



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL REVISION NO. 33 OF 2018

PATRICK WANZALA MULWOTO APPLICANT

VERSUS

REPUBLICDIRECTOR OF PUBLIC PROSECUTIONS

JUDGMENT

1. The proceedings herein were commenced herein on 12th February 2019, by Patrick Wanzala Mulwoto, herein after referred to as the applicant, vide a Motion, dated 5th April 2019, premised on sections 362, 364(1)(b)(2), 365, 366 and 382 of the Criminal Procedure Code, Cap 75, Laws of Kenya, inviting the court to call for the trial court record in Mumias SPMCCRC Nos. 93 of 2013 and 126 of 2014, to satisfy itself as to the correctness, legality, propriety and regularity of the charges and proceedings; and to find that the said proceedings violate the order of the High Court in Kakamega HCPet No. 32 of 2014 of 12th October 2016, and issued on 3rd December 2014; and asking that the proceedings in Mumias SPMCCRC Nos. 93 of 2013 and 126 of 2014 be terminated.
2. The grounds on the face of the application are that the criminal cases were commenced without the investigating officers having obtained evidence whatsoever to sustain the said charges, that police officers raided his premises without search warrants, the documents and items recovered from his premises during the raid were being used to prosecute him in disobedience of court orders made in Kakamega HCPet No. 32 of 2014 of 12th October 2016, and issued on 3rd December 2014, that both criminal cases have reached the critical stages of defence and closure of the prosecution's case, the petitioner participated in the prosecution unrepresented and had not understood the purport of the orders in Kakamega HCPet No. 32 of 2014, the use of the documents recovered during the raid is going to occasion injustice and the respondent would suffer no injustice should the orders sought be allowed.
3. In the affidavit sworn in support of the application, on 5th April 2018, he avers that he was the accused person in the two criminal cases. He states that the court, in Kakamega HCPet No. 32 of 2014, had prohibited the District Criminal Investigations Officer (DCIO) Mumias, and his officers, from using the illegally obtained items and documents against him in any criminal proceedings. He asserts that, despite the said orders, and in violation, thereof, the police proceeded to charge him in the two cases founded on the documents the subject of the order in Kakamega HCPet No. 32 of 2014. He further avers that two land registrars were called as witnesses in the matters to produce some of the subject documents.
4. The State did not file a reply to the application, despite Mr Ngétich appearing in the matter several times, and asking for time to file his papers. The application is, therefore, unopposed.
5. Directions were given on 31st October 2019, for disposal of the matter by way of written submissions, limited to points of law. The applicant is the only party who filed written submissions, which, unfortunately, did not raise any points of law, and they are, therefore, of very little assistance to the court.
6. I called for the file in Kakamega HCPet No. 32 of 2014, to satisfy myself as to what the said proceedings were about. Those proceedings were initiated by way of a petition, dated 15th May 2014. It sought that the DCIO Mumias, or any other police officer involved in investigations touching on the unlawful invasion of the guesthouse belonging to the petitioner, the applicant herein, at Mumias township, be prohibited from bringing any charges against him based on the said unlawful search or invasion. He also sought declaration that the said police action was unlawful and violated his fundamental rights and freedoms. He also sought that the court decrees that the purported evidence, obtained by the police from the said raid, be declared inadmissible in any criminal case against him. Finally, he sought that the documents collected by the police, from the said premises, on 6th May 2014, be returned to him by the DCIO Mumias.
7. The grounds in support of the petition are set out on the face of it. It was averred that the raid was done in the absence of the petitioner, the search was conducted without a search warrant from court, the raid was carried out without any complaint having been lodged against him, the petitioner's employees were arrested without reasonable cause, the petitioner was a duly licensed surveyor, the police had been harassing the petitioner by arresting and bringing him to court on frivolous charges, the evidence obtained violated his fundamental rights and freedoms, and that he did not stand to get justice in any prosecution founded on the documents recovered from the said raid. .

8. In the affidavit that the petitioner swore in support of the petition, sworn on 15th May 2014, he averred that he had left Mumias court on 6th May 2014, which he had attended for one of the cases, which did not proceed because the trial magistrate was unavailable, and he travelled to Nairobi. While at Nairobi his wife called him to inform him that the DCIO Mumias had raided his business premises, arrested workers and purported to recover documents from the premises. Among the documents carried away were title deeds of customers held as lien for unpaid fees. He asserted that the raid violated his constitutional rights, and that the evidence obtained in that raid could not be admissible in proceedings initiated against him. He also expressed fear that some of the documents had been planted by the police against him, arguing that if the police were acting in good faith they would have obtained court orders or warrants for the search.

9. The DCIO filed a response to the petition in Kakamega HCPet No. 32 of 2014, vide an affidavit that he swore on 13th June 2014, and filed in court on 13th June 2014. He averred that he had intelligence that forgery of title deeds and other land registration documents was going on within Mumias town. That intelligence led him to the premises of the petitioner, which he raided, and carried out searches in various rooms and recovered various items and documents. He averred that he acted within the law, which allowed him to conduct searches without an order and to carry out arrests without arrest warrants. He has attached various documents to his affidavit to support his case.

10. The petition was resolved, by consent, on 3rd December 2014, when the Attorney-General conceded to the same. The proceedings of the said date were captured as follows:

“3.12.14

Before AC Mrima – Judge

CC Polycarp

Applicant: present

Mr Shivega for petitioner/applicant

Mr Oroni for respondent

Oroni: We filed the Replying Affidavit by Insp. Kitonyi Augustine but we disagree with his position since no order of the court was sought before invading the petitioner’s premises. We do therefore concede to the application/petition before the court by allowing prayers 2, 3 and 4 of the N/M dated 15/05/2014 and the main petition.

Signed

03.12.14

Shivega: We are agreeable to the position by the state.

Signed

03.12.14

Ct: In view of the position of the Respondent in the matter, the Ct grants the prayers in the Petition dated 15/05/2014 as so sought. Matter be marked as finalised.

Signed 3.12.14”

11. The order that was extracted, from the orders of 3rd December 2014, was expressed as follows:

“ORDER

THIS MATTER coming up for hearing on 3rd DECEMBER 2014 before Hon AC MRIMA judge for a petition dated 15/05/2014 in the presence of Mr Oroni for the Attorney general and Mr Shivega for the petitioner. Upon perusal of the petition and upon hearing Mr. Shivega Advocate for the petitioner in the presence of the Mr Oroni for the Respondent.

IT IS HEREBY ORDERED –

1. THAT the Divisional criminal investigation officer (DCIO) Mumias or any other police officer involved in investigations against the petitioner touching on the unlawful invasion of the Defendants pentagon Guest House at pentagon township or any other police officer of whatever rank be and are hereby prohibited from preferring any criminal charges against the petitioner arising out of the said unlawful search or invasion a foresaid on the intended charges are an affront to the petitioner’s constitutional rights.’

2. THAT the court be and is hereby pleased to declare the intend police action against the petitioner unlawful and a violation of the petitioners by the constitution of Kenya specially the right to privacy and fair trial.

3. *THAT the Honorable court do and hereby decrees that the purported evidence obtained by the police if any during the unlawful raid of his pentagon Guest House in Mumias be and is hereby declared in admissible in any criminal case against the petitioner.*

4. *THAT all the petitioners documents unlawfully collected by the police from pentagon Guest House on 6/5/2014 be returned to him by the DCIO Mumias.*

Given under my hand ...”

12. My understanding of the order of 3rd December 2014 is that the search on the applicant’s premises by the police was declared unconstitutional and a violation of privacy, and that the documents recovered were deemed to be inadmissible against the applicant in any criminal case against him.

13. The application before me is not properly conceived or drafted, but the gist that I get out of it is that the applicant is saying that his prosecution in Mumias SPMCCRC Nos. 93 of 2013 and 126 of 2014 is inconsistent with the orders made in Kakamega HCPet No. 32 of 2014 on 3rd December 2014. It is my further understanding that the applicant is stating that the two prosecutions are no longer tenable in view of the orders of 3rd December 2014, and ought to be terminated.

14. Just what are the two cases in Mumias SPMCCRC Nos. 93 of 2013 and 126 of 2014 about? To what extent can it be said that they are built around the documents that the police recovered in the raid the subject of the proceedings in Kakamega HCPet No. 32 of 2014? That should be the next consideration.

15. The case in Mumias SPMCCRC No. 93 of 2013 is against the applicant and another. There are twelve counts. Of the twelve, the applicant is party to seven of them. In Count I he is charged, jointly with another, of forcible entry contrary section 36 of the Penal Code, cap 63, Laws of Kenya, with respect to violently taking possession of East/Wanga/Eluche/639, the property of George Ndula Wakhule. Counts II and III charge him, jointly with another, of forgery contrary to section 350 of the Penal Code, with respect to making false green cards in respect of East/Wanga/2598 and 2599, in the names of Omumani Otiangala, purporting them to have been issued and signed by James Siguna Onary, a former Senior District Land Registrar Kakamega. Count IV charges him, and another, with forgery contrary to section 350 of the Penal Code, with respect to making a false certificate of official search in respect of East/Wanga/Eluche/639 in the name of his co-accused, purporting it to have been issued and signed by John Mumasi Fundia, Senior District Land Registrar Kakamega. Count X charges the applicant with personation, contrary to section 382(1), of the Penal Code, by falsely presenting himself as a licensed surveyor to Bernard Omumani Otiangala. Count XI charges him, jointly with another, of forgery, contrary to section 350 of the Penal Code, by making a title deed in respect of East/Wanga/Eluche/2599, in the name of Bernard Omumani Otiangala, purporting it to be a genuine title deed issued and signed by John Mumasi Fundia, Senior District Assistant Land Registrar Kakamega. Finally he is accused, in Count XII, of uttering a false document, contrary to section 353 of the Penal Code, to Bernard Omumani Otiangala, a false title deed for East/Wanga/Eluche/2599, issued and signed by John Mumasi Fundia, Assistant District Land Registrar, Kakamega.

16. The case, in Mumias SPMCCRC No. 93 of 2013, is part-heard. Six prosecution witnesses have testified, on divers dates between 7th October 2015 and 7th April 2016, both dates inclusive. George Ndula Wakhule, PW1, allegedly bought East/Wanga/Eluche/636 from a George Ogola Odongo, only for documents to emerge indicating that the property was in the name of another, who claimed to be the owner. James Siguna Onari, PW2, a land registrar, who served at Kakamega, testified that greencard, in respect of East/Wanga/2598 and 2599, purported to have been signed by him were false, since the title from which they were purported to have been created, East/Wanga/168, was yet to be subdivided. Bernard Ommumani Otiangala, PW3, transacted with the applicant, as a surveyor, helping him buy a portion of East/Wanga/639 from the applicant’s co-accused. Subsequently, he was given a title deed for East/Wanga/2599 a purported subdivision from East/Wanga/639. He did a search on East/Wanga/2599, which revealed that East/Wanga/ 2599 had been purported to have been created from East/Wanga/168 and East/Wanga/639. Philip Kirui, PW4, a district surveyor, testified that he issued the numbers in respect of East/Wanga/2598 and 2599, being subdivisions from East/Wanga/639, which subdivisions were not reflected in the register held by the lands office, and therefore, East/Wanga/639 was still intact. John Mumasi Fundi, PW5, was a land registrar. He testified that the title deed for East/Wanga/2599, in favour of Bernard Ommumani Otiangala, was a forgery, for East/Wanga/168 was never subdivided to create it, and the signature on the title deed purported to be his was in fact not his. Number 73365 PC Martin Chitayi, PW6, was a forensic document examiner. He testified that he compared the genuine signatures of James Siguna Onari and James Moses, with others that were purported to be theirs and found them to be from the same source. He also examined stamp impressions for James Moses and John Mumasi Fundia, with other stamp impressions alleged to have been from the same machine, and found them to have been done by different machines.

17. The following documents were produced or marked for identification: a green card in respect of East/Wanga/Eluche/639, a copy of an adjudication register for Parcel Number 639 Luche Adjudication Section, a green card for East/Wanga/Eluche/2599, a green card for East/Wanga/Eluche/2598, a green card for East/Wanga/Eluche/168, a sale agreement in respect of East/Wanga/Eluche/639 involving the applicant’s co-accused and Bernard Ommumani Otiangala, three acknowledgements of receipt of sale price with regard to sale agreement in respect of East/Wanga/Eluche/639 involving the applicant’s co-accused and Bernard Ommumani Otiangala, a receipt issued to Bernard Omumani by Geodata Land Surveyors & Consultants, a certificate of official search for Wanga/Eluche/2599, title deed for East/Wanga/Eluche/2599, a certificate of official search for East/Wanga/Eluche/639, a sale of agreement between the applicant’s co-accused and Bernard Ommumani Otiangala, two agreements between the two accused persons as such and Bernard Ommumani Otiangala where they committed to refund certain moneys to Bernard Ommumani Otiangala, two letters dated 12th February 2013 and 6th March 2013 from the DCIO to the land registrar and land surveyor calling for original documents relating to East/Wanga/Eluche/168 and 2599 amongst others, mutation forms in respect of East/Wanga/Eluche/639, a letter of Land Control Board consent in respect of East/Wanga/Eluche/639, and application for consent of land control board consent, official receipt issued to the applicant’s co-accused with respect to East/Wanga/Eluche/639.

18. The applicant is the sole accused person in Mumias SPMCCRC No. 126 of 2014. He faces eight counts. Count I relates to personation, where he is accused of falsely presenting himself as a licensed private surveyor. Count II accuses him of obtaining money by false pretences, for receiving survey fees whilst falsely pretending to be a licensed registered private surveyor. Count III accuses him of forgery, of forging a certificate of official search in respect of South/Wanga/Lureko/357, purporting it to be a genuine green card issued and signed by John

Mumasi Fundia, a senior land registrar at Kakamega. Count IV charges him with uttering a false document, a certificate of official search in respect of South/Wanga/Lureko/357, to Jane Nyarotso Okando, purporting it to be a genuine document issued and signed by John Mumasi Fundia, a senior district land registrar at Kakamega. Count V is about the applicant forging judicial documents, being an affidavit of justification of proposed administrator, purporting it to be a genuine document sworn and signed by Jane Nyarotso Okando, before Patrick Okile, advocate. Count VI charges him with forging a letter of confirmation, purporting it to be a genuine letter of confirmation written and signed by Philip Toloi, an Assistant Chief of Lureko Sub-Location. Count VII is about forgery of an affidavit in support of petition for letters of administration intestate, purports it to have been sworn and signed by Jane Nyarotso Okando, before Patrick Okile, Advocate. Finally, Count VIII accuses him of uttering forged documents, being the documents in respect of Counts V and VII.

19. The case is also part-heard. Four witnesses have testified. Jane Nyarotso Okando was PW1. She testified that she approached the applicant to assist her with filing a succession cause, and gave him her late husband's title deed. She said that she did not sign the two affidavits with respect to filing a petition for representation that were purported to have been signed by her. She disagreed with him over something, and she withdrew instruction, from him. Aneriko Omoto Okando, PW2, was a brother-in-law of PW1, he confirmed the disagreement between PW1 and the applicant, and the withdrawal of the case from him. Haji Mulisia Saheed, PW3, was the Assistant Chief of Lureko Sub-Location, who denied writing a letter which was to be filed in court for the proposed succession cause. He stated that the Chief who purported to have signed the letter was not in charge of Lureko Sub-Location. Patrick Owoyo Toloi, PW4, was the Assistant Chief of Matawa Sub-Location. He averred that the letter that was purported to have been signed by him was not in fact signed by him. Number 62046 Police Constable Richard Tum, PW5, was the investigating officer, who detailed how he came by the documents that were placed before the court as evidence. John Mumasi Fundia, PW6, a land registrar, testified on the green card for South Wanga/Lureko/357, saying that it was unusual to have two green cards in respect of the same property bearing different particulars or entries. Number 235252 Police Inspector Vincent Chelongo, PW7, a document examiner did not complete his testimony since he was not the maker of the report he was to produce. Number 69497 Corporal Maurice Agoro, PW8, the document examiner testified that the applicant forged several documents for presentation in court. Moses Makokha, PW9, another document examiner, testified on the signatures that were purported to be of PW4, and found them to be false. Jael Nelima Maasai, PW10, was a former employee of the applicant, she confirmed that the applicant had received documents from Jane Nyarotso for registration at lands office.

20. The documents placed on record in these proceedings, as either exhibits or marked for identification, include a certificate of death, a certificate of official search in respect of South/Wanga/Lureko/357, an affidavit of justification of proposed administrator, petition for grant of letters of administration intestate, an affidavit of justification of proposed sureties, a guarantee by personal sureties, a letter from the Assistant Chief of Lureko Sub-Location, receipts alleged to have been issued from court, an application for registration of proprietor through transmission, letters of administration intestate, transfer by personal representatives to person entitled in intestacy, certificate of confirmation of grant, receipts issued by Geodata Land Surveyors & Consultants, copy of green card for South/Wanga/Lureko/357, letters written by DCIO to court, among others.

21. In the petition in Kakamega HCPet No. 32 of 2014, the applicant did not list the documents that he claimed were carted away from his premises by the police in the impugned search. It was, actually, in the response, by Number 231624 Inspector Kitonyi, that the items retrieved were listed. Attached to that affidavit is copy of identity card for David Nyasero Ocholla, one of the employees of the applicant who was present when the search was done. There were impressions of a stamp by the District Surveyor, Kakamega, MOH Mogare 062, JM Fundia 172, and another reading This True Copy of the Original. There was an inventory of the documents retrieved, being 121 title deeds of assorted properties, 63 mutation forms of assorted properties. There were two original green cards for North/Wanga/Khalaba/2485 and 2586, 11 blank original green cards, 1 blank original green card for leasehold, and 54 copies of green cards. There were also 26 succession files. I shall presume that the items and documents listed in the affidavit of Inspector Kitonyi were the ones that the court in the order in Kakamega HCPet No. 32 of 2014 decreed that they ought not be admitted as evidence in the criminal proceedings, since the said decree did not specify the documents it referred to.

22. I need at this stage to consider whether any of the said documents were used in the criminal proceedings or are likely to be so presented as evidence in view of the charges that the applicant faces in the two cases.

23. I will start with Mumias SPMCCRC Nos. 93 of 2013. Count I charges the applicant with forcible entry into East/Wanga/Eluche/639, a property belonging to George Ndula Wakhule. No doubt, the prosecution would need to produce a title document to demonstrate that East/Wanga/Eluche/639 was a property that did not belong to the accused persons, but to George Ndula Wakhule, and, therefore, any forcible entry into that property by the accused persons would amount to a criminal act. A title deed relating to East/Wanga/Eluche/639 was not among those that the police recovered from the applicant. Similarly, among the green cards retrieved, none related to East/Wanga/Eluche/639, and, therefore, it is not among the documents that are covered by the order in Kakamega HCPet No. 32 of 2014, and thus the prosecution of the applicant on Count I should be unaffected by the said order, and should be continued to its final conclusion.

24. Count II is about forgery of a green card in respect of East/Wanga/Eluche/2598, purported to have been made and signed by James Siguna Onary. In the inventory attached to the affidavit of Inspector Kitonyi, the green card for East/Wanga/Eluche/2598 is not listed. There is reference to some 54 photocopies of green cards, but the particulars are not given. He who alleges must prove. It is the applicant who is alleging in this case. It should be up to him to prove that the green card for East/Wanga/Eluche/2598 was among the documents retrieved from his premises, and, therefore, among the documents covered by the order in Kakamega HCPet No. 32 of 2014. I note that James Siguna Onary is not listed a a prosecution witness. He is not among the individuals who have so far testified. His stamp is not among those that were retrieved from the applicant's premises. The prosecution of the applicant on Count II should also be continued to its final conclusion.

25. Count III is on forgery of a green card for East/Wanga/Eluche/2599, in the name of Bernard Omumani Otiangala, purported to have been signed by James Siguna Onary, a land registrar. The inventory attached to the affidavit of Inspector Kitonyi does not list the green card for East/Wanga/Eluche/2599 amongst the items that were retrieved by the police from the premises of the applicant. I note too that the purported maker of the green card is not listed amongst the prosecution witnesses and has not testified at the trial so far. It is the applicant who alleges that documents were taken away from him; he was obliged to place a list of what was alleged to have been taken away. He did not. I have to go by what the police have disclosed. The green card for East/Wanga/Eluche/2599 is not one of them. It is, therefore, not among the evidence that the order in Kakamega HCPet No. 32 of 2014 refers to. The prosecution of the applicant on Count III should, accordingly, be continued to its final conclusion.

26. Count IV is about forgery of a certificate of official search in respect of East/Wanga/Eluche/639 in the name of Ali Chibwile Lukwiso, the applicant's co-accused, purported to have been issued by John Mumasi Fundia, land registrar. The inventory attached to the affidavit of Inspector Kitonyi does not list certificates of official searches amongst the items and documents that were recovered from the applicant's premises. The applicant alleges, he should prove that the certificate of official search the subject of Count IV was amongst the documents that the police collected from his premises. He has not proved that. It is, therefore, not subject to the order in Kakamega HCPet No. 32 of 2014, and his prosecution on that count should be continued to its logical conclusion.

27. Count X is about impersonation, that the applicant falsely presented himself as a licensed private surveyor to Bernard Ommumani Otiangala. The applicant has not pointed at any document to say that the same relates to this charge, and was retrieved from his custody, and is, therefore, subject to the order in Kakamega HCPet No. 32 of 2014. None of the documents listed in the inventory attached to the affidavit of Inspector Kitonyi relate to this charge, and, therefore, I do not see any basis for barring the State from prosecuting the applicant on Count X.

28. Count XI is about forgery of a title deed in respect of East/Wanga/2599 in the name of Bernard Omumani Otiangala, purporting it to have been made and signed by John Mumasi Fundia, a land registrar. The title deed for East/Wanga/2599 is not among the documents that Inspector Kitonyi listed in his inventory. The applicant did not give details, in his petition, of the documents that he alleged were taken away. He was obliged to prove his case with regard to that document, the title deed for East/Wanga/2599. He did not. Since he did not disclose it in his petition, and it was not listed in the reply by the police, it follows that it was not covered by the order in Kakamega HCPet No. 32 of 2014. The only aspect of the charge affected by the order in Kakamega HCPet No. 32 of 2014 is with regard to the stamp impression reading JM Fundia 172. The trial court should be at liberty to hear the case against the applicant to its final conclusion with respect to Count XI but being careful not rely on any evidence that makes reference to the stamp impression in the name of JM Fundia 172. Any evidence recorded so far relating to that stamp impression shall be struck off the record. However, that does not affect any evidence that JM Fundia and any other witness might have given on any signature or other impression that the said JM Fundia might have made on the impugned title deed. I say so since the stamp for JM Fundia 172 is listed in the inventory attached to the affidavit of Inspector Kitonyi, as among the items that the police retrieved from the premises. It is, therefore part, of the evidence that the order in Kakamega HCPet No. 32 of 2014 rendered inadmissible.

29. Count XII is about the uttering of the title deed in respect of East/Wanga/2599. In view of what I have stated in paragraph 28, there would be nothing to prevent the state from carrying on with prosecution of the applicant with regard to Count XII.

30. Let me now turn to the charges in Mumias SPMCCRC No. 126 of 2014. Count I is about impersonation, where the applicant is accused of falsely presenting himself as a licensed private surveyor. I reiterate what I have stated in paragraph 27, foregoing, and find that the applicant has not demonstrated, through his petition in Kakamega HCPet No. 32 of 2014, that any of the documents that the police collected from his custody have been or are likely to be used as evidence in support of the charge. I do not find any of the documents listed in the inventory attached to the affidavit of Inspector Kitonyi in Kakamega HCPet No. 32 of 2014 to be relevant to the charge in Count I, and, therefore, the subject of the order made in Kakamega HCPet No. 32 of 2014. Count I should, therefore, be prosecuted to its logical conclusion.

31. Count II is about obtaining money, being survey fees, by falsely pretending that he was a licensed private surveyor. This charge is related to Count I, and, therefore, what I have stated in paragraph 30 here above should apply. I do not find any reason why the applicant cannot be prosecuted on Count II. I note that he had made an effort, in Kakamega HCPet No. 32 of 2014, to demonstrate that he was indeed a qualified and licensed surveyor. However, I am not sitting as the trial court, whether he is a licensed surveyor is a matter for determination by the trial court. He should lead evidence before the trial court to challenge the assertion by the prosecution that he was not so licenced.

32. Count III is about forgery of a certificate of official search and green card for South/Wanga/Lureko/357, purported to have been signed by John Mumasi Fundia. I reiterate that the only evidence of what was retrieved from the applicant's premises is what was disclosed in the inventory attached to the affidavit of Inspector Kitonyi in Kakamega HCPet No. 32 of 2014. The applicant did not give details of what was retrieved, therefore, it can only be concluded that the order in Kakamega HCPet No. 32 of 2014 only affected the items listed in the inventory provided by Inspector Kitonyi. That inventory says nothing about certificates of official search. Count III is poorly drafted for it refers to both a certificate of official search for South/Wanga/Lureko/357, as well as a green card for the same. I note that in the category of green cards, there is no mention of South/Wanga/Lureko/357. Consequently, I find that the applicant has not demonstrated that either the certificate of official search or green card for South/Wanga/Lureko/357 were among the items collected by the police from his premises, and, therefore, one of the documents that the order in Kakamega HCPet No. 32 of 2014 relates to. Consequently, the prosecution is not barred by the order in Kakamega HCPet No. 32 of 2014 from prosecuting the applicant on Count III.

33. Count IV is related to Count III, since it is about the uttering of the certificate of official search the subject of Count III. I shall reiterate what I have held in paragraph 32, the said certificate of official search has not been shown to have been among the documents that the police took away from the applicant. He did not disclose it in his petition in Kakamega HCPet No. 32 of 2014, and it is not in the inventory availed by Inspector Kitonyi. It is, therefore, not among the documents envisaged in the order in Kakamega HCPet No. 32 of 2014. There is nothing, therefore, to stop prosecution of the applicant on Count IV.

34. Count V is about forgery of judicial documents, specifically an affidavit purported to have been signed by Jane Nyarotso Okando before Patrick Okile, advocate. In the petition in Kakamega HCPet No. 32 of 2014 the applicant did not list any of the documents that he alleged the police took away from his premises. I reiterate that it is the police who have placed some evidence on the record of what might have been taken away. The inventory by Inspector Kitonyi mentions succession files as being among what the police found and took away. The details of those files are, however, not disclosed. The file relating to documents touching on Jane Nyarotso Okando are not mentioned. The reference to succession files is general. It was up to the applicant, as the allegor, to disclose the details of what was exactly taken away by the police. Courts of law do not act on speculation. It should not be expected that the court will conclude that the reference to succession files in the inventory must include the papers relating to Jane Nyarotso Okando. There is no evidence that documents relating to her were amongst what the police recovered, and are using to prosecute the applicant. It cannot be said that the order in Kakamega HCPet No. 32 of 2014 covers documents that are to be used as evidence with respect to Count V. The trial court should be at liberty to continue hearing the case against the applicant with respect to Count V.

35. Counts VI, VII and VIII are related to judicial documents in succession proceedings. I reiterate what I have stated above, in paragraph 34. The applicant did not disclose, in Kakamega HCPet No. 32 of 2014, the specific succession files that were taken away from his premises. He did not give any details, least of all relating to the letter by Patrick Tolo, or the affidavits by Jane Nyarotso Okando. Such details are not disclosed in the inventory done by Inspector Kitonyi. It cannot, therefore, be said that the order in Kakamega HCPet No. 32 of 2014 has anything to do with the documents that the prosecution would rely on to prove the charges with respect to Counts VI, VII and VIII. There is, therefore, nothing to bar prosecution of the applicant with respect to those counts.

36. It is important to put everything in its proper perspective. The applicant moved the court in Kakamega HCPet No. 32 of 2014, and obtained orders that he thought were in his favour, and which, no doubt, he believed would help him halt the criminal charges he faced in Mumias SPMCCRC No. 93 of 2013, and any future prosecution with respect to related matters. However, everything was apparently went wrong with the proceedings in Kakamega HCPet No. 32 of 2014 and the orders that he ultimately obtained. I say so mindful of the fact that I am not called upon to review the orders in Kakamega HCPet No. 32 of 2014, nor I am sitting on appeal with respect to the said orders. However, the applicant has moved the court in the instant revision application seeking to have the said orders, made in Kakamega HCPet No. 32 of 2014, enforced.

37. I have already addressed some of the challenges with those orders in the body of the ruling. The most critical is that the orders do not identify the documents that were the subject of the order, that is to say “*the purported evidence obtained by the police if any during the unlawful raid ...*” The order is silent on which documents were the subject of the order, and any court called upon to enforce compliance with the said orders would, no doubt, have a challenge having the order enforced without the documents in question being identified in the body of the order.

38. To get some clarity with respect to the order, I called for the file in Kakamega HCPet No. 32 of 2014. From it I noted that the applicant had not disclosed the documents that the police were said to have had collected from his premises. In paragraphs 4 and 5 of the affidavit that the applicant swore in support of his petition, he merely talked of the police purporting to have recovered “several documents” and to have confiscated several title deeds that were in his custody belonging to his clients who had not settled his professional fees. He ought to have listed the “several documents” and “title deeds” that he was talking about, which should have then formed a basis for the order made on 3rd December 2014. Court orders must be in clear and certain and in unambiguous language. Certainty and unambiguity of language is particularly crucial in criminal matters, given that the stakes are higher in criminal justice, on account of standards of proof and the fact that in criminal matters issues around fundamental rights and freedoms often arise. As it is the order of 3rd December 2014 is vague as it does not identify the documents in question.

39. After perusing through the court file in Kakamega HCPet No. 32 of 2014, I noted that the police, through the affidavit in reply sworn by the Inspector Kitonyi, did attach an inventory of the documents that the police removed from the applicant’s premises. I have noted that the applicant did not file a response to the said reply, to either confirm that those were the documents removed from his premises, or to contend that the list of the documents in the inventory was not complete, on account of some documents being left out. He who alleges must prove, that is the trite law. The applicant alleged that documents were removed from his premises by the police. He was obliged to identify the said documents in his petition. He did not. The police sought to help him out by placing an inventory of the documents they carted away from his premises. But he made no effort to confirm whether the documents listed in that inventory were indeed the documents taken away from his premises. Without that confirmation, the court is left to speculate as to whether indeed the said documents were the ones that the applicant was talking about in his petition. Furthermore, it would have been expected that the order of 3rd December 2014 would refer to the inventory in the affidavit of Inspector Kitonyi, with respect to identification of the documents that were the subject of the said order.

40. One other intriguing thing about the proceedings and order in Kakamega HCPet No. 32 of 2014 is that the party named in the proceedings was the Attorney-General, yet the affidavit in reply, sworn by Inspector Kitonyi, was drawn by the Office of the Director of Public Prosecutions. At the court appearance on 3rd December, 2014, the Attorney General was represented by counsel, who compromised the matter. That raises fundamental issues. Firstly, the petition was brought after the promulgation of the new Constitution in 2010. Under the retired Constitution, the office of Director of Public Prosecutions was subsumed in the office of the Attorney-General. That meant that the Attorney-General was also the Director of Public Prosecutions. Constitutional petitions that raised issues that fell within the ambit of criminal prosecutions would name the Attorney-General as respondent. Under the Constitution 2010, the two offices have been separated.

41. Criminal prosecution is now, under the new constitution, the exclusive preserve of the Director of Public Prosecutions, under Article 157. Under Article 157(6) of the Constitution, the Director of Public Prosecutions has to power institute and undertake criminal proceedings, to take over and continue criminal proceedings that may have been commenced by other persons or entities, and to discontinue criminal proceedings at any stage before judgement. Under Article 157(4) of the Constitution, the Director of Public Prosecutions is empowered to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct, and the Inspector-General should comply with such directive. Clearly, the Constitution grants exclusive power to the Director of Public Prosecutions with respect to criminal prosecutions, and residual power with respect to criminal investigations.

42. The powers and duties of the Director of Public Prosecutions should be contrasted with those of the Attorney-General. Under Article 156(4) of the Constitutions, the Attorney-General is defined as the principal legal advisor to the Government, and the duties of that office are detailed as representing the national government in court or in any other proceedings in which the national government is named as a party, among other functions that may be conferred on the office by legislation or by the President. The provision is clear that the representation of the national government in court should not include criminal proceedings. Article 156(5) empowers the Attorney-General to appear as a friend of the court in civil proceedings in which the national government is not a party.

43. For avoidance of doubt, the relevant portions of Article 156 state as follows, with respect to the powers and functions of the Attorney General:

“(4) *The Attorney-General –*

(a) *is the principal legal adviser to the Government;*

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party , other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

(5) The Attorney-General shall have authority, with leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.

(6) The Attorney-General shall promote, protect and uphold the rule of law and defend public interest.”

44. The relevant portions of the Constitution, in Article 157, on the other hand, on the powers and functions of the Director of Public Prosecutions, state as follows:

“(4) The Director of Public Prosecutions shall have the 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) 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) that have been instituted;

(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 judgement is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b);

(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.”

45. From the above, it should be clear that prosecution of criminal cases is the preserve of the Director of Public Prosecutions. The role of the Attorney-General, with respect to prosecution of matters in court, is in connection with civil matters. Its role in criminal prosecutions is nil. I note that Article 156(4) provides that the Attorney-General should represent the national government in court or any other proceedings to which the national government is a party. That would mean that where the national government or its officers are made parties, then the Attorney-General ought to represent them, however, that provision excludes representation in criminal proceedings.

46. The question then is what should be the case where the proceedings in question are over constitutional issues, where the primary issue relates to either criminal investigations or prosecution. Such proceedings would not strictly be criminal nor civil in nature. Indeed, they may be described as quasi-criminal. The ideal party, that a petitioner in such case should name as primary respondent, ought to be the Director of Public Prosecutions, in view of the powers granted to that office by Article 157 of the Constitution. The Inspector-General of Police or Director of Criminal Investigations, who often act under the direction of the Director of Public Prosecutions, could also be named as respondents, particularly where the issues raised revolve around criminal investigations or the conduct of the police in the course of investigations, as was the case in the instant matter. The Attorney General would be a nominal party, so far as quasi-criminal proceedings are concerned, since that office has no power to direct criminal investigations nor to initiate and undertake criminal prosecutions. The minimal role of the Attorney-General in such case, under Article 156, would be advisory. Indeed, omission of the Attorney-General from such proceedings would not be fatal at all.

47. The effect of the above is that the applicant herein should have, in Kakamega HCPet No. 32 of 2014, named the Director of Public Prosecutions as the principal respondent, since prosecutorial function rests with that office, and so does the power to direct criminal investigations. The role of the Attorney-General is primarily concerned with civil proceedings. That office ought to have been named as a nominal respondent. The fact that the Director of Public Prosecutions would have been the proper respondent is demonstrated by the detailed replying affidavit it drew to be signed by the relevant officer who was responsible for investigations. The said affidavit cites constitutional provisions that would have justified, according to the deponent, the conduct by the police. No doubt, indicating the legal position that the Director of Public Prosecutions would have taken had that office been given opportunity to be heard. That is so since, despite the orders of 3rd December 2014 in Kakamega HCPet No. 32 of 2014, the Director of Public Prosecutions continued to prosecute Mumias SPMCCRC No. 93 of 2013, and even initiated Mumias SPMCCRC No. 126 of 2014. These are clear indicators that the Director of Public Prosecutions

was not in support of the orders of 3rd December 2014. It would also appear to explain the ambivalent position that the Director of Public Prosecutions took with respect to these revision proceedings.

48. It is somewhat surprising that the Attorney - General, when Kakamega HCPet No. 32 of 2014 came up for hearing, chose to disagree with the affidavit that had been sworn in its favour by Inspector Kitonyi, and to concede the petition. Curiously the respondent did not apply to withdraw the offending affidavit, but rather chose to concede the petition, despite the affidavit. The question that arises is whether the Attorney-General could make such a concession with respect to matters that fell within the exclusive purview of the Director of Public Prosecutions without appearing to be overstepping his powers and usurping powers that have been granted to another constitutional office. The said concession, no doubt, embarrassed the Director of Public Prosecutions, as he had an ongoing case which was likely to be imperilled by the same, and when this revision cause was initiated he found himself unable, one way or the other, to respond to the said cause. That would have been avoided had the Director of Public Prosecutions been given the opportunity to respond to the petition in Kakamega HCPet No. 32 of 2014 as the principal respondent, since the same amounted to a challenge to the exercise of constitutional powers by his office.

49. The petition in Kakamega HCPet No. 32 of 2014 was ill-fated from the moment the applicant chose not to bring in the principal respondents on board, and once the Attorney-General chose to wade into matters that were well outside his mandate. No doubt, had the Director of Public Prosecutions come on board, the matter would have, perhaps, taken a proper direction, probably leading to the court making orders that would have been easier to implement. But then, I have digressed.

50. In the end, I do not see any basis at all for revision of the proceedings, orders or decisions by or of the trial court in Mumias SPMCCRC Nos. 93 of 2013 and 126 of 2014, based on the orders made in Kakamega HCPet No. 32 of 2014. The only small matter that the trial court should take note of, is that which I have referred to in paragraph 28 here above. Overall, there is little merit in the Motion dated 5th April 2018 the same highly dismissed. Let the trial court records in Mumias SPMCCRC Nos. 93 of 2013 and 126 of 2014 be returned to the trial court, so that the said court can conclude the trials as guided in paragraph 28 here above. The instant file shall herein accordingly be closed.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS2nd DAY OF ...October..... 2020

W MUSYOKA

JUDGE