



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 390 OF 2016**

**NANCY WANGARI GICHOMO.....PETITIONER/APPLICANT**

**VERSUS**

**NAIROBI COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT/DEFENDANT**

**SAMUEL WAWERU KINDIGA.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**DIRECTOR OF PUBLIC PROSECUTION...3<sup>RD</sup> RESPONDENT/DEFENDANT**

**JUDGMENT**

This is a straight forward matter. In her petition amended on 24<sup>th</sup> September, 2016 **Nancy Wangari Gichomo**, the petitioner, sought orders against the respondents **Nairobi County Government**, **Samuel Waweru Kindiga** and the **Director of Public Prosecution** to the effect that an order issue to bring into this Court and terminate Criminal Case **NO. 248 of 2016**, pending before City Court, Nairobi (Hon. Muchungi.) or an order of certiorari to quash the said case. The petitioner also sought damages for unlawful arrest, false imprisonment, malicious prosecution and for loss of mesne profits.

The grounds forming the petitioner's case are that she is being prosecuted for documents already submitted to the 1<sup>st</sup> respondent, that the evidence presented in court so far does not support the charges which allege that the petitioner's building is unsafe when the structural engineer has termed the building safe and stable and that the case in court is meant to achieve ulterior motives.

The petitioner's affidavit sworn on 13<sup>th</sup> September, 2016, reveals the following facts; the petitioner was served with a demolition notice on 30<sup>th</sup> November, 2014 to demolish her premises situated on plot number Baba Dogo plot no 7/11 which she says was in breach of her fundamental rights. Although demolition never took place, she was asked to submit structural plans and reports on the premises which she did on 26<sup>th</sup> January, 2015. On 24<sup>th</sup> August, 2016, she was arrested and charged in Criminal Case number 248 of 2016 with erecting a building structure without approved plans. The charge stated that the building was on plot number 336/1 which was not true.

The witness statement supplied to the petitioner did not tally with the charge laid against her, and the evidence of that witness as adduced in court also did not support the charge. This made the petitioner believe that the case against her was malicious. She therefore wants that case terminated, the respondents stopped from harassing her, and that they be ordered to pay damages for malicious prosecution and mesne profits.

The 1<sup>st</sup> respondent filed a replying affidavit through **ERIC ABWAO**, its director for legal affairs sworn on 28<sup>th</sup> September, 2016. The 1<sup>st</sup> respondent denied that there had been any approval of structural or architectural designs for the petitioner's building, thus maintaining that the petitioner's structure is illegal in terms of **section 30(1)** of Physical Planning Act. The 1<sup>st</sup> respondent also denied contravening the petitioner's rights stating that she is performing her public duty to its residents. Also denied was the authenticity of the documents said to be approval plans for the building.. It was further stated that the criminal case was instituted by an independent organ and will be determined on its own merit.

The 2<sup>nd</sup> respondent filed grounds of opposition dated 3<sup>rd</sup> October, 2016 and denied the petitioner's allegations. He stated that the 3<sup>rd</sup> respondent has mandate under **Article 157** of the constitution to institute prosecutions, that the 3<sup>rd</sup> respondent does not require consent or authority from any person to commence prosecution, and that the issues raised by the petitioner are issues of evidence before the trial court.

Parties filed written submissions which the court has dully considered. The petition herein challenges the veracity of the charges laid against the petitioner before the magistrate's court at City court, Nairobi in criminal case **No. 248 of 2016**. In the petitioner's view, those charges are actuated by malice since, it was submitted, and she has all the building plans and approvals required. Her other submission is that the evidence adduced in court falls short because it does not support the charge laid against her.

I have considered this petition, grounds in support those in opposition and submission on behalf of the parties. This petition raises only one question for determination. That is whether or not this court should terminate the case pending before the magistrate's court at city court, Nairobi on the basis that the evidence before that court is insufficient or the case was instituted by malice.

I have carefully perused the petitioner's case and the responses thereto. Whether or not the evidence adduced before the trial court supports the charge, is a question of fact and the trial court has a duty to hear evidence by the prosecution and where such evidence does not establish a prima facie case, that court will have to decide on that issue in accordance with the law. If there is no case, the court will obviously acquit the petitioner. If there is sufficient evidence, she will defend herself and .thereafter the trial court will make a decision, either to acquit or convict.

I have seen the reply by the 1<sup>st</sup> respondent where it is said that the authenticity of the documents relied on by the petitioner is questionable. This indeed is a question of fact that the trial court will have to resolve after hearing parties. The trial court is a court of law which must act in accordance with the law. I also note that there is no accusation levelled against the trial court in the manner it is conducting its proceedings or on anything else. Had that been the case, this court would have looked at this matter differently and addressed such concerns.

Although this court has jurisdiction under **Article 165(6)** of the constitution to exercise supervisory jurisdiction over subordinate courts, that jurisdiction must be exercised on sound grounds and not capriciously or whimsically. There must be justification to interfere with the work of an independent competent court exercising its jurisdiction in accordance with the law. There being no accusation levelled against the trial court itself or that it is exercising jurisdiction it does not have, I see reason to interfere with proceedings pending before it.

The 3<sup>rd</sup> respondent is an independent constitutional institution which exercises its mandate under **Article 157** of the constitution. Under **Article 157(10)**, the 3<sup>rd</sup> respondent does not require consent from any person or authority to commence criminal prosecution against any person and cannot be so directed. The 3<sup>rd</sup> respondent equally has power to terminate any proceedings if he thinks it fit. I therefore do not think the petitioner has put forward sufficient grounds to justify this court's interference in the exercise of the 3<sup>rd</sup> respondent's constitutional mandate. There is no evidence of malice either at least from the material placed before court that the prosecution is without bona fides. The issue of malice is a question of fact that must be established or proved before the trial court, and in any case it forms part of the petitioner's

defence before that court.

Whether or not the petitioner is entitled to damages for malicious prosecution will also depend on a number of factors and this court would not wish to venture into that arena because that is a civil claim. Similarly, the issue of mesne profits is subject to proof by evidence which was not before this court. This court was asked to halt and terminate prosecution against the petitioner pending before the trial court.. Having declined as I have, the rest of the prayers would not be available for granting.

Finally, this being a constitutional petition, it is strite law that where a petitioner seeks relief from the court for breach of fundamental rights and freedoms, he must set out with precision the rights violated and the alleged manner of violation in relation to him. The principle was laid down in the case of **Anarita Karimi Njeru (No. 1) [ 1979] KLR 154** and emphasized in **Mumo Matemo v Trusted Society of Human Rights Alliance [2013] eKLR** where it was stated;

*“The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding objective. Principle under section 1A and 1B of the civil procedure Act (Cap 21) and Section 3A and 3B of the appellate Jurisdiction Act Cap 9.*

*Procedure is also a hand maiden of just determination of cases. 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 extract of this principle”.*

**The above decisions established the principle that** there be reasonable precision in drafting and framing of issues in Constitutional petitions, by defining with precision the dispute the court is called upon to decide, give particulars of the complaint, and manner of alleged infringement. A petitioner should not just cite omnibus constitutional provisions without providing particulars of the alleged violation and the jurisdictional basis.

This petition does not meet the threshold in constitutional petitions. The petitioner has not pleaded the constitutional provisions she alleges have been violated, her rights that she alleges have been infringed and the manner of the alleged infringement have also not been particularized with precision. Although the petitioner has cited **Article 22(1)** of the constitution which gives everyone a right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, or infringed, or is threatened, there is no basis that was laid for this particular petition.

The petitioner’s complaint is that she is being prosecuted maliciously. Prosecution is initiated where there are reasonable grounds, it is initiated in accordance with the law and is therefore a legal process. The petitioner will have to undergo trial before the magistrate’s court because that is a lawful process, and for my part, I do not find any circumstances of a constitutional nature that vitiate that trial to warrant this court’s intervention.

This court would have intervened if there was an allegation that that prosecution is a breach of the petitioner’s fundamental rights. It should not be the case that whenever one is arraigned before court in what is suspected to be a breach of the law, the first place of call is this court regardless of whether or not there is merit in the charges laid against that person. In cases of this nature this court would be slow in interfering and allow due process to run its course and only intervene in cases that really merit.

Having given due consideration to this petition, and addressed myself fully on it, I come to the conclusions that the same is not meritorious and must fail. Consequently, the amended petition dated 24<sup>th</sup> September, 2016 is hereby dismissed. Any interim orders granted herein are hereby discharged. Each party will bear their own costs.

**Dated and Delivered at Nairobi this 7<sup>th</sup> Day of March 2017**

**E. C. MWITA**

**JUDGE**