



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**PETITION NO.2 OF 2018**

**CATHERINE NYAMBURA MURARIA..... PETITIONER**

**VERSUS**

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

**INSPECTOR GENERAL OF POLICE..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ISAAC GATHUNGU WANJOHI.....1<sup>ST</sup> INTERESTED PARTY**

**ISAIAH K.W. MUTUNYI.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGEMENT**

1. **Catherine Nyambura Muraria**, the petitioner, has filed this petition against the **Director of Public Prosecution and Inspector General of Police**, the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, claiming that they have violated her constitutional rights and fundamental freedoms guaranteed under various Articles of the Constitution.

2. She avers that the two respondents' reason for instituting criminal Case No. 343 of 2018 at the Chief Magistrates in Kajiado against her for the offences of forgery of a document of title to land contrary to section 350(1) of the Penal Code; making a false document without authority contrary to section 347 (d)(i) as read with section 349 of the Penal Code; making a false document without authority contrary to section 347 (d)(i) as read with section 349 of the penal code; uttering a false document contrary to section 353 of the Penal Code as read with section 349 of the Penal Code and giving false information to a person employed in the public service contrary to section 129 (a) of the Penal Code is malicious, in bad faith and a violation of her fundamental rights.

3. The petitioner further avers that she is the proprietor of Parcel of land **Kajiado/Kisaju 1177** measuring approximately 40.47 hectares and has been in possession since t 2002. She states that she fenced the property, constructed a water tank and temporary houses on the land between 2003 and in 2005. She also states that she permitted the vendor's wife and her children to continue staying on the property as licensees as caretakers.

4. According to the petitioner when she attempted to sell the property in 2012, her application for consent from the Land control Board was rejected on the basis that there were people claiming ownership of the same property. She states that she reported the matter to the police at Isinya Police station which was recorded on OB No. 23/30/05/2012 and that she later received a letter dated 11<sup>th</sup> July 2012 from the Criminal Investigation Department,(DCI) Kitengela informing her that no criminal offence had been lodged against her and that she was the rightful owner of the land.

5. The petitioner pleads that by letter dated 4<sup>th</sup> August 2012, the DCI, Kajiado confirmed that she had provided original title documents and that the wife to the seller had confirmed that she was the bona fide purchaser of the suit property.

6. It is the petitioner's case that a letter dated 4<sup>th</sup> January, 2016, the DCI Kitengela informed her that investigations over the matter had been closed and the 1<sup>st</sup> respondent's office had confirmed that no further police action was to be taken hence she was free to deal with her property. It is the petitioner's further case that the respondents concluded investigations and through various correspondences, she was assured that she had not committed a criminal offence. She argues that the respondents did not inform her of any new evidence which she could have responded to before she was arrested and charged in court.

7. She contends that the criminal case instituted against being in relation to the ownership of the suit property, is based on ulterior motive and that her prosecution has no factual foundation. The petitioner further contends that her prosecution is an infringement to her right to human dignity guaranteed under Article 28 of the Constitution, in that she is being vexed and victimized after four years since the closure of investigations.

8. She asserts that institution of the criminal case is an abuse of the court process; a violation her right to privacy, fair administrative action, access to justice, right to property, equal protection of the law, fair trial and hearing. The petitioner further asserts that her prosecution is occasioning her great prejudice, mental anguish and psychological torture and torment contrary to Article 29 of the Constitution.

9. It is the petitioner's case that the respondents are abusing their offices and powers and are subjecting her to illegal prosecution contrary to Article 157 of the Constitution as read with Articles 3 and 27 of the Constitution and that the 1<sup>st</sup> respondent is not exercising his mandate in accordance with the Constitution.

10. According to the petitioner, the purpose of investigations and the intended prosecution is to advance the interested parties' claim in the civil case and not pursuing genuine criminal acts given that the contents of the letter dated 10<sup>th</sup> July 2012 from the police had not been controverted. She sought the following reliefs;

***1) A declaration that the initiation, maintenance and prosecution of the petitioner in Kajiado principal magistrates court criminal case No. 343 f 2018, Republic versus Catherine Nyambura Muraria is an abuse of the criminal justice system, oppressive, malicious, abuse of the process of the court, and a contravention of the petitioner/applicant's constitutional rights to freedom and security of the person and the right to secure protection of the law.***

***2) An order of certiorari does issue bringing into this court for quashing and quash the charge and any proceedings before the trial court in Kajiado principal court, criminal case number 343 of 2018, republic versus Catherine nyambura muraria.***

***3) An order of prohibition so issue the continuance (sic) of the Kajiado principal magistrate's court, criminal case Number 343 of 2018 republic versus Catherine nyambura muraria or any other similar charge.***

***4) An order for compensation of the petitioner for general damages for the distress and anguish caused by the infringement of her fundamental rights and freedoms.***

***5) An order awarding costs of the petition to the petitioner***

***6) Any other or further orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the petitioners fundamental rights and freedoms.***

#### **Respondents' response**

11. The 1<sup>st</sup> respondent filed grounds of opposition dated 25<sup>th</sup> April 2018 and filed in court on 26<sup>th</sup> April, 2018. The 1<sup>st</sup> respondent contends that the 1<sup>st</sup> respondent is an independent constitutional institution established under Article 157 of the Constitution with the mandate to commence take over and prosecute criminal; cases; the 1<sup>st</sup> respondent is mandated to enforce Articles 157 and 50 of the Constitution and sections 5 and 9 of the victim's protection Act that the petitioner intends to obstruct and interfere with; that the 2<sup>nd</sup> respondent is mandated by Articles 238,239,243 and 247 of the Constitution to enforce the purpose of Articles 244 and 50 of the Constitution, section 5 and 9 of the victims protection Act and the National Police Service Act and that the petition is intended to obstruct and interfere with the respondents' constitutional mandate.

12. The respondents assert that the petition intends to deny the Director of Criminal Investigations the right to investigate unlawful actions and omissions the right to fair hearing under Article 50 of the Constitution. It is the respondents' case that the decision to prosecute the petitioner is based on evidence and the law; is done in good faith; is in the public interest and the interest justice. They assert that they have not acted *ultra vires* the law or infringed on the fundamental right and freedoms of the petitioner but are performing their constitutional and statutory mandate. It is their position that the petition lacks merit, is incompetent, vexatious and amounts to an abuse of the court process with the aim of defeating the course of justice.

13. The respondents also filed a replying affidavit by Sgt Gilbert Okello one of the investigating officers worn on 17<sup>th</sup> December 2018. He deposes that the interested parties lodged a complaint at the DCI headquarters regarding the ownership of parcel No. Kajiado/ Kisaju/1177; that he was instructed to take part in the investigations and that interested parties gave details on how they purchased land through a sale agreement dated 1991 and gave photographs of building the constructed in lieu of payments for the property. He deposes that the interested parties also availed a copy of the title deed for purposes of investigations.

14. Sgt Okello further deposes that the petitioner alleged to have been issued with a title deed dated 9<sup>th</sup> January 2002 which was not registered in the presentation book as required; that he obtained a green card allegedly used to register the petitioner's title and that title was signed by two Land Registrars, James Mugambi Njeru and Joseph Munguti, who, however, disowned the signatures.

15. He states that a document examiner analysed the petitioner's title and presented a report confirming that the title was not signed by the two Land Registrars. According to Sgt Okello, the interested parties' title was also examined and the signature confirmed to be that of James Mugambi Njeru.

16. He denies the petitioner's contention that she was not informed of the new evidence before her arrest. He asserts that the petitioner was

summoned by the investigating officer but instead chose to protest through a letter dated 26<sup>th</sup> January, 2015 to the ODPP. According to Sgt Okello, upon completion of investigations, the file was forwarded to the 1<sup>st</sup> respondent's office and a recommendation for the petitioner's prosecution was made and which was implemented. He contends that the charges preferred against the petitioner are fair, just and that the prosecution is based on facts and evidence.

### **Interested parties' response**

17. The interested parties filed a replying affidavit Isaac Gathungu Wanjohi the 1<sup>st</sup> interested party, sworn on 23<sup>rd</sup> July 2018. He deposes that they purchased the property in September, 1991 and that consideration was in form of construction of a commercial building for the vendor. He deposes that sometimes in April and 2012, they learnt that the petitioner was trying to sell their property; that they contacted the Chairperson of Isinya Land Control Board and the Land Registrar, Kajiado for assistance to stop the intended sale.

18. He also deposes that they lodged a complaint with the police that the petitioner had forged documents relating to their property; that the Police investigated the matter after which they charged the petitioner. He contends that the petition is intended to deny them the right to their property.

### **Petitioner's submissions**

19. Mr Nyandieka, learned counsel for the petitioner submits highlighting their written submissions dated and filed in court on 23<sup>rd</sup> October 2018. Counsel submitted that the petitioner has made a case to warrant grant of the reliefs sought in the petition as the evidence and materials placed before court demonstrate that her continued prosecution will be in breach of her fundamental rights and freedoms.

20. Learned counsel argues that the respondents violated the petitioner's rights guaranteed under Articles 47 and 50 of the Constitution in that they did not give the petitioner an opportunity to comment on the new evidence, if any. He relies on *Bitange Ndemo v DPP & 4 others*, (judicial review Miscellaneous Application No. 192 of 2016), for the submission that when the decision to review the earlier decision by the DPP not to prefer charges against the petitioner was made, the petitioner should have been called upon to respond to the new evidence.

21. He further submits that the respondents changed their position on the closure of the investigation file; re-opened it, carried out further investigations; hurriedly arrested and charged the petitioner in court without informing her of any new evidence they may have come across to enable her respond to that evidence same before instituting criminal prosecution against her. He relies on *Republic v Attorney General & 4 others ex parte Diamond Lalji and Ahmed Hasham Lalji*, eKLR for the proposition that where a decision had been made to close an inquiry file, it is my view before reopening the investigations resulting from discovery of new evidence, the people sought to be charged ought to be given an opportunity to comment on the fresh evidence.

22. Counsel submits that the decision to charge the petitioner is founded on improper factual foundation; that the 1<sup>st</sup> respondent is acting outside the law and that he is pursuing unknown motives contrary to constitutional principles. He cites *Republic v Attorney General ex parte Kipngeno Arap Ngenye* (High Court Civil Application No.406 of 2001) for the submission that a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose.

23. Mr Nyandieka is of the view that the interested parties and the police colluded in the investigations to reach a finding that the petitioner's title deed and green card are forged; that prosecution is intended to further the interested parties' civil case before the Environmental and Land Court (ELC) between them and the petitioner over the ownership of the land the subject of this criminal case.

24. According to counsel, the respondent's actions are in breach of Article 157(11) of the Constitution and infringe on the petitioner's right to equal protection and equal benefits of the law guaranteed under Article 27 (2) and therefore the prosecution amounts to abuse of court process. He relies on *Jago vs. District court (nsw)106* for the submission that abuse of the court process occurs when the process of the court is put in motion for a purpose which, in the eye of the law it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve.

25. He urges this court to safeguard the petitioner's fundamental rights and freedoms and discontinue the proceedings instituted against her contrary to constitutional principles and an individual's legitimate expectations. He relies on *Republic v DPP & 2 others ex parte pius kiprop chelimo and another*, judicial review miscellaneous application no 26 of 2017.

26. Counsel argues that once a representation is made to an individual that no prosecutions will be initiated against him or her, or the investigation file is closed, the 1<sup>st</sup> respondent cannot make an about turn against that decision and arbitrarily purport to institute criminal proceedings against such a person. In counsel's view, where the petitioner having been given an assurance that she would not be prosecuted, change of that decision without any justifiable and lawful reason should not be allowed in a judicial system that upholds the rule of law. He cites *Ronald Leposo Musengi v Director of Public Prosecutions & 3 others*, Petition No. 436 of 2014 and *Stanley Munga Githunguri vs. Republic* Criminal Application No. 271 of 1985 in support of his position.

### **Respondents' submissions**

27. Mr Meroka, learned counsel for the respondents, submits orally and through written submissions filed on 17<sup>th</sup> December, 2018. Counsel argues that the 2<sup>nd</sup> respondent received a complaint warranting investigations and possible criminal charges if found culpable. He submits that upon finalizing investigations, investigators came to the conclusion there was a breach of the law and forwarded the file to the 1<sup>st</sup> respondent for review and action.

28. He further submits investigations established that land parcel No. Kajiado/ kisaju/1177 which was originally registered in the names of

the 1<sup>st</sup> and 2<sup>nd</sup> interested parties had changed hands into the petitioner's name; that land registration bore forged signatures of the land officers and that the 2<sup>nd</sup> respondent's mandate is purely to investigate establish a criminal conduct.

29. Mr Meroka relies on section 193 A of the Criminal Procedure Code to argue that the law allows concurrent criminal and civil proceedings at the same time. In counsel's view, forgery and uttering of documents is a criminal offence and therefore, the competent authority to arbitrate this dispute in the trial court where the respondents have lodged a formal charge against the petitioner.

30. It is counsel's contention that the decision to charge the petitioner was not made through ill will, intimidation or coercion, but on the strength of the evidence gathered. He argues that the decision to prosecute was subjected to the evidential and public interest test review before it was made. In his view, stopping the criminal proceedings will adversely affect the mandate of the respondents in executing their duties. He urges the court to allow proceedings in Criminal Case No. 343 of 2018 to continue to its logical conclusion.

### **Interested parties' submissions**

31. Mr Munyoki, learned counsel for the interested parties, submits orally and through written submissions dated 20<sup>th</sup> August 2018 in opposition to the petition. He associates himself with the submissions made on behalf of respondents. Counsel submits that the petition is an abuse of the court process and has not been brought to court in good faith or for a proper purpose. He argues that the issue of whether or not the petitioner committed a criminal offence is to be determined by the criminal court. He relies on *Eunice Kahluchi Miliima v DPP and 2 others* (2017) eKLR for the submission that the falsity or otherwise of allegations made in charge sheets is an issue to be determined by the criminal court seized of the matter and not for the High court.

32. Counsel also relies on section 23 of the Victims Protection Act for the submission that a victim has a right to restitution or compensation from the offender. According to counsel, interested parties are victims within the meaning of that Act which also allows criminal process to be used by the victim to attain restitution through punishing of the offenders. In his view, the criminal process assists victims recover their property from the offenders and therefore, the petition should not be allowed. He urges the court to dismiss it and allow the criminal case proceed to full trial.

### **Determination**

33. I have considered this petition; responses; submissions and the authorities relied on by parties. From all these, the core issue that arises for determination is whether this court should issue an interdict against the criminal prosecution mounted by the respondents against the petitioner in the Chief Magistrates' court, Kajiado in **criminal case No. 343 of 2018 Republic v Catherine Nyambura Muraria**.

34. The facts of this petition are not in dispute. Both the petitioner and the interested parties claim ownership over **Parcel No Kajiado/Kisaju/ 1177**. Each side contends that it purchased the land from the owner and has ownership documents.

35. Sometime in 2012, the petitioner asserts that the interested parties reported to the police that she was about to sell their land. The Police investigated the matter and according to the petitioner, she was cleared of any wrong doing. She argues that the police confirmed through correspondence that their investigations had not revealed any criminal conduct on her part and therefore the matter ended there. She states that the respondents have now turned around and lodged criminal proceedings against her over a matter that had been closed in 2016.

36. The petitioner views this as an abuse of the respondents' constitutional mandate; an abuse of the court process and that it is guided by improper purpose. According to her, the only reason why the respondents have instituted criminal proceedings against her is to aid the interested parties in the civil suit pending before the ELC between them over the same parcel of land.

37. The respondents, supported by the interested parties, argue that they are discharging their constitutional mandate; that investigations revealed fraudulent activities on the part of the petitioner and that the criminal case has not been instituted with malice or improper motive, but in the interest of justice. In their view, the petition, if allowed, will interfere with their mandate to detect crime and prosecute offenders. They further argue that the fact that there is a civil suit in the ELC is not a sufficient ground to suspend criminal proceedings given that the law allows concurrent civil and criminal proceedings.

38. The Constitution, (Article 157), grants the 1<sup>st</sup> respondent mandate to commence and continue criminal prosecutions. In discharging this mandate, he does not require consent or authority from any person or authority. His actions should however be in accord with Article 157(11), that is; he should ***"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."***

39. On the other hand, the 2<sup>nd</sup> respondent is an office established under Article 245(1) of the Constitution to command the National Police Service (NPS). The mandate of the NPS is stipulated under Article 244 and the National Police Service (NPS) Act. Section 24, of the NPS Act provides for the functions of the service, which include; investigating crime, maintenance of law and order and protection of life and property. The police are also under duty to apprehend offenders suspected of committing crimes. In performing their duties, they are required to abide by highest standards of human rights and professionalism. That is, the police must exercise their powers and discharge their functions in accordance with the Constitution and in particular the Bill of Rights.

40. The Police do not prosecute cases. After concluding investigations and establishing that a crime may have been committed giving reason for possible prosecution, they forward their findings to the 1<sup>st</sup> respondent who decides whether to prosecute or not. That is precisely what happened in this case. When the police forwarded their findings, it was the 1<sup>st</sup> respondent who decided to institute prosecution against the petitioner.

41. The petitioner's contention is twofold. First, that the police were wrong in starting fresh investigations when they had closed the file and given her a clean bill. Second, she argues that her prosecution is intended to assist the interested parties in the ELC case against her.
42. On the first argument, it is the petitioner's case that the police assured her that there was no crime disclosed and no action would be taken against her. She refers to various letters from the police to show that indeed the police had found nothing against her and closed the file a fact the respondents have not denied. She contends that she was surprised that investigations had been started afresh over the same matter without her knowledge.
43. There is no denial from the respondents and the interested parties that investigations had been conducted by the police and that those investigations brought out nothing against the petitioner and that file was closed. In fact the petitioner states that the interested parties reported the matter to the Land Control Board and police at Isinya when she was about to sell the property.
44. Of significance to the petitioner's case, are letters dated 11<sup>th</sup> July 2012 and 4<sup>th</sup> January 2016. Both letters refer to investigations on a complaint over the same parcel of land. In the former, the CID Kitengela confirms that investigations were carried out over the land; that the petitioner produced ownership documents and that the state counsel perused the file and advised that the petitioner was the lawful owner of the land and closed the file. The latter is also from CID Kitengela and states that they had been investigating forgery over the same parcel of land; that they forwarded their findings to the state counsel at Machakos, who advised that there was no case and directed that the file be closed. This was in 2016.
45. Despite all the depositions and averments, the respondents and interested parties have not denied that the police conducted investigations on allegations of over the same parcel of land and closed the file.
46. In the respondents' replying affidavit, Sgt Okello deposes that the interested parties lodged a complaint regarding the suit property at the DCI Headquarters; that they carried investigations and the 1<sup>st</sup> respondent authorised the petitioner's prosecution. It shows that the complaint was lodged by letter dated 6<sup>th</sup> November 2014. The respondents have not commented at all regarding the earlier investigations the petitioner had alluded to and the decision made by the 1<sup>st</sup> respondent's office not to prosecute her.
47. It is also clear from the documents attached to Sgt Okello's replying affidavit, that after investigations, the 1<sup>st</sup> respondent's office, authorised the petitioner's prosecution by letter dated 24<sup>th</sup> October 2017 signed by Nicholas K Mutuku a Deputy Director of Public Prosecutions. The letter makes reference to another letter of 18<sup>th</sup> July 2016 directing the police to prosecution of the petitioner. What is interesting is that Mr Mutuku's letter refers to **INQUIRY NO 2/2012 on LR NUMBER KAJIADO/ KISAJU/1177**. This was the same inquiry that had been investigated by the DCI Kitengela and was closed on the advice of the ODPP- Machakos through letter **Ref. DPP/MKS/CRM/11/2012(4) dated 10<sup>th</sup> July 2012**. This information is contained in the letter dated 4<sup>th</sup> July 2016 from DCI Kitengela. The letter from the ODPP Machakos is not attached and its author is unknown to the court.
48. Taking into account the above facts, was it possible that the same office recommended closure of the inquiry on 10<sup>th</sup> of July 2012 while in another letter written of 18<sup>th</sup> July 2016, a week later, the same office issued contradictory directions over the same subject inquiry? I think not.
49. The view I take, and which is clear from the record, is that the respondents were aware of the investigations by the DCI Kitengela since the letters from both DCI Kitengela and DCI Headquarters refer to the same inquiry but appear to convey different positions. Whereas the DCI Kitengela and ODPP- Machakos ordered closure the file on 10<sup>th</sup> July 2016, the DCI Headquarters recommended prosecution a week later as can be seen from a copy of the letter dated 18<sup>th</sup> July 2016. The letter on record is however incomplete as it does not the page containing the name of the author and signature. From that letter, it is not clear whether it was overturning the decision of the ODPP- Machakos to close the same inquiry. Neither is clear whether the author had power to review the decision made by the same office at Machakos.
50. The petitioner argues that she was not called upon to respond to any new allegations after the file had been closed. The respondents have state that she was summoned but did not attend. I have perused the replying affidavit by Sgt Okello but could not trace a document from him or any other officer summoning the petitioner for investigations. It is therefore not clear to the court how the decision to prosecute her may have been arrived at without hearing her side of the story. It is also not clear whether or not this was a new investigation given that the letters refer to the same inquiry.
51. The police could again investigate the allegations if they came across new evidence that they did not have at the time they closed the earlier investigations. However in doing so, they would be under an obligation to act in accordance with the Constitution and the law. They would have to give the petitioner an opportunity to respond to any new allegations before they decided to press on with the charges.
52. Section 52(4) of the NPS Act requires a police officer to record any statement made to him by a person he has summoned, whether that person is a suspect for the commission of the crime or not. Before recording the person's statement, the officer is required to warn that person of the fact that the statement he is recording may be used against him. The statement should be in writing and signed by the person, (subsection (5),
53. The petitioner argues that she was not given such opportunity and, therefore, the respondents violated her rights under Articles 47(1) and 50(1) of the Constitution. The respondents on their part contend that they gave the petitioner an opportunity but she decided to complain to the 1<sup>st</sup> respondent through correspondence.
54. The respondents have not attached such correspondence to show when she was summoned, if at all. They have not also explained why there is contradiction in the decisions arrived at after the investigations: one to close the inquiry file and the other to prefer charges against

the petitioner.

55. From the foregoing, it is clear to the court that either the respondents are not telling the truth or it is a case of one hand not knowing what the other hand is doing, which leads the court to conclude that the petitioner has a point regarding the propriety of the investigations leading to the decision to prefer charges against her.

56. There is no way the same office could handle the same matter and reach different conclusions at the same time. Having decided to close the inquiry, and communicated that decision to the petitioner, the same office could not decide a week later to prosecute her without giving an explanation for the change of the earlier position. The 1<sup>st</sup> respondent's decision was, to that extent, irrational and violated the petitioner's right to fair administrative action and be informed reasons why that action was being taken against her after investigations had been called off and the file closed.

57. Turning to second limb of the petitioner's argument, she contends that her prosecution is malicious; was mounted with improper motive and is intended to assist the interested parties in the civil case between her and them. The respondents and interested parties maintain that the petitioner's prosecution was neither instituted with malice, bad faith nor improper motive. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that they acted within their mandate as provided for under the Constitution and the law.

58. As already pointed out, the decision to prosecute is the mandate of the 1<sup>st</sup> respondent. Article 157(6) of the Constitution provides for the powers and functions of the 1<sup>st</sup> respondent, including prosecuting offences. These powers are reiterated in section 23 of the Office of the Director of Public Prosecutions Act, (ODPP Act) which provides, among others, that; "(1) ***it shall be the function of the Director to decide to prosecute or not to prosecute in relation to an offence.*** Article 157 (11) is clear that in the exercise of those powers, the 1<sup>st</sup> respondent "***should have regard to the public interest, interests of the administration of justice and the need to prevent and avoid abuse of the legal process.***"

59. The law is therefore clear that it is the duty of the 1<sup>st</sup> respondent to decide whether or not to undertake criminal prosecution. That decision would usually be based on the investigations conducted by police officers under the NPS Act. The question that arises is whether that decision was made in bad faith or with improper motive to assist the interested parties in the ELC case.

60. It is not in dispute that the petitioner and the interested parties are involved in litigation over the ownership of the same parcel of land. That matter is live in court and each side claims to own the land and has what they say are valid ownership documents. Both sides claim to have purchased the land from the owner and paid the purchase price. That is a matter to be decided by the ELC. It is on that basis that the petitioner argues that the criminal case is intended to give advantage to her adversaries.

61. The court will ordinarily be reluctant to interfere with the mandate of the 1<sup>st</sup> respondent to prosecute, except where it is shown that he is using his powers in an improper manner. That this the caveat placed by Article 157(11).

62. In *Republic v Attorney General & another exparte Hussein Mudobe* (High Court Misc. Application No. 898 of 2003, the Court observed that:

***"The constitutional court should not usurp the duties of the prosecutor or the jurisdiction of the trial court. The power of the court to halt criminal proceedings involves a delicate balance of the power of the state to prosecute and the right of the individual to liberty and freedom from malafide and oppressive prosecution."***

63. The Court of Appeal reiterated the same position regarding the powers of the Attorney General under the repealed Constitution, in *Meixner & Another vs. Attorney General* [2005] 2 KLR 189, thus;

***"The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution."***

64. The rights and fundamental freedoms referred to in the above decision must include the right to fair hearing enshrined in Article 50(1) to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or another independent and impartial tribunal or body. In that regard, the decisions referred to above, are clear that the court will interfere with the 1<sup>st</sup> respondent's discretion if it is shown that the impugned prosecution is intended to achieve a collateral purpose rather than the course of justice and will not result into a fair hearing.

65. The petitioner has argued that the decision to charge and prosecute her is meant to bring pressure to bear on her in order to force a certain outcome in the ELC suit. To back this up, it has been submitted that investigations and the subsequent decision to charge her were shrouded in secrecy so that it could catch her unaware. The respondents and interested parties have denied, though that this is the case.

66. The core issue here is about the land claimed by both the petitioner and the interested parties. It is a dispute that has had its way to Court in ELC No.641 of 2017. That suit is live in Court, and was instituted by the interested parties. The petitioner is one of the defendants in that suit. The others are; the Land Registrar Kajiado, Susan Wanjiru Mbugua and the Attorney General. It is also a fact that whereas the ELC case was initiated by the interested parties in 2017, the criminal proceedings were initiated in 2018 during the pendency of that suit.

67. So was the criminal prosecution intended to achieve criminal justice or some other purpose? According to the petitioner, which is

supported by the record, investigations were conducted between 2012 and 2016. There are on record correspondences from officers of both the respondents to that effect. Some of the correspondences confirm that 1<sup>st</sup> respondent's office advised that investigations be closed and that the petitioner was at liberty to deal with the property as she wished. It was after that decision that the interested parties instituted the civil suit in 2017 against the petitioner and other persons who are not a party to this petition. The correspondences relied on by the respondents though referring to the same investigations, advised otherwise as already explained in this judgment.

68. As already pointed out, where the 1<sup>st</sup> respondent is not conducting prosecutions in accordance with his constitutional mandate and it is shown that the prosecution is for an improper purpose the court will intervene. See *Fredrick Okeyo Otieno v Director of Public Prosecutions & 4 others* [2017] eKLR. Similarly, in *Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another* [2015] eKLR, the Court observed that if the applicant demonstrates that the criminal proceedings constitute an abuse of process, the Court will not hesitate in putting a halt to them.

69. The respondents have not explained why the criminal proceedings have been instituted after the interested parties filed a civil suit in the ELC over the ownership of the same property against the same person who is the defendant in the suit. The respondents have argued that the law allows concurrent civil and criminal proceedings and existence of the civil suit should not be a basis for halting the criminal case. They rely on section 193(A) of the Criminal Procedure Code to advance their argument.

70. Section 193(A) provides 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 be a ground for any stay, prohibition or delay of the criminal proceedings.”***

71. It is correct to say that section 193(A) permits concurrent criminal and civil proceedings and the court should not halt criminal proceedings merely because there are civil proceedings arising from the same facts. However, where circumstances show that the desire to mount prosecution is motivated by extraneous matters, the court will stop criminal proceedings section 193(A) notwithstanding.

72. In other words, the court must bear in mind the circumstances of each case in making a decision on whether or not to terminate criminal proceedings. In my view, it is not the mere fact of there being concurrent criminal and civil proceedings. Rather it is the purpose for which the criminal proceedings have been commenced that the court should interrogate. The purpose should be attainment of criminal justice and nothing else. If its initiation is for an improper purpose, the court will intervene.

73. It was in that regard that the court observed in *Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another* (supra) that:

***“[T]he concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.”***

72. It will be considered an abuse of the Court process to mount a criminal prosecution for extraneous purposes such as to secure settlement of a civil debt or to settle personal differences. In that respect, it will not matter whether or not the complainant has a prima facie case. In deciding whether to commence or pursue criminal prosecution the 1<sup>st</sup> respondent must consider the interests of the public and ask himself whether the prosecution will enhance public confidence or whether the case can be easily resolved by civil process without putting an individual's liberty at risk. (*See R v Attorney General Ex parte Kipngeno Arap Ngeny* High Court Civil Application No. 406 of 2001)

73. In the present case, the 1<sup>st</sup> respondent does not seem to have taken into account the possibility that the dispute being over ownership of land, it could easily be resolved through the civil process, given that the interested parties had already filed a suit against the petitioner over the ownership of the same parcel of land. To a keen observer, the criminal process may not have been geared towards achieving the cause of justice when all the circumstances of this case are taken into account, including the fact that the decision to prosecute was shrouded in mystery and secrecy.

74. Where it is clear to the court that institution of the criminal process is guided by extraneous matters divorced from the goals of justice, it has a duty to prohibit the continuation of the criminal prosecution to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to the cause of justice, public interest and fair play. (*Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69*).

75. I have carefully considered this matter and perused the record. There is no doubt that even though the respondents and the interested parties have denied it, the criminal proceedings were not initiated against the petitioner in good faith. Whereas at one point the 1<sup>st</sup> respondent's office advised on closure of the investigations, it sanctioned the petitioner's prosecution a week later without offering any explanation at all. There is also no evidence that the petitioner was called upon to say something before her prosecution. Criminal proceedings against her were instituted in 2018 after investigations had been closed. If on the other hand it is the respondents' case that recommendation for the petitioner's prosecution was made in 2016, no explanation has been given why she was not charged between then and 2017 when the interested parties file the civil suit.

76. I reiterate, at the risk of repeating myself, that the Constitution and the law require the 1<sup>st</sup> respondent in exercising his mandate, to have regard to the public interest, interests of the administration of justice and the need to prevent and avoid abuse of the legal process. It is difficult to say that the 1<sup>st</sup> respondent observed this constitutional principle in making the decision to initiate criminal proceedings against the petitioner, bearing in mind the facts of this case.

77. I must also point out that at the heart of the civil suit, before the ELC, is the question of ownership of the same land and whether there was fraud or not. The ELC will definitely determine that issue . Some of the people sued in that case may be potential witnesses in the criminal case if it was allowed to proceed. That, in my view, would make the whole process jumbled up. It will also be prejudicial to the petitioner as she defends herself both in the criminal case and the civil suit.

78. The taking into account the circumstances of this case and that evidence on record, the submission that the second round of investigations was conducted secretly and never accorded the petitioner an opportunity to state her position, and further still that the criminal case was instituted after the civil case had been filed against the petitioner, there can be only one conclusion: That the criminal proceedings were intended to bring pressure to bear upon the petitioner to settle the civil suit. That is; it was intended for a purpose other than upholding criminal justice.

79. For the above reasons, I am satisfied that the petitioner has proved his case to the required standard. Consequently the petition is allowed as follows:

***a) A declaration is hereby issued that the initiation, maintenance and prosecution of the petitioner in Kajiado Chief Magistrates court criminal case No. 343 f 2018, Republic versus Catherine Nyambura Muraria is an abuse of the criminal justice system and a violation of the petitioner's right to fair administrative action and fair hearing and fair administrative action guaranteed under Articles 47(1) and 50(1) of the Constitution.***

***b) An order of certiorari is hereby issued quashing the charge and criminal proceedings against the petitioner in criminal case number 343 of 2018, Republic versus Catherine Nyambura Muraria pending before the Chief Magistrate's court in Kajiado.***

***c) Costs of the petition be borne by the respondents.***

Dated Signed and Delivered at Kajiado this 3<sup>rd</sup> Day of October 2019.

**E C MWITA**

**JUDGE**