



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 1192 of 2005

WILLIAM S. K. RUTO & ANOTHER.....PETITIONERS

VERSUS

ATTORNEY GENERAL..... RESPONDENT

PRIORITY LIMITED & FIVE OTHERS.....INTERESTED PARTIES

JUDGMENT

William Samoei Ruto and Berke Commercial Agencies, the 1st and 2nd Petitioners were charged in Criminal Case 973/2004 before CM's Court Kibera with offences relating to acquisition and sale of land which is part of Ngong Forest.

Later, the case was consolidated with Criminal Case 1606/2004 where the Interested Parties (hereinafter referred to as IPs) Priority Ltd, Celtic Multisystems Ltd, Somog Ltd, Joshua Kulei, Sovereign Group Ltd, and Sammy Silas Komen Mwaita were charged with offences relating to the same property. Unless specific reference is made to anyone of them, we shall hereinafter refer to both Petitioners and Interested Parties as Applicants. The applicants herein, raised questions of interpretation of the Constitution and enforcement of their fundamental rights which the Magistrate considered and in the ruling of 24.05.05, framed 15 questions to be considered by the High Court. The Petitioners then filed the originating summons dated 26.09.05 alleging that the preferring of criminal charges in Kibera Criminal Case 973/04 violated their fundamental rights and they seek the following orders and declarations;

- 1. The honourable court declares that the criminal process and proceedings have already contravened, are contravening and are likely to contravene the applicants' Constitutional rights and freedoms as stated and set out herein.***
- 2. The honourable court do declare that the proper construction of the provisions of the Constitution, its spirit and tenor it is neither fair nor just nor Constitutional to have initiated nor to maintain the criminal charges as obtain in Criminal Case 973/04 as against the Applicants.***
- 3. The honourable court do stop, and terminate the said criminal proceeding and prohibit the Chief Magistrate or any other Magistrate from hearing, continuing or proceeding to hear CM Criminal Case 973/04 and from admitting on the record of the court proceedings count or counts alleging charge offences by the Applicant in any way touching upon or connected with any matters relating to the applicants on issues made out in this Constitutional reference.***
- 4. The honourable Court gives directions as to the compensation for the suffering, losses, and damages arising from the states' violation of the applicants' Constitutional rights.***

5. The honourable court do make such orders, issues such writs and gives such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the applicants Constitutional rights and freedoms.

In support the originating summons, Ruto swore an affidavit dated 26.09.05 and his counsel Mr. Katwa filed submissions and authorities on 22.09.09 and grounds of opposition. The Interested Parties supported the originating summons and Mr. Kemboy Advocate came on record for Priority Ltd., Mr. Kosgey for Celtic Multisystems Ltd, Mr. Sigei appeared for Somog Ltd, Mr. Bowry appeared for Joshua Kulei and Sovereign Group Ltd while Mr. Ochieng Oduol appeared for Sammy Silas Mwaita. The Interested Parties did not file any reply or submissions but submitted on points of law. At the hearing Mr. Katwa held Mr. Kemboy's brief.

The originating summons was opposed and Ken Wabwoba, a superintendent of Police attached to Fraud Investigations in the Economic and Commercial Crime unit Filed a replying affidavit dated 17.07.2006 and Mr. Wohoro Senior Principal State counsel, filed submissions and a list of authorities on 09.11.09.

Mr. Ngari held watching brief. For Kenya Pipeline Company Ltd. Briefly stated, the facts underlying the originating summons are as hereunder:

The two Petitioners and Interested Parties were charged with various offences which all revolve around the sale of land which was part of Ngong Forest which was subdivided into 35 plots, allocated to among others, the applicants and Interested Parties who then sold the plots to the Kenya Pipeline co. Ltd (KPC). The applicants and Interested Parties were charged with various offences of obtaining money by false pretences from KPC while the 5th Interested Party faced a charge of stealing and abuse of office (see the charge sheet).

It is the case of the applicants that all Titles in respect of the plots in issue were issued from the Ministry of Lands and all the relevant dues of premiums, rents, rates were paid and KPC accepted the pieces of land in the condition in which they were. After they were charged with the above charges, the applicants raised questions on Constitutional interpretation under Section 67 and violation of their rights under Section 84 of the Constitution. The magistrate in her ruling of 24.05.05 framed 15 questions for determination following which the applicants filed the present originating summons. At the hearing, Mr. Katwa indicated that he had consolidated the questions into 8 questions as follows:

- 1. Questions 2, 3, 4 and 10: whether the Title, having been issued by the president on behalf of the Government of Kenya can be challenged;**
- 2. Question 1, 5 and 7: whether the applicants' right to protection of the law have been violated;**
- 3. Question 8 and 11: whether the criminal proceedings were commenced for ulterior motives;**
- 4. Question 6: whether the particulars of the charge sheet disclose an offence;**
- 5. Question 9: whether the applicants have been discriminated against on account of their political opinions. and associations;**
- 6. Question 13: whether the applicants right to association conscience and expression have been violated;**
- 7. Question 12 and 14: whether the court can grant the reliefs sought to quash and prohibit, the continuation of the criminal proceedings;**
- 8. Question 15: whether the applicants are entitled to damages for loss and suffering.**

In our view, the questions framed above really do form the issues for determination.

It was Mr. Katwa's submission that the Titles in question were prepared in 1995, transfers done in 2001 and Title issues in 2004 and were issued by the Commissioner of Lands Mr. Gachanja, not Mwaita who is charged with abuse of office. The Titles were issued under R.T.A (Cap 281) and under Section 23 and 24, such Titles are indefeasible. That the Titles did not have an endorsement barring transfer to a 3rd party by way of sale and the applicants therefore exercised their rights under the Act and got value for the property. That the prosecution has not offered to refund the monies paid by applicants and in any event if they claim that the Titles were not genuine. The same having been issued by Government Officers, if the court said the Titles to be fake, then the Government should compensate the applicant's. Counsel also urged that our land system is the Torrens system which envisage, inter alia that the Government will maintain a register for all land parcels and when there is registration, the Government guarantees that it is correct and it will take responsibility for any prejudice that may be suffered by any party.

That the applicants were beneficiaries of a Government exercise from which the Government can not escape out of. Counsel also urged that if there is any error in mis-description in the Title sections 60 and 65 of Cap 281 RTA provide the remedy whereby the Registrar can summon the party in possession of the Title to surrender it.

It was also Mr. Katwa's submission that the impugned decision is an Executive decision. That the Executive received the request to allocate land, it did allot land to the 2nd Applicant, the 1st to 5th Interested Parties and premiums, rates and rents were paid to the Executive, it issued clearance certificates assessed the stamp duties and lastly issued Title documents. He urged the court to refrain from reviewing the decisions of the Executive that the decision of the President to allocate land to one or other is discretionary even after he had information that the land was a forest. Counsel also submitted that though the investigating officer alleges that the land in question was not available for allocation because it had not been degazetted, but he did not point to any law that provides as such. He submitted issue that there was no way that the applicants would have known that the Title was not good. That is why the applicants conclude that the criminal proceedings were commenced for ulterior motives but not for purposes of bringing anybody to justice.

Mr. Katwa also pointed out that in the charges that were preferred, one Hellen Njue is named as the complainant yet she did not record a statement with the police. It is the applicant's contention that the charges are therefore defective and that in any event, the complainant should have been the Registrar of Titles; That the 1st party that should have been prosecuted is the Registrar of Titles but by filing the criminal cases against the applicants, he is listed as one of the witness

Counsel also accuses the prosecution of discrimination in that the prosecution seems to question why the Titles were issued in respect of the land which was not yet de-gazetted, that the land was allocated to the 2nd applicant whose direction include the 1st applicant, that 16 departments were involved in the processing of the Title that is, the Chief Lands Registrar, Director of Survey, Chief Valuer etc (see paragraph 21 of 1st petitioner's affidavit); that all the departments confirmed that the land was available for allotment and the payable price was received and all the necessary fees were paid. Petitioners question why the other people involved in the transactions were not charged; that even when KPC wanted to buy the land, it surveyed it and was satisfied and did not complain that it was forest land but bought it in the condition they found it and there is no provision in law that a Title is invalid if it is forest land.

It was also urged that there has been inordinate delay in preferring the criminal charges; that the charges were preferred 10 years after the allotment and 4 years after the conveyance, that the delay of 14 years is unreasonable and there has been no justification for the delay; that the Government received payment on the land, facilitated the transfers and issued the Titles and the Government is to blame for any errors; that the Torrens System of land registration which applied to Kenya, provides for alternative remedies and that the Government should pay KPC Ltd for any loss suffered. The applicants argue that they were mere actors in the transactions whereby the money was received on behalf of Kenya Media Trust by 2nd petitioner and was paid to Transnational Bank to offset a loan which Kenya Media Trust had obtained from the bank and that the applicants have not benefited from the said proceeds.

It is also the applicants' contention that the daily newspapers covered a report which was prejudicial to

the applicants in that it dealt with the issues that were before the trial court. That it offended the subjudice rule and no action was taken in the form of contempt by the Attorney General.

At the hearing Mr. Katwa held brief for Mr. Kemboi for the 1st Interested Party and adopted the same submissions. Mr. Kosgey, counsel for the 2nd Interested Party also adopted Mr. Katwa's submissions and so did Mr. Sigei counsel for the 3rd Interested Party.

Mr. Bowry counsel for the 4th and 5th Interested Parties submitted on points of law. He urged that the charge that relate to his clients is count 5 which is stealing contrary to Section 275 of the Penal code and yet there is no complainant. That the process is fictitious as there was no formal complaint. He also submitted that the criminal charges are an abuse of the court process as the respondents are trying to **"distort the sale transactions"** nearly 10 years later and it amounts to a perversion of justice. Counsel made reliance on **GITHUNGURI V R [1986] KAR 1** where it was held that a delay of 14 years in prosecution an offence was unreasonable.

He also submitted that the 5th Interested Party is a limited liability company and can not be criminally liable, and that the directors should have been charged and since only one is charged, that is evidence of ulterior motives. He further urged that KPC is a Government parastatal and that the AG sits on its Board of Directors; That the filing of criminal charges against the applicants and interested parties is abuse of power because the applicants involved in the transaction, that is the company secretary of KPC and managers were also answerable. Lastly, counsel urged that despite the fact that criminal charges were brought for ulterior motives, some of the sections under which they have charged are already repealed e.g. **Section 10(2)** on abuse of office.

Mr. Oduol, counsel for the 6th Interested Party associated himself with the above submissions and added that the Titles issued have not been impeached and by virtue of **Section 23** of **RTA**, are absolute. That since the Title ultimately belongs to the Government after the 99 years lease, there are serious issues raised under **Section 84** of the **Constitution**.

He also submitted that **Section 101(2)** under which the Interested Parties were charged was repealed by **Act No. 7/07** and therefore the 6th Interested Party was charged with a non-existent offence.

The Respondent opposed the Originating Summons and Mr. Wohoro, counsel for the state relied on the affidavit of Inspector Wabwoba, and skeleton arguments that had been filed by consent. It was Mr. Wohoro's submission that the Title to the land was obtained unlawfully, without de-gazettement of the forest land and therefore, the land still belongs to the Ministry of Environment and Natural Resources. That this was confirmed by the evidence recorded from the 33 prosecution witnesses that the prosecution intends to call to support the charges in the criminal case; that the Titles can not be genuine and that is why the former Commissioner of Lands was charged with abuse of office. As regards the applicants' defence that their Titles are unimpeachable, counsel relied on the decision in **JAMES JORAM NYAGA V THE HON. THE AG & ANORTHER 1732/09** where similar submissions were made in respect of **Section 23** of the RTA when alleging violation of their Constitutional rights. The court upheld the doctrine of public trust, that any alienation made contrary to the provisions of **Section 75** of the **Constitution** was unConstitutional. That the Constitution is the supreme law of the land and the Commissioner of Lands cannot purport to pass any Title to land under the **Government Lands Act**. That the court also held that the spirit of **Section 75** was that public land is held by the Government on trust for its citizens and any alienation of land that defeats public interest goes against that spirit. According to Mr. Wohoro since the applicants do not deny that the land had not been degazetted and it is still a public forest, its acquisition by the parties amounts to an offence of obtaining by false pretences. He also urged that the parties to the contracts of sale could not contract to commit an illegality as the land was held by the companies in trust for the Kenya Media Trust and they were the sole beneficiaries of the sale proceeds since the whole process of alienation was tainted with illegality. According to Mr. Wohoro they would tender evidence to the effect that the applicants were the principal actors and recipients of the proceeds of sale.

It is also the Respondent's contention that the petitioners are attempting to ventilate their would-be

defence in this application and they want this court to analyse the evidence yet that should be done in the lower court. In **IMMANUEL KURIA WAGATHONI V AG, H**

1384/03, the court said that the applicants had analyzed the evidence that should have been adduced at the trial and that a Constitutional application is not about analyzing the sufficiency of evidence.

On the allegation of breach of **Section 77** of the **Constitution**, it was urged that no rights have been violated since:-

(i) The Petitioners and IPs are presumed innocent until proved guilty,

(ii) The applicants have been sufficiently informed of the charges that they face within reasonable time and in a language that they understand,

(iii) They have been accorded all statements and adequate time to prepare their defence.

In respect of **Section 82** of the **Constitution**, Mr. Wohoro submitted that the decision to charge the Petitioners is founded on evidence and it is not for the petitioners to decide who else should be charged.

As regards delay in prosecuting the applicants, it was submitted that the applicants are high ranking officials in the Government who conducted their transactions under cover of privileged communication and could not be easily investigated by police.

As to the allegation of prejudicial statements having been made by persons in Government to the press, the counsel submitted that the comments can not influence the trial court in arriving at its verdict guided by evidence before it and that the prosecution does not ascribe to the views expressed in public by politicians.

On the contention that this should be a civil matter counsel urged that **Section 193A of the CPC** does allow both criminal and civil jurisdiction to be exercised by the courts at the same time and the fact that KPC seeks refund of the purchase price from the Petitioner and IPs does not bar the criminal cases from proceeding. Counsel relied on the case of **HUSHI MUHAMED S/C RUKAN V SULEIMAN HAJI [1946] 22(1) KLR 54** where Sir Sheridan held that adjourning a criminal case to give way to a civil case was contrary to judicial practice.

As regards Presidential immunity, counsel submitted that the President performs his functions through agency of civil servants and on their advice. That the issuance of Titles was based on misleading information. The President enjoys immunity and it is the perpetrators of

the illegality to answer for it. He urged that the Commissioner of Lands cannot commit criminal acts and enjoy immunity. That the criminal proceedings are based on the fact that the person used false pretences to obtain money from KPC. KPC could have got the land freely if it requested for it since it is a parastatal. That the scheme was hatched by the Petitioners and IPs to get money from KPC and those who hatched it should face the charges.

1. JURISDICTION

Having considered all the proceedings on record, the rival submissions and case law that was relied upon, we think it important to recall what the jurisdiction of this court is. It is to inquire into whether the rights of the applicants have been violated under the provisions of the Sections cited i.e. **Sections 70, 72, 74, 77, 81 and 82**. Mr. Katwa also indicated that this court needs to interpret the issues that were framed by the lower court. It is not for this court to determine the sufficiency or otherwise of the evidence that will be adduced at the trial court. That would be the function of a trial court and this court, has to tread with care that it does not usurp the functions of the trial court.

2. COMPETENCE OF THE CHARGES

The Petitioners have questioned the competence of the charges that they face. In our view, it is not for this court to determine whether or not the charges as framed disclose an offence. There are adequate provisions in the Criminal Procedure Code (CPC) for instance **Section 89(5) CPC** which can be used to address that issue. That section states as follows -

“S.89(5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.”

The applicants only need to move the trial magistrate to strike out the charge for being incompetent or the prosecution can seek to substitute the charges. The fact that a charge is defective incompetent does not raise a Constitutional issue.

The IPs also raised issue with the provisions of law under which they were charged alleging that those provisions had been repealed and were no longer law. Again that is an issue that should be raised in the trial court.

ALTERNATIVE REMEDY:

It is the applicants' contention that **KPC** has already lodged 33 civil cases in Milimani High Court seeking compensation for losses incurred as a result of the sale transactions. They also maintain the criminal charges have been preferred in order to mount pressure on the applicants to settle the said civil claims. Since the introduction of **Section 193A** in the **Civil Procedure Act**, the courts can now exercise concurrent jurisdiction in both criminal and civil courts on the same subject matter. Whereas KPC has a right to seek redress from the civil courts, if the State has evidence to prove that criminal acts have been committed in the allotment of the suit land, that may result in the persons charged being punished for their wrongful actions, then the civil cases would not be a bar to the criminal cases. It is only in very clear cases where it is shown that the criminal cases are being mounted for the sole purpose of exerting pressure on the applicants to settle civil claims that have been filed that the court would be persuaded to interfere. In this case, whereas KPC suffered loss, what was allegedly sold was Government land so that the issues in the civil case are distinct from those in the criminal case. We find that even if civil cases have been filed, that cannot be a bar to the criminal cases. We have been told that the investigations in this matter commenced way back in 2003. Though the charges were preferred in 2005, it is not disclosed when KPC filed the civil cases. We do agree with the view of the court in **HUSHI MUHAMED's** case (supra) that a criminal case should not be stayed or adjourned to give way to a civil case. If anything, it should be the vice versa. Section 193A CPC has made it clear that both criminal and civil cases can proceed concurrently and the criminal case can only be stayed for very good reason which has not been demonstrated in this case.

4. ADVERSE PUBLICITY

The applicants also urge that they can not get a fair trial because of the comments made against them by Senior Government Officials and Ministers e.g. Hon. Norman Nyaga, Hon. Kiraitu Murungi and Hon. Amos Kimunya. The applicants exhibited newspaper extracts from the daily newspapers as evidence of the comments made.

The applicants will be tried by qualified, competent and independent judicial officers who are not easily influenced by statements made by politicians to the press. In our country today, such statements are the order of the day and it is our view that the courts will rise above such utterances. We find no basis for the applicant's fears. In **KAMLESH PATTNI V. AG** the court held as follows:- **“Media publicity per se does not constitute of itself a violation of a party's right to a fair hearing.”** The court in **DEEPAK KAMANI V. AG** reached a similar finding on allegations of pre-trial publicity.

5. WANT OF COMPLAINANT:

The applicants also contend that the criminal proceedings that they face are fictitious as there is no known

complaint made by any complainant and that one Hellen Njue who is named as the complainant was an employee of KPC has not recorded any statement to the police. We would first wish to note that the want of a complainant is not a Constitutional issue for determination by this court. That is an issue that can be raised before the trial court and dealt with as a preliminary issue. (see **S.89(5) CPC** below).

Secondly, it is our view that KPC is a corporate body and a going concern, so that even if Hellen Njue was the Financial Director of KPC at the time the alleged offences were committed and has left employment, KPC still exists and the one who took over, or another senior officer of the company who is conversant with the issues can take over as the complainant or the company itself can be named as complainant. The charges had just been filed in court. The hearing has not even commenced and a charge can be subject to amendment in accordance with **S.214(1)** of the **CPC**.

Section 89 of the **CPC** provides for the making of complaints and who may complain. The section reads as follows:

“S.89(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.

(2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.

(3) A complaint may be made orally or in writing but if made orally shall be reduced to writing by the magistrate, and in either case, shall be signed by the complainant and the magistrate.

(4)

(5) Where the magistrate is of the opinion that a complaint signed made or presented under this case does not disclose an offence the magistrate shall make an order refusing to admit the complaint or formal charge and shall record no reasons for the order.”

Under the above section the word “complainant” covers a whole range of would-be complainants beside the State. Besides, the state is the complaint in every criminal case. In this case KPC is the complainant. For the above reasons, we find that want of a complainant would not necessarily be a basis for striking out of the charges and it is not a Constitutional issue.

6. INORDINATE DELAY:

The applicants’ complaint is that there was inordinate delay in bringing the charges against them, which in itself is a sign of ill motive. The land, the subject matter of the sale agreement, was allotted in 1995. The sale transactions took place about 2001. It was not until the year 2005 that the criminal charges were preferred. Unless a statute specifically provides so, there is no limitation period provided by law within which criminal charges should be commenced. This is because of their nature A crime may be committed but go unnoticed for

a long time, or the offenders may not be found in good time. In this case, the 1st applicant’s statement was recorded in 2003, but no charges were preferred till 2005. It is the respondent’s contention that the applicants were high ranking Government officials who transacted under the cover of privilege and could not be easily accessible for investigation by police. We find that to be a plausible explanation for the delay. The **GITHUNGURI** (case) that was relied upon does not apply because in that case the accused had been promised that he would not be prosecuted after a certain period. The facts of the case are different.

7. PRESIDENTIAL DISCRETION AND EXECUTIVE POWERS

It is the applicants’ submission that the decision whether or not to allocate land lies with the President and that the decision being a discretionary one, the applicants are being subjected to trial in exercise of

Presidential discretion can not be challenged. The President performs his functions through civil servants. In this case, he must have acted on the advice of the Commissioner of Lands and all others involved. Those officers must act and give advice in accordance with the law and also consider public interest. They can not be a law unto themselves. If they give advice that results in unlawful acts and decisions that are contrary to public policy, those decisions can not be upheld just because it was exercise of Presidential discretion if that argument of counsel were to be allowed, then there would be total anarchy resulting from abuse of exercise of Presidential discretion which would be hijacked by unscrupulous self serving officers. We are of the view that Presidential discretion cannot be invoked to aid officers who may have committed criminal acts. We need not say anymore on that issue.

Bearing the above in mind, we now turn to consider whether or not the rights of the applicants have been infringed as alleged.

8. VIOLATION OF FUNDAMENTAL RIGHTS

(i) In respect to **Section 70** of the **Constitution** we are of the considered view that this section generally lays down the foundation of all fundamental rights which are then specifically provided for under the other sections of the Bill of Rights (71-83) and the specific

limitations under each section. **Section 70** also subjects all rights to the rights of others and to the public interest. It reads as follows:-

“S.70. Whereas every person in Kenya is enTitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation.

The provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

We therefore take the view that Section 70 should be read together with the other sections of the Bill of Rights in enjoying one’s rights.

(ii) Section 71 guarantees the right to life. It reads:-

“71(1). No person shall be deprived of his life intentionally save in event of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been committed.

(2)”

Though the above provision was cited, no submissions were made in support thereof nor was there any evidence in support of such an allegation.

(iii) Section 72 of the **Constitution** guarantees protection of right to personal liberty. It reads in part:-

“72(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:-

- (a) in execution of the sentence or order of a court, whether established for Kenya or some other country in respect of criminal offence of which he has been convicted;**
 - (b) in execution of an order of the High Court or the Court of Appeal punishing him for contempt of that court, or of another court or tribunal;**
 - (c) in execution of the order of a court made to secure the fulfillment of an obligation imposed on him by law;**
 - (d) For the purpose of bringing him before a court in execution of the order of a court;**
 - (e) Upon reasonable suspicion of his having committed or being about to commit, a criminal offence under the law of Kenya;**
 - (f) In the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;**
 - (g) For the purpose of preventing the spread of an infectious or contagious disease;**
 - (h) In the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;**
 - (i) For the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another, or**
 - (j) To such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during a visit that he is permitted to make to a part of Kenya in which, in consequence of the order, his presence would otherwise be unlawful.**
- (2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.**

(3) A person who is arrested or detained –

- (a) for the purpose of bringing him before a court in execution of the order of a court; or**
- (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,**

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

The police claim to have reasonable and probable grounds for arresting and charging the applicants which charges they are yet to plead. The respondent’s action is catered for under S 72 (e) of the Constitution cannot therefore be in breach of the right to liberty is not absolute and can be taken away upon suspicion

of one having committed a criminal offence as in this case. When the applicants appeared in court, they were granted bond and have been on bond as they await the determination of the matter. We find that no rights to personal liberty have been violated in any way.

(iv) Section 74 of the Constitution guarantees protection from, torture, inhuman and degrading treatment. It reads as follows:-

“74(1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963.”

No specific allegations were made in respect of the said section though it was one of those invoked. It is trite law that one bringing an application under **Sections 70-83** of the Constitution must plead with precision, the section, subsection or paragraphs under which he alleges breach, and spell out the nature of the infringement in relation to him. – see **MATIBA V AG [1990] KLR 666 and ANARITA KARIMI V AG [1979] KLR 54**. We find no proof of breach of the applicants rights under the above section.

(v) Section 77 of the Constitution offers secure protection to fair hearing in both criminal and civil cases. It reads as hereunder:-

“77(1) If a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence –

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;

(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;

(c) shall be given adequate time and facilities for the preparation of his defence;

(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

(3).....(15)”

One of the grounds that the applicants raise as the main reason why they are being prosecuted is that the forest which was purportedly allocated to them had not been degazetted and was therefore not available for allotment or alienation. The applicants contend that no law exists that makes such Title issued without alienation of Government land void and that nothing obligated the 1st to 7th applicants to counter-check

that the said parcels of land had been de-gazetted. It is however not denied that the subject land was forest land, i.e. part of Ngong Forest. The prosecution had recorded statements from several witnesses to the effect that the land had not been degazetted and was therefore not subject of alienation; see for instance of DW7 Benson Kakucha Mbwagwa, Director of Physical Planning, who states that, to prepare development plans, a request had to be received from the Commissioner of Lands in writing attaching a notice of degazettment of the forest; Gideon Gathaara (DW 10) Chief Conservator of Forests states that as of 10/6/03, the land in question had not been degazetted in accordance with the laid down procedures and was still under management of Forest Department; DW 19 Peter Joseph Kamwara, Head of Survey and Mapping Section, Forest Department, states that there is no indication that the area in dispute had been sub-divided into

private plots and there had been no degazettment; David Kahuma Mbubua, acting Chief Conservator of Karura Forest, states that Ngong Forest Reserve is still a gazetted forest reserve and the Titles that were issued are unknown to the Government since procedure to degazette was not followed. **Section 4** of the **Forests Act Cap 385** provides as follows:-

“4(1) The Minister may, from time to time, by notice in the Gazette –

- (a) declare unalienated any unwanted Government land to be a forest area.**
- (b) Declare the boundaries of a forest and from time to time alter those boundaries.**
- (c) Declare that a forest area shall cease to be a forest area.**

(2) Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1), twenty eight days notice of the intention to make the declaration shall be published by the Minister in the Gazette.”

Section 2 of the **Act** also defines what unalienated Government land means:-

“It means land for the time being vested in the Government which,

- (a) is not the subject of any conveyance lease or occupation license from the Government;**
- (b) has not been dedicated or set aside for the use of the public but includes outspans; and**
- (c) has not been declared to be a central forest or a forest area.”**

In the instant case, statements from people to be called as witnesses in the trial court, have been recorded that the forest land has not been degazetted and it has not ceased to be a forest. For the land to be available for conveyance or lease or for public use the forest has to

be degazetted. The prosecution is alleging that the Government land that was conveyed to KPC is still a forest. It therefore has to be established how Titles were issued, without due process being followed, and whether somebody somewhere committed an offence. We find that it is for the trial court to establish from the evidence that will be laid before it. That cannot be done in a Constitutional application.

It is also the applicants’ contention that the Title in issue was processed by Government officers who issued allotment letters; assessed the fees payable; carried out the searches; Further that the Kenya Land Law is based on the Torrens System of land registration (specifically **Sections 23, 24, 60 & 65 of Cap 281**) that operates in New South Wales. That system of law presumes the person who is registered to be the proprietor and has an indefeasible Title and that if as a result of an error or fraud committed by a 3rd party, then the person wrongly deprived is entitled to compensation. That in addition, under **Section 60 of Cap 281** if the Title is found to have an error or misdescription, it is the Registrar to ask the holder to surrender it or in default he may apply to the court for summons for the person to appear in court and show cause why it can not be delivered up. It was therefore the applicants’ contention that it is up to the

Government to compensate KPC. If, as we have considered above, the allocating authority indeed allocated the land without following the process laid down in the Forests Act, then the whole process is flawed nullity ab initio and an illegality. In our view, no rights can accrue from an illegal process and the provisions of **Section 23, 24, 60 & 65** of **RTA** would not come into play;

(vi) Section 82 of Constitution

The applicants complain that the criminal charges are discriminatory in that several Government officials i.e. surveyors, valuers etc, were involved in the transactions culminating in the issuance of Titles, the Board of Directors of KPC who endorsed the process and the Commissioner of Lands who dealt with the initial transaction Mr. Gachanja, have all been left to go scotch free. That the charges allege that the offences were committed with others not before court, yet those others are actually known but have not been charged. It was also urged that criminal charges are discriminatory against the 1st Petitioner on account of his political opinion and his stand in the Constitutional review process and lastly that the applicants are

discriminated against because although there are many people who have been allocated Government land, they have not been charged with any offences relating thereto.

This section offers protection against discrimination and the categories of discrimination are set out under **Section 82(3)**. The section reads as follows:-

“S.82(1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (8) and (9) no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(3) In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby person of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

For the allegation that the charges were meant to defeat the 1st applicant’s political carrier, it is our view that that seems not to be the case because the 1st applicant still retained his Parliamentary seat with an overwhelming majority and still holds a ministerial post.

On the allegation that there are people who have been issued with Titles in a similar manner and still hold them, we are unable to make any finding of discrimination because no

material has been placed before this court to support that allegation. No names were given to this court of people who were issued Titles in the same manner and have not been prosecuted. For the Government employees who facilitated the transactions that led to issuance of the subject Titles, we also have no material to support that allegation. Maybe, if the matter goes to full trial then the applicants will be able to articulate exactly how they were discriminated against.

Having considered all the above, we find and hold that the applicants’ rights have not been violated in anyway. As can be deduced from paragraph 11 to 21 and 23-30 of Mr. Ruto’s affidavit, the applicant has actually tried to preempt the prosecution case by setting out his defence. We find and hold that the petitioners can only make such a defence at the trial court but not at this forum. In **WAGATHONI’s** case (supra) it was held that analyzing of the evidence should be done in the trial court As pointed out earlier, in such an application, the court is not concerned with the sufficiency of the evidence available to support a criminal charge. It is sufficient for the respondents to demonstrate that they have a reasonable or

probable case that an offence may have been committed and therefore the accused persons should stand trial. That is why the applicants are presumed innocent until proved otherwise and so far there is no allegation that the requirements of a fair trial under **Section 77(2)** (supra) have not been complied with.

9. COMPENSATION:

KPC is said to have spent Kshs.272 million in the purchase of the disputed land. The land is said to be public land held by the Government in trust for them. If the allotment thereof and all subsequent acts were unprocedural and therefore an illegality, there are no rights that would accrue to the applicants to be entitled to any compensation. If this court were to order compensation, then the public would suffer double loss.

CONCLUSION

We believe we have considered all the 8 questions that were framed by Mr. Katwa from the questions framed by the Chief Magistrate and we are unable to grant any of the prayers sought. This petition is therefore dismissed and we direct that this matter be sent back to the trial court for hearing and determination.

Costs to be borne by the Petitioners and Interested Parties.

Dated and delivered at Nairobi this 15th day of October 2010.

JEANNE GACHECHE

JUDGE

LEONARD NJAGI

JUDGE

R.P.V WENDOH

JUDGE

Present:-

Katwa for 1st and 2nd Applicants

Mr. Okello & Mukofu for Respondent

Katwa also holding brief for Kemboi for 1st Interested Party

Kosgei for 2nd Interested Party

Mrs. Sigei for 3rd Interested Party

Mr. Muturi for 4th & 5th Interested Parties

Mr. Kuyo for 6th Interested Party

Mwangi, Kabiru & Kajuru Court Clerks