



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. 380 OF 2017

GODFREY NJOROGE NGATIA.....PETITIONER

-versus-

- 1. PRINCIPAL MAGISTRATE, GATUNDU LAW COURTS**
- 2. DIRECTOR OF PUBLIC PROSECUTIONS**
- 3. COMMANDER OF POLICE, KIAMBU COUNTY**
- 4. THE HON. ATTORNEY GENERAL**
- 5. OCPD, GATUNDU SOUTH**
- 6. DCIO, GATUNDU SOUTH.....RESPONDENTS**

-and-

- 1. REGINA WARUIRU NGATIA**
- 2. FRANCIS KIRUNGE NGATIA**
- 3. PATRICK WAWERU NJOROGE**
- 4. NAOMI WANJIRU MURAYA**
- 5. SDANIEL KISINGA**
- 6. CPL. EVANS KIPTER**
- 7. IP HELEN ONGERI.....INTERESTED PARTIES**

JUDGMENT

Introduction:

1. At the centre of the Petition subject of this judgment is *Gatundu Principal Magistrates Court Criminal Case No. 1036 of 2017 Republic v. Godfrey Njoroge Ngatia* (hereinafter referred to as '***the Criminal Case***') against the Petitioner. *Regina Waruiru Ngatia*, the 1st Interested Party herein, is the complainant in the criminal case.
2. The Petitioner is charged with the offence of creating disturbance contrary to *Section 95(1)(B)* of the Penal Code. The particulars of the offence are as follows: -

On the 24th day of April, 2016 at 5:00pm in Nembu village in Gatundu South Sub-County within Kiambu County, created a disturbance in a manner likely to cause a breach of peace by threatening to set ablaze the house of Regina Waruiru Ngatia and also attempted to knock her using his motor vehicle.

3. The Petitioner denied the charge.

4. In the Petition before this Court, the Petitioner variously challenges the constitutionality of the criminal case. Currently the proceedings in the criminal case are stayed courtesy of an order of this Court issued on 2nd August, 2017.

5. The Petitioner and the 1st Interested Party are closely related. The Petitioner's mother one *Salome Nyakaria Ngatia* and the 1st Interested Party herein, *Regina Waruiru Ngatia*, are the first and third wives of the Late *Mzee Ngatia Kirungi* respectively. The 1st Respondent is, hence, a step mother to the Petitioner.

6. The second wife to Mzee Ngatia Kirugi is one *Mariah Njoki*. The 1st and 2nd wives of the said Mzee Ngatia Kirugi passed on. Mzee Ngatia Kirugi, as well, passed on.

The Petition:

7. The Amended Petition is dated 30th August, 2017. It is supported by two Affidavits sworn by the Petitioner. They are a Supporting Affidavit sworn on 30th August, 2017 and a Supplementary Affidavit sworn on 5th October, 2017 respectively.

8. In further support to the Petition, the Petitioner filed written submissions dated 19th February, 2017, a List of Authorities dated 19th February, 2019 and a Case Digest dated 3rd January, 2020.

9. In the main, the Petitioner prays for the following orders: -

a) A declaration that the petitioner right to fair administrative action has been and continues to be violated by the actions and /or inaction of the Respondents.

b) A declaration that the petitioner's right to fair administrative action as guaranteed by Article 47 of the constitution has been and continues to be violated by the action and/or inactions of the respondents and more particularly by the conduct of the 1 and 2 Respondents.

c) An Order of Prohibition thus directed at the 2nd, 3d Respondents, the 6 and 7th Interested Parties to cease interfering with suit parcel and further to cease harassing the petitioner.

d) An order that the Respondents, more particularly the 1st Respondent be stayed from taking any further proceedings, execution or enforcement in Principal Magistrates Court at Gatundu Criminal case No. 1036 of 2016 pending the hearing and determination of this Petition,

e) An order that the Respondents and the Interested Parties be restrained from taking any action in the suit parcel KIGANJO/NEMBU/262 pending the hearing and determination of succession cause HCCC No. 391 of 2010 at Milimani High Court.

f) An order that the Respondents do pay damages for losses incurred during the farming period.

g) This honourable court be pleased to order the production of the DCIO, OCPD Gatundu and other relevant witnesses for examination and for interparty hearing to the said suit.

h) This honourable court be pleased to issue any other order may ensure deem lit and just to ensure that law and order is maintained and that the rule of law in upheld.

i) Costs of this petition

10. The Petitioner is represented by the firm of Messrs. Muchoki Kang'ata Njenga & Company Advocates.

The Responses:

11. The Petition is opposed by all the Respondents as well as the Interested Parties. The 1st and 4th Respondents are represented by the Hon. Attorney General whereas the 2nd, 3rd, 5th and 6th Respondents are represented by the Office of the Director of Public Prosecutions. The Interested Parties are represented by the firm of Messrs. Nchoe, Jaoko & Company Advocates.

12. The Hon. Attorney General, through No. 235041 CI George Muriuki filed a Replying Affidavit sworn on 8th December, 2017 and written submissions dated 9th March, 2020.

13. The said *No. 235041 CI George Muriuki* swore another Replying Affidavit on 9th October, 2017 on behalf of the Director of Public Prosecutions. The Director also filed written submissions dated 21st May, 2018.

14. The Interested Parties filed and relied on the written submissions dated 13th April, 2018.

15. The Respondents and the Interested Parties prayed that the Amended Petition be dismissed with costs.

Issues for Determination:

16. I have carefully considered the Amended Petition, the responses thereto, the parties' submissions and the decisions referred to. I find the following two main issues arise for determination: -

(a) *Whether the the Petitioner's rights as guaranteed by Articles 27, 28, 32 and 47 of the Constitution have been and continue to be violated by the actions and/or inactions of the Respondents;*

(b) *Whether the remedies sought do issue.*

Analysis and Determination:

(a) Whether the the Petitioner's rights as guaranteed by Articles 27, 28, 32 and 47 of the Constitution have been and continue to be violated by the actions and/or inactions of the Respondents:

17. The Petitioner pleads in the Amended Petition that his father, the Late Mzee Ngatia Kirungi (hereinafter referred to as '*the deceased*') married three wives.

18. The deceased owned a parcel of land known as Nembu/Kiganjo/262 measuring approximately 15.32 acres (hereinafter referred to as '*the disputed land*'). The deceased had, under a will, divided the disputed land into two portions way before he passed on. One portion measures approximately 8 acres and the other portion is approximately 7.32 acres.

19. The deceased apportioned the house of the Petitioner's mother (the first house) the 8-acre portion of the disputed land and the house of the 1st Interested Party was apportioned the other portion.

20. The Petitioner further pleads that the deceased owned another parcel of land known as Nembu/Kiganjo/1073 measuring approximately 4 acres. That parcel of land was apportioned the house of the second wife. However, all the three houses used to live together on the portion of the disputed land allotted to the Petitioner's mother.

21. It is pleaded that that sometimes in 1985, after the demise of the second wife of the deceased, the family of the deceased agreed that each house should occupy its allotted portion. It is further pleaded that the Petitioner's mother and the 1st Interested Party lived in the same house. That house was built by the Petitioner's mother and her children including the Petitioner.

22. As a result of the resolution of the family meeting on relocation of the houses, the house of the second wife relocated to the parcel of land known as Nembu/Kiganjo/1073 and has peacefully lived thereon. The Petitioner avers that the 1st Interested Party was infact assisted to relocate by being given money to build her house on the portion allotted to her.

23. To the Petitioner's utter shock and surprise, after receiving the money, the house of the 1st Interested Party refused to relocate to its portion and instead began a vicious demand of the entire disputed land on the basis of an alleged second will in which the deceased bequeathed the entire land to the 1st Interested Party. The second will is now the subject of Milimani High Court Succession Cause No. 391 of 2010.

24. As the 1st Interested Party's demands became intense, the Petitioner moved to Court and obtained appropriate restraining orders including an order that the 1st and 2nd Interested Parties not to interfere with the portion of the disputed land allotted to the first wife. The case is now consolidated with Succession Cause No. 391 of 2010.

25. According to the Petitioner, the 1st Interested Party's demand is very outrageous given that she did not oppose the interment of both the deceased and the Petitioner's mother on the portion allotted to the Petitioner's mother.

26. The Petitioner posits that while the matter is still in Court, the 1st Interested Party fenced off the portion allotted to the Petitioner's mother and barred the access to the coffee factory which is owned by the family of the deceased.

27. At one time, as the Petitioner attempted to access the coffee factory, the 1st Interested Party reported him to the police alleging that he had created disturbance and that the Petitioner was about to hit her with his vehicle. The Petitioner was later charged in the criminal case.

28. The Petitioner further posits that he received death threats from people well known to the 1st Interested Party and also reported to the police. Surprisingly, the police have never acted on his complaint. On following up the matter with the OCS Gatundu Police Station, the DCIO Gatundu South and the OCPD Gatundu South, the Petitioner was informed that he had no right to the disputed land on the basis of the second will. The Petitioner's explanation that the second will is part of a dispute in Court has never been heeded to by the police.

29. The Petitioner also pleads that he does not understand why he was charged since he only went to the land where the family homestead is to try to claim his property.

30. It is the Petitioner's further contention that the trial court in the criminal case has severally ordered the investigating officer, one *Cpl. Kipter*, to produce some documents in vain and that he was provided with unsigned witness statements.

31. The Petitioner avers that there has been serious disharmony in their family to the extent of the 1st Interested Party demolishing the main gate leading to the homestead. When the Petitioner repaired the gate, the 1st and 2nd Interested Parties hired goons who brought the gate down and completely destroyed it.

32. It is the Petitioner's averment that the incident was reported to Gatundu Police Station by her sister namely Jacinta Njeri under OB NO. 26/24/8/2016. The Gatundu South DCIO and OCPD visited the scene, but no action was taken as they hold on to the second will which is still disputed in Court. The Petitioner also avers that several other reports by his siblings from his mother to the police have gone unattended to.

33. The Petitioner contends that the prosecution of the criminal case has led to loses as no farming has taken place as the police continue to harass the members of the Petitioner's family in holding that they have no access to the land.

34. The Petitioner further contends that the deceased died in unclear circumstances while under the care of the 1st Interested Party. That was on 26th April, 2005. The family demanded and carried out an autopsy which revealed that the deceased did not suffer a natural death.

35. It is the Petitioner's claim that the police opened an inquiry under INQ 11/05 at the Gatundu Police Station, but there has been no action since then. The Petitioner wonders why all his efforts in pursuing the various matters he reported to the police have been futile whereas the 1st Interested Party's single complaint was acted on with such haste and speed.

36. The Petitioner reiterated the foregoing and annexed various exhibits in support of his case in his Supporting and the Supplementary Affidavits.

37. The Petitioner filed detailed submissions. He submits that the Constitution establishes the Bill of Rights which rights and fundamental freedoms must at all times be respected.

38. It is submitted that the failure by the police to investigate the various complaints the Petitioner made is a violation of the Petitioner's rights especially the right to a fair administrative action under Article 47 of the Constitution and Section 4(3) of the Fair Administrative Actions Act. The Petitioner submits further that the police have acted arbitrarily, inappropriately and contrary to the due process of the law.

39. The Petitioner also submits that the investigation and prosecution of the criminal case has further infringed his rights and fundamental freedoms as they are in abuse of the powers granted in law and ought not proceed. The Petitioner made reference to the decisions in *DPP v. Humphreys* (unreported), *Meixner & Another v. Attorney General* (2005) 2 KLR 189, *Rep. v. Chief Magistrates Court at Mombasa exparte Ganijee & Another* (2002) eKLR, *Rep. v. Attorney General & Another exparte Kipng'eno arap Ng'eny* (2002) eKLR, *Rep. v. Director of Public Prosecutions & Chief Magistrates Court at Milimani* (2017) eKLR, *Kuria 3 others v. Attorney General* (2002) 2 KLR 69 and *Commissioner of Police & 2 others v. Kenya Commercial Bank & 4 Others* (2013) eKLR in buttressing the issue.

40. In arguing that the investigation and prosecution is an abuse of discretion, the Petitioner made reference to the definition of 'abuse of office' in Section 99 of the Penal Code, the Code of Criminal Procedure Book 5th Edition and *Koinange v. Attorney General & Others* (2007) 2 EA 256.

41. The Petitioner also submitted that his rights to property as guaranteed under Article 40 of the Constitution is infringed. He further submitted that his right to privacy under Article 31 of the Constitution stands infringed. Various decisions including *Berstein v. Bester No. (1996) (2) SA 751*, *CORD and Others v. Republic of Kenya & Others*, *Petition No. 628 of 2014* and *Manfred Walter Schmitt & Another v. Republic & Another Criminal Revision No. 669 of 2012* (unreported) were referred to in support.

42. The Petitioner in his further submissions aver that his right against discrimination in Article 27 of the Constitution is trampled on.

43. In the end, the Petitioner submits that the Petition be allowed and that the matter be amicably settled.

44. In its response to the Petition, the Hon. Attorney General who appears for the 1st and 4th Respondents, deponed through George Muriuki aforesaid that the Petitioner reported threats to his life at the Gatundu Police Station on 24th April, 2016. The complaint was registered as OB No. 12/24/4/2016. Later on the same day, the 1st Interested Party made a complaint against the Petitioner and his brother that they went to her home and created disturbance by threatening to chase her away from her house.

45. It is posited that the twin complaints were investigated. Whereas the Petitioner's claim was not substantiated, the police gathered sufficient evidence from witnesses in support of the complaint by the 1st Interested Party. The Petitioner was then charged as required in law.

46. It is denied that the police have interfered with the matters subject of the succession dispute in Courts. The police aver that whereas the family of the deceased is engaged in Court battles, they are only discharging their duties under the Constitution and the law in ensuring that law and order prevails.

47. The manner in which the Petition is drafted is also tasked. It is averred that it lacks specificity and does not disclose which rights and the manner in which they are allegedly infringed.
48. The Hon. Attorney General submits that Article 157 and 249 of the Constitution establishes the Office of the Director of Public Prosecutions and the Inspector General of Police and confer upon them power to investigate any information or allegation of criminal conduct or offence and to carry out prosecution.
49. It is submitted that unless the Constitution and the law is infringed, there ought to be judicial deference so that constitutional organs discharge their duties. The decisions in *Hassan A.A.H. Zubedi v. PDD & 2 Others*, *Michael Monari & Another v. Commissioner of Police & 3 Others*, *Republic v. Commissioner of Police & Another (2012) eKLR*, *Republic v. Director of Public Prosecutions & 4 Others ex parte Simion Nyamanya Ondiba (2018) eKLR* and *Kipoki Oreu Tasur v. Inspector General of Police & 5 Others (2014) eKLR* were relied upon.
50. It is further submitted that there is no evidence that the actions and/or inactions of the Respondents amount to a violation of the Petitioner's right to fair administrative action. The Attorney General submits that the decision to arrest and charge the Petitioner can only be challenged on grounds of illegality, irrationality and procedurally impropriety.
51. It is denied that the complaint by the Petitioner on his life was never investigated. Instead, the complaint was investigated and found to hold no water.
52. The Attorney General further submits that the Petitioner has failed to discharge the burden of proof and has to face his accusers in Court. The Court is urged to dismiss the Petition with costs.
53. The factual averments pleaded by George Muriuki in support of the Attorney General's case are also reiterated by said George Muriuki on behalf of the Director of Public Prosecutions (hereinafter referred to as '**the DPP**').
54. In its submissions, the DPP posits that it discharged its mandate within the confines of Article 157 of the Constitution and the law. It is further submitted that office of the DPP is independent and that it makes its decisions to prosecute on the basis of the law and facts of a case.
55. The DPP reiterates that the Petitioner has not proved his case. That, there is no evidence of unlawfulness, excess or want of authority, harassment, intimidation or even manipulation of the Court process.
56. The DPP variously relied on the same decisions which were referred to by the Attorney General in buttressing the submission that the Petitioner has not demonstrated the manner in which he allege his rights are infringed.
57. In the end, the DPP calls for the dismissal of the Petition.
58. The Interested Parties also opposed the Petition. They echoed the Respondents' positions and submissions. They submit that the Petitioner is out to mix up issues with an intention of creating a confusion and potraying a false impression that the criminal case is engrossed in the succession dispute. It is submitted that there is no correlation whatsoever between the succession dispute and the criminal case.
59. It is also submitted that there is clear evidence that the Petitioner was at the scene of crime as alleged and as he himself confirms. The police investigated the matter and accordingly charged the Petitioner base on the evidence and the law.
60. The Interested Parties submit that the Petitioner pleaded his case in the Amended Petition and that he is bound by such pleadings. They urge the Court to disregard all the new issues raised in the Petitioner's submissions as they are not anchored in the pleadings.
61. The Interested Parties echo the position that the Petition be dismissed with costs.
62. The foregoing are the parties' cases and submissions on the first issue.
63. I will, in the first instance, deal with the last issue raised by the Interested Parties. It is on the nexus between pleadings and evidence.
64. It is a well settled legal principle that parties are bound by their pleadings and that any evidence which does not support the pleadings is for rejection. The position was reiterated by the Court of Appeal in ***Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR*** which decision cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where *Sylvester Umaru Onu, JSC* stated that: -
- It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties.*
65. *Adereji, JSC* in the same case expressed himself thus on the importance and place of pleadings: -

.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

66. The Supreme Court of Kenya as well agreed with the above legal position in a ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR**.

67. The Petitioner pleaded its case in the Amended Petition. The gist of the Petition is the constitutionality of the criminal case and the alleged inaction on the of the Respondents, especially the 1st Respondent. To that end, the Petitioner seeks *inter alia* declaratory reliefs that his right to a fair administrative action under Article 47 of the Constitution is infringed. He also petitions that his rights under Articles 27, 28 and 32 of the Constitution are, as well, infringed.

68. As a result, the Petitioner seeks the termination of proceedings in the criminal case. He also seeks prohibitory orders against the Respondents and the Interested Parties in respect to the disputed land pending the determination of the succession proceedings in Milimani High Court Succession Cause No. 391 of 2010. He further seeks that the Gatundu South DCIO and OCPD be summoned to testify in the succession proceedings.

69. That being the position, it is expected that any evidence and submissions tendered by the Petitioner should only be limited to proving the averments in the Petition.

70. I have carefully considered the evidence and the submissions. There is no doubt the Petitioner in some ways travelled beyond the confines of the Petition in his evidence and submissions. For instance, the allegation of infringement to his right of privacy under Article 31 of the Constitution and the right to freedom and security under Article 29 of the Constitution are not part of the Petition. Therefore, this Court will disregard any evidence and submission that will introduce any issue which is not part of the Petition.

71. Having said so, I will, albeit briefly, deal with the burden of proof in constitutional petitions. Like any other disputes, the conduct of constitutional petitions is generally governed by the Constitution and the law.

72. Article 159(2)(d) of the Constitution call upon Courts and Tribunals to administer substantive justice without undue regard to procedural technicalities.

73. The Supreme Court has, however, spoken of the need not to abuse the said constitutional provision. In **Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others**, Petition No. 14 of 2013 the apex Court held that: -

Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls.

74. And, in **Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR** the Supreme Court further held that: -

Not all procedural deficiencies can be remedied by Article 159...

75. The practice and procedure in constitutional petitions is further provided for under *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as '**the Mutunga Rules**').

76. Rule 10 of the Mutunga Rules is on the form of the petitions. Rule 20(1) of the Mutunga Rules is on the manner in which constitutional Petitions ought to be heard. Such Petitions may be heard by way of *affidavits* or *written submissions* or *oral evidence*. Rule 20(3) of the Mutunga Rules provide that a Court may upon application or on its own motion direct that the Petition or part thereof be heard by oral evidence. Rule 20(4) and (5) of the *Mutunga Rules* provide for the summoning and examination of witnesses.

77. The conduct of constitutional petitions is also guided by various laws. For instance, the Evidence Act applies to matters generally relating to evidence. The Evidence Act is clear on its application to constitutional Petitions and affidavits in Section 2 thereof. The provision provides as follows: -

(1) *This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.*

(2) *Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.*

78. Sections 107(1), (2) and 109 of the Evidence Act are on the burden of proof. They state as follows:

107(1) *Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

79. The burden of proof on a Petitioner in a constitutional petition was addressed by the Supreme Court in **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR** 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 vs. 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.

80. Turning back to this matter, and given that the Petitioner principally seeks the termination of the criminal case, it is of importance to look at the instances where the prosecution of a criminal case may be terminated.

81. The starting point is the Constitution. The Petitioner is entitled to the rights and fundamental freedoms provided for in the Bill of Rights among others which are either recognized or conferred by law. Such rights and fundamental freedoms are an integral part of Kenya as a democracy and are the cornerstone of our social, economic and cultural policies. As such they must be recognized and protected.

82. In the wording of Article 19(2) of the Constitution ‘*the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings*’. It is, therefore, for such reasons that the rights and fundamental freedoms are inherent, to the extent that they are not granted by the State, and can only be limited as provided for by the Constitution.

83. The Respondents are either State organs, state officers or public officers. They all discharge various mandates under the Constitution and the law. As such they are bound by the national values and principles of governance enumerated in Article 10(2) of the Constitution. The provision itemizes them as under: -

(2) *The national values and principles of governance include—*

(a) *patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*

(b) *human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;*

(c) *good governance, integrity, transparency and accountability; and*

(d) *sustainable development.*

84. Article 157 of the Constitution establishes the Office of the Director of Public Prosecutions. It also stipulates the scope of the mandate as follows in sub-articles (4), (6), (10) and (11) as follows: -

(4) *The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.*

(6) *The Director of Public Prosecutions shall exercise State powers of prosecution and may—*

(a) *institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;*

(b) *take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and*

(c) *subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*

(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.*

85. Article 245(4)(a) of the Constitution further provides that: -

The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to-

a) the investigation of any particular offence or offences.

86. The institution which is vested with the mandate to carry out investigations is the National Police Service. Articles 243 to 245 of the Constitution provide for the establishment of, the objects and functions and the command of the National Police Service. The legislation contemplated under Article 243(4) of the Constitution is the now National Police Service Act, No. 11A of 2011.

87. As creatures of the Constitution, the Respondents can only perform their duties within the confines of the Constitution and the law.

88. Courts have, many a times, dealt with the manner in which the investigative and prosecutorial agents are to discharge their mandates. I will, hereunder, consider some of such decisions.

89. Regarding the exercise of prosecutorial discretion by the Director of Public Prosecutions, the Court of Appeal in **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR** stated as follows: -

[41] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in Mohit v Director of Public Prosecutions of Mauritius [2006] 5LRC 234:

these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP's decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...

In Regina v. Director of Public Prosecutions ex-parte Manning and Another [2001] QB 330, the English High Court said partly at para 23 page 344:

At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.

Although the standard of review is exceptionally high, the court's discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.

[42] The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.

In Ramahngam Ravinthram v Attorney General (supra) the Court of Appeal of Singapore said at p. 10. Para 28:

however, once the offender shows on the evidence before the court, that there is a prima facie breach of fundamental liberty (that the prosecution has a case to answer), the prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At this stage the prosecution will not be able to rely on its discretion under Article 35(8) of the Constitution without more, as a justification for its prosecutorial decision.

90. The High Court in **Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others [2019] eKLR** had the following to say about the role of the Director of Public Prosecutions in prosecuting criminal offences: -

25. It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this Court cannot shirk its Constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that:

*the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of **Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003** is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, **Constitution of the World**: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.*

91. Long before the advent of the Constitution of Kenya, 2010 the High Court in **R vs. Attorney General exp Kipngeno arap Ngeny Civil**

Application No. 406 of 2001 expressed itself as follows: -

... Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognized, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognized lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds...

92. It has also been well and rightly argued that, on the basis of public interest and upholding the rule of law, Courts ought to exercise restraint and accord state organs, state officers and public officers some latitude to discharge their constitutional mandates. The Court of Appeal in **Diamond Hasham Lalji & another v Attorney General & 4 others** (*supra*) stated as follows: -

The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, State interest may outweigh societal interests. In the context of the interest of the administration of justice, it is in the public interest, inter alia, that persons reasonably 'suspected of committing a crime are prosecuted and convicted, punished in accordance with the law, that such a person is accorded a fair hearing and that court processes are used fairly by state and citizens.

93. The Court of Appeal in **Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR** referred to the Supreme Court of India in **State of Maharashtra & Others v. Arun Gulab & Others, Criminal Appeal No. 590 of 2007**, where the Court stated:

The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as "Cr.P.C.") are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.

94. The High Court in **Bernard Mwikya Mulinge case** (*supra*) expressed itself as follows: -

14. As has been held time and time again the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon.....

95. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189** the Court stated as follows: -

The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution....

96. **Mumbi Ngugi, J** (as she then was), in **Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others (2014) eKLR** stated that:

The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts,

except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated...

97. In **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** the Court held that:

... the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene...

98. It is, hence, a settled legal principle and position that whenever a Petitioner sufficiently demonstrates the stifling of or threats of infringement of rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies, a Court should not hesitate to intervene and stop such a prosecution. Such intervention by the Courts should, however, be in clearest of the cases.

99. Drawing from the foregoing, for the Petitioner to succeed in his claim in this case, he must demonstrate the stifling of or threats of infringement of his rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies. The Petitioner may also demonstrate that the prosecution of the criminal case is not in public interest or is not in the interests of the administration of justice or that the prosecution is in abuse of the legal process. Likewise, the Petition may succeed if the Petitioner proves that the investigations were undertaken contrary to Article 244 of the Constitution, the National Police Service Act and the law in general.

100. One of the grievances by the Petitioner is the inaction of the Respondents in respect to other complaints he made to the police. To that end, the Petitioner contends that his right to fair administrative action is infringed.

101. This Court will not venture into an in-depth analysis of this contention. The reason thereof is that even if the Petitioner is correct in asserting that his right to fair administrative action is infringed by the police in not dealing with the other complaints the Petitioner made to the police, still I do not see the connection between the inaction by the police and the prosecution of the criminal case.

102. I will deal with the argument further. For instance, going by the state of the evidence on record the issue of the inquest in respect of the death of the deceased has no relation with the criminal case. The position cuts across all the other complaints laid by the Petitioner to the police. Needless to say, the Respondents have stated that the Petitioner's claim that his life was threatened was investigated and found not holding.

103. The Petitioner did not attempt to connect the alleged pending complaints to the criminal case. It was incumbent upon the Petitioner to demonstrate how the criminal case is intertwined with the other complaints so as to bring the conduct of the investigations and prosecution under the legal rudder. Making bare allegations and nothing more, does not discharge the burden of proof on a party.

104. Having found that the Petitioner's contention that his right under Article 47 of the Constitution is variously stifled does not lie in this case, suffice to say that the Petitioner can still pursue that right independent of the criminal case. On proof, the Petitioner will be adequately remedied.

105. The Petitioner has also alleged that his rights and fundamental freedoms under Articles 27, 28 and 32 of the Constitution are contravened. Again, on careful consideration of the evidence, I find myself in lots of difficulties in trying to ascertain how the said rights were infringed.

106. The Petitioner has not demonstrated how he is discriminated against or how the law is not equally applied to him. The same fate visits the allegation of infringement of his right to human dignity and how that dignity has not been respected and protected. On the same wavelength, there is no evidence on how the Petitioner's freedom of conscience, religion, belief and opinion is thwarted.

107. This Court has also been called upon to give reliefs in respect of matters pending in Milimani High Court Succession Cause No. 391 of 2010 to the effect that the Respondents and Interested Parties be restrained from dealing with the disputed land, that the Court order makes an order for payment of damages in respect to loss of user of the disputed land and that the Court orders some witnesses to testify in the succession cause. My simple response thereto is that this Court has no jurisdiction to issue any such orders as it is not adjudicating over the succession dispute. The prayers can be made in the succession proceedings.

108. The Petitioner has also raised two other issues on the criminal case. The first one is that he was supplied with unsigned witness statements, and, two, that the trial court variously summoned one *Cpl. Kipter* to testify in vain.

109. On the unsigned state of the witness statements, I have perused the record and seen typed witness statements. At the end of each of the said statements, it is indicated that the statement is signed by the maker.

110. The normal practice in recording of witness statements by the police is that such statements are recorded by hand and are signed by the witnesses. The statements may later be typed. Generally, if a statement which is originally handwritten is typed, there is no necessity of the maker of the original handwritten statement to also sign the typed statement. The only requirement is that there must be a clear indication in the written statement that the original hand written statement is signed by the maker.

111. In his contention, the Petitioner did not allege that he was issued with unsigned handwritten statements. The typed statements on record indicate that the original statements were signed by the makers. The typed statements are annexed to the Supplementary Affidavit of the Petitioner.

112. The Petitioner has also not indicated that he raised the matter before the trial court and that the court declined to intervene. This Court,

therefore, does not find the contention holding. It is for rejection.

113. On the allegation that Cpl. Kipter has not testified in the criminal case despite having been summoned by the trial court, I take note that the criminal case is still pending. Further, the court is seized with powers over witnesses. The Petitioner may consider raising the matter before the trial court. This issue is also not holding and is hereby rejected.

114. This Court has, with care, considered the evidence in the criminal case as contained in the witness statements filed in this matter. The Court has also considered the matter in totality. As found above, there is no evidence in proof of the allegations tendered by the Petitioner over the conduct of the investigators and the prosecutor in the criminal matter. The investigators and the prosecutor cannot, therefore, be legally faulted.

115. Given the state of affairs in this case, the most prudent way forward is for the Petitioner to counter the adverse evidence against him and to tender his defence in the criminal case. That can only be before the trial court.

116. At this point in time, I have to reach the inevitable conclusion that the Petition is not proved. With such a finding, the following final orders hereby issue: -

(a) The Amended Petition dated 30th August, 2017 is hereby dismissed.

(b) In view of the time taken in these proceedings, the trial court in *Gatundu Principal Magistrates Court Criminal Case No. 1036 of 2017 Republic v. Godfrey Njoroge Ngatia* is hereby directed to accord priority to the hearing and determination of the criminal case. For avoidance of doubt, the orders issued on 2nd August, 2017 staying the proceedings in the criminal case are hereby set-aside and vacated forthwith.

(c) Costs of the Petition to be borne by the Petitioner.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF JULY, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Njenga, Learned Counsel for the Petitioner.

Miss. Robi, Learned State Counsel instructed by the Honourable Attorney General for the 1st and 4th Respondents.

Mr. Okello, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the 2nd, 3rd, 5th and 6th Respondents.

Mr. Jaoko, Learned Counsel for the Interested Parties.

Elizabeth Wambui – Court Assistant