



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CONSTITUTIONAL PETITION NO. 38 OF 2013**

**CHRISTOPHER MBUGUA KIIRU ..... PETITIONER**

**VERSUS**

**THE INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> RESPONDENT**

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

**THE HONORABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**THE SRM, TAVETA LAW COURTS ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The petitioner, Christopher Mbugua Kiiru, filed this petition dated 17<sup>th</sup> June 2013 seeking a declaration that his arrest and prosecution in the Taveta Senior Resident Magistrate's Court Criminal Case No. 628 of 2012 is unlawful and unconstitutional, and, consequently, prayed the court to restrain further prosecution. He contends that his prosecution is linked to a land dispute, where he claims to be the beneficial owner of plots known as Plot. No. 2205, 2206 and 2215 comprised in Taveta Settlement Scheme Phase II Adjudication Section, on which he has constructed a home and carries on farming of fish, horticulture, poultry, livestock, trees and irrigation.

2. The petitioner claimed to have settled comfortably on the land, developing it until June 2013 when the Government began to issue letters of offer which exercise he claims was "*replete with obscurity*". He averred that his application for allotment was overlooked and instead the said criminal proceedings against him were initiated, which he considers unlawful, arbitrary, malicious and a mischievous ploy to deprive the petitioner of his constitutional rights. The petition cited Articles 20(1), 22, 23, 27, 28, 29, 40, 43, 48, 50, 60, 61, 62, 63, 159, 232, 258 and 259 of the Constitution of Kenya, 2010.

3. The petition was accompanied by a Chamber Summons application under Certificate of Urgency seeking to restrain the proceedings in the criminal case pending the hearing and determination of the petition. The court on 10<sup>th</sup> December 2013 issued a stay of proceedings of the criminal case pending the hearing and final determination of this petition.

**THE CHARGES**

4. The petitioner was arrested on **7<sup>th</sup> November 2012** and charged with two counts: one, forcible detainer contrary to section 91 of the Penal Code and two, interfering with a legally demarcated land boundary contrary to section 33 (c) as read together with subsection (e) of the Land Adjudication Act, Cap 284 of the Laws of Kenya. The particulars of the offences were that on the 7<sup>th</sup> day of November 2012 at Taveta Settlement Scheme Phase II within Taita Taveta County, the petitioner was respectively, in illegal possession and interfered with legally demarcated land boundaries of land parcels Nos. 2205, 2206, 2207, 2214, 2213, 2212 and 2215, the property of the government.

### **THE PETITIONER'S CASE**

5. The petitioner alleged that the land in question was previously owned by Basil Criticos and is subject of a conservatory court order issued by consent on 17<sup>th</sup> February 2012 before the High Court of Kenya at Nairobi in Constitutional Petition No. 258 of 2011 filed by Basil Criticos whose details were not provided. The order restrained the Ministry of Agriculture, The Settlement Fund Trustees and the Director, Land Adjudication and Settlement from subdividing, allotting or dealing with LR No. 5865 situate in Taveta District pending hearing on 7<sup>th</sup> March 2012. It was not indicated whether the orders are still in force. The Petitioner alleged that the original allottee of the his 6 acre plot was one David Muli Musango who later sold it to him for Kshs.60,000/-. He annexed a sale agreement handwritten in Kiswahili and headed "*Kurudishiana Ngarama.*"

6. The petitioner had on **22<sup>nd</sup> November 2012** filed a motion under certificate of urgency in Mombasa ELC Case No. 270 of 2012 against the Hon. Attorney General and 12 others on the grounds that they had unlawfully evicted him and prevented him access to his residence and property, and had unlawfully demolished the petitioner's investments on his plots Nos. 2205, 2206, 2215. In the ELC case, the petitioner sought orders of injunction to prevent further "*harassment*" from the named defendants, and prayed also that, "*...Pending the hearing and determination of this suit, this Honourable Court be pleased to stay all proceedings, and charges in Criminal Case No. 628 of 2012 – Taveta.*"

7. The petitioner further argued that the High Court at Nairobi in Constitutional Petition No. 325 of 2011 filed by Mathenge Ramadhani Kamozu, Wilson Buyah and Athumani Mozi Msafiti as against the Hon. Attorney General had issued similar orders to those sought herein on 20<sup>th</sup> November 2012 staying related cases – Taveta Magistrate's Case No. 630/2012 and 631/2012 pending the hearing of Chamber Summons application of 19<sup>th</sup> November 2012 in that case. It is not clear whether these orders are still in force, or what the substance of the constitutional petition in that case was.

### **THE RESPONSE**

8. The petition was defended. Ruth Lutta, Litigation Counsel, filed Grounds of Opposition on behalf of the Attorney General urging that the petition was an abuse of court process, the orders sought are untenable and a nullity and that the actions by the 4<sup>th</sup> respondent (Taveta SMR Court) were proper and within its powers. It was also urged that no rules or rights had been demonstrated to have been breached, the claim is strictly improper against the respondents, and that the law is clear on the better alternative legal remedy that will adequately address the petitioner's issues. It was also urged that the prayers in the petition were not substantiated or supported by evidence in proof.

9. Further, a Replying Affidavit of 7<sup>th</sup> May 2014 was sworn by Ag. Inspector of Police Josphat Tanguis of Changamwe Police Station, the Investigations Officer in the Criminal Case. He deponed that a Mr. Stephen Maina, the District Land Adjudication Officer, Taveta reported to Taveta Police Station that the petitioner had invaded a Government Settlement Scheme. Mr. Maina had been so informed by the Land Surveyor who was on the ground placing beacons on the said scheme. The said Mr. Maina had visited the scheme and advised the petitioner to vacate the land, to which the petitioner had promised to vacate after harvesting his crop. Instead of vacating, however, the petitioner continued to farm the land and erected structures, buildings and a fish pond. The plot was said to be in disputed land and had been allocated to another person, but the petitioner had invaded it without due process, hence the report to the Taveta Police. The police investigated the matter and thereafter arrested the petitioner. The petitioner alleged to

have bought the plot and had an agreement to that effect, which was found to be vague. As a pending Court matter directly or substantially in issue relating to this criminal case is not a bar to the charge before a criminal trial court, the court was urged to allow the criminal case to continue to its logical conclusion to meet the ends of justice.

### **Reply by the Petitioner**

10. In a further affidavit dated 17<sup>th</sup> June 2014, the petitioner criticized the failure by IP Tangus to quote the OB Number of the alleged report by Mr. Maina, stating that without it, the evidence was nothing but hearsay.

### **ISSUE FOR DETERMINATION**

11. The issue for determination before the Court is whether, and the principles for the grant of, a stay of criminal prosecution will be ordered in a matter where similar civil proceedings are pending before court.

### **SUBMISSIONS**

12. The parties thereafter filed written submissions and judgment was reserved. The petitioner's submissions dated 1<sup>st</sup> September 2014 reiterated the facts of the case, accusing the respondents of using in excess their prosecutorial powers and evicting the petitioner when there was an on-going civil suit before the Environment and Land Court (ELC) Mombasa pending hearing and determination. The court was referred to ***Thames Launches Ltd v Corporation of The Trinity House of Deptford Strond [1961] 1 All ER 26*** where it was held that, “Where matters which involved substantially the same issues were raised both in Civil Proceedings and a later stage in criminal proceedings in an inferior court between parties who, looking at the substance of the matter, where in reality the same, the court could restrain the prosecutor in criminal proceedings from continuing them until the Civil Proceedings had been decided.” The petitioner accused the respondents of needlessly instituting the criminal proceedings against him when they were well aware of the ELC Case No. 270 of 2012 at the same time. The petitioner invited the court to terminate the criminal proceedings to prevent abuse of court process.

13. The 2<sup>nd</sup> respondent's filed their submissions dated 30<sup>th</sup> September 2014. It was submitted that the Director of Public Prosecution exercises prosecutorial powers under Article 157 of the Constitution. It was submitted that the ELC Case No.270 of 2012 sought orders of injunction against eviction and dealings in the suit land, which orders were obtained. The orders did not stay the Taveta SRM Crim. Case No. 628 of 2012 was instituted on 7<sup>th</sup> November 2012. The trial court being aware of the ELC case proceeded with the criminal case on the basis of section 193A of the Criminal Procedure Code. The 2<sup>nd</sup> and 4<sup>th</sup> respondents therefore exercised their mandate lawfully. The charges preferred against the petitioner were said to have been preceded by investigations, and his arrest and arraignment in court was not a violation of the petitioner's rights. The court was asked to disregard that similar orders had been issued in High Court Nai. No. 38 of 2013 as the petitioner was not a party to that suit and the orders therein did not stay the criminal case against him. The court was urged to find that the petitioner has failed to demonstrate that his rights had been violated as claimed, and that the mere fact that there is a pending High Court matter directly or substantially in issue relating to the criminal case is not a bar to the charge before the trial court, unless there is an order of stay.

### **DETERMINATION**

14. Article 157 of the Constitution of Kenya 2010 gives the Director of Public Prosecutions (DPP) the discretion to prosecute criminal offences without interference from any other authority. In considering similar provisions of the former constitution in relation to the Attorney general, the Court of Appeal in ***Meixner & Anor. v. Attorney General*** (2005) 2 KLR 189, at 193 held that-

*“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3) (a) of the Constitution. 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 that 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 particularly the right to protection by law enshrined in section 77 of the Constitution.”

15. Section 193A of the Criminal Procedure Code 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.”

16. The effect of the provisions, respectively, of Article 157 of the Constitution and section 193A of the Criminal Procedure Code, which must take binding precedence over any case-law, is clearly that the DPP would be properly within his discretion to prosecute a criminal offence regardless of the pendency of any civil suit on the matter, unless the prosecution was shown to be a contravention of the fundamental rights of the accused.

17. While considering a similar application for stay of criminal prosecution, this court dealt with the discretion of the DPP and the impact of Articles 25 and 50 of the Constitution in MOMBASA HC Misc. Application No. 77 OF 2013, **Republic v. Inspector General of Police and 2 Ors. Ex Parte Zelea Jakaa Akiru** held that

“34. The Director of Public Prosecutions (DPP) has constitutional duty to prosecute offences under Article 157 of the Constitution and in the exercise of such mandate, the DPP may use the police investigators and prosecutors as may have happened in this case, and I would, therefore, find that the 2<sup>nd</sup> respondent acted within his powers to file criminal prosecution. The Prosecution would, of course, be expected to bring charges only where the investigations reveal an offence. However, whether the investigations leading to the arrest and charge of the applicant were properly done, if at all, will be established before the trial court in its decision whether the applicant has a case to answer or whether the prosecution proves the case beyond reasonable doubt upon full hearing in accordance with section 215 of the Criminal procedure Code. The court cannot, in exercise of its judicial review jurisdiction of Order 53 of the Civil Procedure Rules, consider the merits of the criminal charges facing the applicant and determine whether proper investigations were conducted in the alleged offence, and consequently, whether the applicant is guilty or not guilty as charged.

35. Under the criminal trial the applicant will be afforded all the Article 50 rights including the right to a fair trial which is, in accordance with Article 25 of the Constitution, not subject to limitation. If the rights of the applicant are breached in the criminal trial setting, the accused will be at liberty to lodge an appeal on the merits or file a constitutional application for their enforcement and protection. Such is not the application before the court.”

18. In my view, the High Court must in determining an application for stay or striking out of criminal proceedings consider four significant matters, namely:

(a) the rule of law principle underpinning the discretion of the DPP to prosecute criminal cases without undue influence, direction or control by any other authority;

(b) the need to protect accused persons from violation of their fundamental rights and freedoms through unwarranted criminal prosecution;

(c) the need to ensure that the criminal process of the court is not abused to further or defeat private interests which are, or should be, the subject of civil proceedings or for other improper purposes; and

(d) as, an over-arching principle, the existence of fair trial guarantees for accused persons in the criminal process by virtue of Articles 25 and 50 of the Constitution of Kenya, 2010.

19. I have respectfully noted the concurring views of Waki, J. as he then was in *Republic vs Chief Magistrate's Court, Mombasa ex parte Ganijee & Another* [2002] 2 KLR 703, Mulwa, J. in *Kuria & 3 Others vs AG* [2002] 2 KLR 69 and Odunga J, in *Republic vs Attorney General & 4 Others ex parte Kenneth Kariuki Gathii* (2014) eKLR.

20. The facts of this case as presented by the petitioner do not disclose any malice on the part of the prosecution in the institution of the criminal proceedings against him. The charges appear to have been brought against him on 7<sup>th</sup> November 2012 before he filed the Environment and Land Court (ELC) case on 22<sup>nd</sup> November 2012 on the same issue in question (only the Notice of Motion dated 22<sup>nd</sup> November 2012 in th ELC case was brought before the court) and so it cannot be said that the criminal case is calculated to frustrate his litigation in the ELC case. The petitioner has also not demonstrated that he is the registered proprietor, or that he has been declared by a competent court as the legal or beneficial owner, of the suit property to support a claim to the constitutional infringement of his right to property and the constitutional court is not properly suited to determine ownership disputes.

21. The petitioner is not a party to the suits mentioned alleged to be similar or related, and in any event, the court is not in a position to determine whether such similarity exists as these matters were not before it. In the premises, the petitioner has failed to establish a case for the court to interfere with the course of the criminal investigations or proceedings against the petitioner.

22. It is expected that the petitioner, in the ordinary course of things under the criminal process of the court, will be accorded ample opportunity to defend himself before the trial court, and if successful, seek appropriate remedy as he may be advised by counsel. During the criminal trial, the accused person will be under the constitutional safeguards of fair trial under Article 50 of the Constitution. The judicial review or constitutional court cannot be used as a substitute to, or a summary procedure in lieu of, the full length criminal trial with fair trial protections before the magistrate's court ordained by the Criminal Procedure Code, unless it can be shown that the trial has offended or is likely to offend the accused person's constitutional rights or rights to natural justice.

23. Accordingly, for the reasons set out above, the court finds no merit on the petitioner's Petition dated 17<sup>th</sup> June 2013 and it is, consequently, declined with costs to the respondents.

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF MARCH 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Waithera for the Petitioner

No appearance for the Respondent

Miss Linda - Court Assistant.