



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CONSTITUTIONAL PETITION NO. 1 OF 2019

IN THE MATTER OF: ARTICLE 1, 2(4), 10, 21, 22, 23, 27, 28, 35, 47, 48, 49, 50, 157, 159, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF: THE 1ST RESPONDEN'S DECISION TO CHARGE THE PETITIONER IN MOMBASA CHIEF MAGISTRATE'S COURT ANTI-CORRUPTION CASE NO. 17 OF 2018. TO THE PETITIONER.

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 29, 48, & 50 OF THE CONSTITUTION OF KENYA, 2010 AND THE ADVOCATES ACT-CAP 16 LAWS OF KENYA.

AND

IN THE MATTER OF: THE PENAL CODE-CAP 63 LAWS OF KENYA AND THE ADVOCATES ACT-CAP 16 LAWS OF KENYA.

AND

IN THE MATTER OF: THE POLICE ACT, NATIONAL POLICE SERVICE ACT & THE DIRECTOR OF PROSECUTIONS ACT.

BETWEEN

JOSEPH KARANJA KANYI

T/A KANYI J. & CO. ADVOCATES.....PETITIONER

VERSUS

- 1. THE DIRECTOR OF PUBLIC PROSECUTIONS**
- 2. EHICS AND ANTI-CORRUPTION COMMISSION**
- 3. THE CHIEF MAGISTRATES' COURT, MOMBASA**

AND

- 1.KIKAMBALA DEVELOPMENT COMPANY LIMITED**
- 2. JANE NJERI KARANJA**
- 3. FREDRICK OTIENO OYUGI**
- 4. MAURICE MILIMU AMAHWA**

5. EPHRAIM MAINA RWINGO

6. SELINE CONSULTANTS LIMITED

7. JOAN ZAWADI KAREMA

8. RENSON THOYA JUMA

9. HARRY JOHN PAUL ARIGI

10. JOY KAVUTSI MUDAVADI *alias* JOY K. ASIEMA

11. KENYA PORTS AUTHORITY RETIREMENT BENEFIT

SCHEME.....INTERESTED PARTIES

JUDGMENT

The Petition

1. This is the Judgment on the petition herein dated 8/1/2019.

Submission on Facts and Law making the Petition

2. The Petitioner, an advocate of the High Court of Kenya, was retained by the 1st Interested Party herein, Kikambala Development Company Limited, to represent the 1st Interested Party in a conveyance transaction the subject matter of an agreement for sale dated 17/12/2014 vide which the 1st Interested Party purchased Plot Nos. 5025/1191, 5025/1192, 5025/1194, 5025/1195, 5025/1196, 5025/1197, 5025/1200, 5025/1201, 5025/1202, 5025/ 1203, 5025/1204, 5025/1205, 5025/1206, 5025/1224, 5025/1225, 5025/1226, 5025/1227, 5025/1228, 5025/1229 and 5025/1230 (the suit properties) situate South of Takaungu Kilifi District, from Amkeni Farm Limited. The 1st Interested Party then on 18/12/2014 entered into an agreement for the sale of the suit properties to Kenya Ports Authority Retirement Benefits Scheme, the 11th Interested Party herein. The firm of Cootow & Associates Advocates was appointed by the 11th Interested Party to carry out the aforesaid conveyancing exercise on its behalf. As a consequence of those instructions the Petitioner issued a professional undertaking to the firm of Cootow & Associates Advocates for the successful completion of the transaction. On account of the aforesaid professional undertaking the sum of Kshs. 70,000,000/=, being the agreed deposit of the purchase price, was transferred by the firm of Cootow & Associates Advocates to the Petitioner. However, the transaction fell through for reasons that the said Amkeni Farm Limited had questionable title to the suit properties which made the transfer of the suit properties to the 11th Interested Party not practicable. This failure of the transaction attracted the interest of the Ethics and Anti-Corruption Commission – the 2nd Respondent herein - who investigated the circumstances surrounding the failed transaction and decided that public funds were lost in the failed transaction and, on 21/6/2017 filed a civil suit being Milimani **Commercial Anti-Corruption and Economic Crime Case No. 16 of 2017** (herein called NBI ACECC No. 16 of 2017), against the Petitioner and the 1st to 10th Interested Parties, claiming a refund of the said sum of Kshs. 70,000,000/= given to the Petitioner as deposit by 11th Interested Party. The Defendants in that case – the Petitioner and 1st to 10th Interested Parties herein have since filed their defences in that matter, which is proceeding in that court. This case has itself given rise to Msa H.C. Constitutional Petition No. 24 of 2015 and Malindi Court of Appeal Civil Appeal No. 52 of 2015 both of which are pending.

3. What appears to have annoyed the Petitioner herein, however, is that while aforesaid ACECC Case No. 16 of 2017 is about to be settled pursuant to a partial consent filed the Respondents herein have charged the Petitioner in **Mombasa Chief Magistrates Court Anti-Corruption Case No. 13 of 2018** (herein called MSA CMCACC No. 13 of 2018) to prosecute the Petitioner and 1st to 10th Interested Parties over the same issues raised in the NBI ACECC No. 16 of 2017.

4. This development has come as a shock to the Petitioner and the Interested Parties because the 2nd Respondent made a decision to engage the Petitioner and the 1st to 10th Interested Parties in negotiations with a view to amicably settling the said suit. The Petitioner and Interested Parties had perceived the need to negotiate to be born out of the realization by the 2nd Respondent that the transaction between the 1st Interested Party and the 11th Interested Party was not legally tenable. The said negotiations resulted in the filing of a consent agreement between the 2nd Respondent, the Petitioner and 1st to 11th Interested Parties in the following terms: -

a) **That the Petitioner was to deposit Kshs. 45,000,000/= as part of the 2nd Respondent's claim in an Escrow Account to be opened in the names of the Advocates on record for Ethics and Anti-Corruption Commission and the firm of Kanyi J & Company within 10 days from 23rd November, 2018 as the parties finalize on the negotiations.**

b) **That this matter will be mentioned on 14th February, 2019.**

c) **That in the meantime parties to comply with Order 11 of the Civil Procedure Code.**

5. The Petitioner states that whereas he was ready to deposit the sum of Kshs. 45,000,000/= in an Escrow account as per the aforesaid consent order the same has not materialized because the 2nd Respondent has upto date not availed the particulars of the account into which

the money is to be deposited.

6. The Petitioner states that the 1st Respondent was at all material times fully aware of these negotiations as it is privy to correspondences disclosing the foregoing and at no time did the 1st Respondent protest the said actions. However, the conclusion of the said negotiations were delayed by a dispute between the Kenya Ports Authority and 11th Interested Party. The 11th Interested Party filed Mombasa High Court Constitutional Petition No. 24 of 2015 against the Kenya Ports Authority seeking, *inter-alia*, an order that the Kenya Ports Authority does not have authority to interfere with the aforesaid transaction between the 1st Interested Party and the 11th Interested Party. On 4/5/2015 the court granted an order that,

“the status quo-that is to say, no transaction shall proceed between the 11st Interested Party and the 1stInterested Party who are not parties to this application pending the simultaneous determination of the Applicants’ application dated 16th April, 2015 and the Respondents’ application dated 30th April, 2015”.

7. The Petitioner has not been able to satisfy his professional undertaking to Cootow & Associates Advocates because Mombasa High Court Constitutional Petition No. 24 of 2015 is still pending and the aforesaid status quo order is still in force.

8. It is the Petitioner’s case and that of the 1st to 10th Interested Parties that their intended prosecution in the MSA CMCACC No. 13 of 2018 is founded upon the same principles, transaction and foundation of NBI ACECC No. 16 of 2017 and Mombasa High Court Constitutional Petition No. 24 of 2015. The Petitioner states that the said prosecution comes 6 months after the filing of NBI ACECC No. 16 of 2017. The Respondents have not explained why there was the sudden change to proceed by way of a criminal case when right from June, 2018 the said Respondents had represented to all that the said issue was to be resolved through the civil justice system. The issues raised in all the above cases are so intertwined that they cannot be segregated by pursuing the same in civil suit, and now also in criminal cause. To do that is to allow the Respondents to use information produced by the parties in the civil case to assist them in the criminal case. This is against constitutional principle against self-incrimination.

9. Further, the Petitioner’s case is that the 11th Interested Party is a private institution which is governed by the Trust Deed dated 24th October, 2012. As such the 2nd Respondent has no mandate and/or jurisdiction to entertain issues to deal with the transaction herein, and that the monies held by the 11th Interested Party are not public funds.

10. In addition the Petitioner states that he has at all material times acted upon instructions given to him by the 1stInterested Party at a fee chargeable under the relevant laws. As such, it is improper for the 1st and 2nd Respondents to prefer any charges against the Petitioner. The Petitioner states that he has never received any complaints from his client regarding his conduct in the aforesaid transaction. The Petitioner states that neither the firm of Cootow & Co. Advocates nor the 11th Interested Party raised any complaints regarding the professional undertaking given by the Petitioner.

11. In any event, any complaint would only be resolved as per the terms in the aforesaid professional undertaking, and pursuant to Section 80 of the *Advocates Act*, Cap 16 Laws of Kenya, ***“Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence: Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the Attorney-General by the Committee under subsection (3) of section 61.”*** The Petitioner avers that there is no report which has been filed with the Attorney General pursuant to Section 80 of the *Advocates Act* to allow the 1st and 2nd Respondents to initiate the aforesaid criminal proceedings. As such, the institution of MSA CMCACC No. 13 of 2018 is ipso facto, unlawful.

12. Further, the Petitioner avers that under Section 134 of the *Evidence Act*, ***“(1) no advocate shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment.”*** As such, it was unreasonable for the 1st and 2nd Respondents to charge the Petitioner for alleged offences committed by his client. The Petitioner states that being an agent of a known principal the 1st and 2nd Respondents ought to have pursued the Petitioner’s principal and not the Petitioner.

13. The Petitioner is unable to understand why the Petitioner and the 2nd to 9th Interested Parties were arrested and charged in court over the same issues raised in NBI ACECC No. 16 of 2017 despite them having recorded a consent order and the fact that the said suit is still pending determination. Consequently, the Petitioner believes that the MSA CMCACC No. 13 of 2018 is an abuse of the court process and an attempt to arm-twist the Petitioner and the 1st to 10th Interested Parties.

Constitutional Foundation of Petition

14. The Petitioner avers that the 1st to 3rd Respondents violated Article 10 of the Constitution of Kenya, 2010 by failing to act in an accountable and transparent manner so as to uphold the rule of law, transparency, accountability and good governance; the 1st Respondent has violated Article 157 of the Constitution of Kenya, 2010 by acting as agents of the 2nd Respondent for purposes of assisting the 2nd Respondent in NBI ACECC No. 16 of 2017; the Respondents have violated Article 10, 28 and 50 of the Constitution of Kenya, 2010 by entertaining criminal proceedings, to wit, MSA CMCACC No. 13 of 2018 which is an abuse of the court process, and offends Article 157 (11) of the Constitution.

15. The Petitioner avers that if the said criminal case MSA CMCACC No. 13 of 2018 proceeds the Petitioner will be prejudiced in that the

Petitioner and the Interested Parties Nos. 1 to 10 have filed their defences and other relevant documents and witness statements in NBI ACECC No. 16 of 2017 in the honest belief that the 2nd Respondent had decided to resolve the dispute through the civil justice system. It is noted that in the Verifying Affidavit annexed to the said plaint, the 2nd Respondent deponed that there were no other proceedings pending between it and the Petitioner. It would thus prejudice Petitioner's fundamental right to a fair hearing if the Respondents are allowed to use materials obtained via the civil case from the Petitioner to prosecute the Petitioner. Secondly, the Petitioner would be prejudiced as the Respondents will not be free agents while negotiating in the said civil case if the criminal case is allowed to proceed. Lastly, the Petitioner and 1st to 10th Interested Parties will be prejudiced by having to commit finances to defend both causes.

16. Based on the foregoing, the petition prays for the following orders:

(a) A declaration that the initiation, maintenance and prosecution of Mombasa Chief Magistrate's Court anti-corruption Case No. 13 of 2018 against the Petitioners herein is an abuse of the criminal justice process and contravenes the Petitioners' constitutional rights to freedom and security of the person, right to a fair hearing, right to equality and freedom from discrimination.

(b) A declaration that the charges in Mombasa Chief Magistrate's Court Anti-Corruption Case No. 13 of 2018 have no legal or factual background.

(c) A declaration that the institution, maintenance and prosecution of Mombasa Chief Magistrate's Court Anti-Corruption Case No. 17 of 2018 against the Petitioners herein is oppressive, malicious and an abuse of the court process.

(d) An order prohibiting continuance of Mombasa Chief Magistrate's Court Anti-Corruption Case No. 13 of 2018 against the Petitioners herein.

(e) A consequential order to quash the proceedings in Mombasa Chief Magistrate's Court Anti-Corruption Case No. 13 of 2018 against the Petitioners herein.

(f) The costs of the petition.

(g) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

1st Respondent's Response and Submissions

17. In opposition to the petition the 1st Respondent filed Grounds of Opposition, and a Replying Affidavit sworn by Hellen Mutellah on 14/1/2019, both filed herein on 14/1/2019. Ms. Mutellah is a Senior Prosecution Counsel in the Office of the DPP, and is one of the counsel seized of the matter herein.

18. The 1st Respondent's case is that the 2nd Respondent is statutorily empowered to detect, investigate and recommend the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under Ethics and Anti-Corruption Commission Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution; that in addition to the mandate of undertaking investigations the Ethics and Anti-Corruption Commission is mandated to institute and conduct proceedings in court for the purposes of the recovery or protection of public property, or for the freezing or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures; that the Ethics and Anti-Corruption Commission (2nd Respondent) pursuant to their mandate under Article 252 of the Constitution of Kenya, the Anti-Corruption and Economic Crimes Act, 2003 and Section 11 of the Ethics and Anti-Corruption Commission Act, launched investigations into allegations that the Trustees of the Kenya Ports Authority Retirement Benefit Scheme, 2012, had illegally, fraudulently and/ or corruptly entered into a sale agreement for the purchase of 100 acres of land situated at Kikambala area near Vipingo in Kilifi County measuring 100 acres for Kshs. 700 million; that pursuant to Section 35 of the Anti-Corruption and Economic Crimes Act, 2003 as read with Section 11(1)(d) of the Ethics and Anti-Corruption Commission Act, submitted to the Director Public Prosecutions (1st Respondent) on 1/7/2016 a report together with the duplicate investigation file on the results of their investigations with their recommendations; that the 1st Respondent under Article 157 of the Constitution and the Office of the Director of Public Prosecutions Act, analysed the inquiry file submitted by 2nd Respondent and ascertained that there was sufficient evidence disclosed to warrant prosecution of the suspects on the following charges in MSA CMCACC No. 17 of 2018:

1. Fraudulent acquisition of public property contrary to Section 45 (1) (a) as read with Section 48 of the Anti-Corruption and Economic Crimes Act;

2. Conspiracy to commit an economic crime contrary to Section 47 A of the Anti - Corruption and Economic Crimes Act; and

3. Money laundering contrary to section 3 as read with Section 16 of the proceeds of crime and Anti-Money Laundering Act Cap 59b Laws of Kenya.

19. Consequently, it is the 1st Respondent's case that the decision to charge the Petitioner and the 1st – 10th Interested Parties was made independently based on sufficiency of evidence and the public interest underlying prosecution of corruption and economic offences, and was not instigated by anybody or institution as alleged by the Petitioner.

20. Further, it is the 1st Respondent's case that if in the course of the Ethics and Anti-Corruption Commission investigations it is established

that certain public funds have been fraudulently paid out, the 2nd Respondent is statutorily mandated by Article 252 of the Constitution, the Anti-Corruption and Economic Crimes Act, 2003 and the Ethics and Anti-Corruption Commission Act, to institute and conduct proceedings to recover and or protect public property. Consequently, the 2nd Respondent instituted a civil suit being NBI ACECC No. 16 of 2017 to recover public funds belonging to the Kenya Ports Authority Retirement Benefit Scheme, 2012.

21. The 1st Respondent states that the criminal case MSA CMCACC No. 13 of 2018 is separately and lawfully founded, and that both causes can run simultaneously and the fact that there is a civil case against the Petitioner cannot be a bar to a criminal case against the Petitioner; that the NBI ACECC No. 16 of 2017 are civil recovery proceedings of public funds due to the 11th Interested Party whereas the MSA CMCACC No. 13 of 2018 are criminal proceedings in respect to the determination of whether or not the Petitioner and the 1st-10th Interested Parties have committed any criminal offence, which determination can only be done by the trial court. The DPP is however, amendable to plea agreement negotiations with the Petitioner and the Interested Parties, within the confines of the law.

The 2nd Respondent's Response and Submissions

22. In response to the petition the 2nd Respondent filed Grounds of Opposition on 14/1/2019, and Replying Affidavit sworn by Mulki Abdi Umar on 18/1/2019. The Grounds of Opposition and the Replying Affidavit aforesaid address the same issues. The deponent to the Replying Affidavit is an investigator appointed by the 2nd Respondent and alleges to have investigated the matter herein. The 2nd Respondent's case is that the petition is grounded on generalities, conjectures and suppositions and is incurably bad in law, grossly incompetent, fatally defective and legally untenable.

23. The 2nd Respondent's case is that pursuant to Section 11 (j) of the Ethics & Anti-Corruption Commission Act, 2011, the 2nd Respondent NBI ACECC No. 16 of 2017 - EACC vs. Joseph Karanja T/A Karanja and Company Advocates & 10 Others, being a civil claim of Kshs. 70,000,000.00/= and statutory interest over the pecuniary claim from 18/12/2014 against the Petitioner, who is the 1st Defendant in the said civil suit. Pursuant to its legal mandate under Articles 10, 79 and 252(1) (a) (b) (d) of the Constitution of Kenya as read with sections 3 and 11(j) of the Ethics and Anti-Corruption Commission Act, 2011 and provisions of the Anti-Corruption and Economic Crimes Act, the 2nd Respondent investigated allegations that the trustees of the Kenya Ports Authority Retirement Benefit Scheme (KPARBS) 2012 had illegally, fraudulently and/or corruptly entered into a sale agreement for the purchase of the suit properties at the purchase price of Kshs. 7,000,000.00/= per acre; amounting to Kshs. 700 Million. The said investigations established that:

In the 10th meeting of the Board of Trustees of the aforesaid KPARBS (11th Interested Party) 2012 held on 24/10/2014, under Minute 63/2014 entitled "Any Other Business" and specifically on No. 63.07 matters regarding Scheme Property Portfolio, the said Trustees had discussed the need for the Scheme to consider a property portfolio for compliance with the RBA asset class requirement for a maximum of 30% property asset class; the said meeting resolved that the Defined Contribution Scheme Chairman, Mr. Fredrick Otieno Oyugi (3rd Interested Party) should write a letter to the Chairman of the Defined Benefit Scheme with intent of purchasing property earmarked for disposal from the Defined Benefit Scheme at prevailing market rates; the 3rd Interested Party wrote a letter dated 27/10/2014 to the Chairman KPA Pension Scheme as directed by the aforesaid Board of Trustees expressing interest in the properties that were up for sale; the Pension Administrator, Mr. Maurice Milimu Amahwa (4th Interested Party), via a Memorandum No. 20 of 2014 informed the aforesaid Board of Trustees that the Chairman of the Defined Benefit Scheme had not responded to the Defined Contribution Scheme Chairman's aforesaid letter dated 27/10/2014, and proposed to the Board of Trustees that consideration be given to purchasing some 200 acres in Kikambala which had been advertised for sale at a price of Kshs. 10,000,000.00/= per acre in the Tuesday 25th November, 2014 edition of the Standard Newspaper; the issue was discussed in the 12th meeting of the Board of Trustees held on 1/12/2014 which resolved that the Pension Administrator, Mr. Maurice Milimu Amahwa, should obtain three independent valuation reports on the aforesaid parcels of land from three reputable valuation firms to enable the Trustees to determine the basis of negotiations. At the same time, a Committee comprising of three trustees namely: Ms. Joan Zawadi Karema (7th Interested Party), Mr. Juma Renson Thoya (8th Interested Party) and Mr. Harry John Paul Arigi (9th Interested Party) and the Pensions Administrator, Mr. Maurice Milimu Amahwa (4th Interested Party), were selected to carry out a site visit and report back to the said Board in its next meeting; the aforesaid Committee reported back to the Board of Trustees in its 13th meeting held on 4/12/2014 that the said Committee had met the vendor in the presence of the vendor's Advocate M/S Kanyi J & Co. Advocates (The Petitioner herein) on 2/12/2014, and that they had made an offer to purchase the said 100 acres of land at Kshs. 5,000,000.00/= per acre, but which was settled at Kshs. 7,000,000.00/= per acre after negotiations; the Board of Trustees at its meeting held on 4/12/2017 approved the recommendations above and authorized the purchase of one hundred (100) acres of land at the price of Kshs. 7,000,000.00/= per acre totaling to Kshs. 700,000,000.00/=. The Trustees also approved the payment of a deposit of Kshs. 70,000,000.00/=: on 17/12/2014, Kikambala Development Limited (1st Interested Party herein) entered into an agreement with the registered owner of the aforesaid plots Amkeni Farm Limited, where the said 1st Interested Party agreed to purchase the said plots at a total purchase price of Kshs. 430,000,000.00/=: by an Agreement for Sale dated 18/12/2014, the Kikambala Development Limited (1st Interested Party herein) agreed to sell to KPARBS 2012 (11th Interested Party herein) the aforesaid Plots at a total Purchase price of Kshs. 700,000,000.00/=. The said agreement was executed by Mr. Ephraim Maina Rwingo (5th Interested Party herein) and Ms. Jane Njeri Karanja (2nd Interested Party herein) for and on behalf of Kikambala Development Limited (1st Interested Party herein) while Mr. Fredrick Otieno Oyugi (3rd Interested Party herein), Ms. Joan Zawadi Karema (7th Interested Party herein) and Mr. Juma Renson Thoya (8th Interested Party herein) executed the same for and on behalf of KPARBS 2012 (11th Interested Party herein); there is evidence that the aforesaid purported Sale Agreement was executed by above persons on 16/12/2014 and not on 18/12/2014 as the date affixed on the said purported Sale Agreement would appear to suggest; on the date when the aforesaid Sale Agreement was concluded, the Kikambala Development Company Limited was not the registered owner of the said plots and the said Agreement was therefore a nullity; the Kikambala Development Company Limited was incorporated on 10/12/2014 and was consequently only 8 days old when it purported to conclude the aforesaid Sale Agreement with KPARBS 2012 (11th Interested Party herein) and the 2nd Respondent has reason to believe that the said company was incorporated for the purposes of carrying out the land transaction in issue; the executors on behalf of the 1st Interested Party were in the process of buying the same parcels of land from the registered owners, that is, Amkeni Farm Limited when they executed a sale agreement on 17/12/2014 to purchase the said parcels of land from Amkeni Farm Limited at a purchase price of Kshs. 430,000,000.00/=: pursuant to the aforesaid sale agreement dated 18/12/2014, KPARBS 2012 on the same date paid Kshs. 70,000,000.00/= to Kikambala Development Company Limited

(1st Interested Party herein) through its Advocates, the Petitioner herein being 10 percent of the purchase price; upon receipt of the said Kshs. 70,000,000.00/= the Petitioner transferred Kshs. 43,000,000.00/= to Amkeni Farm Limited pursuant to the aforesaid sale agreement dated 17/12/2014 between Amkeni Farm Limited and Kikambala Development Company Limited (1st Interested Party herein); apparently, Kikambala Development Company Limited (1st Interested Party herein) was relying on funds from KPARBS 2012 (11th Interested Party herein) to purchase the Plots in question and thereafter sell them to the 11th Interested Party herein at an exorbitant price; the sale agreement dated 17/12/2014 between Amkeni Farm Limited and Kikambala Development Company Limited (1st Interested Party herein) was rescinded after the said 1st Interested Party failed to meet its obligation under the said agreement; after that rescission Kshs 41,600,000 was refunded by Amkeni Farm Limited to 1st Interested Party; the result was that the said 1st Interested Party was unable to honour its obligations under its Sale Agreement with KPARBS 2012; the purported sale agreement between KPARBS 2012 (11th Interested Party) and Kikambala Development Company Limited (1st Interested Party herein) was tainted with illegality, was null and void and was part of a fraudulent scheme to embezzle public funds unlawfully drawn from the 11th Interested Party.

24. The 2nd Respondent's case is that their analysis and interpretation of the activities and conduct of the Petitioner and the Interested Parties show that they were involved in a corrupt plan to fraudulently steal money from the 11th Interested Party. These activities establish a clear criminal intention which can only be established and punished in a criminal cause, and relying on Section 11(j) of the Ethics and Anti-Corruption Commission Act, it filed the NBI ACECC No. 16 of 2017, WHERE THE Petitioner herein is the 1st Defendant.

25. The 2nd Respondent states that following the outcome of its investigations in respect to the criminal culpability of the Petitioner and 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Interested Parties herein, recommendations were made to the 1st Respondent pursuant to provisions of Section 35, 11 (d), 45 (1) a, 47 and 48 of the Anti-Corruption and Economic Crimes Act as read with Article 157 of the Constitution of Kenya, 2010, and Section 127 of the Penal Code, under which it was established that the Petitioner and the 1st to 10th Interested Parties had committed offences including money laundering, theft of public funds, and conspiracy to commit fraud.

26. The 2nd Respondent avers that the criminal proceedings in MSA CMCACC No. 17 of 2018 before the 3rd Respondent is based on the findings of culpability mentioned above, and that it is in the public interest and within the 1st Respondent's legal mandate pursuant to provisions of Article 157(6)(a) of the Constitution of Kenya, 2010 as read with section 5(1) of the Office of Director of Public Prosecutions Act, 2013 and the provisions of the Criminal Procedure Code, to institute and prosecute the Petitioner and Interested Parties.

27. The 2nd Respondent's case is that the civil proceedings in NBI ACECC No. 16 of 2017 are strictly in respect to the 2nd Respondent's civil claim of Kshs. 70,000,000.00/= and applicable statutory interest, against the Petitioner, and that although there was a partial consent on the matter for refund of the said Kshs. 70,000,000/=, the Petitioner has not complied with the same.

28. Further it is the 2nd Respondent's case that pursuant to Section 193A of the Criminal Procedure Code, the criminal proceedings in MSA CMCACC No. 17 of 2018 and civil proceedings in NBI ACECC No. 16 of 2017 can run and be undertaken concurrently according to the respective legal mandate of the 1st and 2nd Respondents.

29. The 2nd Respondent further avers that the provisions of Sections 80 and 134 of the Advocates Act do not prohibit the criminal proceedings undertaken by the 1st Respondent in MSA CMCACC aforesaid pursuant to provisions of Articles 10, 27(1)(2); 157(6)(a) of the Constitution of Kenya, 2010 as read with section 5(1) of the Office of Director of Public Prosecutions Act, 2013 and the provisions of the Criminal Procedure Code.

30. The 2nd Respondent avers that the 11th Interested Party is a Retirement Benefit Scheme for the employees of Kenya Ports Authority regulated by the Retirement Benefits Authority Act and as such the said 11th Interested Party is a public body due to the fact that it was founded by Kenya Ports Authority and further due to the fact that the funds held by 11th Interested Party are statutory contributions from Kenya Ports Authority. Therefore, it was within the legal mandate of the said 2nd Respondent to investigate the reported allegations of corruption in respect to the said 11th Interested Party, which is a public body.

31. Further, at all material times in respect to the 2nd Respondent's investigations, the 3rd, 4th, 7th, 8th, 9th and 10th Interested Parties were public officers and enjoined under Article 232 of the Constitution of Kenya, 2010 to account for their actions which led to misappropriation of Kshs. 70,000,000.00/= being pension for Kenya Ports Authority retirees. Section 9 of the Leadership and Integrity Act, 2012 enjoined 3rd, 4th, 7th, 8th, 9th and 10th Interested Parties to take personal responsibility for the reasonably foreseeable consequences of any actions or omissions arising from the discharge of their respective public duties. The 2nd Respondent avers that the constitutional principle of the rule of law under Article 10 of the Constitution of Kenya, 2010 enjoins the Petitioner to respect the operations of the criminal justice system and the due course before the 3rd Respondent.

32. The 2nd Respondent states that the Petitioner has failed to demonstrate that he is unlikely to get a fair trial in criminal case before the 3rd Respondent. The criminal liability of the Petitioner and the 1st to 11th Interested Parties if any, will only be determined in the said criminal court. Granting of orders sought by the Petitioner would amount to fettering the 1st, 2nd and the 3rd Respondents in executing their respective legal mandates.

The 3rd Respondent's Case

33. The 3rd Respondent opposed the petition through Grounds of Opposition filed herein on 5/12/2019. The 3rd Respondent's case is that the petition is an abuse of the Court process since the issues ought to be determined via the mechanisms and institutions created by the constitution such as the Court justice system, investigative agencies and the Director of Public Prosecution. The 3rd Respondent states that

this petition has been filed by the Petitioner to evade any further investigations and probable prosecution. The petition offends Article 157 of the Constitution of Kenya 2010 as read together with Section 34 and 35 of National Police Service Act. The 3rd Respondent avers that the Ethics and Anti-Corruption Commission is an independent Constitutional body with the mandate to recommend the prosecution, and this suit offends the authority of EACC and the DPP working in tandem for prosecution of offences. If the orders sought in this petition are granted it will be detrimental to investigations and are likely to injure the independence of the 1st and 2nd Respondents' constitutional mandate.

Interested Parties

34. All the Interested Parties filed supporting Affidavits to the petition. The 11th Interested Party's position is that all they want is recovery of Kshs. 70,000,000/= paid as part purchase price.

Determination

35. All parties, including the Petitioner, Respondents and Interested Parties (except the 11th Interested Party) filed submissions and list of authorities to the petition.

- The Petitioner filed his submissions and list of authorities on 25/11/2019
- The 1st Respondent filed his submissions and list of authorities on 4/12/2019
- The 2nd Respondent filed submissions and list of authorities on 28/11/2019
- The 1st, 2nd 5th and 6th Interested Parties filed their submissions and list of authorities on 4/12/2019
- The 7th to 10th Interested Parties relied on their submissions filed on 5/3/2019 on the Notice of Motion dated 14/1/2019
- The 3rd and 4th Interested Parties relied on Petitioner's submissions

36. The submissions were not highlighted. I have carefully considered the petition and the submissions. In my view, the petition raises the following issues for determination:

- (i) Whether this court has jurisdiction to entertain the petition.
- (ii) Whether the petition has met the threshold of constitutional petitions as per **Anarita Karimi Njeru vs. Republic [1976-1980] 1KLR 1972.**
- (iii) Whether the 2nd Respondent is using the criminal cause in MSA CMAACC to arm twist and upstage the Petitioner and Interested Parties in civil cause No. NBI ACECC No. 16 of 2018 and if so, if that is unconstitutional violation of Petitioner's rights.
- (iv) Whether the Petitioner or Interested Parties rights under Article 47 (2) of the constitution were violated.
- (v) Whether the Criminal Case MSA CMAACC No. 13/2018 is an abuse of court process.
- (vi) Whether both civil and criminal causes herein can proceed and co-exist simultaneously without affecting the right to fair trial.
- (vii) Whether the prosecution of the Petitioner violates Section 80 of Advocates' Act, Cap 16 Laws of Kenya.

37. Because all these issues are intertwined, I will address them all simultaneously.

38. In my view, the fundamental issue for the determination herein is whether or not the institution, maintenance and prosecution of MSA CMAACC No. 13 of 2018 against the Petitioner herein and 10 others is constitutionally founded. There is no merit argument against the Respondents for instituting the said criminal case. Indeed, the 1st and 2nd Respondents have stated their justification for preferring the said charges. It is also the Respondents' legal mandate to initiate prosecution of offenders. It is therefore not within the ambit of this Court to find or establish whether or not the said prosecution is merited. That is a determination to be made by the trial court should the criminal prosecution proceed in that court. The duty and concern of this court is to establish whether the said prosecution meets the constitutional threshold, or whether it has a footing in the constitutional principles of access to justice and fair trial.

39. Article 157 of the constitution establishes the Director of Public Prosecution's Office as an independent office, and empowers it to initiate prosecutions without deference to any authority. The Article states:

“157:

- (1) There is established the office of Director of Public Director of Public Prosecutions. Prosecutions.**
- (2) ...
- (3) ...
- (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.

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

(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.

(12) ...

40. The DPP's authority and latitude to perform his functions is not fettered, except that Sub-Article 11 of Article 157 requires that the DPP, while performing his mandate, shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

41. The issue that arises in the instant petition, therefore, is whether the DPP in initiating the aforesaid criminal prosecution, has violated the rights of the Petitioner and those of the Interested Parties, thereby affecting their right to a fair administration of justice and/or abusing the legal process.

42. It is common ground that the 1st Respondent filed a civil action being NBI ACECC No. 16 of 2017 against the Petitioner and the 1st – 10th Interested Parties, seeking to recover Kshs. 70,000,000/= from the Defendants being moneys received allegedly illegally and without consideration; it is another common ground that the parties to the aforesaid NBI ACECC No. 16 of 2017 have already entered into negotiations to settle the said case amicably and indeed there is a partial consent recorded to that effect, on 23/11/2018 as follows:

a) That the Petitioner was to deposit Kshs. 45,000,000/= as part of the 2nd Respondent's claim in an Escrow Account to be opened in the names of the Advocates on record for Ethics and Anti-Corruption Commission and the firm of Kanyi J & Company within 10 days from 23rd November, 2018 as the parties finalize on the negotiations.

b) That this matter will be mentioned on 14th February, 2019.

43. It is also not in dispute that the Petitioner herein has agreed to refund the entire Kshs. 70,000,000/=, but has not been able to do that because in a related matter herein, being Mombasa High Court Constitutional Petition No. 24 of 2015 and Malindi Court of Appeal Civil Appeal No. 52 of 2015 there are stay orders prohibiting further proceedings in related matters; yet again, it is not disputed that above stay orders notwithstanding, the Petitioner is ready and willing to comply with the consent filed by the parties in the aforesaid NBI ACECC No. 16 of 2017.

44. With these positions in mind, and above consent notwithstanding, the 1st Respondent has gone ahead to institute MSA CMCACC No. 13 of 2018, without any reference to the case in Nairobi. The absurdity of this situation as put by the Petitioner, is that the DPP relies on the documents already filed in the NBI ACECC No. 16 of 2017 including averments leading to the concession by the Petitioner to refund the sums claimed in that cause.

45. Record shows that the DPP has always been aware of the NBI ACECC No. 16 of 2017 and the negotiations obtaining therein. To purport to rely on the pleadings filed in NBI ACECC No. 16 of 2017 to support the criminal cause in MSA CMCACC No. 13 of 2018 would, *prima facie* appear to be unfair on the part of the DPP, and a retraction on the access to justice principle, and not in the interest of the administration of justice.

46. The Petitioner herein and the 1st to 10th Interested Parties must have carefully negotiated in good faith to record a partial consent in the NBI ACECC No. 16 of 2017. They did not foresee a situation where their own words, documents and record in that case would be used against them to initiate a criminal process. The rule against self-incrimination is a constitutional principle. Therefore, the Petitioner and the Interested Parties would not be expected to self incriminate by availing incriminating information in a civil suit, while knowing that the same would be used to initiate and maintain a criminal prosecution against them. The least the Respondents would have done before entering the consent in the Nairobi matter was to inform the Petitioner and the Interested Parties of the Respondents' intention to pursue a criminal prosecution the civil cause notwithstanding. With this kind of information, the Petitioner and the Interested Parties would have been careful what information to disclose in preparation for their defences. It is noteworthy that the issues raised in NBI ACECC No. 16 of 2017 form the bedrock of the prosecution's charges in MSA CMCACC No. 13 of 2018. While I am careful to consider the merit of the prosecution's case, it is also the duty of this Court to ensure that matters which are proposed for prosecution should have a sustaining evidential threshold. In **Diamond Hasham Lalji & Another vs. Attorney General and 4 Others [2018] eKLR**, the Court of Appeal stated as follows:

“In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which the DPP’s decision is made establishes a prima facie case necessitating prosecution...”

47. The National Prosecution Policy states in part in paragraph 4 (B) (1):

“The decision to prosecute as a concept envisages two basic components, that the evidence available is admissible and sufficient and that the public interest requires a prosecution to be conducted...”

And in paragraph 4 (B) (2), the policy states:

“The Evidential Test –

Public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction...”

48. In the matter before the Court the charges against the Petitioner and the 1st – 10th Interested Parties are largely dependent on documentary and oral evidence, most of which are not in controversy, and which are already recorded in NBI ACECC No. 16 of 2017 and to which the Petitioner and the Interested Parties have already made affirmative representation. A careful scrutiny of the charges (which have been stated herein) show that there is little else to be produced to court by way of evidence. These charges also form the main ingredients of NBI ACECC No. 16 of 2017. The intended prosecution does not appear to derogate from the claim in NBI ACECC No. 16 of 2017, but if actualized may actually be oppressive, and cause embarrassment to the Petitioner and to the 1st to 10th Interested Parties, and infringe their right to a fair administrative action that is lawful, reasonable and procedurally fair, as provided under Article 47 (2) of the constitution and under the Fair Administrative Actions Act.

49. The evidential test referred to above clearly demands that not every offender should be prosecuted. Some prosecution may end up embarrassing the due process. For example, in this matter, there is the risk that a magistrate’s court in Mombasa may make a finding which conflicts with the finding of the High Court in Nairobi. This will itself be embarrassing. However, the embarrassment will be compounded when one considers that the magistrate’s decision would still be appealable to the High Court. In emphasizing the concept that not every offence is prosecutable, the court of Appeal of Singapore in **Ramalingam Ravinthran vs. Attorney General [2012] SGCA 2**, at paragraph 53 observed:

“The Attorney General is the custodian of prosecutorial power. He uses it to enforce criminal law not for its own sake but for the greater good of the society, i.e. to maintain law and order as well as to uphold rule of law.

Offences are committed by all kinds of people in all kinds of circumstances. It is not the policy of the law under our legal system that all offenders must be prosecuted, regardless of the circumstances in which they have committed offences. Furthermore not all offences are provable in a court of law. It is not necessary in the public interest that every offender must be prosecuted, or that an offender must be prosecuted for the most serious possible offence available in the statute book. Conversely, while the public interest does not require the Attorney General to prosecute any and all persons who may be guilty of the crime, he cannot decide at his own whim and fancy who should or should not be prosecuted and what offence or offences a particular offender should be prosecuted for. The Attorney General’s final decision will be constrained by what public interest requires.”

50. In this matter, there was already a civil case filed to recover Kshs. 70,000,000/=. The Respondents clearly understood that their remedy lay in the civil realm. However, it appears that settlement in the civil cause was not coming as fast as the Respondents expected. They therefore appear to have decided to commence criminal proceedings with a view to putting pressure on the Defendants to settle the civil claim. Such action would not be countenanced by a Court of law since criminal justice system ought only to be invoked to vindicate the commission of a criminal offence and not to aid the litigants in the settlement of their civil claims. In reference to this issue, Majanja J in Petition No. 461 of 2012 – **Francis Kirima M’ikunyua & Others vs. Director of Public Prosecutions** expressed himself as hereunder:

“It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State’s coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent.”

51. Clearly, if that happened, then this would be a clear violation of Article 157 (11), and such criminal cause would be a clear abuse of the legal process, a prosecution not founded in the public interest or in the interest of administration of justice.

52. In **Republic vs. Attorney General Ex parte Kipngeno Arap Ngeny HC Civil Application No. 406 of 2001** the Court stated, correctly, that:

“Criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior or improper motive.”

53. The Office of Director of Public Prosecution is an independent office and the court will therefore in an ideal situation be reluctant to prohibit that office from exercising its statutory and constitutional powers except in the clearest of cases. In **Rosemary Wanja Mwagiru & 2 Others vs. Attorney General & 2 Others** Mumbi J stated that:

“The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.”

54. In this matter, the decision to charge was shrouded in mystery. The Petitioner and the Interested Parties were never informed that the particulars they had given in the civil suit would be used against them. The DPP was not forthcoming with proper information, given that the DPP was aware that there was already a consent in the civil matter. There was lack of transparency on the part of the Respondents. They ought to have informed the Petitioner that they intended to use the information the Petitioner had given in the civil matter to initiate prosecution in the criminal matter. This lack of transparency denied the Petitioner his right to a fair administrative action, and violated his rights under Article 47 of the constitution. If there was new evidence, the Petitioner was not confronted with the new evidence in order to challenge the same. Commenting on lack of transparency, Odunga J in **Njuguna S. Ndungu vs. EACC & 3 Others [2014] e KLR** held as follows:

“Transparency is one of the national values and principles of governance enshrined under Article 10 of the Constitution. Section 4 of the office of Director of Public Prosecution enjoins that office in fulfilling its mandate to be guided by the Constitution and inter alia, the principles of natural justice, promotion of public confidence in the integrity of the office, the need to serve the cause of justice, prevent abuse of the legal process and public interest and promotion of Constitution. The office cannot be promoting public confidence when its activities are shrouded in mystery and secrecy. Anything done in contravening of the Constitution must be prohibited, to securing fair treatment for all persons brought before the court and to prevent an abuse of the court process.”

55. In a letter dated 15/11/2018 addressed to the Office of the DPP by M/S Mogaka Omwenga & Mabeya Advocates for the Petitioner and the Interested Parties upon being aware of their possible prosecution, the Petitioner and Interested parties expressed their fears in paragraph 10 as follows:

“In their minds, however, they entertain very genuine fears that their kind gesture, of co-operating with EACC, though made in good faith, may in future be construed as an admission of liability, guilty and/or culpability to their detriment.”

It is noted that this letter is dated **15/11/2018**, while the consent in the civil matter was recorded on **23/11/2018**. The consent must therefore have been done as a result of some assurance that the civil matter would be the end game in the process. The DPP had earlier, in a letter dated **25/1/2018** to the 2nd Respondent, indicated that they were not averse to any kind of settlement or negotiation on the matter but noted that this was a matter in which **“...a decision to charge has already been made...”** but nonetheless asked the 2nd Respondent for their views. This shows that all along the DPP was aware of the matter and how the parties were negotiating the same. It was therefore surprising that despite the Petitioner and the 1st to 10th Interested Parties expressing their fears of possible double jeopardy, the DPP never adequately responded, but indeed waited for the parties to file a consent on 23/11/2018, and on the basis of that consent now purport to charge the Petitioner and others with a criminal case. It is my view that when the Petitioner and others raised their fears vide their letter dated 15/11/2018 addressed to the DPP, they were in effect reminding the DPP of their right to fair administrative action under Article 47 of the constitution and the Fair Administrative Action Act. The DPP had the obligation to address these fears either negatively or positively so that the parties were in a position to know what awaited them, and how to defend themselves should their fear of prosecution come true. There is all possibility that the Petitioner and the 1st to 10th Interested Parties would not have entered into the aforesaid consent in the civil suit because no person can willfully self-incriminate. The decision to charge was made in secrecy, and only after the Plaintiff had made certain admissions in the civil cause, which admissions would be detrimental to his cause in the proposed prosecution. It is noteworthy that the Petitioner and the 1st to 11th Interested Parties were charged on 20/12/2018, almost 27 days after the said consent was recorded in the civil cause.

56. The Respondents' case is that both the civil and criminal causes can co-exist and continue through to determination notwithstanding that they are founded on more or less similar premises. It is not disputed that indeed under Section 193 A of the Criminal Procedure Code, the institution of civil proceedings does not preclude the State from undertaking criminal proceedings against a party with respect to an issue which is also directly in issue in a pending civil suit. Section 93 A states:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

57. That notwithstanding, it is the duty of the Court to exercise its inherent jurisdiction so as to prevent its process being used to perpetrate injustice. The High court is entitled to exercise its jurisdiction to avert abuse of power, discretion or process. This principle was aptly captured in **R vs. Attorney General & Another ex parte Hussein Mudobe H.C Misc Civil Application No. 898 of 2003**, where the court stated as follows:

“Notwithstanding the provisions of S 193A of the Criminal Procedure Code the court is still bound to ensure that its process is not abused and also to protect itself against the abuse of its process by litigants....in the context of criminal proceedings, there are two fundamental policy considerations which the court must take into account in dealing with the abuse of process.

Referring to the two considerations in *MODEVAO V DEPARTMENT OF LABOUR* [190] INZLR 464 at 481 in a passage which Manson CJ quoted in *JAGO* (1989) 168 CLR AT 30 Richardson J, reproduced the two policy considerations as follows;

“The first is that the public interest in the administration of justice require that the court protects its ability to function as a court of law ensuring that its processes are used fairly by state and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice.... The court grants a permanent stay in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes...that the court processes are being employed from ulterior purposes or in such a way... as to cause improper vexation and oppression.”

58. I have said enough on abuse of the legal process.

59. In this matter, the Petitioner specifically also submitted that as an advocate performing his professional duties, any disputes relating to such performance ought to have been resolved within the terms of his professional undertaking, and under Sections 34 and 80 of the Advocates' Act.

Sections 134

“Unqualified person not to prepare certain documents or instruments

(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument— (a) relating to the conveyancing of property; or (b) for, or in relation to, the formation of any limited liability company, whether private or public; or (c) for, or in relation to, an agreement of partnership or the dissolution thereof; or (d) for the purpose of filing or opposing a grant of probate or letters of administration; or (e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or (f) relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument: Provided that this subsection shall not apply to— (i) any public officer drawing or preparing documents or instruments in the course of his duty; or (ii) any person employed by an advocate and acting within the scope of that employment; or (iii) any person employed merely to engross any document or instrument.

(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.

(3) Any person who contravenes subsection (1) shall be guilty of an offence.

(4) This section shall not apply to— (a) a will or other testamentary instrument; or (b) a transfer of stock or shares containing no trust or limitation thereof.”

Section 80:

“Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence: Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the Attorney-General by the Tribunal under subsection (3) of section 61.”

60. The Petitioner states that he rendered professional legal services to a client pursuant to the Advocates Act, as stated above. The said Act clearly states how disputes which may arise out of such transaction is to be addressed. It is to be noted, firstly, that the Petitioner provided a professional undertaking for the performance of his obligation under the transaction. This professional undertaking was issued to Cootow & Associates Advocates on behalf of the 11th Interested Party. Secondly, neither the said Cootow & Associate Advocates to whom the undertaking was issued, nor the 11th Interested Party the owner of the money, have complained. They have neither complained to the Petitioner nor to the DPP. The Petitioner's client – 1st Interested Party herein - has also not complained. But if any party to the said transaction were to complain, then the complaint would be resolved pursuant to the aforesaid undertaking. None of the parties have resorted to the said undertaking. Section 80 of the Advocates Act as stated above gives direction of what is to be done where the DPP may suspect that a criminal offence has taken place. The Petitioner, an advocate of the High Court, cannot be dragged to court in disregard of the law. The law clearly says that if an advocate is to be prosecuted pursuant to activities mentioned in Section 80 of the Advocates Act –

“...no prosecution for an offence under this Act shall be instituted unless a report has been made to the Attorney General by the Tribunal under sub-section (3) of Section 61.”

There is no evidence before this Court that the Attorney General had received a report referred to above to enable the prosecution of the Petitioner.

61. It is the finding of this Court that the intended prosecution of the Petitioner violates both his constitutional and statutory (Advocates Act) rights, and is intended to embarrass and cause him anguish as such advocate. This also amounts to an abuse of the legal process.

62. This petition therefore raises constitutional issues which this Court has the jurisdiction to entertain. The High Court's authority is founded in Article 165 of the constitution which provides:

(1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and ...

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

...

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of

—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

63. From the foregoing it is clear that all the issues I raised for determination in this petition have been resolved in the favour of the Petitioner and the 1st to 10th Interested Parties. This Court is satisfied that the Petitioner has proved the petition on a balance of probability, and that the Petitioner is entitled to orders sought in the petition. The petition is allowed with orders made as follows:

(i) A declaration that the institution, maintenance and prosecution of MSA CMCACC No. 13 of 2018 against the Petitioner and the 1st to 10th Interested Parties herein is an abuse of the legal process and offends the right to fair hearing and access to justice and the fair administrative action imperatives under the constitution, and especially more so in the light of the existence of the following cases yet to be concluded:

(a) NBI ACECC No. 16 of 2017

(b) MSA High Court Petition No. 24 of 2015

(c) Malindi Civil Appeal No. 52 of 2015

(ii) The intended prosecution of the Petitioner based on the performance of Petitioner's professional duties as an advocate of the High Court of Kenya without a prior report filed with the Attorney General offends Section 80 of the Advocates Act, Cap 16 Laws of Kenya, and amounts to a violation of the Petitioner's right to engage in his profession as such advocate.

(iii) The proceedings in MSA CMCACC No. 13 of 2018 are hereby quashed.

(iv) The 1st to 10th Interested Parties are entitled to equally benefit out of the orders granted herein to the Petitioner.

(v) The costs herein shall be for the Petitioner against the Respondents, while the Interested Parties shall each bear own costs.

Dated, Signed and Delivered at Mombasa this 12th day of May,

2020.

E. K. OGOLA

JUDGE

Judgment delivered in Chambers via MS Teams in the presence of:

Mr. Gikandi for Petitioner

Mr. Adhoch for 1st, 2nd, 5th and 6th Interested Parties

Mr. Elisha Ongoya & Morris Kimuli for 7th- 10th Interested Parties

Mr. Omwenga Peter for 3rd and 4th Interested Parties

Mr. Ngoya for 11th Interested Party

No appearance for 2nd Respondent

No appearance for 1st Respondent

Mr. Kaunda Court Assistant