



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MARSABIT**

**PETITION NO. 1 OF 2016**

**BETWEEN**

**KUNA TURA MAMO .....PETITIONER**

**AND**

**ANTI CORRUPTION COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**KUNA TURA MAMO**, the petitioner herein filed a petition dated 29th June 2016. She is seeking the following orders against the respondents:

1. A declaration that the conspiracy charges against her preferred by the 2<sup>nd</sup> respondent in Meru Anti Corruption Court case No. 3 of 2016 are arbitrary, oppressive and unreasonable.
2. A declaration that the charges were a violation of **Articles 27(4) and 157 (11)** of the Constitution of Kenya.
3. That there be a prohibition issued against the 2<sup>nd</sup> respondent from prosecuting the petitioner.
4. General damages for violation of fundamental rights and abuse of legal process.
5. Costs to be awarded.

The petitioner was at the material time the Managing Director of Marsabit Investment Limited, a company engaged in the building and construction industry.

The 1<sup>st</sup> respondent is the Ethics and Anti-Corruption Commission. It is created under **Article 79** of the Constitution and established under **Section 3(1)** of the ***Ethics and Anti-Corruption Commission Act (No. 22 of 2011)*** and is mandated to ensure compliance with, and enforcement of, the provisions of **Chapter Six** of the Constitution. Other functions include investigating and recommending to the Director of Public Prosecutions (2<sup>nd</sup> respondent) the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under the Act or any other law enacted pursuant to **Chapter Six of the Constitution**.

The 2<sup>nd</sup> respondent is a creature of the Constitution of Kenya at **Article 157** whose powers and duties are

provided for under sub articles 4,6,7, 8, 9,10 and 11 as follows:

***(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.***

***(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;***

***(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and***

***(c) subject to clause (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).***

***(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.***

***(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.***

***(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.***

***(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.***

***(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.***

The basic facts that gave rise to this case are that the petitioner through her company successfully tendered to erect a perimeter wall and a guard house for the Marsabit governor's office. The work was done to completion. She was however later enjoined in a criminal case in Meru Law courts. The 1<sup>st</sup> respondent has contended that the petitioner has been sued in her capacity as the Managing Director of Marsabit Investment Limited which was involved in various breaches of the law concerning procurement, the subject of the court case.

The issues for determination are:

1. Whether **Articles 27(4)** and **157 (11)** of the Constitution have been breached, and;
2. Whether the petitioner is entitled to the orders sought.

**Article 27 (4)** of the Constitution outlaws any form of discrimination. It states as follows:

***The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***

Other than stating that she was charged in Meru criminal case for being a spouse of one of the accused persons thereof, there was no scintilla of evidence adduced to show that this was actuated by any form of

bias or discrimination. There is no base for her petition to stand on **Article 27 (4)** of the Constitution.

**Article 157 (11)** of the constitution provides as follows:

***In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.***

The petitioner has not demonstrated in any way that the pending prosecution has breached this constitutional provision.

The two respondents are clothed with powers to investigate and institute criminal proceedings subject only to the law and the Constitution. Courts can only intervene where it is demonstrated that the criminal proceedings were instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process. This was observed in the case of **VINCENT KIBIEGO SAINA V ATTORNEY GENERAL, HIGH COURT MISC CIVIL APPL. No. 839 of 1999 (Unreported)** at pages 20 & 21

***“If a criminal prosecution is seen as amounting to an abuse of the process of the court the court will interfere and stop it. This power to prevent such prosecutions is of great constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of court the court will unhesitatingly step in to stop it.”***

In the instant petition, nothing has been demonstrated to call for such an intervention.

The Constitution and the Criminal Procedure Code have given the appellant sufficient safeguards to ensure that the trial is conducted fairly. For instance, the petitioner will cross examine all witnesses called by the prosecution and at the close of the prosecution case if no prima facie case is established, she would be entitled to an acquittal. This is what **section 210** of the **Criminal Procedure Code** Provides:

***If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.***

There are other issues that touch on the evidence of the contested charges that the parties had addressed. I will deliberately steer away from commenting on them to avoid prejudicing the trial. These issues will be better addressed by the trial court.

I therefore find that the petitioner is not entitled to any of the prayers sought. The Meru Anti Corruption case shall proceed to conclusion. The trial court is encouraged to fast track the hearing and where possible on a day to day basis.

The petition is therefore dismissed with costs to the respondents.

**DATED and DELIVERED at MARSABIT this 15 February 2017.**

**KIARIE WAWERU KIARIE**

**JUDGE**