



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 11 OF 2019**

**BETWEEN**

**HASHIM GOT SAT.....PETITIONER**

**AND**

**1. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION**

**2. INSPECTOR GENERAL OF POLICE**

**3. DIRECTOR OF CRIMINAL INVESTIGATIONS**

**4. THE SENIOR PRINCIPAL MAGISTRATE, SHANZU**

**5. EDWARD MNGOLIA MWAMBUI.....RESPONDENT**

**JUDGMENT**

1. The Petitioner is currently the District Land Registrar based in Narok but was the District Land Registrar in Mombasa on or about the year 2013.
2. The 1<sup>st</sup> Respondent is the Director of Public Prosecutions an office created under Article 157 of the Constitution.
3. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are the Inspector General of Police and Director of Criminal Investigations respectively, offices created under the National Police Service Act No. 11 A of 2011, which takes directions from the 1<sup>st</sup> Respondent by virtue of Article 157(4) of the Constitution.
4. The 4<sup>th</sup> Respondent is the Senior Principal Magistrate an office created under Article 169 of the Constitution.
5. The 5<sup>th</sup> Respondent is an adult male of sound mind residing and working for gain in Mombasa.

**Petitioner's Case**

6. By way of Petition dated and filed in Court on the 1.2.2019, the Petitioner avers that sometime on or around the 24.7.2013, in his capacity as District Land Registrar Mombasa, he handled a land transaction relating to property known as **Mombasa/ Mwembelegeza/925** (herein referred to as "the suit property") between one **Lydia Wakesho Mwamburi** and **Abdulrahman Kimani Kabila** as Trustee of **Abdulfatah Abdulrahman Kimani** and others. The said transaction was backed with authentic documents and it was only after authenticating the said documents that a transfer was effected.

7. The Petitioner states that sometime in the year 2014, he received a complaint letter through the Mombasa Deputy County Commissioner, which alleged fraudulent transfer of the property. Following the complaint, the Petitioner proceeded to exercise his powers under Sections 14(a) (b) and 87 of the Land Registration Act, 2012 by summoning the then registered owners of the suit property one **Smith Muthoka** and the complainant **Risca Chao Mwamburi**. Summons were honoured, a meeting was set and the same held in his office on the 28.6.2014. Parties were given adequate time to make enquiries and to verify the authenticity of the suit property's title that had been obtained by

**Abdulrahman Kimani.**

8. The Petitioner further averred that after the parties in the dispute finished making their representations, he cross-examined them and subsequently prepared his finding/Ruling which he delivered on the 24.7.2014.
9. The Petitioner further avers that one **Kennedy Muthini** owns the adjacent plots 923 and 934, which are adjoining parcels next to the property herein. The Petitioner alleges that the said **Kennedy Muthini** has continued to have a grudge with the Petitioner since 2016 when the Petitioner assisted the Attorney General's Office in a matter in which the said Kennedy Muthini was involved.
10. It is also averred that the Respondents have breached the spirit of the Constitution, and their conduct is oppressive, since the criminal proceedings in **Shanzu Senior Principal Magistrate Court Criminal Case Number 34 of 2019** have been instituted against him without his knowledge, and a warrant of arrest issued against him for failing to attend Court and he faces a threat of being arrested at any time pursuant to the arrest warrant already issued. Therefore, it is paramount that this Court intervenes to halt the gross misuse of the criminal process and the Court process.
11. The Petitioner states that on or around the year 2013 in his capacity as the District Land Registrar Mombasa he was presented with a letter of allotment/offer dated 1.12.1998 in favour of one **Lydia Wakesho Mwamburi**, payment receipt number 181009 for Kshs. 6750 dated 21.2.2000 and a sale agreement dated 18.12.2012 between **Lydia Wakesho Mwamburi** and **Abdulrahman Kimani Kabila** in respect of the suit property.
12. The Petitioner avers that in his capacity as the Land Registrar Mombasa and by virtue of the lodged ownership documents and the aforementioned sale agreement, he issued title deed of the suit property to the purchaser **Abdulrahman Kimani Kabila** as Trustee of **Abdulfatah Abdulrahman Kabilia** (Minor), **Abdulkarim Abdulrahman Kimani Kabila** (minor) and **Amina Abdulrahman Kimani Kabila** (minor).
13. The Petitioner avers that they received letters from Ananda & Co. Advocates and the Deputy County Commissioner alleging fraudulent transfer of the suit property to **Smith Muthoka**. He was not involved in the said transfer and he never signed a title deed for the said **Smith Muthoka Ndila**, but nevertheless, he invoked his powers as a District Lands Registrar by summoning the said **Smith Muthoka Ndila** and **Abdulrahman Kimani Kabila** vide letter dated 4.6.2014 and 25.6.2014. He also summoned one **Risca Chao Mwamburi** and **Josephine Hongo Kapesa**, and a meeting was held at the Lands Offices where all the issues were deliberated and he issued a ruling on the deliberated issues.
14. The Petitioner states the firm of **Messers Ogoti & Company Advocates** was instructed by **Mr. Smith Muthoka Ndila** to write a letter disputing the said ruling and on the 28.10.2014, the Director of Criminal prosecutions wrote to them indicating that they were investigating some aspects of forgery over the said property. He co-operated with the investigators on the issue of forgery, and was later exonerated over the said allegations, and the matter put to rest. Further, the Petitioner states that on or about 9/8/2016, he wrote a letter to the litigation Counsel relating to a complaint made by **Kennedy Muthini** against **Smith Ndila** for malicious damage to property relating to the suit property.
15. The Petitioner states that he has learnt that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have instituted criminal proceedings against him in Shanzu Senior Principal Magistrate Criminal Case no. 34 of 2019, yet he has never been notified and/or summoned to any police station before the said criminal proceedings were instituted against him. Further, the Petitioner states that on the 23.1.2019, an arrest warrant was issued against him for failing to attend Court on the 7.1.2019 in **Shanzu Senior Principal Magistrate Criminal Case No. 34 of 2019** yet he was not aware of the said case.
16. The Petitioner avers that the particulars of the charge against him are the same as those dealt with in his enquiries, ruling and written statements during his various letters to the Respondents. Therefore, his being charged without his knowledge is a clear indication that there is more than meets the eye and the said charges are meant to embarrass, intimidate and frustrate him from properly conducting the functions of his office.
17. The Petitioner further states that currently, there is another criminal case being **Shanzu Criminal Case No. 95 of 2016 (Republic vs. Emmanuel Mwambui Mbojo and Abdul Kimani Kabila)** wherein the accused have been charged with the offence of **stealing contrary to Section 268 as read with Section 275 of the Penal Code**. In the particulars of Count 1 of the charge, the suit property is described as the property belonging to **Lydia Wakesho Mwambui** who is the same person that presented ownership documents and a sale agreement which prompted Petitioner to cause a transfer in favor of **Abdulrahman Kimani Kabila**. Therefore, the Petitioner avers that it would be wrong to charge him over the said matter before criminal case no 95 of 2016 is concluded in order to ascertain whether or not the suit property was stolen by the accused persons in Shanzu Criminal Case No. 95 of 2016.
18. The Petitioner states that the conduct of the Respondents is in clear breach of the principles and spirit of the Constitution of Kenya, and the national values and principles of governance set out under Article 10 of the Constitution. Further, the Petitioner states that the office of the Director of Public Prosecution is an independent office empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what the Constitution dictates and which one of the dictates is that in the exercise of his powers, the DPP is to have regard to the public interest of administration of Justice and need to prevent and avoid abuse of the legal process.
19. The Petitioner also states that as a citizen and civil servant, he is entitled to the protection of his fundamental constitutional rights and freedoms enshrined in the Constitution and more specifically, Articles 10, 20(1), (2), and (3), 23(1), (3), 25, 27, 47 and 48 of the Constitution and that his fundamental rights as set out in the Constitution shall be infringed if this petition is not granted.
20. The Petitioner therefore prays for the following orders:

*a) A declaration that the institution, maintenance and prosecution of Shanzu Senior Principal Magistrate Court Criminal Case Number 34 of 2019 against the petitioner herein is an abuse of the Criminal Justice System and process and contravenes the petitioner's constitutional rights to freedom and security of person, right to fair hearing, right to equality and freedom from discrimination.*

*b) A declaration that the petitioner exercised his discretion and mandate in relation to Mombasa/Mwembelegeza 925 professionally and as required of a District Land Registrar.*

*c) A declaration that the institution, maintenance and prosecution of Shanzu Senior Principal Magistrate Court Criminal Case Number 34 of 2019 against the petitioner herein is oppressive, malicious and an abuse of the court process.*

*d) An order prohibiting continuance of Shanzu Senior Principal Magistrate Court Criminal Case Number 34 of 2019 against the petitioner herein.*

*e) Costs of the Petition*

*f) Any other or further orders and/or directions as the Honourable Court shall deem fit to meet the ends of justice.*

### **The Respondent's Case**

21. The 1<sup>st</sup> Respondent has opposed this Petition through its Grounds of Opposition dated 21.3.2019 on the following grounds herein summarized as follows:

**a) That the Petition is a non-starter, bad in law and an abuse of the Court process as it is meant to usurp the constitutional mandate of independent offices and targeted to derail the already instituted criminal proceedings.**

**b) That the petition offends the mandatory provisions of Section 193A of the Criminal Procedure Code as the criminal proceeding that are directly or substantially in issue in any pending civil proceedings is not a ground for any stay or delay of criminal proceedings.**

**c) That the trial Court should be allowed to proceed and determine the criminal case on merit and the Petitioner be allowed to adduce evidence in his Defence.**

**d) That Article 157 of the Constitution mandates the 1<sup>st</sup> respondent to institute and undertake criminal proceedings against any person before any Court in respect to any offence alleged to have been committed.**

**e) That the Respondent has failed to demonstrate that his constitutional rights have been violated by the 1<sup>st</sup> Respondent as he is still presumed innocent until proven guilty.**

22. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents through the Attorney General opposed the Petition via Grounds of Opposition, which are summarized hereunder as follows:

**a) That this Court cannot injunct an institution carrying out its mandate granted to it under Article 157(10) of the Constitution.**

**b) That the Petition offends Article 160 of the Constitution in regards to the independence of the judiciary.**

23. The Respondents other than filing their Grounds of opposition did not file any Replying affidavit to the Petition.

### **Submissions**

24. The petition was canvassed through written submissions; both parties adopted their submissions on record.

### **Determination**

25. I have considered the submissions filed on behalf of the Petitioners, as well as the Grounds of Opposition filed by the Respondents and all other relevant material. The argument by the Respondents is that the Petition is a non-starter, bad in law and an abuse of the Court process as it is meant to usurp the constitutional mandate of independent offices and targeted to derail the already instituted criminal proceedings. Therefore, this Court lacks jurisdiction of injuncting the same, and the same does not have merit. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, the High Court held:

**“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in**

personal civil feuds and individual vendetta...The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer...”

26. From the foregoing, it is apparent that whereas the discretion given to the Respondents to investigate and prosecute criminal offences is not to be flippantly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the proof of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt.

27. Section 4 of the *Office of the Director of Public Prosecutions Act*, provides the factors, which the Director of Public Prosecution is required to take into account in making a decision whether or not to embark on a prosecution. The said provision provides that:

*“In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—*

*(a) the diversity of the people of Kenya;*

*(b) impartiality and gender equity;*

*(c) the rules of natural justice;*

*(d) promotion of public confidence in the integrity of the Office;*

*(e) The need to discharge the functions of the Office on behalf of the people of Kenya;*

*(f) The need to serve the cause of justice, prevent abuse of the legal process and public interest;*

*(g) protection of the sovereignty of the people;*

*(h) secure the observance of democratic values and principles; and*

*(i) promotion of constitutionalism.”*

28. It follows that the discretion and powers given to the DPP under Article 157 of the Constitution cannot be said to be unfettered. See **Wendoh, J in Koinange vs. Attorney General and Others [2007] 2 EA 256:**

**“Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the Constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the Constitution; (iii) Whether the prosecution is against public policy.”**

#### **Whether the 1<sup>st</sup> Respondent has Exercised Its Discretion Fairly**

29. As stated earlier, the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioner that the charges leveled against him are ill conceived, malicious, and gross abuse of the Court process. The Grounds of Opposition that were filed by the Respondents are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see **Peter O. Nyakundi & 68 others vs. Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR** Odero, J addressing a claim where the Attorney General as the Respondent failed to file a replying affidavit stated:

*“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see MEREKA & CO. ADVOCATES Vs UNESCO CO. LTD 2015 eKLR, PROF OLAKA ONYANGO & 10 OTHERS Vs HON. ATTORNEY GENERAL CONSTITUTION PETITION NO. 8 OF 2014 and ELIUD NYAUMA OMWOYO & 2 OTHERS –Vs KENYATTA UNIVERSITY). The Respondents have failed to refute specifically the allegations in the Petitioner’s sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.”*

30. Similarly, in **Phillip Tirop Kitur v Attorney General [2018] eKLR**, the Court accepted the affidavit evidence, and ruled that in the absence of a replying affidavit or oral evidence from the Attorney General, the petitioner’s evidence stood unchallenged. In addition, the High Court rejected the Attorney General’s contention that the delay in filing the Petition had caused it prejudice, ruling that in the absence of a Replying Affidavit or oral evidence, the court had no facts upon which it could make such a finding.

31. The Petitioner's averments in his supporting affidavit are not controverted by the Respondents, either through an affidavit in response or through cross-examination. An affidavit is sworn evidence. It occupies a higher pedestal than Grounds of Opposition that are issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants' claims?

32. The facts of this case are not in dispute. A complaint was brought to the attention of the Petitioner from the office of the County Commissioner. The Petitioner while exercising his mandate as provide under Sections 14(a) and (b), and 87(1) &(2) of the Land Registration Act, dully informed the parties to the dispute of the complaint and gave them adequate time to put in their representations. The parties were cross-examined by the Petitioner on the 8.7.2014 and a Ruling was delivered on the 24.7.2014 where it was recommended as follows:

- a) **That the said parcel be restricted with no dealings until further notice.**
- b) **The criminal aspect to be investigated by the relevant arm of government CID.**
- c) **The matter to be referred to a competent Court of law for orders.**
- d) **The right of Appeal to the Chief Land Registrar office in conformity with the law.**
- e) **No costs.**

33. I find and hold that the Petitioner exercised is discretion as he is mandated under Sections 14(a) and (b), and 87(1) &(2) of the Land Registration Act in resolving the dispute between the parties to the dispute. If any person was aggrieved by his findings, they ought to have exercised their right of appeal to the Chief Land Registrar and/ or exercise right of review as provided for under Section 86(1) of the Land Registration Act. Therefore, it is an abuse of the Court process for the Respondents to opt to prefer criminal proceedings against the Petitioner, when the Petitioner exercised his due diligence by authenticating the documents before him; exercised his discretion while dealing with the dispute referred to him by the Deputy County Commander; and delivered his Ruling on 24.7.2014.

34. Furthermore, in this case neither the complainant, nor the investigator has sworn any affidavit showing the basis upon which the charges against the petitioner were preferred. It is trite that based on **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra):

**“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.**

35. It follows that the burden is on the prosecutor to show by way of admissible evidence that he is in possession of material that disclose the existence of a prosecutable case. In **Stanley Munga Githunguri vs. R [1986] eKLR** the Court held as follows:

**“A prosecution is not to be made good by what it turns up. It is good or bad when it starts.”**

36. The prosecution of the petitioner cannot be permitted to proceed unless, the prosecution shows upfront that it has a prosecutable case based on the investigations conducted upon a complaint lodged with those who are empowered to do so. In this case, there is no such material. Accordingly, I find merit in this petition, and allow the same as follows:

- a) *A declaration that the institution, maintenance and prosecution of Shanzu Senior Principal Magistrate Court Criminal Case Number 34 of 2019 against the petitioner herein is an abuse of the Criminal Justice System and process and contravenes the petitioner's constitutional rights to freedom and security of person, right to fair hearing, right to equality and freedom from discrimination.*
- b) *A declaration that the petitioner exercised his discretion and mandate in relation to Mombasa/Mwembelegeza 925 professionally and as required of a District Land Registrar.*
- c) *A declaration that the institution, maintenance and prosecution of Shanzu Senior Principal Magistrate Court Criminal Case Number 34 of 2019 against the petitioner herein is oppressive, malicious and an abuse of the court process.*
- d) *An order prohibiting continuance of Shanzu Senior Principal Magistrate Court Criminal Case Number 34 of 2019 against the petitioner herein.*
- e) *Costs for the Petition*

Dated, Signed and Delivered at Mombasa this 12<sup>th</sup> day of May, 2020.

E. K. OGOLA

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Mr. Aziz for Petitioner/Applicant

No Appearance for Respondents and others

Mr. Kaunda Court Assistant