



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**PETITION NO 232 OF 2012**

**TERESIA WANJIKU MBAU & ANOTHER ..... PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS & ANOTHER ..... RESPONDENT**

**SILIAKA MUTHONI NGABA.....CITED THIRD PARTY**

**JUDGMENT**

**Introduction**

1. The petition before me dated 30<sup>th</sup> May 2012 challenges the prosecution of the petitioners before the Chief Magistrate's Court, Thika, in Criminal Case No 1063 of 2012, for malicious damage to the cited 3<sup>rd</sup> party's property. The petitioners allege that their prosecution in the case will result in violation of their constitutional rights.

**The Petitioners' Case**

2. The case for the petitioners as presented by their counsel, Mr. Wambugu, is set out in the affidavit of **Mary Njeri Wanyoike** sworn in support of the petition on 30<sup>th</sup> May 2012 and the petitioner's written submissions dated 30<sup>th</sup> September 2012.

3. The petitioners are both related to the cited third party, **Siliaka Muthoni Ngaba** (hereafter **Siliaka**), the 2<sup>nd</sup> petitioner being **Siliaka's** sister and the 1<sup>st</sup> petitioner her cousin. They allege that the genesis of this matter is a succession cause in which **Siliaka** surreptitiously applied for and obtained letters of administration *ad litem* at the Nyeri High Court in Succession Cause No. 104 of 2012 which were issued on 13<sup>th</sup> February 2012. The petitioners claim that the documents on which the letters of administration were issued were forgeries, being a will drawn by one Joshua Ongaro M., a person purporting to be an advocate, whom the Law Society of Kenya has confirmed did not exist.

4. The petitioners also allege that **Siliaka** obtained an injunction against them in a civil suit restraining them from accessing the suit property, **Loc 5/Kagumoini/563** which is registered in the name of one Wambui Ngaba (Deceased), the mother of **Siliaka** and the 2<sup>nd</sup> petitioner; and that thereafter, **Siliaka** went and instituted criminal proceedings at Thika Magistrate's Court against the petitioners in the criminal case now the subject of this petition.

5. The petitioners ask the court to suspend the criminal proceedings against them as they amount to a violation of their constitutional rights under Article 25(c) and Article 50 on the right to a fair hearing, as well as Article 27 on the right to equal protection before the law. They assert that they have enjoined the respondent as a party due to his powers to stop prosecution at any stage as provided under Article

157(6)(c), and that the public interest consideration set out in Article 157(11) has been met by their case.

6. They also ask the court to prohibit their prosecution as its continuation will deny them the opportunity to collect information, instruct advocates and attend the succession proceedings, and they will be deprived of the opportunity to protect their interest in the property in violation of their rights under Article 40. They allege that the complainant, **Siliaka**, will not suffer any prejudice if the prosecution is not stayed but they stand to suffer greatly if it proceeds as their right to a hearing will be violated.

7. The petitioners have not, either in the affidavit in support of the petition or in their written submissions, made any mention of or averments with regard to the reasons for their prosecution. Their counsel did, however, concede, in response to a question by the court during the hearing of this petition, that property was damaged, and that the petitioners are suspected to have caused the damage. He maintained, however, that the petitioners cannot be charged with malicious damage to property as the ownership of the property is based on fraudulent documents.

8. The petitioners seek the following orders from the court:

*(a) A declaration that the institution, prosecution and maintenance of the Chief Magistrate's Thika Criminal Case No 1063 of 2012 against the petitioners upon the complaint of the cited 3<sup>rd</sup> party herein was and is for a purpose other than that for which it was properly designed to achieve.*

*(b) An order that the proceedings in the Chief Magistrate's Thika Criminal Case No 1063 of 2012 be stayed permanently.*

*(c) As an alternative to the above, an order of prohibition directed to the Chief Magistrate, Thika prohibiting him and any other magistrate from hearing or further hearing or determining the Chief Magistrate's Thika Criminal Case no 1063 of 2012, Republic v Teresia Wanjiku Mbau and Mary Njeri Wanyoike or any other criminal suit relating to the aforementioned property.*

*(d) The respondent and cited 3<sup>rd</sup> party do pay the costs occasioned by and of this petition jointly and severally.*

### **The Respondent's Case**

9. The respondent opposes the petition and has filed a replying affidavit sworn by a police officer, **P.C No. 92309. Kawira Gitonga Rauni** on 6<sup>th</sup> November 2012 and written submissions dated 25<sup>th</sup> February 2013. In her replying affidavit dated 6<sup>th</sup> November 2012, PC Rauni states that she is an Inspector of Police and the investigating officer in the matter. She avers that on 5<sup>th</sup> March 2012, **Siliaka** made a complaint at Kabati Police Station to the effect that the petitioners had trespassed into her land and maliciously destroyed her fencing posts and barbed wire; that she commenced investigations into the matter and visited the scene accompanied by one Corporal Kanyendi; that at the scene, they found that Siliaka's fence had been completely destroyed, the posts had been pulled up from the ground and the fencing wire cut into pieces.

10. PC Rauni states that she recorded statements from the complainant and other witnesses; that she established that the fence was erected by Siliaka; and that in her view, the evidence revealed a prima facie case against the petitioners. She therefore decided to charge them with malicious damage to property in Thika Criminal Case No 1063 of 2012.

11. The respondent submitted through his Counsel, Ms. Kahoro, that the investigations and prosecution being undertaken are in regard to malicious damage to property contrary to section 339(1) of the Penal Code and the police have jurisdiction to prosecute. He also points out that the petitioners have not denied destroying the complainant's property, and contends therefore that the allegations made by the petitioners can best be dealt with in a criminal trial; that the existence of a succession dispute between the petitioners and Siliaka does not justify the petitioners in destroying her fence. He therefore asks the court

to dismiss the petition and allow the criminal proceedings to continue so that the trial court can determine the truthfulness of the allegations by the parties.

12. The cited third party did not participate in the proceedings before me.

### **Determination**

13. The responsibility of a party alleging violation of constitutional rights is now well established: he or she must demonstrate, with a reasonable degree of precision, what provisions of the Constitution have been violated, as well as the manner in which they have been violated. See **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012**.

14. The petitioners in this case allege violation of their rights under Article 25(c), 27, 40 and 50 of the Constitution. The violations arise allegedly as a consequence of their prosecution for malicious damage to property. The criminal case is pending before the Chief Magistrate's Court in Thika. Article 25 of the Constitution provides which of the rights of citizens cannot be limited under Article 24 of the Constitution, with Article 25(c) prohibiting limitation of the right to a hearing.

15. The petitioners have alleged violation of their rights under Article 50 of the Constitution. However, the trial of the petitioners has not yet commenced, following orders restraining the trial pending the hearing and determination of this petition. Consequently, as the trial of the petitioners has not yet commenced, there can be no basis for alleging violation of rights under Article 50. As held by the Court of Appeal in **Julius Kamau Mbugua -vs- The Republic, Criminal Appeal No. 50 of 2008**, the right to a fair hearing under Section 77(1) of the former constitution, which is now guaranteed under Article 50, relates to proceedings at the trial. Thus, the petitioners would need to show that there was a violation of their right to a fair trial in the course of the trial, and they cannot do so through a petition intended to stop the trial itself.

16. In the case before me, the petitioners are asking the court to stop the trial and prohibit their being tried at all. Their argument is that the trial was instituted against them by the cited third party, and that it arises out of succession proceedings in relation to a parcel of land. The respondent counters that he has investigated the matter and established that a criminal offence of malicious damage to property contrary to Section 339(1) of the Penal Code has been committed.

17. The Constitution vests powers of prosecution in the office of the respondent. Section 157 establishes the office of the Director of Public Prosecutions, providing, at Article 157(10), that:

***'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.'***

18. The petitioners allege that the criminal case in Thika was instituted by Siliaka, the cited third party, which clearly cannot be the case. They allege that because there is a pending succession matter, they should not be tried for alleged malicious damage to property. The law, however, is clear on this. The pendency of a civil matter is not a bar to a criminal prosecution, as section 193 A of the Criminal Procedure Code clearly contemplates simultaneous and concurrent civil and criminal proceedings.

19. The petitioners allege that continuing with the trial will affect their ability to assert their right to property to the disputed parcel of land, thus violating their right to property under Article 40 of the Constitution. This, however, is not a tenable argument. If there is credible evidence that the petitioners committed acts that amount to a criminal offence, they cannot hide behind the need to assert a constitutional right in order to escape facing the consequences of their actions.

20. The petitioners also allege violation of their right to equal protection of the law under Article 27 of the Constitution. They have not however, placed anything before me in support of this allegation. I

take the view that their prosecution for malicious damage to property is line with what would befall any person who takes the law into his or her own hands and destroys, as it is alleged the petitioners have done in this case, property belonging to another.

21. In my view, public interest demands that those who commit, or are suspected to have committed criminal offences, should face the due process of the law, which is also ordained by the Constitution. I agree in this regard with the submissions of Counsel for the respondent, placing reliance on the decision of the court in **Bryan Yongo –vs- The Attorney General High Court Petition No. 61 of 2006**. The purpose of criminal proceedings is to establish whether a criminal offence has been committed, and whether the perpetrator is deserving of punishment. There is nothing before me that demonstrates a violation of the petitioners' rights, and no basis for this court to interfere with the prosecution of the petitioners.

22. I must observe in closing that this petition presents a very unfortunate state of affairs, with sisters and cousins embroiled in a succession dispute over the property of their mother. It must be brought home to all concerned that entitlement to inherit the property of a deceased person is not justification for fighting over the said property and engaging in acts which may be criminal in nature and attract penal consequences. Issues related to succession will be dealt with appropriately by the court seized of the succession cause, but that does not excuse the commission of criminal acts, should that turn out to be the case in this matter.

23. I would encourage the parties to abide the determination by the court seized of the succession dispute over their deceased mother's property, or to be guided by another provision of the Constitution which they may have overlooked: Article 159(1)(c), which encourages parties to pursue alternative dispute resolution mechanisms including reconciliation and mediation.

24. At any rate, I find no merit in this petition, and it is hereby dismissed with no order as to costs.

**Dated, Delivered and Signed at Nairobi this 3<sup>rd</sup> day of May 2013.**

**MUMBI NGUGI  
JUDGE**

**Mr. Wambugu instructed by the firm of S.N. Thuku & Associates Advocates for the Petitioners**

**Ms. Kahoro for the Director of Public Prosecutions**

**No appearance for the Cited Third Party**