



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**PETITION NO. 2 OF 2013**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 22, 23 (3) (f), 27 (1), (2), 25 (c), 40, 47, 50, 157 (6), (10), (11), 259  
OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF MAVOKO PRINCIPAL MAGISTRATES COURT CRIMINAL CASE NO.  
525 OF 2012**

**BETWEEN**

**RUGA GITUKU .....APPLICANT/APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**PHILIP LEMEITEI SIRONKA**

**THE PRINCIPAL MAGISTRATE'S COURT, MAVOKO LAW COURTS.....RESPONDENTS**

**RULING**

1. The Chamber Summons application dated 21/1/2013 seeks orders that pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue an order, staying any further court proceedings in **Mavoko Principal Magistrate's Court Criminal Case No.525 of 2012, Republic –vs- Ruga Gitugu**.
2. The application is supported by the affidavit of the Applicant, **Ruga Gitugu** sworn on 21/1/2013. According to the said affidavit, the Applicant is the registered owner of all those parcels of land known as Title Nos. **Kajiado/Kaputiei-North/2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882 and 2883**. It is the Applicant's averment that he purchased the said land from the 2<sup>nd</sup> Respondent sometime between 1984 and 1987. That the Applicant obtained good title thereto and is now the absolute proprietor of the same land by virtue of **section 26** of the **Land Registration Act**.
3. The Applicant was charged in **Mavoko Case No. 525 of 2012, Republic –vs- Ruga Gituku**. The

- Criminal Case arose from the transactions of a sale agreement entered between the Applicant and the 2<sup>nd</sup> Respondent, **Philip Lemeitei Sironka** in the year 1987. According to the Applicant, he had enjoyed quiet enjoyment of the land the subject matter of this case until the year 2011 when the 2<sup>nd</sup> Respondent instituted a civil suit in **Machakos H.C. Civil Suit 108 of 2011** and also instituted a claim before the **Land Disputes Tribunal, Kajiado Court Case No. TC/282/4/11**.
4. That subsequent to the filing of the civil claims, the Applicant was summoned to **Kitengela Police Station** severally and on 28/8/2012 he was arrested and arraigned in court on 29/8/2012 and charged with the offence referred to herein. It is the Applicant's assertion that the 24 year delay in prosecuting him is inordinate and has not been explained to him. The Applicant sees the prosecution as *mala fides*, tantamount to harassment, oppressive and actuated by ulterior motives and an infringement of his constitutional rights to a fair trial. It is for these reasons that the Applicant filed the petition herein.
  5. In opposition to the application, both the 1<sup>st</sup> Respondent (DPP) and the 2<sup>nd</sup> Respondent (**Philip Lemeitei Ole Sironka**) swore replying affidavits. No appearance was entered for the 3<sup>rd</sup> Respondent, **Mavoko Law Courts**.
  6. The Investigating Officer in the aforesaid criminal case, **Cpl. Dickson Musya Mutemi** in his affidavit stated that on 16/7/2012, the CID Officer, **Kitengela** received a complaint of forgery from the 2<sup>nd</sup> Respondent against the Applicant. That he was assigned the duty to investigate the case and that his investigations revealed that an offence of forgery had been committed on the 18/5/1987. Subsequently, the Applicant was charged in **Mavoko PMC Criminal Case No. 525 of 2012** on 29/8/2012. That the DPP (1<sup>st</sup> Respondent) in so charging the Applicant exercised the powers conferred on the DPP by **Article 157** of the **Constitution of Kenya 2010**. It was further deposed that the Applicant was charged in accordance with the law which demands that the offences be tried as from the time of the discovery of the offence. That there is no time limit within which a criminal case should be instituted.
  7. That there was no delay as the matter was reported on 16/7/12 and investigations commenced immediately and the Applicant was arraigned in court on 29/8/12. It is contended that the Applicant should vent his defence through the trial court and not through the filing of this petition and raise the issues of abuse of court process through the pending civil suit. That the Applicant still has the documents relating to the questioned transaction in his possession and the institutions which were involved in the transaction are still in existence and therefore the Applicant will not suffer any prejudice.
  8. The 2<sup>nd</sup> Respondent swore a replying affidavit on 20/2/2013 in opposition to the application. The 2<sup>nd</sup> Respondent termed the application and the petition herein as fatally defective, scandalous, frivolous, vexatious and an abuse of the due process of the law. It is asserted that **Machakos HCCC 108/2011** raises the issue of effluxion of time and the Applicant herein wants to circumvent and pre-empt the hearing and final determination of the criminal case. That the civil case between the parties is on course and the Judicial Review case was withdrawn.
  9. The 2<sup>nd</sup> Respondent described himself as an illiterate **Maasai** man whom the Applicant took advantage of. According to the 2<sup>nd</sup> Respondent, there was no inordinate delay in instituting the criminal case. It is deposed that the Applicant went into hiding and deliberately failed to settle on the suitland or carry out any developments therein. That the 1<sup>st</sup> Respondent was only able to trace the Applicant in the year 2011 when his family (2<sup>nd</sup> Respondent's) instituted a case before the Land Disputes Tribunal. That criminal cases are not governed by the Limitation of Actions Act. That the criminal case is not an abuse of the court process and there is sufficient evidence to prove that the Applicant committed the offences he is accused of. That the documentary evidence and the witnesses required are still available from the KCB where the monetary transactions were conducted. That there are no difficulties in obtaining documents from the **Purka Land Control Board** which issued the consents to transfer, the Agricultural Finance Corporation (AFC) and the **Emboloi Group Ranch Ltd**.
  10. The 2<sup>nd</sup> Respondent traces the background to this suit to 16/11/1984 when he entered into a sale agreement with the Applicant for the sale of fifty (50) acres of unregistered land to the Applicant at a purchase price of Kshs. 1,300/= (one thousand, three hundred shillings) per acre making a total of Kshs.65,000/= (sixty five thousand shillings). That the 2<sup>nd</sup> Respondent had his land

registered and in the year 1985 took a loan of Kshs.40,000/= from **Agricultural Finance Corporation(AFC)** but he was not able to service the same regularly. The 2<sup>nd</sup> Respondent started looking for assistance. The Applicant wanted his 50 acres excised from the 1<sup>st</sup> Respondent's land but the title deed was now held by the bank as the security for the loan. The 2<sup>nd</sup> Respondent and the Applicant reached an agreement that the Applicant would clear the loan of Kshs.52,000/= with **AFC** on behalf of the 2<sup>nd</sup> Respondent and pay the 1<sup>st</sup> Respondent an additional Kshs.290,000/= in exchange of a further 50 acres of land making the total land purchased by the Applicant one hundred (100) acres.

11.The loan with **AFC** was cleared and on 27/1/1988 the title to the land released to the 2<sup>nd</sup> Respondent that the 2<sup>nd</sup> Respondent subdivided the land into two parcels as follows:-

v. **Land Reference No. Kajiado-Kaputei-North 1076 measuring 40.47 Hectares approximately 100 acres.**

v. **Land reference No. Kajiado-Kaputei-North/1077 measuring 46.51 Hectares approximately 114.93 acres.**

12.That the 2<sup>nd</sup> Respondent passed the original certificate of title to **Land Reference Kajiado-Kaputei-North/1076** to the Applicant to hold as security until he settled the loan with **AFC** on behalf of the 2<sup>nd</sup> Respondent and also settle the outstanding balance of Kshs.290,000/=. The 2<sup>nd</sup> Respondent alleges the Applicant re-surveyed the land then raised claims that the land's acreage fell short by two (2) acres and started moving the beacons. That thereafter the Applicant disappeared and efforts to trace him were fruitless until year 2004 when the Applicant requested for more time to clear the payment of Kshs.290,000/=.

13.The 2<sup>nd</sup> Respondent maintained that in the year 1993 the land was to be acquired by the Government for the purpose of the construction of the **Kiserian – Isinya Pipeline** and urged the Applicant not to receive the compensation from the Government as the title to the land was still in the name of the 2<sup>nd</sup> Respondent's name. That the Applicant was evasive and non communicative and the 2<sup>nd</sup> Respondent decided to carry out an official search on **Land Reference Kajiado-Kaputei North/1076** with the (then) **Ministry of Lands**. The 2<sup>nd</sup> Respondent found that the land had been sub-divided into ten parcels and registered in the Applicant's name.

14.The 2<sup>nd</sup> Respondent's contention is that the sub-division and the transfer of the suit land to the Applicant was fraudulently and illegally done as no consent was obtained from the Land Control Board. According to the 2<sup>nd</sup> Respondent, he did not execute the transfer forms and the Applicant failed to pay the outstanding purchase price. That when his family learnt of the actions by the Applicant, they lodged a complaint with the **Land Disputes Tribunal**.

15.The application was canvassed by way of written submissions which were highlighted by the parties. I have considered the said submissions and the authorities cited by the parties. There is no dispute regarding the dates of the questioned transactions or the date the criminal charges were preferred against the Applicant. Both parties are in agreement that the date of the agreement for the sale of the first 50 acres to the Applicant is 16/11/1984. The date of the second round of the sale of another 50 acres to the Applicant is not reflected in the affidavit evidence. The Applicant has however reflected the year of the second purchase as 1987. It is also clear from the 2<sup>nd</sup> Respondent's affidavit in reply that he subdivided his land and obtained title to the 100 acres of land on 27/1/88 and gave the title deed **Number Kajiado-Kaputei North/1076** to the Applicant to hold as security.

16.It is also not disputed that the Applicant was charged in **Mavoko PMC Criminal Case No. 524/2012** on 29/8/12. The averment by the Investigating Officer that the complaint by the 2<sup>nd</sup> Respondent was received at the CID offices, **Kitengela** on 21/1/2013 is uncontroverted. There is therefore no delay from the time of the complaint to the time of instituting the criminal charges.

17.The main issue is whether the Applicant's constitutional rights were violated and whether the prosecution amounts to abuse of court process and contravention of the Applicant's rights to a fair trial under **Article 50** and right to equality before the law under **Article 27 (1)** of the **Constitution** and the right to property under **Article 40**.

18.The powers of the DPP to prosecute are spelt out under **Article 157** of the **Constitution** which

states as follows:-

**Article 157 (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 instated by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”**

**Article 157 (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.”**

**Article 157 (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.”**

19. The powers of the DPP are therefore not absolute. However, the court cannot interfere with the independence of the DPP’s office as long as the exercise of the DPP’s power is within the Constitution and the law. I am persuaded by the decision – **Stephen Kipkenda Kiplanga –vs- the CM’s Court and 2 Others (2012) e KLR** where it was observed as follows:-

**“First, it must be remembered that the Constitution confers discretion to prosecute on the DPP and not the court and the court’s jurisdiction is to ensure compliance with the Constitution. Second, the High Court in exercising its jurisdiction is not a trial court to test and weigh the evidence and to conduct a mini trial to see whether there is sufficient evidence or determine whether the Applicant would be acquitted in any event. This task is better left to the trial court. Thirdly, the Applicant bears the burden of proving the breach of its fundamental rights or that the decision to prosecute constitutes an abuse of the legal process.”**

20. The prompt response by the office of the DPP in investigating and charging the Applicant cannot be looked at the isolation without considering what lead to a delay of over 24 years before the 2<sup>nd</sup> Respondent made a report to the CID office, **Kitengela**.

21. The 2<sup>nd</sup> Respondent has described himself as an illiterate **Maasai** man who did not expect the 2<sup>nd</sup> Respondents to disappear with his title deed. However, the 2<sup>nd</sup> Respondent has not come out in a candid manner on the issue of the alleged disappearance of the 2<sup>nd</sup> Respondent. In paragraph No. 9 of the 2<sup>nd</sup> Respondent’s replying affidavit, the 2<sup>nd</sup> Respondent states he only managed to trace the 1<sup>st</sup> Respondent in the year 2011 when his family filed a complaint at the **Land Disputes Tribunal**. In paragraph No. 25 of the said replying affidavit, the 2<sup>nd</sup> Respondent states that the

Applicant disappeared completely until the year 2004, when as per paragraph 28 of the 2<sup>nd</sup> Respondent's replying affidavit, the Applicant was traced at his home in **Eastleigh area** of Nairobi. The 2<sup>nd</sup> Respondent then deponed in paragraph No. 29 of his affidavit that in 1993 he looked for the Applicant urging him not to receive the compensation from the Government for the acquisition of the suit land by the Government for the construction of the **Kiserian – Isinya road** stating that the land was in the 2<sup>nd</sup> Respondent's name. The 2<sup>nd</sup> Respondent then states in paragraph 30 of his affidavit that he carried out a search on **Land Reference No. Kajiado/Kaputei North/1076** and found that the land had been subdivided into ten pieces and registered in the Applicant's name. The 2<sup>nd</sup> Respondent fails to mention exactly when he carried out the said search. The averments on when the 2<sup>nd</sup> Respondent traced the Applicant are inconsistent and self contradictory. The 2<sup>nd</sup> Respondent has not been candid enough to reveal to the court when he discovered that the land in question had been subdivided and registered in the Applicant's name. The explanation by the 2<sup>nd</sup> Respondent for his failure to report the matter in question is not plausible. No doubt a delay of over 20 years is inordinate delay. Memories fade and witnesses and documents may not be easy to trace. The over two decades delay by the Applicant in reporting the matter to the police has not been sufficiently explained and cannot be said to be in the interests of administration of justice. Consequently, I allow the application as prayed with costs.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 4<sup>th</sup> day of June 2014.**

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**B. THURANIRA JADEN**

**JUDGE**