



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

PETITION NO. 23 OF 2018

IN THE MATTER OF CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 1,2,10,22,23,24,28,29,50,

157(11) AND 236 OF CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE LEGALITY AND PROPRIETARY OF CHARGES

AGAINST PETER NG'ANG'A MBURU, CAROLINE NABALAYO KITUYI

AND GLADYS MWIKALI MUNYANGA VIA ACC. NO.33 OF 2018,

CHIEF MAGISTRATE'S COURT AT MILIMANI

BETWEEN

PETER NG'ANG'A MBURU.....1STPETITIONER

CAROLINE NABALAYO KITUYI.....2NDPETITIONER

GLADYS MWIKALI MUNYANGA.....3RDPETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION

COMMISSION.....INTERESTED PARTY/APPLICANT

JUDGMENT

1. The Petitioners here in Peter Nganga Mburu, Caroline Nabalayo Kituyi and Gladys Mwikali Muiyanga are advocates of the High Court of Kenya employed as Registrars at the Ministry of Lands and Physical planning. They filed this Petition dated 17th September 2018 seeking the following orders:-

a) *A declaration that the Petitioners cannot be held personally liable for lawful acts discharged in their capacity as Registrars in*

respect of actions and decisions made in good faith in their course of employment.

b) *A declaration that the Petitioners acted in good faith in their registration of properties being L.R No's 9084,9085,9086,9087 and 9088 forming the subject of the charge in Milimani Anti-Corruption Case No. 33 of 2018, Republic v Professor Abdalla Swazuri Mohammed & 16 Others and that they are not liable to criminal prosecution or any other form of victimization.*

c) *A declaration that the initiation , maintenance and prosecution of the Petitioners in Milimani Anti-Corruption Case No. 33 of 2018 , Republic v Professor Abdalla Swazuri Mohammed & 16 Others contravenes article 157"(11) of the Constitution and read with Articles 27,47,50 and 236 of the Constitution and section 14 of the Land Registration Act.*

d) *A judicial review order of certiorari quashing Milimani Anti-Corruption Case No. 33 of 2018, Republic v Professor Abdalla Swazuri Mohammed & 16 Others.*

e) *In the alternative to (d) above, a judicial review order of certiorari quashing the charges against the Petitioners in Milimani Anti- Corruption Case No. 33 of 2018, Republic v Professor Abdalla Swazuri Mohammed & 16 Others.*

f) *An order of compensation for violation of each of the above rights more so for subjecting the Petitioners to unfair trial and for affront on their dignity and security of person courtesy of the Respondent's unconstitutional decision and actions*

g) *That the costs of this Petition be borne by the Respondents.*

h) *Any other/further relief that this Honourable Court may deem fit to grant.*

2 The above Petition was supported by the supporting affidavit of the 1st Petitioner herein **Peter Ng'ang'a Mburu** having authority (PMN-1) of the 2nd and 3rd Petitioners averring that presently, they hold the position of Principle Land Registration Officers who are subordinates to the Chief Land Registrar. That their main functions are registration of titles and registration of transactions affecting land and issuance of searches; thus they occupy the tail end of the land tilting processes and are not the ones responsible for assigning or allocating land rights.

3 Consequently, sometime in 2016, they were presented with applications for registration of titles in respect of various properties, to wit, L.R No. 9084,9088,9087,9085 and 9086 on various dates. The said applications were presented vide correspondence files (PNM 3,4,5 6 and 7) which contained: -

a) The letters of Allotment and acceptance letter in respect of each of the properties.

b) The Payment Receipts (For Rent, Allocation fees and Stamp Duty); and

c) Correspondences and comments between /amongst various officers and the allottees.

4 He deponed that the leases (PNM-8) in the subject properties were prepared by officers besides themselves. He explained all the steps followed before a lease is created. He further averred that in this case, the Senior Plans & Record Office (SPRO) gave a confirmation to the effect that all the subject properties were not public utilities(PNM10). There was therefore no basis for continuing with registration and issuance of titles.

5 He was later summoned by the Ethics & Anti-Corruption Commission to record a statement (PNM-11) on 3rd August 2018. It's there that he learnt that the subject properties had been compulsorily acquired by Kenya Railways Corporation through the National Lands Commission. The 2nd Petitioner on her part had attended the Law Society of Kenya Annual conference when she was arrested and dragged to Nairobi. The 3rd Petitioner was arrested at her house in Nairobi and detained at the EACC offices from 11th to 13th August 2018.

6 On 13th August 2018, they were charged (PNM-12) alongside 14 other persons via **Milimani Anti-Corruption Case No. 33 of 2018, Republic v Professor Abdalla Swazuri Mohammed & 16 Others**. They face charges of Conspiracy to Commit an offence of corruption Contrary to Section 47A(3) whose particulars are that: *Between the 1st July 1999 and 30th June 2018, within Nairobi City County in the Republic of Kenya jointly with others not before Court conspired to commit an offence of corruption, namely fraud, thereby causing a loss of public funds belonging to Kenya Railways Corporation in the sum of Kenya Shillings 221,375,000/= for compensation for acquisition of L.R Nos 9084, 9085,9086,9087 and 9088 being public land.'*

7 Despite the fact that they were employed in April 2006, 7 years after it was alleged that the offense was conceived they were still charged and count XIX reads as follows:

the Petitioners and 4 Others 'Between January 2009 and December 2016 within Nairobi City County, being private surveyor and persons employed in the public service as government surveyors and Land Registrars, unlawfully disposed off public property namely L.R No. 9084,9085,9086,9087 and 9088 belonging to Kenya Railways Corporation.

8 They are also charged with an alternative count of 'Neglect of official duty by a public officer contrary to section 128 of the penal code with particulars of each count in the following terms:

CAROLINE NABALAYO KITUYI

On or about 16th September, 2015 at the Ministry of Lands offices, Ardhi House, within Nairobi City County being a person employed in the public service as a Land Registrar and being concerned with registration of titles for LR 9087, willfully neglected to do due diligence in the registration of title thereby causing loss of public fund amounting to Kshs. 43,815,500/=

PETER NGANGA MBURU

On or about 16th September, 2013 at the Ministry of Lands offices, Ardhi House, within Nairobi City County, being a person employed in the public service as Land Registrar and being concerned with registration of titles for LR 9084 and 9088, willfully neglected to do due diligence in the registration of titles, thereby causing loss of public fund amounting to Kshs. 89,930,000/=

GLADYS MWIKALI MUYANGA

On or about 16th September, 2015 at the Ministry of Lands offices, Ardhi House, within Nairobi City County, being a person employed in the public service as Land Registrar concerned with registration of titles for LR 9085 and 9086, willfully neglected to do due diligence in the registration of titles, thereby causing loss of public fund amounting to Kshs, 47,630,000/=

9 Afterwards, they learnt that the titles to the properties they had registered had been allegedly revoked by the Review of the Grants and Disposition Committee of the National Land Commission on or about 25th July 2015. He averred that there was no correspondence whatsoever in the files indicating that there was any cancellation of title. Upon being charged they were suspended with half salary pursuant to the provisions of section 62 of the ACECA.

10 It was thus his case that the decision and act of the Respondent of initiating charges against them in **Milimani Anti-Corruption Case No. 33 of 2018 Republic VS Professor Abdalla Swazuri Mohammed & 16 Others** did not 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. This he averred was contrary to article 157(11) read with articles 27,47,50 and 236 of the Constitution as read with section 14 of the Land Registration Act.

11 He deponed further that the decision to single them out when in fact there are several other officers of the National Land Commission and Ministry of land substantively responsible for allocation of land, and other key duties amounts to affording adverse different treatment to persons in materially similar circumstances and is a violation of Article 27 of the Constitution.

12 Finally he deponed that the discretion to charge them was not exercised judiciously as it is capricious, unconstitutional, unfair, unlawful and that the impugned trial is unfair and they need not go through it.

RESPONDENTS CASE

13 The Petition was opposed by the Respondent through its replying affidavit dated 25th September 2018 and sworn by Lilian Ogwara in her capacity as a Senior Principal Prosecution Counsel at the office of the DPP. She averred that the EACC commenced investigations into the matter Anti-Corruption Case No. 33 of 2018 (*supra*) following receipt of information about fraudulent acquisition and compensation of public land that lies on the railway reserve.

14 The compensation amounted to Kshs. 221,375,000/= which was paid and titles irregularly issued by the Petitioners to owners of LR 9084,9085,9086,9087, 9088 and to Olomotit Estates Limited and Dasahe Investment Limited which were not in existence at the time of allotment of the said pieces of land.

15 Upon completing their investigations the EACC they forwarded their file together with the report under section 35 of the Anti-Corruption and Economic Crimes Act (ACECA) to the Respondent recommending that the suspects be charged with various offences. The Respondent on its part in exercise of its powers under Article 157 of the Constitution agreed with EACC's recommendations and directed that the suspects be charged as recommended. This was done.

16 She further averred that in making the decision to prefer criminal charges against the Petitioners herein among others, the Respondent considered the sufficiency of the evidence gathered, culpability of all the accused persons and the relevant laws among other considerations. That under Article 157 of the Constitution, the Respondent has the mandate to decide which offence and law to charge a suspect.

17 She averred that all the matters of fact and evidence deponed to in the Petition and supporting affidavit of the Petitioner are matters of evidence for consideration by the trial court during the full trial and on the basis of which the guilt or otherwise of the Petitioners shall be determined by the court.

18 She further contended that the prosecution of the Petitioners does not in any way violate any of their constitutional and fundamental rights and freedoms as alleged or at all in order to warrant the granting of the orders sought including compensation. That under Article 157(6) of the Constitution of Kenya 2010, the DPP exercises State powers of prosecution and in that capacity, may institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed.

19 She added that under Article 157(10) of the Constitution of Kenya, as replicated in section 6 of the Office of the Director of Public Prosecutions Act, 2013, the Director of Public Prosecutions does not require the consent of any person or authority for the commencement of criminal proceedings. Further that the DPP does not act under the direction or control of any person or authority. It was therefore her case that the criminal case proceeds to its logical conclusion.

INTERESTED PARTY'S RESPONSE

20 The Interested party also opposed the Petition through a replying affidavit sworn by Joel Alfred Mwendwa an investigator with the EACC. He averred that he received a complaint to the effect the officials of the National Land Commission (NLC) and the Kenya Railways Corporation (KRC) in complete disregard of the law; deliberately engaged in a fraudulent compulsory acquisition scheme for the Standard Gauge Railway (SGR) whereby they compensated persons who did have a lawful proprietary interest in the following parcels of land situated in Embakasi Nairobi County:

i. LR No. 9084- unlawfully allocated to Editor Irima Mugo

ii. LR. No. 9085 unlawfully allocated to Estama Investment Ltd

iii. LR No. 9086 –unlawfully allocated Olomotit Estate Ltd

iv. LR. No 9087 -unlawfully allocated to Dasahe Investment Ltd

v. LR. No 9088 -unlawfully allocated to John Kiprono Chepkwon and Ambrose Kipsoi Kandie

21 He averred that Article 252 of the Constitution and Section 11(d) of the Ethics and Anti-Corruption Commission Act, 2011 (EACC Act), mandates EACC to investigate corruption, economic crimes and related offences. Pursuant to the said mandate, EACC carried out investigations into the said allegations and made findings.

22 Mr. Mwendwa has in his affidavit given a detailed account of the findings by the EACC. These are all contained in EACC 1-14. He has cited instances of manipulation of the PDP. For purposes of this Petition, I will not delve into the details of this affidavit as it is real evidence in the criminal matter.

23 He deponed that investigations established that by granting authority to process compensation; the Chairman, NLC was usurping the role of the CEO of the NLC as this was not a function of the Chairman, NLC. Consequently, on 19th December, 2016, payments were made to bank accounts of the owners of LR. No. 9085, LR. No. 9086, LR. No 9087 and, LR. No 9088, after which a letter from the Chairman, NLC to the MD-KRC was delivered. According to the interested party, this marked the completion of the fraudulent scheme to defraud the tax payer a colossal sum in a dubious compensation process.

24 In response to the averment by the Petitioners that they cannot be held personally liable for acts done in discharge of their duties in their capacity as registrars, he responded as follows;

a) That constitutional Petitions do not deal with the innocence or otherwise of the Petitioners.

b) That only a trial court can competently make a finding whether or not a criminal offence was committed after hearing the evidence.

25 In response to the prayer in the Petition seeking *inter alia* to quash the ongoing Criminal proceedings in **ACC No. 33 of 2018: Republic vs= Mohammed Abdalla Swazuri & Others** touching on compensation for the illegal ownership of the parcels in issue, he stated that the interested party has the legal mandate to investigate this case, That devoid of evidence of malice, illegality, procedural impropriety, unreasonableness on the part of the commission; the conservatory orders sought cannot issue. He further deponed that the land involved is public property with a lot of public interest.

26 He averred that the contested matters of fact are issues for determination by the criminal court and do not constitute grounds for preventing criminal trials of the Petitioners. If anything the Petitioner would have an opportunity before the trial court to state their case. Further that the conservatory orders sought were not in public interest.

27 The 1st Petitioner in his further affidavit dated 2nd October 2018; denied ever seeing the determination of the National Land Commission as the same was not availed to him at the issuance of title and that the certificate of incorporation was not part of the application for issuance of title. In his supplementary affidavit dated 29th October 2018 he averred that the Petitioners are not employees of the National Land Commission. That issuance of title does not normally come after verification of deed plans and that the process of compulsory acquisition is different from the process of land titling; hence, it was not necessary that for titles to be issued compensation had to be undertaken.

THE PETITIONERS' SUBMISSIONS

28 Mr. Okubasu for the Petitioners' submitted that his clients are advocates of the High Court and Registrar's of title attached at the Ministry of Lands with their principle functions being registration of titles and issuance of searches. That they are public officers and were presented with applications for registration of titles in respect of the parcels of land in issue.

29 Counsel further submitted that the Petitioners received the lease and the application for registration, without any determination from the National Land Commission. They were therefore not even privy to the correspondence between the different land officers since the issuance of lease and titles started as early as 2009 and was completed when the titles were issued.

30 On the legal basis of the Petition counsel submitted that a series of decisions from our courts affirm that though the DPP has an unqualified right to institute or halt criminal proceedings, this court cannot hesitate to bring them at an abrupt end, if it constitutes an unfair trial. He relied on the case of **George Joshua Okungu & Another v The Chief Mahistrate's Court ACC Nairobi & Another [2014]Eklr where Odunga J held:-**

...where therefore the prosecution has been commenced or is being conducted in an arbitrary discriminatory and selective manner which cannot be justified that conduct would amount to an abuse of the legal process’

31 On why the Petition should succeed counsel submitted that there was discrimination as other numerous persons participated in the process in one way or another and were not part of the impugned proceedings. He relied on the case of **Ronald Leposo Musegi v Director of Public Prosecutions & 3 Others [2015] Eklr** where Odunga J issued a prohibition order, prohibiting the Respondent from continuing with the prosecution of the Applicant and held:-

“The decision is discriminative and selective and cannot be justified under the Constitution and relevant law. Secondly, the decision flies in the face of the provision of section 4 of the Office of the Director of Public Prosecution Act.”

32 Counsel further submitted and relied on Wednesbury reasonableness which is a common law principle that has been used by courts to review ultra vires decisions of public institutions. He relied on the case of **Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9** wherein he held that a decision should not be :-

‘ So, outrageous in its defiance of logic or accepted moral standards that no sensible person which had applied his mind to the question to be decided could have arrived at it.’

33 Finally he submitted that the Petitioners are not asking this court to evaluate evidence but that there are questions about the legality and propriety of the charges which only this court can address.

RESPONDENT’S SUBMISSIONS

34 M/s Wangia for the Respondent’s submitted by first outlining the following issues for determination:-

i) Whether in exercise of the powers conferred upon the Respondent herein under Article 157 of the Constitution, criminal proceedings can be initiated against a Land Registrar;

ii) Whether Petitioners are immune to criminal prosecution over acts committed in the course of duty;

iii) What amounts to good faith?

35 On the constitutional and statutory mandate of the DPP Counsel submitted that the Director of Public Prosecution (DPP) exercises state powers of prosecution that are constitutionally reposed in his office. The legislature through the Office of Director of Public Prosecutions Act No. 2 of 2013 replicates the powers and functions of the DPP state powers of prosecution and as provided for under article 157(6) of the Constitution of Kenya.-

36 It was thus Counsel’s submission that this Article clearly leaves no doubt as to the DPP’s power to institute proceedings against the Petitioners. Furthermore, Counsel submitted that the Office has published a National Prosecution Policy that provides guidelines on the test to be applied before a decision to prosecute is taken. That Key among the considerations is whether the evidence placed before him discloses a prosecutable case and whether it is in the public interest to commence a prosecution.

37 Counsel submitted that in the case of the Petitioners, and by virtue of the office they hold, public expectation is that they will at all times uphold the highest standards of professionalism and ensure that in all their dealings the spirit of **Chapter 6** of the Constitution prevails. Hence, the decision to charge the Petitioners was not actuated by malice, ill will or spite on the part of the DPP. Having so acted, the DPP cannot be faulted in the absence of concrete evidence to establish *mala fides* on his part.

38 Counsel contended that the decision to institute criminal proceedings by the DPP was discretionary and that discretion should not be unnecessarily fettered by the courts or any other authority except where it can be proved with concrete evidence that the DPP’s action is irrational, unreasonable, disproportionate, borne out of irrelevant considerations, actuated by spite, malice and ill will. Counsel relied on:-

1. Section 5 of the Office of the Director of Public Prosecutions Act which provides that pursuant to Article 157 of the Constitution, the Director shall exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.

39 She submitted that the Office of the Director of Public Prosecution (ODPP) is an independent institution established under the Constitution and the court can only interfere with or interrogate its actions where there is contravention of the Constitution, any statute, the rules of natural justice and or a breach of fundamental rights of any subject. Allegations of any of these should be proven by the Petitioner before the court can consider granting any orders. She cited the cases of **Paul Ng’ang’a Nyaga v Attorney General & 3 others (2013) eKLR** and **Francis Anyango Juma v The DPP & Anor Petition No. 160 of 2012** to buttress this submission.

40 On whether this court may usurp the DPP’S mandate by substituting its own assessment of evidence, counsel relied on the cases of:-

i) Kenya Commercial Bank Limited & 2 others V Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) EKLR,

ii) George Joshua Okungu and Another v Chief Magistrate Court Anti-Corruption Court at Nairobi and Another (2014)

41 He referred to the case of **Republic v Royal Media Service JR Case Number 221 of 2013** where the Court cited with approval the case of **Francis Anyango Juma v Director of Public Prosecutions and Another, Petition No 160 of 2012** where the court held that:

“Clearly, the intention under the Constitution was to enable the Director of Public Prosecution to carry out his constitutional mandate without interference from any party. This Court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s right under the Constitution or violation of the Constitution itself.”

42 Counsel thus submitted that the court’s power to prohibit prosecution should be exercised sparingly and in the clearest of cases. He relied on **Mohit v The Director of Public Prosecutions of Mauritius (Mauritius) [2006] UKPC 20** where the Privy Council cited with approval the decision of the Supreme Court of Fiji in **Matatulu v DPP [2003] 4LRC 712** which held:-

“Contentions that the power (of the DPP) has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the consideration, to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.”

43 He submitted that the DPP made his decision based on the evidence that was placed before him. Counsel relied on **the Court of Appeal’s decision in Diamond Hasham Lalji & Another v Attorney General and 4 others (2018) eKLR** cited with approval the case of **William v Spautz [1993] 2 LRC 659** in which the court distinguished the duty of the court to prevent a prosecution which will result in an abuse of process at p.667 c – e the court observed:

“If a permanent stay is sought to prevent the accused from being subjected to unfair trial, it is only natural that the court should refrain from granting a stay unless it is satisfied that unfair trial will ensue unless the prosecution is stayed. In other words, the court must be satisfied that there are no other available means, such as directions to be given by the trial judge of bringing about a fair trial...., If, however, a stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay for the court to satisfy itself in such a case that an unfair trial will ensue unless the prosecution is stopped.”

44 Referring to Article 50, CPC, & Evidence Act, he submitted that there are sufficient safe guards to ensure that parties are accorded a fair trial. He cited the case of **Sussex Justices, Ex parte Mc Carthy [1924] 1KB 256, [1923]ALL ER Rep 233)**

45 On protection of land registrars from personal liability counsel referred section 14(5) of the Land Registration Act, and submitted that protection of a Registrar is only to the extent that they shall not be held personally liable for lawful acts discharged in good faith. However, it was counsel’s submission that the Petitioners acted unlawfully and their actions were not in good faith and they cannot claim protection of the Law.

46 Furthermore counsel submitted that the question of whether the actions of the Petitioners were in good faith or not can only be best determined by the trial court. Counsel relied on **Erick Kibiwott Tarus v Director of Public Prosecutions & 7 others [2014] eKLR**

47 On what amounts to good faith counsel cited Rand, J in Supreme Court of Canada case in **Roncarelli vs. Duplessis [1959] SCR 141** where it was stated;

“means carrying out the statute according to its intents and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.”

48 He therefore submitted that the issue of good faith can only be used by the Petitioners as a defence in the trial Court and not as a ground for application for a judicial review order of certiorari quashing the charges against them in the trial Court. That the trial Court is best placed to determine whether the Petitioners are personally liable for their actions.

INTERESTED PARTY’S SUBMISSIONS

49 The interested party submitted on the following issues:-

- i) **Whether the Petitioners can be held personally liable for acts committed in discharge of their duties?**
- ii) **Whether the Petitioners should be granted the prerogative orders as sought by this Honourable Court?**
- iii) **Public Interest**

Whether the petitioners can be held personally liable for acts committed in discharge of their duties.

50 On prayer number 1 (c) of the Petition, counsel stated that the Petitioners seek a declaration that the initiation, maintenance and

prosecution of the Petitioners **ACC No. 33 of 2018, (supra)** contravenes Article 157 (11) of the Constitution as read with articles 27, 47, 50 and 236 of the Constitution and Section 14 of the Land Registration Act. She contended that the protection anticipated under Section 14 of the Land Registration Act is not automatic and is only merited if the Petitioners discharged their duty in good faith.

51 It was her submission that the Petitioner's acted in bad faith and unlawfully since despite having access to all documents relevant in the process of land acquisition they deliberately chose not to detect the fraud.

52 She relied on the case of **Jonathan Namulala Nyongesa v Multi Business Shooters Investors Ltd & 3 others [2017] eKLR**, where S. Mukunya, J held as follows:

"I also make a finding that the charge registered in the Land office was irregular. There was no Land Control Consent for the same. The title deed used to back it was a forgery. The stamp duty was not paid. These are some of the requirements the Land Registrar should have easily picked out. He had all the means at his disposal to do so. He did not do so. This was not only negligence; it was also because he was part of the fraudulent scheme." [Emphasis added]

53 Counsel further submitted that this court not being a trial court cannot deal with the issue of good faith. She relied on the observations by Justice Emukule in the case of Nbi. HC. Misc. Appl. No. 1413 of 2005; **Neptune Credit Management Ltd & another v Chief Magistrate's Court & 2 others** (supra). He observed as follows:

"In my very humble opinion, many applicants including these applicants rush to this Court for orders to stop the law enforcement agencies and other Constitutional offices, like the Attorney-General, charged with statutory duties from carrying out their legitimate duties. This does not mean that the CID and other agencies are always right but where they are found not to be right or not to accord with the law, the rights of the persons affected are always vindicated by either acquittals or where appropriate the tendering of Nolle Prosequi(S). At the tail end of such process, the persons affected retain the right to vindicate their rights through a constitutional reference under S. 84(1) of the Constitution....." [Emphasis]

It is her submission that the Petitioners acted in bad faith and they cannot seek protection of the law citing contravention of Article 157 (11) of the Constitution as read with Articles 27, 47, 50 and 236 of the Constitution and Section 14 of the Land Registration Act.

54 She submitted that the Petitioners were not deserving of the conservatory orders sought because of their actions. She referred to the case of **Republic v Attorney General & 4 Others Ex-Parte Kenneth Kariuki Githii[2014]Eklr**. She added that the DPP's decision could only be interfered with if there was malice, bad faith and abuse of process.

55 It was thus counsel's submission that the absence of evidence to demonstrate violation of the Constitution, abuse of the process, malice or ill motive, the decision of the Commission to investigate and that of the DPP to prosecute should not be amendable to judicial review. This was the position as held in **KSM CA No.1 of 2013; DPP vs Crossly Holdings and 2 others**.

".....absent of dishonesty, bad faith or some exceptional circumstances, the decision of the Commission and the AG to investigate, recommend for prosecution, arrest, charge and prosecute respectively should not be amendable to judicial review in court.." (Emphasis ours).

56 It was counsel's submission that it is in the public interest that criminal cases, particularly those touching on misuse of public funds and/or unethical conduct be prosecuted expeditiously. She relied on the case of **Wilfred Karuga Koinange vs Commission of Inquiry into Goldenberg Commission** (Misc. Appl. 372 of 2006) 2006 eKLR, where the Court recognized that it is in the public interest for criminal cases to be expeditiously dealt without unnecessary judicial interventions.

57 She referred to the case of **Republic v Attorney General & another Ex parte Vaya & another** (2004) KLR where Justice Ojwang (as he then was) stated:

"One critical custodian of this public policy is the Attorney General in his prosecutorial role now the DPP; and in a matter such as the one in hand, this Court ought not hold that no prosecutions may be brought against persons suspected of committing offences touching on rational resource use. Accordingly, I hold that there is no public policy to limit the competence of the Attorney General to prosecute persons in the position of the applicants."

58 She finally submitted that it is in the public interest that corruption scandals are thoroughly investigated, the perpetrators prosecuted and punished and assets recovered. Counsel relied on the case of **Kuria & 3 others versus Attorney General (supra) 69**, the court held;

"the effect of a criminal prosecution of an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time, there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-a-vis the available evidence." (Emphasis ours).

DETERMINATION

59 After considering the above Petition, all affidavits, all the replying affidavits by all the submissions and cited cases the issues which

present themselves for determination are:-

- i) Whether in exercise of the powers conferred upon the Respondent herein under Article 157 of the Constitution, criminal proceedings can be initiated against a Land Registrar;**
- ii) Whether Petitioners are immune to criminal prosecution over acts committed in the course of duty;**
- iii) Whether the Petitioners rights and fundamental freedoms under article 28, 29 and 50 of the constitution have been violated.**

Issue (i) Whether in exercise of the powers conferred upon the Respondent herein under Article 157 of the Constitution, criminal proceedings can be initiated against a Land Registrar;

60 The Constitution provides under at **Article 157 (6) (a) & (c) of the Constitution** that:

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) *Institute and undertake criminal proceedings **against any person before any court** (other than a court martial) in respect of any offence alleged to have been committed;*

(c) *Subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*

61 The DPP in directing that investigations be undertaken is not subject to the direction and control of any person, body and authority. If it is however shown that the decision made is against the tenets of the Constitution and has been made in bad faith, the same may be reviewed.

In **Paul Ng'ang'a Nyaga v Attorney General & 3 others (2013) eKLR**, it was held that:

“This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution”.

62 In **Francis Anyango Juma v The Director of Public Prosecutions and another** the Court observed that:

“Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under the Constitution, or violation of the Constitution itself.”

63 Further Majanja J in the case of **Kenya Commercial Bank Limited & 2 others V Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) EKLR**, held:-

“The office of the Director of Public Prosecution and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the constitution”.

64 Similar sentiments were also expressed in the case of **George Joshua Okungu and Another v Chief Magistrate Court Anti-Corruption Court at Nairobi and Another (2014) eKLR** which summarized some of the considerations that will not form the basis for the court to interfere with the DPP’s Constitutional mandate thus:-

“The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defense is always open to the Petitioner in those proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the 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 Petitioner 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 recognized aim”.

65 From the above case law, the court’s power to prohibit prosecution should be exercised sparingly and in the clearest of cases. Prosecutorial decisions should be left to the domain of the DPP who is constitutionally mandated to determine the basis of evidence and public interest on who should be charged.

66 The Court on the other hand must remain the neutral arbiter and restrain itself from making orders that would amount to an unnecessary fetter on the DPP in the discharge of his Constitutional mandate. Hence, in my humble view, the Petitioners’ were to establish that the DPP

acted ultra vires and irrationally for the court to entertain the petition.

67 The Interested Party carried out investigations and Joel Alfred Mwendwa in his replying affidavit gave a detailed step by step exposition of the kind of investigation that was done. The DPP was satisfied upon studying the report that an offence was committed. He directed that the Petitioners among others be charged. The Petitioners have not adduced any evidence to show that the DPP's decision was arbitrary, ultra vires, unfair or irrational. On discrimination it's the trial court after hearing the full evidence that can ask why certain persons were not charged. They may be prosecution witnesses.

68 The Court of Appeal in **Diamond Hasham Lalji & Another v Attorney General and 4 others (2018) eKLR** cited with approval the case of **William v Spautz [1993] 2 LRC 659** in which the court distinguished the duty of the court to prevent a prosecution which will result in an abuse of process at p.667 c – e the court observed:

“If a permanent stay is sought to prevent the accused from being subjected to unfair trial, it is only natural that the court should refrain from granting a stay unless it is satisfied that unfair trial will ensue unless the prosecution is stayed. In other words, the court must be satisfied that there are no other available means, such as directions to be given by the trial judge of bringing about a fair trial...., If, however, a stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay for the court to satisfy itself in such a case that an unfair trial will ensue unless the prosecution is stopped.”

Issue (ii) Whether Petitioners are immune to criminal prosecution over acts committed in the course of duty;

69 Section 14(5) of the Land Registration Act provides that protection of a Registrar is only to the extent that they shall not be held personally liable for lawful acts discharged in good faith. The question of whether the actions of the Petitioners' were in good faith or not can only be best determined by the trial court. In **Erick Kibiwott Tarus v Director of Public Prosecutions & 7 others [2014] eKLR** the court observed as follows:

“In my view, the trial Court is usually in a better position to scrutinise the evidence presented before it in determining whether such evidence prove the accused's guilty beyond reasonable doubt. Unreliable or inconsistent evidence may well be a ground for acquitting the accused. It was the applicant's case that contrary to the position taken by the Respondents they are not culpable since some of the accused persons were only doing their jobs while others were acting on instructions from their superiors. These contentions in my view are better applied in their defences in the trial court since his court cannot embark on the minute examination of the case facing the applicants in order to make conclusive findings thereon.”

70 It is also worth noting that the grounds raised by the Petitioners in their Petition go to the merits of the criminal case and they should best be used as a defence in the trial court. The court in **Erick Kibiwott Tarus** case (*supra*) also held that:

*“To paraphrase the decision in **Meixner & Another vs. Attorney General**, to set out on that voyage would have the effect of embarking upon an examination and appraisal of the evidence to be adduced before the trial Court with a view to show the applicant's innocence yet that is hardly the function of the judicial review court.”*

71 The court further stated:-

“Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved.”

72 Similar sentiments were also expressed in the case of **Republic v Attorney General & 4 others Ex-Parte Kenneth Kariuki Githii [2014] eKLR** where the court cited with approval the decision in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** that:

“Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law.”

Based on the law and cited authorities I humbly find that it is the trial court that will after weighing all evidence determine the Petitioners' culpability. It is not for this court to examine and weigh that evidence.

Issue (iii) Whether the Petitioners rights and fundamental freedoms under article 28, 29 and 50 of the constitution

73 The Petitioners' have not demonstrated how their rights have been contravened by the Respondent. No specific allegations have been made in regard to the above mentioned Articles of the Constitution. The Petitioners have merely listed Articles but the alleged particulars do not constitute any breach of their Constitutional rights.

74 In the case of **Anarita Karimi Njeru v Republic [1979] eKLR** the Court stated that a party who wishes the Court to find in his favour

must plead with a reasonable degree of precision the rights he claims to have been violated, the constitutional provisions allegedly violated, and the jurisdictional basis for it.

75 This was also reiterated in the case of Meme v Republic [2004] eKLR. In that case the court observed;-

“Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant’s instant application had not fully complied with the basic test of constitutional references, as it was founded on generalised complains without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants”

76 The principle was re-stated in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013]eKLR where the court stated;

‘,,The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle....”

77 On this issue I find that the Petitioners have failed to demonstrate how their constitutional rights and cited fundamental freedoms have been violated.

78 In conclusion, I do find that there are sufficient safeguards under the CPC and Evidence Act which are entrenched in Article 50 of the Constitution to enable the trial court conduct a fair trial on the basis of the evidence and material before it. I have therefore concluded that the Petitioners have failed to satisfy this court of the need to review the DPP’S decision to have them charged.

74 The Petition fails and is dismissed with costs.

75 Orders accordingly.

Dated, signed & delivered this 7th day of December 2018

in open court at Nairobi.

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H.I. ONGU’DI

JUDGE