



Mutiso v Director of Criminal Investigations & another (Petition E019 of 2021) [2024] KEHC 9750 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PETITION E019 OF 2021
FROO OLEL, J
JULY 30, 2024**

BETWEEN

DANIEL MASILA MUTISO PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

JUDGMENT

A. Introduction

1. The petitioner herein Daniel Masila Mutiso did file this petition dated 4th October 2021 and sought for orders that;
 - a. A declaration that the facts and circumstances herein described do not disclose any criminal liability but are rather issues that are within the jurisdiction of the environment and land court established under Article 162 of *the constitution*.
 - b. An order of certiorari do issue for the purpose of being quashed and to forthwith quash the decision of the chief inspector Caroline Kinoti to charge the petitioners with the offence of obtaining and forgery and the Machakos CM Criminal case no. E149 of 2021 be quashed and terminated hence forth.
 - c. Any other relief and/or directions that this honourable court may deem fit to grant in the circumstances.
2. This petition was opposed by both respondents. The 1st Respondent did file their replying Affidavit dated 20th December 2021 sworn by the investigating officer Chief Inspector Catherine Kinoti, while the 2nd Respondent did file grounds of opposition dated 15th November 2021.



B. The Petition

3. The petitioner did aver that he was a resident of Kabaa in Mwala Sub County of Machakos County. Sometime in the year 1991, he did purchase a parcel of land from one Thomas Munyao Kithome and paid him a consideration of Kshs.105,000/= . The said parcel bought was a portion of land parcel known as Mbiuni/Kabaa/64 and later it was sub-divided and his portion hived off and given a new registration known as Mbiuni/kabaa/909. The other portion of the said parcel which was created was land parcel No Mbiuni/Kabaa/ 910, which was also later sold to him by the said Thomas Munyao Kithome. After acquiring both parcels of land (herein after referred to as the suit parcels) a dispute arose over his acquisition of the 2nd suit parcel Mbiuni/kabaa/910 which dispute ended up before the lands dispute tribunal being Machakos district land tribunal case no.12 of 1997 . This case was heard on merit and was ruled in his favour and the tribunal directed Mr. Thomas Munyao Kithome to transfer the said property to him.
4. Later on, in 1994 the petition avers that he did enter into a separate land sale agreement with one Mr. Charles Munyao Kithome (deceased) to acquire a portion of parcel no. Mbiuni/kabaa/63 and towards finalizing the said transaction paid him a sum of Ksh.97,000/= though the purchase price was Ksh.150,000/= . A legal dispute also arose over the acquisition of this parcel of land and the said dispute also ended up before the lands dispute tribunal being case Machakos District Lands tribute case no.11 of 1997 which too was ultimately ruled in his favour and the effect of the Ruling was that land parcel Mbinui/kabaa/63 was to be sub divided into two parties, one of three (3) acres to be retained by Charles Munyao Kithome and the other of seven (7) acres to be transferred to him.
5. Both decisions of the District land tribunal in case no. 11 and 12 of 1997 were subject of a consolidated appeal to the Provincial land tribunal in Appeal no. 17 of 1997, which appeal was heard on merit and both appeals against the finding of the District Lands dispute tribunal were dismissed. No further appeal was filed in the High Court by the aggrieved parties.
6. The petitioner further averred that in order to secure his interest in the suit parcels, he did file for adoption of both awards in Machakos CMCC Miscellaneous application no 64 of 1997 and Machakos CMCC Miscellaneous application no 9 of 1998. Both awards were adopted as an order of the court and the court executive officer authorized to sign the transfer documents. Subsequently both suit parcels Mbiuni/kabaa/910 and Mbiuni/kabaa/973 were lawfully transferred to him on 20th March 1998 and 17th May 2000 respectively and his registration as the owner of the said land parcels had remained as such to date.
7. Being aggrieved by him acquiring his title deeds, the Respondents did file Machakos civil appeal no 78 of 2002, challenging the sanctity of his title deed and the said appeal was dismissed on 8th February 2008. He did thereafter institute Machakos ELC case no.26 of 2016, to protect his interest in the suit parcels of land. His case was heard on merit and final judgement issued in his favour declaring he was as the sole, legal and registered owner of both suit parcels. After judgment had been entered in the said Machakos ELC case no 26 of 2016, the Respondents filed three different applications thereafter seeking to set aside the said judgment. All the said applications were dismissed and no further proceeding or any appeal was filed in the court of Appeal.
8. In 2019, the petition avers that he was surprised when DCI officers from Mwala Sub County purported to investigate his acquisition of both suit properties. He did give the said DCI officers documents used to support his acquisition of the suit properties and the various court orders he had obtained in his favour determining ownership of the said suit parcel but they opted to ignore the same and he was arraigned in court and charged in Machakos criminal case no. E149 of 2021 with the offence of forgery



and uttering a false document. It was the petitioner's contention that the cause of action taken by the respondents was wrong and unlawful as the purported investigations were being conducted long after the complainant had died and the investigation officers could not have obtained his specimen signature for examination.

9. Further the allegations of forgery had been deliberated upon by Justus Angota Sitting in Machakos ELC no.26 of 2016 and a determination made absolving him of any wrong doing. Therefore, subjecting the same issue for further proceedings would amount to unpredictability of the justice system and would subject the petitioner to double jeopardy.
10. The petitioner thus prayed that this court does find that his imminent prosecution was clearly made in bad faith and would amount to abuse of the Respondents mandate and thus urged the court to grant the orders sought as his petition was merited.

C. The Responses

i. The 1st Respondents Replying Affidavit

11. The 1st respondent did respond to this petition by filing a replying affidavit dated 20.11.2021 and sworn by one Chief Inspector Catherine Kinoti, who described herself as the investigating officer and confirmed that she had arraigned the petitioner in court and had him charged with two counts of forgery, one count of making a document without authority and one count of uttering a false document. They had received a complaint from Charles Munyao and Julius Wambua Kithome who had alleged that the petitioner had forged his signature so as to acquire parcel of land Mbiuni/Kabaa/63 between the years 1994 and 1995.
12. The second complaint, Julius Wambua also alleged that his fathers' signature was forged by the petitioner in the year 1991 and he wrongfully acquired land parcel No Mbiuni/Kabaa/910. She proceeded to record the complaints statements, got further documents from F.M. Mulwa & Co Advocates, documents from the land's office and a report from the forensic document examiner. At the conclusion of her investigations she concluded that indeed the petitioner had indeed forged the signatures of Charles Munyao Kithome and Thomas Munyao Kithome and sent her recommendations to the DPP for Approval.
13. The petition as filed was therefore misconceived as the applicant could not prevent the police from exercising their statutory mandate as provided for under Section 24 of the *National Police service Act*. The petition as filed was also vague and had not specified the nature of infringement or violation of his rights, which he alleges to have been trampled on. Further the 2nd respondent under provisions of Article 157(6),(a) of *the constitution* had the exclusive mandate too institute and undertake prosecution of criminal proceedings as against any person before any court in respect of any offence alleged to have been committed.
14. The 1st respondent therefore urged this court to find that this instant petition was unmerited and prayed that it be dismissed.

ii. 2nd Respondent Grounds of Opposition

15. The 2nd Respondent did file their grounds of opposition dated 15.11.2021 and stated that the petition as filed was misconceived, frivolous, vexatious and incompetent. Under provision of Section 193A of the criminal procedure code, Cap 75 Laws of Kenya Criminal proceedings could be instituted despite existence of civil suits filed and both processes could run concurrently. The 2nd Respondent had the exclusive mandate under Article 157(6) of *the constitution* to exercise state power of prosecution



and therefore an order of certiorari could not issue as against them, while he was exercising his constitutional and statutory mandate.

16. It was also the 2nd Respondent's contention that the issues raised by the petitioner herein should be raised before the trial court seized of the criminal matter. The petitioner had also not demonstrated that his rights to fair trial as guaranteed under *the constitution* of Kenya 2010 had been infringed upon. The 2nd Respondent therefore urged court to find that the petition as filed was vexatious incompetent and prayed that the same be dismissed as the petitioner had not demonstrated how they had over stepped their mandatory and/or acted in excess of their statutory powers while discharging their duty.

D. Submissions

17. The petitioner did file his submissions dated 3rd November 2023 where he reiterated the background facts pertaining to this dispute and emphasized that he had followed due process to acquire both suit parcels of land. He had availed all his supporting documents and various court orders showing how he had acquired the suit parcels of land to the DCI officers at Mwala Sub County but his plea to be exonerated had fallen on deaf ears. He was later charged in Machakos CMCRC case no. E149 of 2021 with the offence of forgery and uttering a false document. The purported DCI investigation was maliciously conducted long after the purported complainant was deceased and there was no way his specimen signatures could have been obtained to support the charge of forgery as alleged. The issue of forgery had also been dealt with conclusively by Justus Angote sitting in Machakos ELC no. 26 of 2006 and it was not right/proper to subject the same issue for determination by the Magistrate yet no appeal had been filed from the previous Ruling delivered regarding the said issue.
18. From the foregoing, it was clear that the criminal court process was being misused by the investigating agencies to re-open a long standing land dispute which had already been concluded by courts with proper jurisdiction. The investigating officer therefore had not acted independently and her decision to charge the petition had not made objectively. It was also to be noted that during his lifetime the late Charles Kithome never complained of forgery in any of case prosecuted as against him in the various civil proceedings and only offered to refund the purchase price, this allegation of forgery by the deceased son was therefore an afterthought and made in bad faith to support his ulterior motive.
19. The petitioner further submitted that his rights were protected by Article 21(a), 23 of *the Constitution* 2020 as read with Article 157(ii) of the said constitution which provided that the 2nd Respondent must have regard to public interest, the interest of administration of justice and the need to prevent abuse of legal process. The respondent's action were therefore unlawful and unconstitutional; made without the legal power to do so (unlawful on the grounds of illegality), was unreasonable and made without observing the rules of natural justice. Reliance was made to the case of *Imperial Tobacco Ltd vrs Attorney General* (1981) AC 718, *Francis Gathungu vrs Kenyatta University* (2018)eKLR & *Carmichela vrs Minister of safety & Security* (2001)(4) SA 938, 2001(10) BCLR & *R vs Horseferry Roads Magistrate Ex parte Bannet* (1994) 1 A.C 42 where it was held that criminalizing of land disputes constituted an abuse of the process of court and perverts the course of justice.
20. The petitioner also relied on the case of *Issa Timamy vrs Republic* (2006) eKLR where it was emphasized that "where the complainant had died, the suit would abate pursuant to provisions of Section 360 of the Criminal Procedure Code." The deceased had long died before the complaint was made and therefore the criminal proceedings had no legs to stand on. The petitioner urged the court to allow the prayers sought in the petition.
21. The respondents did not file any submissions.



D. Analysis & Determination

22. The applicants' case is in effect that the respondents are misusing their power to give one of the parties' leverage in the land dispute, which dispute had been adjudicated upon by courts of competent jurisdiction and finalized in the Applicant's favour. After securing the awards in his favour from the lands dispute tribunal, he did proceed had had the suit parcels lawfully registered under his names in March 1998 & May 2000. The complainant's father filed an appeal MACHAKOS CIVIL APPEAL NO 78 OF 2002, which Appeal was dismissed in February 2008. He also had subsequently filed MACHAKOS ELC CASE NO 26 OF 2006, which was heard on merit and it was determined that he was the sole legal and registered owner of the suit properties.
23. It is trite that the powers and discretion given to the National police service to Investigate and subsequently recommend to the ODPP for prosecution ought to be exercised lawfully, in good faith and purely for the vindication of the commission of a criminal offence under the criminal justice system. Therefore, where the same are being exercised for the achievement of some collateral purpose other than its legally recognized aim, the Court would be entitled to and must intervene.
24. In was in this regard that Majanja, J in Petition No. 461 of 2012 – Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions, when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:
- “It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State's coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent.”
25. In *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69, the High Court held:
- “The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal



prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute.”

26. In *Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate’s Court Nairobi & Another* (2006) eKLR Nyamu, J examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of *M. Devao vs. Department of Labour* (190) in sur 464 at 481 as:

“The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice...the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression.”

27. The circumstances which the Court takes into consideration in deciding whether or not to halt a criminal process were set out by Musinga, J (as he then was) in *Paul Stuart Imison Another vs. The Attorney General & 2 Others* Petition No. 57 of 2009, in the following manner:

“The instances in which a court can declare a prosecution to be improper were well considered in *Macharia & Another –vs- Attorney General & Another* (2001) KLR 448. A prosecution is improper if:

- a. It is for a purpose other than upholding the criminal law;
- b. It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;
- c. It is an abuse of the criminal process of the court;
- d. It amounts to harassment and is contrary to public policy;
- e. It is in contravention of the applicant’s constitutional right to freedom.

28. Finally according to *Bennett vs. Horseferry Magistrates’ Court* (1993) 3 All E.R. 138, 151, HL, an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

- a. where it would be impossible to give the accused a fair trial; or
- b. Where it would amount to a misuse/manipulation of process because it offends the court’s sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

29. On the other hand, the DPP derives his prosecutorial power both from *the Constitution* and the *Office of the Director of Public Prosecutions Act*. Whereas Article 157(10) of *the Constitution* 2010, provides 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, Article 157(11) of the constitution provides:

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.

30. Apart from that, section 4 of the Office of Public Prosecutions Act, No.2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

- a. the diversity of the people of Kenya;
- b. impartiality and gender equity;
- c. the rules of natural justice;
- d. promotion of public confidence in the integrity of the Office; (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
- f. the need to serve the cause of justice, prevent abuse of the legal process and public interest;
- g. protection of the sovereignty of the people;
- h. secure the observance of democratic values and principles; and
- i. promotion of constitutionalism.

31. This Court has therefore held that since the promulgation of the Constitution of Kenya, 2010, the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the Office of the Director of Public Prosecutions Act No 3 of 2013. Where it is alleged that these standards have not been adhered to, it behooves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. It is on this basis that I understand the holding in *Nakusa vs. Tororei & 2 Others* (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that :

“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial



self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”

32. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognized under *the Constitution* and the *Office of the Director of Public Prosecutions Act*, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion.

33. It is therefore clear that this Court has the power and indeed the duty to bring to a halt, criminal proceedings where the same are being brought for ulterior motives or for achievement of some collateral purposes notwithstanding the constitutional and legal powers conferred upon the DPP and the police. In *Meixner & Another vs. Attorney General* [2005] 2 KLR 189, the Wendo J stated that;

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of *the Constitution*. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of *the Constitution*). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in *the Constitution* particularly the right to the protection by law enshrined in section 77 of *the Constitution*...Judicial review is concerned with the decision-making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.”

34. The rationale for not permitting criminal process to assist the litigants in the settlement of their civil disputes as appreciated in *Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another* [2002] 2 KLR 703, where it was held that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-



awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in... In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings.”

35. This court is therefore clothed with original jurisdiction under Article 23 and 165 of *the constitution* 2010 to remedy any breach or infringing of a party’s fundamental rights where it is show that state authorities or other respondents are infringing upon the same. As stated in (Ex Parte Ganijee & Ano) (Supra) quoted above; “It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose.”
36. The applicant has shown by a clear trail of evidence that he bought both suit parcels and when disputes arose, the parties litigated right from the District lands Tribunal, and after successfully prosecuting his claim before the lands tribunal, the complainant’s father appealed against the said decision to the Provincial lands dispute . Their Appeals were dismissed and subsequently the applicant had his decree adopted by the court and transfer papers executed by the court Executive officer. He subsequently got his titles deed for Mbiuni/Kabaa/910 on 20th March 1998 and the title to Mbiuni/Kabaa/973 on 17th May 2000. It should be noted that these were court sanctioned transfers and cannot be subjected to allegation of fraud as the court records speak for themselves.
37. The aggrieved parties, who are the complainant’s parents/fathers did file Machakos Civil Appeal No 78 of 2002, which appeal was dismissed on 8th February 2008. Further the applicant did file a suit being Machakos ELC CAE No 26 of 2006 which was heard on merit and determined in his favour and orders issued declaring that the two suit parcels were validly his. No subsequent appeal had been lodged as against the said Judgment. It is therefore pretentious and preposterous for the 1st respondent to purport to start investigating a land dispute where parties have been in court for a period of over 20 years and several conclusive findings made in favour of the applicant
38. The applicant also raised a valid point, that the current complaints parents who sold him the suit parcels never complained about fraud, during the prior proceedings and this issue was being raised by their sons long after they had rested. Further even when the issue off fraud was raised in the last civil suit filed, Hon Justice Angima had ruled in his favour. It is thus clear that the criminal proceedings instituted have been so instituted in bad faith and with ulterior motive to defeat and circumvent the previous proceedings all of which have been determined in the applicant’s favors. The 2nd respondent in approving the said charges acted against the well settled principles of neutrality and fairness as espoused under Section 4(b), (c), (d) & (f) of the office of the director of public prosecution *Act No 3 of 2013*



D. Determination

39. The upshot is that the applicant's petition is merited, Machakos Chief Magistrate Court Criminal Case Number E149 of 2021 has been instituted in bad faith to vex the applicant and circumvent all previous finding of the civil decrees that have been made in his favor.
40. The petition dated 4th October 2021 is therefore allowed in terms of Prayers (a), & (b);
- a. A declaration is hereby issued that the facts and circumstances herein described do not disclose any criminal liability but are rather issues that lie within the jurisdiction of the Environment and land court established under Article 162 of *the constitution*.
 - b. An order of certiorari be and is hereby issued for purpose of quashing the decision of the chief Inspector Caroline Kinoti to charge the petitioner with the offence of obtaining /forgery and the suit instituted Machakos CMCR No E149 of 2021 is hereby quashed and terminated forthwith.
 - c. The costs of this petition are assessed at Kshs.250,000/= payable by the 1st respondent.
41. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 30TH DAY OF JULY, 2024.

In the presence of:-

Mr. Loki for Applicant

No appearance for O.D.P.P

Susan/Sam Court Assistant

