1st and 2nd respondents.

21. The Petitioner has not produced any evidence before this Court to prove that the 1st and 2nd respondents have, by representing their clients, attempted in any way to usurp the prosecutorial responsibilities of the 3rd Respondent. The Petitioner has not met the threshold for proving the breach of his constitutional rights as laid out in **Anarita Karimi Njeri v R [1976-1980] KLR 1272**. There is no specificity on the exact actions that the respondents have carried out and how those acts have infringed upon his rights.

22. What the Petitioner is essentially asking this Court to do is to overturn the stated ruling of the Chief Magistrate’s Court. In the case **Republic v National Environmental Management Authority [2011] eKLR** the Court of Appeal held that:

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge.”

23. I agree with the decision above that the Petitioner has circumvented the review and appeal procedures which he was bound to follow and instead chose to bring fresh proceedings in another court which is an abuse of the court process.

24. In conclusion, I find that the Petitioner has failed to establish a case on the violation of his constitutional rights to a fair hearing and fair administrative action against any of the three respondents. The respondents were abiding by the ruling of the Magistrate’s Court dated 19th February, 2018, which had already limited the participation of the 1st and 2nd respondents to watching brief to minimize the risk of interference with the criminal trial. The Petitioner has not shown through evidence that the 1st and 2nd respondents acted contrary to the ruling and usurped the prosecutorial duties of the 3rd Respondent.

25. In a nutshell, it is my finding that the Petitioner has not proven that his rights under Articles 47 and 50 of the Constitution have been infringed by the respondents. For the stated reasons the petition is hereby dismissed.

26. As for costs, I am guided by the principle that costs follow the event and shall be awarded according to the Court’s discretion. In this matter, I believe that the Petitioner has attempted to circumvent the review and appellate processes available to him which are more suited to his complaint. This, in my opinion, is an abuse of the court process which cannot be condoned by the court. For the said reason, the costs of the petition are awarded to the 1st and 2nd respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF MARCH, 2021.

W. Korir,

Judge of the High Court