



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 137 OF 2019**

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(5), 27, 28, 29(a) (1), (C) & (H), 50(2a), 157(11) AND 239(A) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**EZEKIEL EVANS SIMIYU WAFULA.....1<sup>ST</sup> PETITIONER/APPLICANT**

**WILSON NYONJI KIMANI.....2<sup>ND</sup> PETITIONER/APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATION....2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATE COURT.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**PETITION**

1. The Petitioners through a Petition dated 1<sup>st</sup> April 2019 supported by affidavit by Ezekiel Evans Simiyu Wafula sworn on 1<sup>st</sup> April 2019 prays for the following orders:-

*a) A declaration be and is hereby made that the investigations undertaken by the 2<sup>nd</sup> Respondent as against the Petitioner in respect to the Advocate/Client relationship between the Petitioner and Wanyororo Farmers Company Limited, culminating in the Petitioners' prosecution in NAKURU CRC 3254 OF 2018 violates the Petitioners' Constitutional rights as set out under Article 27, 28, 29(a), 31, 47 49(1) (a) (i), (c) & (h) of the Constitution, are an abuse of administrative power, are an abuse of the Court process and therefore unlawful, null and void ab initio.*

*b) A declaration be and is hereby made that the Warrants of Arrest issued on 8<sup>th</sup> November, 2018 by the Hon. Kalo in NAKURU CRC 3254 of 2018 Republic –Versus- Exekiel Evans Simiyu Wafula & Wilson Nyonji Kimani was unconstitutional and unlawful.*

*c) An Order of Certiorari be and is hereby issued to bring before the High Court and quash the Warrants of Arrest issued on 8<sup>th</sup> November, 2018 by Evans Simiyu Wafula & Wilson Nyonji Kimani.*

*d) An Order of Certiorari be and is hereby issued to bring before the High Court and quash the decision made by the 1<sup>st</sup> Respondent on the 8<sup>th</sup> November, 2018 to prosecute the Petitioners for the alleged offences of stealing by agent in respect to the*

*Advocate/Client transaction between the 1<sup>st</sup> Petitioner and Wanyororo Farmers Company Limited.*

*e) An Order of Prohibition be and is hereby issued prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondent from arraigning the Petitioners in Court for the alleged offences of stealing by agent in respect to the Advocate/Client transaction between the 1<sup>st</sup> Petitioner and Wanyororo Farmers Company Limited an further, prohibiting the said 1<sup>st</sup> and 2<sup>nd</sup> Respondents from requiring the Petitioners to take plea before any subordinate Court in Kenya in respect of the said charged.*

*f) An Order of Prohibition be and is hereby made prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents form commencing any further criminal investigations against the Petitioners, from recommending the prosecution of the Petitioners, from arresting the Petitioners, from questioning the Petitioners, in respect to the 1<sup>st</sup> Petitioner's performance of his professional function in the Advocates/Client relationship between the 1<sup>st</sup> Petitioner and Wanyororo Farmers Company Limited.*

*g) An Order of Prohibition be and is hereby made prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from commencing any further criminal investigations against the Petitioners, from recommending the prosecution of the Petitioners, from arresting the Petitioners, form questioning the Petitioner, in respect to the 1<sup>st</sup> Petitioner's performance of his professional functions in the Advocates/Client relationship between the 1<sup>st</sup> Petitioner and any of his clients.*

*h) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents be and are hereby directed to pay the 1<sup>st</sup> Petitioner damages for the violation of the 1<sup>st</sup> Petitioner's rights and fundamental freedoms in respect to the 1<sup>st</sup> Petitioner's intimidation, harassment and improper interference with the 1<sup>st</sup> Petitioner's performance of his professional functions as an Advocate of the High Court of Kenya in accordance with recognized professional duties, standards and ethics.*

*i) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents be and are hereby directed to pay the Petitioners the costs of their Petition.*

**PETITIONERS' CASE**

2. The 1<sup>st</sup> Petitioner is an advocate of the High Court of Kenya whereas the 2<sup>nd</sup> Petitioner Applicant was at all relevant times to the parties a Director and shareholder in Wanyororo Farmers Company Limited; the complainant in Nakuru Criminal Case No. 3254 of 2018 Republic vs. Ezekiel Evans Simiyu Wafula and Wilson Nyanji Kimani.

3. There is an Intended Prosecution against the Petitioners in Nakuru CRC 3254 of 2018 Republic vs. Ezekiel Evans Simiyu Wafula and Wilson Nyanji Kimani relating to a claim of jointly stealing the entire award granted to Wanyororo Farmers Ltd by the Government of Kenya as per charge sheet.

4. The charge sheet states as follows:

**Charge:**

Stealing by agent contrary to **Section 283 of the Penal Code**

**Particulars of the Offence**

1. Ezekiel Evans Simiyu Wafula

2. Wilson Nyonji Kimani

On diverse dates between the 24<sup>th</sup> day of December 2014 and the 7<sup>th</sup> day of September 2015, at chase Bank Riverside Branch, Nairobi, within Nairobi County, jointly with others not before court being agents to Wanyororo Farmers Company Ltd, Nakuru stole Kshs.97,093,042.15 the property of the said Wanyororo Farmers Company Ltd, awarded by Kenya Government which had been received by you on account of Wanyororo Farmers Company Ltd, Nakuru.

5. The award was compensation in a Judgment awarded in Nakuru HCC No. 821 of 1993 Wanyororo Farmers Limited vs. The Attorney general; Edward F. Manani; Erastus M. Kiaritha; John Kamau Maina, Peer Ben Muthee; K.K. Sigilai; J.T. Ngaruiya, J.M. Mwaniki and Dorcas Wambui.

6. The 1<sup>st</sup> Petitioner contend that on instructions of the Directors of Wanyoro Farmers Limited, he proceeded to negotiate for settlement of the matter and the matter was settled through a Consent Judgment dated **28<sup>th</sup> October 2013** and a Certificate of Order against the Government dated **7<sup>th</sup> November 2013**. See annexure **"EW 2"** being a copy of the Consent Order settling the matter.

7. The Petitioners herein aver that the Intended prosecution against the 1<sup>st</sup> Petitioner relates to Advocates – Client transactions, between the 1<sup>st</sup> Petitioner as an Advocate and Wanyororo Farmers Limited as Client for which legal services were rendered, fees paid and the Client paid and discharged the advocate fully. See annexure **"EW 3"** being a copy of the Instruction Note.

8. The intended prosecution of the 2<sup>nd</sup> Petitioner relates to the 2<sup>nd</sup> Petitioner as a director and shareholder in Wanyororo Farmers Limited and his role during all material times as the Company Treasurer. See annexure **"EW 4"** being a copy of the CR 12 of the Company dated 29h

April 2016.

9. The 1<sup>st</sup> Petitioner avers that he was instructed by the director namely Mr. Eliud Ndung'u Thuo; James Karega Kaguru, Wilson Nyonji Kimani and Joseph Waweru Gatere (deceased) on 23<sup>rd</sup> October 2012 through a retainer agreement executed by the directors of the Complainant M/s Wanyororo Farmers Company Limited as per Section 45 of the Advocates Act to pursue compensation from the Government.

10. It is the 1<sup>st</sup> Petitioner's case that the aforementioned signatories as Directors were the main contact persons between him and the Complainant Company and the Directors at all times stated that they were in a position to make all decision relating to this matter and the 1<sup>st</sup> Petitioner consequently never met any shareholders and/or members of the Complainant Company. It is urged that, in any event, the Authority of a company lies in resolution passed by its Board of Directors hence once authorized by the Board to perform certain duties on behalf of the Company, one cannot again consult the ordinary members of the Company.

11. The 1<sup>st</sup> Petitioner aver that sometimes early 2016 he received a call from the then DCIO Nakuru instructing him to record a statement on the disbursement of the proceeds of the consent order.

12. The 1<sup>st</sup> Petitioner contend that considering that the information sought by DCIO is privileged and protected by the Advocate – Client relationship; he called for an urgent meeting with the Directors of Wanyororo Farmers Company Limited namely Mr. Eliud Ndung'u Thuo as convener and Secretary, James Karega Kaguru as Chair, Wilson Nyonji Kimani as Treasurer and Joseph Waweru Gatere (deceased) as a Member on the 29<sup>th</sup> of March 2016.

13. The 1<sup>st</sup> Petitioner urge that during the meeting, it was confirmed by the Directors that there was no dispute within the Company and its members on the disbursement of the funds and further that any complaint should be dealt with internally. See Annexure “EW 6” being a copy of the Company minutes and resolutions confirming the same.

14. The 1<sup>st</sup> Petitioner by way of a further affidavit dated 25<sup>th</sup> June 2020, has adduced an additional Directors' resolution dated 24<sup>th</sup> May 2019 (after commencement of this suit) that confirms that the Directors of Wanyororo Farmers Company Limited have not passed any resolutions to institute **NAKURU CRC 3254 of 2018 Republic –Versus- Ezekiel Evans Simiyu Wafula and Wilson Nyonji Kimani**. See annexure “EW 13” to the Further Affidavit dated 25<sup>th</sup> June 2020 being a copy of the Director's Resolution on **NAKURU CRC 3254 o 2018 Republic – Versus Ezekiel Evans Simiyu Wafula and Wilson Nyonji Kimani**.

15. The 1<sup>st</sup> Petitioner law firm additionally wrote to the Office of the Director of Public Prosecution Nakuru on the 1<sup>st</sup> of March 2016 and 12<sup>th</sup> May 2016 and the then Senior Assistant Director of Public Prosecution Nakuru, M.C. Oundo as she then was, wrote to the CCIO Nakuru on 9<sup>th</sup> March 2016 in her latter reference No. NKU/ADV/6/VOL. III/(80) calling for particulars of the case. See annexure “EW7” being copies of the letters with 1<sup>st</sup> Respondent.

16. The 1<sup>st</sup> Petitioner avers that in supporting affidavit, that he personally continued following up on this matter and was informed that part of the recommendation by the office of the DPP in Nakuru was for him to record his statement with the then investigating Officer P.C. Francis Mulayi which he did and after recording his statement, the office of the DPP-Nakuru issued a recommendation that this matter be pursued through the Advocates Complaints Commission or through a Civil Suit in Court.

17. The 1<sup>st</sup> Petitioner state that based on the foregoing the 1<sup>st</sup> Petitioner believed that the matter before the DPP Nakuru rested at that in 2016 and despite his calling on the office of the DPP Nakuru severally, he did not receive any further communication on the alleged complaint.

18. The 1<sup>st</sup> Petitioner contend that in a clear act of abuse of the legal process and while acting in bad faith, the 2<sup>nd</sup> Respondent contrary to the advice given by the Nakuru office of the 1<sup>st</sup> Respondent and pending the High Court matter and without informing the Petitioner, proceeded on the 8<sup>th</sup> of November 2018 to present a charge sheet in Court in NAKURU CRC 3254 of 2018 Republic –Versus Ezekiel Evans Simiyu Wafula and Wilson Nyonji Kimani hence preferring charges against the Petitioners in their absence and as a result, warrants of arrest were issued against the Petitioners. (Refer to the Charge Sheet and Warrants adduced hereinabove).

19. The Petitioners further argue that they verily believe that the 2<sup>nd</sup> Respondent in an apparent calculated and malicious scheme, failed and/or neglected to notify them of he intended criminal proceedings and/or summons to appear before Honourable Magistrate J. B. Kalo of the 3<sup>rd</sup> Respondent thereby causing 1<sup>st</sup> Respondent to request for Warrants of Arrest which were issued by the 3<sup>rd</sup> Respondent.

20. The Petitioners further argue that they verily believe that the 2<sup>nd</sup> Respondent in an apparent calculated and malicious scheme, failed and/or neglected to notify them of he intended criminal proceedings and/or summons to appear before Honourable Magistrate J. B. Kalo on the 8<sup>th</sup> of November 2019, 5<sup>th</sup> of December 2018, 18<sup>th</sup> of January 2019 and 22<sup>nd</sup> of February 2019.

21. That the 1<sup>st</sup> Petitioner was finally notified of Warrants of his arrest on the 11<sup>th</sup> of March 2019 at 8:30 am vide a phone call from Mr. David Wangai of mobile phone number 0726 335 003 who identified himself as an officer attached to the DCIO Nakuru.

22. The 1<sup>st</sup> Petitioner urge that being fearful of the ramifications of an existing Warrant for his arrest, immediately instructed his Advocate to trace the purported criminal file and confirm the foregoing allegations which information was confirmed to be true on the 12<sup>th</sup> of March 2019, upon visiting the 1<sup>st</sup> Respondent's office and the 3<sup>rd</sup> Respondent's Criminal Registry. (See annexure “EW 9” being a copy of the 1<sup>st</sup> Petitioner's Advocate's handwritten request to be supplied with a copy of the Charge Sheet and Warrants in NAKURU CRC 3254 OF 2018 Republic –versus- Ezekiel Evans Simiyu Wafula and Wilson Nyanji Kimani).

23. The 1<sup>st</sup> Petitioner avers that on confirmation of the existence of NAKURU CRC 3254 OF 2018 and the Warrants of Arrest, the 1<sup>st</sup> Petitioner being an officer of the Court and an Advocate of the High Court of Kenya of 12 years standing proceeded to present himself before Honorable Magistrate J. B. Kalo on the 18<sup>th</sup> of March 2019 and the Warrants of Arrest was lifted and he was issued with a cash bail of Kshs.30,000/-. (See annexure “EW 10” being a copy of the Cash Bail Deposit Receipt dated 18<sup>th</sup> March 2019 paid by the 1<sup>st</sup> Petitioner’s Advocate, Mr. Edgar Derrick Washika Ochima).

24. The Petitioner’s case is that from the events commencing sometime in 2016 and crystalizing on or about the 8<sup>th</sup> November 2018 to date that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are engaged in forum shopping expedition for unidentified members of the Complainant Company aimed at intimidating and/or targeting the Petitioners with vexatious and annoying criminal prosecution.

25. The 1<sup>st</sup> Petitioner contend that on the 15<sup>th</sup> March 2019, through his Advocates he raised a protest on this matter with the 1<sup>st</sup> Respondent through a letter. The 1<sup>st</sup> Petitioner received communication indicating that the 1<sup>st</sup> Respondent has called for the Police Duplicate File for perusal and direction. (See annexure “EW 12”)

26. The Petitioner aver and hold that the institution of investigations and recommendations for their prosecution are not only a violation and infringement of their fundamental rights and freedoms but a gross abuse of power by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents which has to be remedied in the manner sought in the Petition and in the meantime, conservatory orders issue to restrain further or threatened violations and infringement of the Petitioners’ said rights and freedoms.

27. The Petitioner further hold that the purported investigations and recommendations for prosecution on matters related to Wanyororo Farmers Company Limited are unlawful actions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents towards intimidation, hindrance, harassment or improper interference in the performance of the 1<sup>st</sup> Petitioner’s professional duties to Wanyororo Farmers Company Limited and to unlawfully identify the 1<sup>st</sup> Petitioner with his clients or my clients’ causes as a result of discharging his professional functions.

### **1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS’ RESPONSE**

28. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are opposed to the Petitioners Petition and in doing so filed grounds of opposition dated 19<sup>th</sup> May 2020 setting out several grounds of opposition being as follows:-

*a) That the dispute in question revolves between an advocate and a client arising from instructions given to the advocates in Nakuru HCC No. 821 of 1993.*

*b) That it is not in dispute that there are two proceedings with regards to this matter one before Advocates Complaint Commission and another one before the Civil Court Civil Suit No. 2 of 2017.*

*c) That Section 193A of the Criminal Procedure Code is very clear that; Notwithstanding the provisions of any other written law, the fact that any matter is 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.*

*d) That under Article 157(10) of the Constitution and Section 6 of the Office of The Director of Public Prosecution Act (2013) the 1<sup>st</sup> Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.*

*e) That Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.*

*f) That the Petitioners have not adduced reasonable evidence to show that the criminal proceedings are mounted for an ulterior purpose.*

*g) That the Petitioners must demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed. The cases are determined on merit.*

*h) That it is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.*

*i) That the Petition is without merit and should be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.*

### **ANALYSIS AND DETERMINATION**

29. I have very carefully considered the Petition, grounds of opposition and parties rival submissions and from the same the following issues arise for consideration:-

*a) Whether the investigation undertaken by 2<sup>nd</sup> Respondent as against the Petitioners in respect of client/Advocate relationship between the Petitioner and Wanyororo Farmers Company Limited, culminating in the Petitioner’s prosecution in Nakuru CRC No. 3254 of 2018 violates the Petitioners Constitutional Rights; are an abuse of administration power; are an abuse of Court process and unlawful, null and void ab initio?*

b) Whether an order of certiorari to remove into this Court and quash the decision of the Respondents of prosecuting the Petitioners can issue?

c) Whether the Petitioners are entitled to an order of prohibition sought in the Petition?

**A. WHETHER THE INVESTIGATION UNDERTAKEN BY 2<sup>ND</sup> RESPONDENT AS AGAINST THE PETITIONERS IN RESPECT OF CLIENT/ADVOCATE RELATIONSHIP BETWEEN THE PETITIONER AND WANYORORO FARMERS COMPANY LIMITED, CULMINATING IN THE PETITIONER'S PROSECUTION IN NAKURU CRC NO. 3254 OF 2018 VIOLATES THE PETITIONERS CONSTITUTIONAL RIGHTS; ARE AN ABUSE OF ADMINISTRATION POWER; ARE AN ABUSE OF COURT PROCESS AND UNLAWFUL, NULL AND VOID AB INITIO?**

30. The Petitioners herein refer to annexure "EW 6" being a copy of the Company minutes and resolutions and annexure "EW 13" to the further affidavit dated 25<sup>th</sup> June 2020 being a copy of the Directors Resolution on Nakuru Criminal Case No. 3254 of 2018 Republic Vs. Ezekiel Evans Simiyu Wafula and Wilson Nyonji Kimani. Paragraph 9 of the affidavit of Ezekiel Evans Simiyu Wafula dated 25<sup>th</sup> June 2020 where it is stated:-

**"9. That during the meeting, it was confirmed by the Directors that there was no dispute within the Company and its members on the disbursement of the funds and further that any complaint should be dealt with internally."**

31. Annexure "EW 6" minutes of Special Directors' meeting Wanyororo Farmers Company Limited held at Jameson Court Ngong Road, Block D, Suite 8, Nairobi on March 29<sup>th</sup>, 2016 is recorded as follows:-

**"Present:**

**James Kaguru Karega Chairman**

**Eliud ndungu thuo Secretary**

**Wilson Nyonji Kimani Treasurer**

**Joseph Waweru Gatere**

**Ezekiel E.S. Wafula Advocate**

**1. The Special Directors' Meeting was called by the Secretary to discuss issues arising from the disbursements of an out of court settlement in the Company's favour with the Attorney general in NAKURU HCCC 821 OF 1993 WANYORORO FARMERS LITMIED –VERSUS- THE ATTORNEY GENERAL AND OTHERS**

**2. The Secretary informed the Board that Advocate Mr. Ezekiel E.S. Wafula was present as the Advocate who handled the matter as instructed through Letter of Engagement dated 23<sup>rd</sup> October 2012 and Addendum to the same dated 8<sup>th</sup> October 2013.**

**3. The Chairman informed the board that after disbursements of the out of court settlement award, there have been issued summons to appear before the Director of Criminal Investigations (DCIO) Nakuru for purposes of recording statements on the disbursements of the award.**

**4. The Board discussed the issuing of summons particularly whether any of its members lodged any complaint on the disbursement of the award with the company or whether the company formally lodged any criminal complaint with the DCIO to warrant issuance of summons in order to record statements.**

**5. The Secretary confirmed that the Company had not lodged any Criminal Complaint on the distribution of the award. The Treasurer and Secretary further confirmed that there was no internal complaint against the mode of distribution or at all.**

#### **RESOLUTIONS**

**The following resolutions were passed by the board of directors:**

**1. That the Company has not lodged any Criminal Complaint or at all with the Director of Criminal Investigations (DCIO) Nakuru on disbursement of the settlement award.**

**2. That the Company has not received any complaint from its members on the disbursement of the settlement award."**

32. Annexure "EW 1" being Special Ordinary Resolution of Wanyororo Farmers Company Limited being Directors Meeting of the Members of the company duly convened and held at Company Office in Nakuru on 24<sup>th</sup> May 2019 passed the following resolutions.

**“1. That the Directors hereby confirm that they have not passed any resolution(s) to institute the following cases:**

**(i) Nakuru CRC 3254 of 2018 Republic –vs- Ezekiel Evans Simiyu Wafula & Wilson Nyonji Kimani**

**(ii) Nakuru Civil Suit NO. 2 of 017 (O.S) Wanyororo Farmers Company Limited Vs. Ezekiel Evans Simiyu Wafula**

**2. The Directors shall attend to and execute all necessary documents toward the withdrawal of the above cases.”**

33. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submission is that the powers of prosecution are exercised by the Director of Public Prosecution personally or by persons under his control and direction; in exercise of such powers, the Director of Public Prosecutions:-

**(i) Is subject only to the Constitution and the law.**

**(ii) Does not require the consent of any person or authority.**

**(iii) Is independent and not subject to the directions and control of any person or authority.**

This is clearly provided under **Article 157(10) of the Constitution**. In exercising the powers conferred by Article 157 of the Constitution the Director of Public Prosecution 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.

34. The Petitioners urge that in view of the contents of annexures “EW 6” and “EW 1” and “EW 13” that there is no discernible compliant in the present matter. They aver that as regards the alleged complainant, the alleged complainant has on two occasions indicated that it has no criminal claim against the Petitioners. They further contend that two of the listed witnesses who are also directors of the Complainant Company; thus Eliud Ndungu Thou and Geoffrey Muturi Ndegwa executed minutes adduced as annexure “EW 6” and resolutions adduced as annexure “EW 13” respectively.

35. It should be clearly noted that a company and its directors are separate entities and that, the court can lift the company veil to examine the real issues in contention as was held in the **case of Salmon and Salmon & Co. Ltd**. In the case of **Post Bank Credit Limited (in Liquidation) vs. Nyamangu Holdings Limited (2015) eKLR** considered some of the salient features of the Salmon Case and espoused:-

**“...The separate corporate personality of a company as a legal person in Salomon v Salomon is the greatest legal innovation in company law. And, although it is artificial person that does not possess the body of natural person, a company is a juristic person; a legal person in law. It exists only in contemplation of law. Because of its artificial nature, a company acts through human persons, namely, the directors, officers, shareholders, and corporate managers, etc., for its management and day to day running. But these individuals represent the company and accordingly whatever they do within the scope of the ostensible or authority conferred upon them by the Memorandum and Articles of Association, in the name and on behalf of the Company, they bind the company and not themselves...As a general rule courts do not interfere with the essentially go by the principle of separate legal entity laid down in the Solomon’s case, but with the passage of time, courts have come to realize that indeed some promoters and members of companies have formulated and executed fraudulent and mischievous schemes through the corporate vehicle. See the case of Jones & Another vs. Lipman & Another [1962] 1 WLR 833 where it was held that whereas a registered company is a legal person separate from its members, the veil of incorporation may, however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the directors to hide themselves from the eyes of equity.” (Emphasis added)**

36. The Petitioners contend that in **Nakuru CRC No. 3254 of 2018** ostensibly present a case that the complainant Wanyororo Farmers Company Limited, never received any proceeds of the decretal sum despite Acknowledgment; discharge vouchers; Company minutes and Resolutions; whereas the Petitioners contend that the signed discharge vouchers constituted a contract couched in clear and unambiguous terms with no room for misunderstanding it, as to expect further payment in future from the 1<sup>st</sup> Petitioner; and in spite of the minutes and resolutions confirming that the purported complainant has no claim is an issue that should be proved by the parties before the trial courts. Further this court is alive to the fact that the Directors are not the only individuals who can raise a complaint on behalf of the Wanyororo Farmers Company Limited. This is open even to shareholders and once a complaint is raised the DPP is mandated by **Article 157 of the Constitution** in regard to public interest and in the interest of administration of justice to have the matter investigated and take appropriate action to prevent and avoid abuse of legal process.

37. The 1<sup>st</sup> Petitioner contend the purported complainant and its directors have benefitted from the services of the 1<sup>st</sup> Petitioner but now through **Nakuru CRC No. 3254 of 2018** wish to negate the Addendum to the Retainer Agreement in its entirety, which it is urged will perpetuate a fraud against the 1<sup>st</sup> Petitioner and is **“against public interest”**. The 1<sup>st</sup> Petitioner urge further the complainant’s directors have passed resolutions confirming that they have no claim against the 1<sup>st</sup> Petitioner and there is consequently no offence that has been alleged to have been committed as envisaged under **Article 157(6)(a) of the Constitution and Section 5(1)(b) of the Office of the Director of Public Prosecutions Act, 2013**. If what the 1<sup>st</sup> Petitioner is alluding to is the actual position, I find that the 1<sup>st</sup> Petitioner need not worry at all, as without a complaint in a criminal case the DPP cannot successfully prosecute the matter and get conviction. After all if the DPP chooses to prosecute the 1<sup>st</sup> Petitioner, the company directors will exonerate the 1<sup>st</sup> Respondent through their evidence, that they never lodged any complaint against him and has no case against the 1<sup>st</sup> Petitioner. In absence of evidence the 1<sup>st</sup> Petitioner will be acquitted on no case to answer and will stand vindicated against the charges preferred against him and will be in a position to seek damages for malicious prosecution amongst other causes of action.

38. The Petitioners on the position on discharge vouchers rely in the case of **Trinity Prime Investments Limited vs Lion of Kenya Insurance**

*Company Limited [2015] eKLR* where it was held that:-

**“...The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged...”**

This finding was cited affirmatively by the superior court in *Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR* where the Court stated:

**“...In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims... It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent’s part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties...”**

39. The Petitioners refer to **Section 204 of the Criminal Procedure Code**, which deals with withdrawal of a complaint. I find that the law is clear as regard withdrawal of a complaint by a complainant in a criminal case and in this case there is no contention of the complainant having approached the court to withdrawal of complaint and court decided otherwise. What is alleged in this Petition is simple and clear that there is no complainant. In absence of the complainant, it is clear the case shall have no legs to stand on and will collapse on its first day of hearing. This need not worry the Petitioners then, as they would be victorious without uttering a single word; when matter comes up for hearing and then they will win their case hands down.

40. The petitioner further sought reliance in a decision by Justice J. B. Ojwang in the case of *Avril Atieno Adoncia V Republic [2008] eKLR* where a Complainant being a corporate body sought to withdraw criminal charges under **Section 204 of the Criminal Procedure Code**. In finding that the withdrawal was merited, the learned Judge stated:-

**“...Section 204 of the Criminal Procedure Code, which is relied upon by Kenya Airways as the foundation for withdrawing the criminal proceedings, thus provides:**

**“If a complainant, at any time before a final order is passed in a case under this Part [i.e. Part VI – Procedure in Trials Before Subordinate Courts], satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.”**

41. I have considered the authority sought to be relied upon by the Petitioners herein above and I am not satisfied the same is relevant and applicable in this Petition as this is not the trial court in respect of the *Nakuru CRC No. 3254 of 2018* and secondly there has been no application for withdrawal of the complaint in the aforesaid court and was rejected.

42. I do not find, that it would be proper and correct as submitted by the Petitioners, that the minutes adduced as annexure “EW 6” and resolutions adduced as annexures “EW 13” respectively amount to withdrawal of the complaint in *Nakuru CRC No. 3254 of 2018*. The issue of withdrawal of any complaint can only be dealt with by the trial court in the particular case but not in the Petition, as this is not the trial court and cannot venture into such arena of dispute.

43. The Petitioners urge that there is no complainant against them and the continued prosecution of *Nakuru CR No. 3254 of 2018* will be malicious and is clearly propelled by ulterior motives to cause unending harassment purportedly in pursuit of recovery of monies alleged to have been stolen. It is further noted if the DPP will proceed with witnesses well knowing that they will have committed perjury would thus be exposing themselves to malicious prosecution suit.

44. In the instant Petition there is a change in *Criminal Case No. 3254 of 2018 (Nakuru)*. The particulars of the charge sheet are clearly set out and witnesses indicated thereto. The complainant is indicated as M/s Wanyororo Farmers Company Ltd; Nakuru. It is therefore not correct for Petitioners to allege there is no complaint against them and that there is no complainant. The Petitioners are much aware of the charge and the complainant and until the charge is either withdrawn or Petitioners acquitted there stands a charge against them and a complaint in the charge sheet, which they should face and deal with it headon.

45. In this matter the 1<sup>st</sup> Petitioner is as per Respondents grounds of opposition, facing two proceedings, with regard to this matter, one before Advocates complaint commission and another one before the *Civil Court Civil Suit No. 2 of 2017*. There is in addition to the two, the *Nakuru Case No. 3214 of 2018*. The three cases notwithstanding **Section 193A of the Criminal Procedure Code** is very clear that, 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 in itself be a ground for any stay, prohibition or delay of the criminal proceedings. The petitioner nevertheless has not adduced reasonable and sufficient evidence to demonstrate that the criminal proceedings are mounted for an ulterior purpose, nor have they demonstrated that substantial injustice would otherwise result if the criminal proceedings proceed nor have they shown that the criminal proceedings would not be determined on merits. I find that it is in the public interest that complaints made to police under **Section 24 of the National Police Service Act** be investigated and perpetrators of crimes be charged and prosecuted.

46. I find that this court would be crossing into the line of the independence of the Director of Public Prosecutions (DPP) if it were to descend into the arena of finding whether there is a prima facie case against the Petitioner in this petition. I find in the instant petition that the petitioners have not demonstrated that the DPP has not acted independently or has acted capriciously, in bad faith or has abused the process in a manner to trigger this court’s intervention. It has also not been shown that the DPP lacked the requisite authority, or acted in excess of jurisdiction or departed from the rules of natural justice in directing that the Petitioner be charged with the offences disclosed by the evidence

gathered.

47. The Petitioners have not shown nor produced evidence of malice, or evidence of unlawful actions, or evidence of excess or want of authority, or evidence of harassment or intimidation or even manipulation of the court process so as to seriously deprecate the likelihood that the petitioners might not get a fair trial as provided for under the constitution to warrant the court to interfere with the criminal process before the subordinate court. Its not shown upon receipt of the reports/complaint, the investigation did not commence with a view to ascertaining the genuineness of the complaint, and that at the conclusion of the investigation, a decision was not made as per provisions of that act to prefer charges against the petitioners based on the evidence gathered. In view of the aforesaid it is clear the Petition has not met the threshold for granting the orders sought by the Petitioners.

48. I have considered the matters raised by the Petitioners and indeed it is clear the matters raised by the Petitioners form the basis of their defences before the Trial Court, which should be raised before the Trial Court; for its consideration and determination and in view of the aforesaid I find that it is premature to raise the same before this court in the manner in which the petitioners have herein.

**B. WHETHER AN ORDER OF CERTIORARI TO REMOVE INTO THIS COURT AND QUASH THE DECISION OF THE RESPONDENTS OF PROSECUTING THE PETITIONERS CAN ISSUE?**

49. The Petitioners seek an order of Certiorari to be issued to bring before this Court and quash the warrants of arrest issued on 8<sup>th</sup> November 2018 by the Honourable Court in Nakuru CRC No.3254 of 2018. The Petitioners further seek an order of certiorari be issued to bring before this court and quash the decision made by the 1<sup>st</sup> Respondent on 8<sup>th</sup> November 2018 to prosecute the Petitioner for the alleged offences of stealing by agent in respect to the Advocate/Client transaction between the 1<sup>st</sup> Petitioner and Wanyororo Farmers Company Limited. The Petitioners further seek prohibition under the same prayers in the Petitioner.

50. The Respondents are opposed to the Petitioners' prayers on the grounds that the High Court cannot quash criminal proceedings by way of writs of certiorari or prohibition in the manner sought in the petition. In supporting this proposition the Respondents rely on the High Court case **Petition No. 21 of 2012, Beatrice Ngonyo Kamau & 2 Others vs. Commissioner of Police and the Director of Criminal Investigations & another**, where the court held that:-

**“...the point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial....”**

51. Further in the **High Court case Petition No. 153 of 2013, Thuita Mwangi & another vs. The Ethics and Anti-Corruption Commission & 3 others** further sums up the issues raised in the above cases and reiterates that acts of the DPP can only be interfered with by Court where it is proved that he has exercised the same in excess of jurisdiction resulting to an abuse of office.

52. It is my considered view that the High Court, which is not seized with a criminal matter pending before a subordinate court, it has no jurisdiction to decide whether or not the Petitioners herein, who are facing a criminal charge before a subordinate court; has no prima facie case or whether there is sufficient evidence against the Petitioners. The Petitioners shall indeed have the opportunity before the subordinate court to tender evidence to controvert, refute and challenge the prosecution's case and evidence as guaranteed in the **Criminal Procedure Code (Cap 75) Laws of Kenya) and the Evidence Act (Cap 80) Laws of Kenya**. I find that it would be improper and incorrect for the High Court to purport to play the role of the trial Court in the manner pleaded herein. The High Court should in my view exercise restraint in such matters.

53. The Petitioners in this Petition have not demonstrated that in undertaking investigations into complaints lodged with the National Police Service and in making the decision to prefer criminal charges against the petitioners, either the Director of Public Prosecutions on any member of staff of the office of the Director of Public Prosecutions on the National Police Service acted without or in excess of the powers conferred upon them by the law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the relevant provisions of the constitution of Kenya 2010 or any other provisions thereof or any other relevant provisions of law.

54. It has not been shown that the DPP did not independently review and analyzed the evidence contained in the investigations file compiled by the Directorate of Criminal Investigations including the witnesses statements; documentary exhibits and statements of the Petitioners as provided by law. It was on the basis of the said review and analysis that the DPP gave directions to prosecute the Petitioners. I find that the decision to charge the Petitioners was informed by the sufficiency of evidence on record and the public interest and not any other considerations. The accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by Trial Court, which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges.

55. From the facts in support of the petition and grounds in opposition; I find that no sufficient grounds have been advanced to warrant the grant of orders sought. I find that it has not been demonstrated that the criminal charges were preferred before investigations, were conducted but after the same had been conducted and which pointed to the commission of an offence. I am further alive of the fact that permanent stay in any criminal proceedings must be and only in exceptional circumstances and the current Petition is not in my view an exceptional circumstance to warrant permanent stay of the criminal proceedings, before the Trial Court.

56. The Petitioners have not shown nor adduced evidence to show that the 1<sup>st</sup> Respondents' intention to institute criminal proceedings herein against the Petitioners was done in bad faith; is actuated by malice and is an abuse of court process.

**C. WHETHER THE PETITIONERS ARE ENTITLED TO THE ORDER OF PROHIBITION SOUGHT IN THE PETITION?**

57. The Petitioners urge that **Article 157(11) of the Constitution** obliges the 1<sup>st</sup> Respondent to have regard to public interest of administration of justice and need to prevent and avoid abuse of the legal process. It is urged that by proceeding with prosecution where the complainant has indicated it does not have a complaint, the 1<sup>st</sup> Respondent will not be discharging its mandate.

58. The Petitioners urge further that under **Article 10(1) of the Constitution** the mandate that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent must adhere to relate to the national values and principles of governance as identified under **Article 10(2) of the Constitution**, which values and principles include the **Rule of Law, Human Dignity, Human Rights and Non-Discrimination**.

59. The Petitioners contend that under **Article 239(a) of the Constitution**, obligates the 2<sup>nd</sup> Respondent to perform its functions and exercise its powers in a non-partisans manner and only to further legitimate causes under the Constitution.

60. The Petitioners urge that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents together with other state agencies have monumentally failed to adhere to the Constitutional edict. They aver that they have been manipulated to engaging in forum shopping for an unknown/non-existent Complainant aimed at intimidating and/or targeting the Petitioners with vexatious and annoying criminal prosecution with the unfounded hope that the vexatious action will finally nail the petitioners.

61. The Petitioners further state in addition to provision of the Constitution, the principles which guide the 1<sup>st</sup> Respondent in exercising his powers are stipulated in **Section 4 of the Office of the Director of Public Prosecutions (ODPP) Act No. 2 of 2013** and in the **National Prosecution Policy** formulated by DPP under powers conferred upon him by **Section 5(1) (c) of ODPP Act**. The **National Prosecution Policy** formulated by the 1<sup>st</sup> Respondent states in part in para. 4 (B) (1) thus:-

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

and in **para 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. In other words, public prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?”**

62. The Petitioners further contend that the intended prosecution relates to a Constitutional, legal contractual and professional relationship between an Advocate and a client, a relationship that enjoys privilege and confidentiality to the extent that subjecting an Advocate to disclose or rather expose the cogent element that constitutes this relationship is tantamount to a violation of this sacred relationship and thus an abuse of power by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

63. The 1<sup>st</sup> Petitioner urges the basic principle on the role of lawyers is anchored in the **Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990** which is applicable in Kenya by virtue of **Article 2(5) of the Constitution** as part of general rule of international law.

64. The 1<sup>st</sup> Petitioner further state that Advocates cannot be held culpable in matters in which they are legally representing and/or instructed by their clients. Action against the 1<sup>st</sup> Petitioner in such a manner would be untenable in law, and would be against public interest, as it cannot be reconciled within the terms of the **Advocates Act (Cap.16, Laws of Kenya)**, quite apart from the likelihood that it would tarnish the image of the advocates, and bring disrespect upon the legal profession generally.

65. The Petitioners have not produced any evidence of malice or evidence of unlawful actions, nor evidence of excess or want of authority on part of the Respondents. Further the Petitioners have not demonstrated any harassment or intimidation or manipulation of court process or the Respondents engaging in forum shopping for an unknown/non-existent complainant aimed at intimidating and/or targeting the Petitioners with vexatious and annoying criminal prosecution. It has further not been demonstrated that the DPP has not acted independently or has acted capriciously, in bad faith or abused the process in a manner to trigger the court intervention.

66. An Order of Prohibition is discretionary and is only tenable where a public body or official has acted in excess of their powers and as such the order requires the public body to cease from performing a certain act. In the instant Petition, I find that there is no evidence of misuse of power or contravention of Rules of natural justice as alluded to by the Petitioners. The burden of proof lies with he who alleges. It therefore follows that the Petitioners have to prove the nature of their complaint with precision as it is not sufficient to merely state that the Respondents have failed to carry out sufficient investigations in the matter.

67. The Court of Appeal in **Civil Appeal No. 266 of 1996 – Kenya national Examinations Council vs. Republic**, laid down the principles upon which the orders of prohibition as sought by the ex-parte Applicant herein would be issued by the Court.

**“The court stated that an order of prohibition would issue against an inferior tribunal or body forbidding the tribunal or body from continuing proceedings therein in excess of jurisdiction or in contraventions of the laws of the land. It lies not only for excess of jurisdiction or lack of it but also for a departure from the rules of natural justice. It does not lie to correct the course, practice or procedure of an inferior tribunal.”**

68. The Petitioners seek to challenge the quality and sufficiency of weight of the evidence or its relevancy or the consideration of whether or not a criminal case has been disclosed or whether an accused has a case to answer. I find such issues as alleged can only be determined by a trial Court upon hearing of the evidence and upon its veracity being tested through cross-examination. The evidence sought to be relied upon

in prosecution of a criminal case; as urged, its quality and sufficiency, can only be tested by a Trial Court, before which the charges are brought. The accused can only get an opportunity to challenge the evidence before the Trial Court but not outside the trial. The process, its quality and sufficiency therefore cannot be an issue that can be canvassed in this Petition. In view of the aforesaid, I have no doubt that the rules of procedure, requires the Respondents to be afforded a fair chance to present their evidence before Trial Court for consideration and determination but not otherwise. If the Respondents for what reason decide to bring a malicious charge and prosecute an accused person where there is no complainant, as alleged in this Petition and where they have no evidence, the accused shall in my view be exposed to a malicious prosecution and the prosecution stands to be sued for damages for malicious prosecution. In my view it is therefore worthy for the prosecution to reconsider their position always before prosecuting any one and if the chance of sustaining conviction is minimal consider to forgo, the prosecution. I will say no more but leave the matter to the good judgment of the prosecution, if there is no complainant and no evidence in support of the charge as alluded to by the Petitioners rather than interfering with the DPP's mandate to prosecute.

**69. *The upshot is that the Petitioners' Petition is dismissed. Each party to bear its own costs.***

**Dated, Signed and Delivered at Nairobi on this 5<sup>th</sup> day of November, 2020.**

**J. A. MAKAU**

**JUDGE**