



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

**PETITION NO 366 OF 2013**

**KIPOKI OREU TASUR .....THE PETITIONER**

**VERSUS**

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

**THE OFFICER IN CHARGE OF CENTRAL**

**POLICE STATION, NAIROBI .....2<sup>ND</sup> RESPONDENT**

**THE OFFICER IN CHARGE OF KILGORIS**

**POLICE STATION .....3<sup>RD</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION .....4<sup>TH</sup> RESPONDENT**

**CHIEF MAGISTRATE MILIMANI**

**COURTS NAIROBI.....5<sup>TH</sup> RESPONDENT**

**PRINCIPAL MAGISTRATE KILGORIS .....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. In the petition dated 15<sup>th</sup> July 2013, the petitioner seeks to stop his prosecution in Criminal Case Nos. 386 of 2012 before the Chief Magistrate's Court in Nairobi and 865 of 2012 before the Principal Magistrate's Court in Kilgoris. He terms the prosecutions a violation of his rights under various Articles of the Constitution and seeks the following orders:
  1. *This matter be certified as urgent and the service of the Petition be dispensed with in the first instance.*
  2. *A Declaration that the proceedings before the Chief Magistrate Court at Nairobi and the Principal Magistrate's Court at Kilgoris respectively be STOPPED and DISMISSED forthwith as both of these cases are an infringement, breach or otherwise a contravention of the*

*petitioners right to a fair trial as enshrined in Article 50 of the Constitution of Kenya.*

3. *A Declaration that the allegation made by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents against the Petitioner in both the Criminal Case No 386 of 2012 pending at the Chief magistrate court at Nairobi and the Criminal Case No 865 of 2012 pending hearing and final determination before the Principal Magistrate's Court at Kilgoris be found to be null and void as they are a breach, infringement, violation and denial of the fundamental rights of the petitioner to equality before the Laws, Equal Protection and Equal benefit of the Laws as enshrined in Article 27(1) of the Constitution.*
4. *A Declaration that the allegations contained in both the Criminal Case No. 386 Of 20123 pending at the Chief Magistrate Court at Nairobi determination before the Principal Magistrate's Court at Kilgoris against the petitioner be found to illegal as they are vexatious, oppressive, unsubstantiated, malicious driven by a personal and political vendetta and envy, harassment, intimidation and abuse of the Court process and contrary to the public interest of the administration of Justice contrary to Article 157(11) of the Constitution of Kenya.*
5. *An Order of JUDICIAL REVIEW in form of PROHIBITION do issue PROHIBITING the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents from thereafter harassing, intimidating and continuing with the prosecution or hearing of these two cases as the charges preferred against the Petitioner and the proceedings in both the criminal case Nos the Criminal Case no. 386 Of 2013 pending at the Chief Magistrate Court at Nairobi and the Criminal Case no 865 of 2012 pending hearing and final determination before the Principal Magistrate's Court at Kilgoris.*
6. *Costs of this petition to be awarded to the petitioners.*

#### **The Petitioner's Case**

2. The petitioner's case was presented by his Counsel, Mr. Naikuni, on the basis of the petition, the affidavit in support sworn by the petitioner, and written submissions dated 1<sup>st</sup> November 2013 as well as a bundle of authorities.
3. In his deposition in support of the petition, Mr. Tasur states that he was a candidate for Kilgoris constituency on an Orange Democratic Movement (ODM) ticket; that he found the nominations flawed and irregular and decided to formally lodge a complaint with the Independent Electoral & Boundaries Commission (IEBC).
4. He states that while attending the IEBC Dispute Resolution Committee at the Milimani High Court, he was arrested within the precincts of the Court by officers who claimed to be from the Divisional Criminal Investigation Offices (DCIO), Kilgoris; that he was thereafter charged with the offence of making documents without authority contrary to the provisions of Section 357(a) of the Penal Code before the Principal Magistrate Court at Kilgoris in Criminal Case No. 865 of 2012; and that he was released on bail and the matter fixed for hearing on 21<sup>st</sup> March, 2013.
5. He depones further that on that date, the prosecution applied to have the petitioner's case consolidated with Criminal Case No 526 of 2012 in which one Francis Leshila Ole Rramet was the accused person. The petitioner alleges that the consolidation of the cases is a clear breach of the law and an infringement of his fundamental rights driven by political motive and personal vendetta.
6. He states that he was on the same date, arrested by officers who claimed to be from the Criminal Investigation Department Nairobi. He was charged the following day before the Chief Magistrate's Court Nairobi in Criminal Case Number 386 of 2012.
7. The petitioner depones that he is certain and apprehensive that the whole exercise is intended to

intimidate, molest and harass him as the charges in the two courts are identical; that while Mr Francis Leshila Ole Rramet is his co-accused in the matter before the Court in Kilgoris, he is also the complainant and/or prosecution witness in the case before the Court in Nairobi, and he terms this a case of double jeopardy and a violation of his fundamental rights.

8. The petitioner further avers that the issues in the two criminal cases are more civil than criminal in nature as they pertain to the authenticity of a certificate of title **Land Reference Numbers Trans Mara/Ilkarekeshe Group Trust/1**. He alleges that these issues have, for unclear reasons, been '*over blown to exaggerated proportions*' by the respondents and they need to be stopped.
9. The petitioner contends therefore that his fundamental rights under Articles 27, 47, and 50 have been violated, and that there had been an abuse of the provisions of Article 157 with regard to the powers of the Director of Public Prosecutions (DPP). It is the petitioner's case that the Office of the DPP has acted arbitrarily and beyond the powers vested in them under Article 157 and asks the Court to halt the proceedings in the two lower Courts as he would be comfortable if the proceedings take place in one place, but not in both.
10. Mr Naikuni submitted on behalf of the petitioner that since he is being made to undergo criminal trial over the same issues in two different courts, his right to a speedy trial will be violated and an ugly scenario will arise as he has to attend both cases at the same time. He illustrated this by alleging that both matters were set for mention on the same date, but that the petitioner obtained a stay of the matter in the Chief Magistrate's Court in Nairobi.
11. The petitioner contends that the respondents have not denied that there are two concurrent cases on the same issue; that the argument being made is that this is in order to safeguard public policy; and that public policy does not override individual rights, which he contends supersedes public interest.

### **The Case for the Respondents**

12. Counsel for the respondents, Mr. Ndege, relied on a replying affidavit sworn by **Corporal Daniel Nzuki** on 18<sup>th</sup> September 2013 and written submissions dated 26<sup>th</sup> September 2013.
13. In the said affidavit, Corporal Nzuki deposes that he is the Investigating Officer in a complaint lodged by Francis Leshila Ole Rramet, Paul Kuyana and Wilson Kishoyan the officials of Ilkarekeshe Group Trust, at Central Police Station. Cpl. Nzuki makes various averments with regard to the investigations, most of which are not pertinent to the issue at hand. What is of relevance is that the petitioner allegedly received a sum of Kshs Ksh 12,682,000 from a non-governmental organisation on behalf of the Ilkarekeshe Group Trust; that he delivered a title to No Transmara/ Ilkarekeshe Group Trust/1 to the Group Trust Chairman together with the receipts for the payments allegedly made at the Lands Office; but that when the Group Trust conducted a search at the Lands Office, Kilgoris, it emerged that the title deed was fake and was not in the records at the Lands Office.
14. According to Cpl. Nzuki, investigations were carried out which established that the documents produced by the petitioner to the complainants were forgeries, and the petitioner was therefore arrested and charged.
15. Cpl. Nzuki avers that there is no bar in law to Francis Leshila Ole Rramet being an accused in one case and being a witness in the other; nor does Francis Leshila Ole Rramet being an accused in one criminal case and a witness in the other amount to double jeopardy against the petitioner.
16. According to the respondents, section 24 of the National Police Service Act mandates police to investigate any complaint, and the Police acted within the law in arresting the petitioner. It was the respondents' case that the petitioner's rights are not absolute and must be balanced with the rights of others and the public interest.

17. Mr. Ndege submitted with regard to the factual situation giving rise to this petition that the two criminal cases have different complainants; that Criminal Case No 865 of 2012 was based on a complaint by the District Land Registrar, Trans Mara, against the petitioner for making a document without authority. Criminal Case No. 386 of 2012 was instituted pursuant to complaints by officials of Ilkarekeshe Group Trust against the petitioner for obtaining money by false pretences, stealing by agent and forgery. It was the respondents' case therefore that the two cases are totally distinct and are rightly before the trial Courts.
18. Mr. Ndege submitted further that the DPP has state powers of prosecution under Article 157; that the charges sought to be stopped were preferred pursuant to those powers; that the petitioner has not demonstrated that the DPP acted in excess of powers under Articles 157(6), (10) and (11); and for the Court to issue the orders sought would be tantamount to ordering the DPP not to discharge his mandate.
19. It was Mr. Ndege's submission that the petitioner should allow the Court seized of the criminal matters to carry out its work and put forward his case before it; that Article 50 provides safeguards for fair trial and the petitioner has not demonstrated why the orders sought should be granted. He therefore asked that the petition be dismissed.

### **Determination**

20. The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated.
21. Thus, while the High Court does have jurisdiction, in the exercise of its constitutional mandate to protect the fundamental rights and freedoms of individuals and to supervise the conduct of inferior courts and tribunals, it cannot and should not interfere unless such cogent evidence as demonstrates a violation of rights or abuse of the criminal justice process is placed before it. The question is whether, in the present case, such evidence has been adduced by the petitioner.
22. The petitioner is unhappy with his prosecution in Nairobi Chief Magistrate's Court Criminal Case No. 386 of 2013 and Kilgoris Criminal Case No. 865 of 2012. I have perused the charge sheets in respect of the two cases. In Criminal Case No. 386 of 2013, the petitioner is charged with stealing by agent contrary to section 283 of the Penal Code. The facts set out in the charge sheet are that on diverse dates between 15<sup>th</sup> November, 2011 and 30<sup>th</sup> May 2012, being an agent of Ilkarekeshe Group Trust, he stole Kshs 12, 682,000, the property of the said Group Trust.
23. The charge sheet in Criminal Case No. 865 of 2012 shows that he was charged with the offence of making a document without authority contrary to section 357(a) of the Penal Code. The facts contained in the charge sheet are that on the 15<sup>th</sup> of December 2011, at the District Lands Office in Transmara West District, jointly with others and with intent to deceive, made a document, namely a title deed to Land Parcel No. Transmara/Ilkarekeshe Group Trust/1, purporting it to be genuine.
24. As I understand the petitioner's complaints, he is aggrieved by the fact that he is facing two criminal charges in two different Courts; that one of his co-accused in one matter is also a prosecution witness in the other case; that the issues in dispute are mostly civil in nature, and that he will suffer double jeopardy if the cases proceed.
25. To dispose of the last argument first, the right against double jeopardy is clearly articulated at **Article 50(2)(o)** which provides that ***"Every accused person has the right to a fair trial which includes the right – (o) not to be tried for an offence in respect of an act of omission for which the accused person has previously been acquitted or convicted."*** [Emphasis added]. In order for

an accused person to claim the protection against double jeopardy, he must show that he has been tried and convicted or acquitted of the offence that he is currently facing. Clearly, that is not the case here.

26. The petitioner also claims that he is facing the same charges in the two criminal cases. I have set out above the charges facing the petitioner and the facts giving rise to them. While they may arise from the same circumstances, they are, in my view, totally distinct, and no violation of the petitioner's rights has been demonstrated.

27. The petitioner alleges that the issues in dispute are more civil than criminal in nature. It is not for this Court to inquire into the evidence and the facts that give rise to the charges. Suffice to say that the authorities charged with investigation and prosecution have carried out their investigations and found that offences under the Penal Code have been established. Whether there are, in addition, civil claims that may arise against the petitioner is no bar to his prosecution in respect of criminal acts. As section 193A of the Criminal Procedure Code clearly provides:

***“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.”***

28. The petitioner is also unhappy that his co-accused in the Kilgoris matter is also a complainant or witness in the case pending before the Chief Magistrate's Court in Nairobi; and indeed that the two cases facing him and his co-accused were consolidated. First, nothing has been placed before the Court that demonstrates how either the consolidation of the two cases or the fact that his co-accused may be a prosecution witness amount to violation of his constitutional rights. The courts seized of these two matters have no doubt full knowledge on how to deal with accomplice evidence, and the petitioner is at liberty to raise the issue with the trial court. At any rate, nothing indicates even remotely the possibility of violation of the petitioner's rights.

29. Finally, the petitioner seems to be contending that having two criminal cases pending against him may be inconvenient as he may have to attend both at the same time. This is not an argument that is sustainable. He has not shown that the Courts seized of the matters have arbitrarily set the hearing or mention of the two matters on the same date, nor that he has been denied an opportunity to appear before the Court on a date convenient to him; indeed, there is nothing to stop the petitioner seeking hearing or mention dates in the two matter that are convenient to him. However, his convenience cannot be a basis for stopping his prosecution if the prosecution is merited and no violation of his rights has been demonstrated.

30. In the circumstances, I am unable to find any merit in the present petition. It is hereby dismissed with no order as to costs, and the conservatory orders in force discharged.

**Dated, Delivered and Signed at Nairobi this 6<sup>th</sup> day of June 2014**

**Mumbi Ngugi**

**Judge**

**Mr. Naikuni instructed by the firm of Naikuni, Ngaah & Miencha Co. Advocates for the Petitioner**

**Mr. Ndege, Litigation Counsel, instructed by the Director of Public Prosecutions for the Respondents**