



REPUBLIC OF KENYA



**Leverage Company Limited & another v Director of Criminal Investigations & 3 others;
Director of Public Prosecutions & 4 others (Interested Parties) (Petition E393 of 2021)
[2023] KEHC 919 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 919 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E393 OF 2021
M THANDE, J
JANUARY 27, 2023**

BETWEEN

LEVERAGE COMPANY LIMITED 1ST PETITIONER

CEPHAS KIARIE MURIU 2ND PETITIONER

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

**THE DCI, KASARANI SUB-COUNTY, KASARANI POLICE
STATION 2ND RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

CHRYSOSTOM NGUNYI WAHOME 4TH RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY

SOLOMON NJOROGE INTERESTED PARTY

SHARLEIF AUCTIONEERS INTERESTED PARTY

JEREMIAH KIRAGU WANJOHI INTERESTED PARTY

DANIEL NDIRANGU WANYIRI INTERESTED PARTY



JUDGMENT

1. The Petitioners have by their Petition dated 28.9.21, moved this Court seeking the following reliefs:
 1. A Declaration that the 4th respondent's complaint at the DCI office Kasarani, Nairobi against the petitioners and the 2nd, 3rd and 4th interested parties regarding the motor vehicle registration number KCG 090Y is malicious and unlawful.
 2. A permanent injunctive Order prohibiting the respondents from arresting, charging or otherwise disturbing the petitioners and the 2nd, 3rd and 4th interested parties over the 4th respondent's complaint regarding the motor vehicle registration number KCG 090Y.
 3. A declaration that the arrest and detention of the 2nd respondent from 11.00am on 21st September 2021 up to 5.00pm on 22nd September 2021 was illegal detention.
 4. General Damages be granted to the 2nd petitioner for his arrest and detention for thirty (30) hours from 11.00am on 21st September 2021 up to 5.00pm on 22nd September 2021.
 5. Costs of this petition be granted to the Petitioners.
2. The genesis of the dispute between the parties herein is a rather convoluted commercial transaction. The facts as stated by the Petitioners, is that in May and June 2017 or thereabouts, the 4th Respondent approached the 1st Petitioner seeking to borrow the sum of Kshs. 560,000/-. Being that the 1st Petitioner is not a lending institution its officers advised the 4th Respondent that it could only accommodate him in a hire purchase agreement. The 4th Respondent offered to transfer to the 1st Petitioner his motor vehicle KCG 090Y Nissan Teana, and then buy it back at a net cash price of Kshs. 560,000/-. An agreement to that effect dated 21.6.17 was entered into and duly registered as hire purchase agreement No. 90000062681. It was a term of the said agreement, which was to subsist for 24 months, that in the event of default in repayment resulting in arrears, the vehicle could be repossessed and sold to recover the sums due and owing. To this end, the 4th Respondent signed transfer forms in respect of the vehicle in the joint names of the 1st Petitioner and himself. He also signed five blank motor vehicle transfer forms which he deposited with the 1st Petitioner as security for the funds advanced to him.
3. Soon thereafter the National Transport and Safety Authority (NTSA) launched the Transport Integrated Management System (TIMS) whereby NTSA directed that all motor vehicle transfer and related transactions would henceforth be done online on the TIMS website. Consequently, the transfer forms signed by the 4th Respondent were rendered redundant. Following refusal by the 4th Respondent to log into his TIMS account to transfer the motor vehicle in their joint names, the Petitioner lodged a caveat against the vehicle. As fate would have it, the 4th Respondent did fall into arrears amounting to Kshs. 399, 843/= as at 15.8.18, which after numerous requests for payments and reminders, he failed, refused and or neglected to make good. On 26.2.19 on the instructions of the 1st Petitioner, Sharleif Auctioneers proclaimed the motor vehicle for the purpose of recovering the sum of Kshs. 360, 302 / =. The vehicle was then sold and transferred to the 5th Interested Party on 30.10.19.



4. The Petitioners' case is that in September 2021, the 4th Respondent lodged a malicious, falsified criminal complaint to the 2nd Respondent against the 1st Petitioner, its directors' employees, auctioneers, agents and one of the 1st Petitioner's customers, claiming that the vehicle had been stolen from him. Upon being summoned by the investigating officer, the 2nd Petitioner presented himself at the Kasarani Police Station at 11.00 am on 21.9.21 and was detained for over 30 hours up to on Wednesday 22.9.21, without being presented in any court. He was only released at 5.00 pm on 22.9.21 upon intervention by his advocate and upon depositing a police cash bail of Kshs. 70,000/=.
5. In a further affidavit sworn on 19.1.22, Prof. Mirie Wangenye deposed that the purported NTSA record filed by the 1st Respondent is fabricated or otherwise forged documents. It is allegedly indicated that on 29.5.17, the vehicle was registered in the names of Solomon Njoroge Ndirangu and Chrysostom Ngunyi Wahome. However, a simple motor vehicle official search on the NTSA TIMS website does not show the said names as past owners of the vehicle. He therefore deposed that the 4th Respondent's complaint is falsified and malicious. Further that he has been assisted by some unscrupulous officers of the 1st and 2nd Respondent, having defaulted on the repayments aforesaid.
6. In his supplementary affidavit of 23.6.22, Prof Mirie Wangenye deposed that the 4th Respondent had filed a civil suit in Milimani Commercial Suit E688 of 2022 at the Chief Magistrate's Court and that the 4th Interested Party filed an application dated 27.4.22 in the said suit. It is therefore paramount, in the interest of justice and of proper use of judicial time that the dispute be determined in the civil court. The lodging of a criminal complaint at Kasarani DCI's office therefore is an abuse of the police process and an attempted abuse of the court process.
7. In a replying affidavit sworn on 11.10.21 on behalf of the 1st and 2nd Respondents No. 100532 PC Mary Wenani deposed that the 4th Respondent reported a fraudulent transfer of the motor vehicle, on 26.8.21 at Kasarani Police station and recorded a statement. In his statement, the 4th Respondent indicated that in May 2017, he sought a Kshs. 560,000/= loan from the 1st Petitioner. Due to the financial constraints, the 1st Petitioner delayed in releasing the funds. The 4th Respondent agreed to a proposal by the 2nd Interested Party whereby he accepted Kshs. 100,000/- payable with a 15% interest once the 1st Petitioner processed the loan. Upon the loan being processed, a sum of Kshs. 407, 600/- given to the 4th Respondent with the rest being given to the 2nd Interested Party. The 4th Interested Party herein after receiving the full payment of the loan advanced to the 4th Respondent, refused to transfer the part ownership of the motor vehicle to the 1st Petitioner. This was despite the 1st Petitioner being fully aware that the 4th Interested Party owned the motor vehicle partially and was supposed to transfer the same once his loan was fully paid but did nothing to affect the transfer, and instead went on to place a caution. The 4th Respondent defaulted in repayments in the months of December, 2018 and January, 2019 as he was away in Tanzania. Upon his return, he found out that the vehicle had been transferred from himself to the 4th Interested Party and then the current owner and that the same was stored at Leakey's storage. He further discovered that the various transfer documents bore his and the 4th Interested Party's signatures but contends that he did not sign any of the documents.
8. PC Mary Wenani further deposed that in his statement, the 4th Interested Party denied signing any of the documents or knowing or having any kind of contract with the 4th Respondent. He however stated that he dealt with the 2nd Petitioner in processing the transfer. She further stated that the 2nd Petitioner presented himself on 21.9.21 at 12.40 PM at Kasarani Police Station. She denied that the Petitioner was booked at 11 pm as alleged and contends that he was booked at 6.18 pm. He was released on 22.9.21 at 5.24 pm, after posting cash bail, which is less than the 24-hour period allowed for custody. She further stated that the 2nd Respondent found that several offences were committed



by the Petitioners including forgery, stealing of motor vehicle, uttering false documents, making false documents, suborning perjury and conspiracy to defeat justice and interference with witnesses. The file was thus forwarded to the 1st Interested Party with a recommendation for prosecution. She further averred that the officers of the 2nd Respondent have at all times acted with professionalism and have never harassed or in any way interfered with the rights of the Petitioners. In light of the foregoing therefore, the Petitioners' claim that there was unlawful detention is frivolous and based on material non-disclosure of facts.

9. The 3rd Respondent filed Grounds of Opposition dated 1.11.21. The grounds raised are that the Petitioners herein have not demonstrated before this Court how the 1st Respondent has violated their constitutional rights; that the Petitioners are misleading the Court by trying to stop investigations and their possible prosecution for the transaction relating to the impugned transfer of the motor vehicle in question, which has raised claims of fraud and forgery; that the 1st Petitioner is improperly enjoined as there is no resolution exhibited showing authority to institute the present Petition; that the documents produced in support of the Petition on behalf of the 1st Petitioner are not properly on record as they are attached to an affidavit sworn by an unauthorized person; that where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for costs of the action; that the advocate for the Petitioners be estopped from filing as an afterthought, any documentation in whatever form, purporting to be an authority by way of a resolution or minute by the 1st Petitioner, to file the Petitioner's Board of Directors; that the Petition, if allowed will interfere with the statutory and constitutional mandate of the 1st and 2nd Respondents to investigate reported cases, and to recommend prosecution, the 2nd Petitioner was arrested and granted bail in less than the constitutionally allowed 24 hours. The 3rd Respondent urged that the petition be dismissed with costs.
10. The 4th Respondent's case as set out in his replying affidavit sworn on 8.10.21 is that in May 2017, he applied for a loan from the 1st Petitioner of Kshs. 560,000/=, being 70% of the value of the said motor vehicle which the 1st Petitioner was unable to give due financial constraints. On the 2nd Petitioner's advice, the 2nd Interested Party loaned the 4th Respondent Kshs. 100,000/= on condition that the vehicle's log book be registered in both their names. The 2nd Interested Party would be repaid once the loan by the 1st Petitioner was processed and the vehicle registered in the 4th Respondent's name and that of the 1st Petitioner. On 21.6.17, the loan was processed and a hire purchase agreement signed. In spite of this, 1st Petitioner never bothered to have the vehicle registered in both their names and the same remained in the name of the 4th Respondent and of the 2nd Interested Party.
11. The 4th Respondent further deposed that he made his repayments and as at 30.10.18, he had paid a total sum of Kshs. 424,867/=. He however fell into arrears and gave an undertaking to make good the default of Kshs. 115,400/= on 15.2.19. On 13.2.19 however, the vehicle was repossessed unlawfully, without prior notice or demand, by the 3rd Interested Party. Thereafter, the 1st Petitioner informed the 4th Respondent's advocates that the vehicle was sold in October 2019. A search showed that the new owner was the 4th Interested Party. On 26.8.21, the 4th Respondent made a complaint to the 2nd Respondent who immediately impounded the vehicle and commenced investigations. He deposed that from NTSA records, there was an agreement dated 20.12.18 indicating that he had sold the vehicle to the 4th Interested Party at Kshs. 400,000/=. He contends that his signature was forged so as to fraudulently transfer the subject motor vehicle. The 4th Respondent denied having reported that the subject vehicle had been stolen. He urged that the Petitioners had not met the threshold for grant of the orders sought and that the application be dismissed with costs.



12. In his supplementary affidavit sworn on 27.6.22, the 4th Respondent admitted that he filed Milimani CMCC No. E688 OF 2022. He contended that the Court cannot halt criminal investigations solely on the basis of the filing of a civil case based on similar facts and circumstances. Further that the Petitioners have not demonstrated how the civil case will prejudice or infringe on their right to fair trial in the event the Director of Public Prosecution recommends that they be charged.
13. Parties filed their written submissions which I have duly considered. The following issues fall for determination:
 - i. Whether the Petition is properly before the Court.
 - ii. Whether the Petition violates the principle of constitutional avoidance.
 - iii. Whether the 1st -3rd Respondents have violated the Petitioners' rights.
 - iv. Whether this Court should issue a permanent injunctive order prohibiting the respondents from arresting, charging or otherwise disturbing the petitioners and the 2nd, 3rd and 4th Interested Parties over the 4th Respondent's complaint.
 - v. Whether the petitioner should be granted general damages.

Whether the Petition is properly before court

14. The 1st -3rd Respondents contended that the Petition is not properly before the Court for want of a board or company resolution authorizing the 1st Petitioner to institute the proceedings herein. Further that there was no evidence that Prof. Mirie Wangenye who is described as a director and shareholder of the 1st Petitioner, had authority to sign court papers in respect of these proceedings, on behalf of the 1st Petitioner.
15. It is evident from the record that at the time of lodging the Petition, no authority or resolution was attached to the pleadings. There was also no resolution authorizing the advocate on record, to represent the 1st Petitioner. The law however is that proceedings commenced without authorization are capable of being subsequently ratified.
16. In the case of *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd* [2000] eKLR, Hewett, J considered a suit filed on behalf of a company without authorization and stated:

The latter case cited the commentary in 4th Halsbury Vol. 7 paragraph 767 which reads as follows:

“Control of Company’s litigation. As regards litigation by an incorporated company, the directors are, as a rule, the persons who have authority to act for the company; but, in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide, even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of a company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.

17. The learned Judge went on to state:

Having considered all these matters, I enter summary judgment for Shs.538,431/05 with interest thereon at court rates from 1st December, 1998 until payment in full but I stay



execution until the Plaintiff passes and files in this court a resolution of its directors ratifying these proceedings to date.

18. There is on record an extract of minutes of a meeting of the Board of Directors of the 1st Petitioner held on 28.9.21 authorizing Prof. Mirie Mwangi Wengenyne to act on its behalf and sign court documents and attend Court on its behalf. The advocates on record were also authorized to represent the 1st Petitioners. This authority was filed vide a further affidavit sworn by Prof. Mirie Wangenyne, on 19.1.22, thereby regularizing the anomaly. I am therefore satisfied that the filing of the Petition was duly ratified by the Board of Directors of the 1st Petitioner. Further, the failure to file the said documents at inception is in my view the kind of procedural technicality contemplated under Article 159(2)(d) of *the Constitution* of Kenya which provides that justice shall be administered without undue regard to procedural technicalities. In light of this, it follows that the Petition is properly before the Court.

Whether the Petition violates the doctrine of constitutional avoidance

19. The 1st-3rd Respondents submitted that the Petition violates the principle of constitutional avoidance. They contended that the issues raised herein can be addressed in a criminal or civil case. The basis of the Petition is the alleged fraudulent transfer of the motor vehicle in question which was originally registered to the 4th Respondent. The 2nd Petitioner was arrested following a report by the 4th Respondent to the 2nd Respondent. In view of this, it was submitted, the matter in issue is forgery, which ought to be handled in a criminal court. Further that in the event that the 2nd Petitioner is absolved, he can sue for malicious prosecution in a civil claim. According to the 1st- 3rd Respondents, the Petitioners approached this Court with unclean hands and to defeat justice as they do not want to account for the fraudulent transfer of the vehicle; that the orders sought if granted will serve to stop any criminal and civil proceedings which are ripe against them.
20. The doctrine of constitutional avoidance was expounded by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. The Court held as follows: -

(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Krentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.



21. And in the case of *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Mativo, J. (as he then was) had this to say about the doctrine:

In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause.

22. The gravamen of the Petitioners' complaint, as I understand it, is that a malicious complaint was made to the Respondents and arising from that, the 2nd Petitioner was arrested and detained at the Kasarani Police Station for a period exceeding that stipulated in Article 49(1)(f) of *the Constitution*, thereby occasioning a violation of his rights. The Petitioners seek an order prohibiting the Respondents from arresting, charging or otherwise disturbing them.
23. A careful look at the Petitioners' complaint will reveal that this is an issue that requires the interpretation of *the Constitution* and consideration as to whether constitutional rights or values have been violated. Article 49 of *the Constitution* safeguards the rights of an arrested person which include the right to be presented to court within 24 hours of arrest. There is no other legal course or basis through which the Petitioner can seek relief. Article 22(1) guarantees to every person including the Petitioners the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23(3) provides for the reliefs that may be granted by this Court in any proceedings brought under Article 22. In the premises, I find and hold that the Petition is properly before this Court and that the doctrine of avoidance does not apply herein.

Whether the 1st -3rd Respondents have violated the Petitioners' rights.

24. The Petitioners contend that the 2nd Petitioner's rights were violated by his being detained for over 30 hours without being presented in any court. He was only released at 5.00 pm on 22.9.21 upon intervention by his advocate and upon depositing a police cash bail of Kshs. 70,000/=. The 4th respondent while relying on the cases of *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154 and *Trusted Society of Human Rights Alliance vs. A.G. & 2 others* [2012] eKLR submitted that the Petition herein has not met the threshold set therein. The Petitioners have cited several Articles of *the Constitution* but however not stated how and in what manner their rights under the said Articles have been violated or infringed.
25. The 1st - 3rd Respondents submitted that although the Petitioner has not stated which right was violated, Article 29 of *the Constitution* is the violation he contends, namely the freedom and security of the person. They submitted that the 2nd Petitioner is being economical with the truth as he was summoned to the 2nd Respondent's offices to record a statement, following a complaint duly lodged by the 4th respondent. The OB annexed at the 2nd Respondent's replying affidavit shows that the 2nd Petitioner was booked on 21.9.21 at 1818 hrs and released on 22.9.21 at 1724 hrs. Having presented himself at around 1240 hrs on 21.9.21, he was interrogated before the decision to book him was made and remained in custody for the period highlighted since he had not posted police bail. According to them, the 2nd Petitioner was detained for a total of 23 hours and six minutes only, as evidenced by the cash bail receipt. Based on the foregoing, the 2nd Petitioner was aware of the offense for which he was booked and was in custody for a period of less than 24 hours, within the allowed constitutional timelines. Hence



his allegation that his arrest was arbitrary and without just cause is dishonest and a misrepresentation of the facts. The officers of the 2nd Respondent were discharging their constitutional and statutory mandate in summoning and charging the 2nd Petitioner.

26. Article 49 of *the Constitution* stipulates the rights of an arrested person as follows:

- (1) An arrested person has the right—
 - a. to be informed promptly, in language that the person understands, of—
 - i. the reason for the arrest;
 - ii. the right to remain silent; and
 - iii. the consequences of not remaining silent;
 - a. to remain silent;
 - b. to communicate with an advocate, and other persons whose assistance is necessary;
 - c. not to be compelled to make any confession or admission that could be used in evidence against the person;
 - d. to be held separately from persons who are serving a sentence;
 - e. to be brought before a court as soon as reasonably possible, but not later than—
 - i. twenty-four hours after being arrested; or
 - ii. if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
 - g. at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and
 - h. to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released

(2) ...

27. Article 49(1)(a) provides that an arrested person has the right to be informed promptly, in language that the person understands, of the reason of his arrest. The Respondents have stated that the 2nd Petitioner was informed for his reason for his arrest and further that the cash bail receipt clearly stated that the reason for his arrest was the offence of forgery. Further, Clause (1)(f) provides that an arrested person has the right to be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested. Although the 2nd Petitioner claimed that he was held in the police station for 30 hours, the Respondents countered this by asserting the 2nd Petitioner was held for a period of less than 24 hours stipulated under Article 49(1)(f). Further, that the 2nd Petitioner remained in custody for the period stated because he had not posted the stipulated cash bail to secure his release. This assertion was not rebutted by the petitioners and remained uncontroverted.



28. The petitioners contend ed that the arrest of the 2nd Petitioner was malicious. The Respondents however denied this and submitted that the 2nd Petitioner was arrested following a complaint by the 4th Respondent.
29. Article 29 of *the Constitution* provides in part as follows:
- Every person has the right to freedom and security of the person, which includes the right not to be—
- a. deprived of freedom arbitrarily or without just cause;
 - b. ...
30. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* places the burden of proof on the person who alleges facts to exist of to be trues, as follows:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
31. The Petitioners have the onus, to demonstrate that the actions taken by the Respondents constitute a violation or threat of violation of the 2nd Petitioner’s rights under Article 29 of *the Constitution*. They have however not proved that the arrest of the 2nd Petitioner was malicious. They have not demonstrated malice on the part of any of the Respondents.
32. In the case of Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others [2016] eKLR the Court of Appeal stated:
- Is threat of arrest or arrest with reasons given a violation or threatened violation of fundamental rights and freedoms? We think not. What the law seeks to prevent is arbitrary arrest without probable cause. An objective justification must be shown to validate arrest of any individual. The Kenya Constitution recognizes that if a criminal offence is committed, investigation arrest and prosecution might ensue. In this context, *the Constitution* anticipates arrest of individuals and that is why Articles 49 and 50 (2) make provision for the rights of arrested persons. In our view, a threat of arrest or any arrest per se is not unconstitutional so long as due process of law is followed and the rights of the arrested person are observed.
33. It is now well settled that for one to prove that a claim is malicious or that the prosecution was malicious and unlawful they have to demonstrate four elements. In the case of George Masinde Murunga v Attorney General [1979] eKLR, Cotran, J. stated:
- As to malicious prosecution the plaintiff must prove four things: (1) that the prosecution was instituted by Inspector Ouma (there is no dispute as to this); (2) that the prosecution terminated in the plaintiffs’ favour (there is also no dispute as to this); (3) that the prosecution was instituted without reasonable and probable cause; and (4) that it was actuated by malice.”



34. And in the case of Calvin Ouma Magare & 18 others v Director of Public Prosecutions & 4 others [2022] eKLR, Aburili, J stated:

45. These elements were summarized by the former East Africa Court of Appeal in Mbowa supra as follows:

“The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action.”

46. Accordingly, a party who claims that he was unlawfully arrested and falsely imprisoned and or maliciously prosecuted, bears the burden of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful. Similarly, an acquittal alone cannot amount to proof of malice. There must be something more than just acquittal. In the case of Nzoia Sugar Company Limited supra, the Court of Appeal observed:

“It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the company.”

47. From the above decision, it is clear that for this petition to succeed, the petitioners have to prove that there was malice on the part of the respondents and the interested parties. The question is whether malice has been proved, on a balance of probabilities. The burden of proof lies on he who alleges.

35. I concur with the sentiments of the learned Judge. For this Petition to succeed the Petitioners were obligated to place before the Court, cogent evidence that there was malice on the part of the Respondents in arresting the 2nd Petitioner arising from the complaint made by the 4th Respondent. From the material placed before me, I find that the malice alleged has not been proved. The Petitioners have also not adduced any evidence to prove that the complaint was unlawful and malicious.

Whether this Court should issue a permanent injunctive Order prohibiting the respondents from arresting, charging or otherwise disturbing the petitioners and the 2nd, 3rd and 4th interested parties over the 4th Respondent’s complaint

36. I now turn to the question whether the order of prohibition sought should be issued? The Petitioners seek a permanent injunction prohibiting the Respondents from arresting, charging or otherwise disturbing the Petitioners and the 2nd, 3rd and 4th Interested Parties in relation to matters herein. It is trite that a prerogative order such as an order of prohibition is of a serious nature and cannot and ought not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution of a person suspected of committing an offence.



37. In the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the Court of Appeal stated:

What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.

38. Article 245(1) of *the Constitution*, establishes the office of the Inspector-General of the National Police Service. Clause (4) provides for mandate and autonomy of the Inspector-General of Police with regards to, the investigation of any particular offence or offences, the enforcement of the law against any particular person or persons and the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service. Article 157 (3) of *the Constitution*, empowers the Director of Public Prosecution to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and he is required to comply. Section 28 of the *National Police Service Act* establishes the Director of Criminal Investigation. Section 34 of the said Act provides for the functions of the Director and Section 35 provides for the functions of the directorate among them, collecting and providing criminal intelligence; undertaking investigations on serious crimes; maintaining law and order; detecting and preventing crime; apprehending offenders; maintaining criminal records; conducting forensic analysis; executing the directions given to the Inspector General by the Director of Public Prosecution etc.
39. The 4th Respondent submitted that from the affidavit sworn by PC Mary Wenani, it is evident that the 1st Interested Party is yet to make a recommendation on whether or not criminal charges ought to be preferred against the Petitioners. It would therefore be speculative to stop the intended prosecution of the 2nd Petitioner when a decision to charge or not is yet to be made. From the material placed before the Court, the Petitioners have not demonstrated that the intended prosecution will constitute an abuse of the court process, will be actuated by malice and conducted in breach of their constitutional rights to warrant the Court’s intervention by way of halting the intended prosecution of the 2nd petitioner. The Court must exercise restraint and must not usurp the powers of the 1st Interested Party, and the 1st and 2nd Respondents.
40. In the case of Republic v Commissioner of Police & another Ex-Parte Michael Monari & another [2012] eKLR Warsame, J. (as he then was) stated:

It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the



institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

41. Similarly, in the case of *Nicholas Mwendwa Kithuku v Director of Criminal Investigations & 2 others; Kenya Commercial Bank Limited (Interested Party)* [2021] eKLR, Makau, J. considered a matter where the petitioners therein had alleged unlawful investigations and malicious intended prosecution and stated:

Further to the above, it has not been shown by the Petitioner that the intended prosecution by the 2nd Respondent is not in accordance with the provisions of the law or is actuated by malice. I therefore find the Petitioners prayer for an order of permanent injunction prohibiting and/or restraining the 1st and 2nd Respondents from summoning, investigating and/or further investigating, charging and/or prosecuting the Petitioner with respect to financial management of the 1st Petitioner is not justified in the circumstances of this case. The instant Petition is premature and purely speculative as the investigation are ongoing and no decision has been made as to whether or not to charge the Petitioners with any criminal offence. I therefore find that the Court ought not to usurp the constitutional and legal mandate of the 1st and 2nd Respondents to investigate any matter that, in the said Respondent's view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the Respondents.

42. Flowing from the cited provisions of the law and authorities, it is evident that the mandate of the 1st and 2nd Respondents is not subject to anyone's control and should not be interfered with unless there is reasonable reason to do so. Acts of arrest and prosecution do not in and of themselves constitute violation of constitutional rights, unless they have been done maliciously or excess of jurisdiction.

43. In the case of *Cape Holdings Limited v Attorney General & Another* [2012] eKLR, Warsame, J. stated:

My understanding of the law is that the responsibility to investigate, determine the credibility of the complaint and prosecution is solely left for the police under the direction and control of the Director of Public Prosecution. The predominant factor being that they must act in accordance with the law and so long as they do not exceed the limits, then a court should not prohibit the prosecution of an individual. The investigation of a criminal offence or complaint cannot be easily prohibited or stopped unless there is credible and reasonable evidence to show the same is mounted for an ulterior purposes or objectives.

The applicant has failed to demonstrate that the Police lack or acted in excess of jurisdiction or have not complied with the rules of natural justice. In my view it is outside the jurisdiction of this court to supervise how the police should conduct its investigations unless there is evidence to show that the investigation is being conducted in a manner to prejudice the rights and the interests of the applicant. The police should be allowed to investigate the complaint lodged by the interested party to its logical conclusion and it is now premature for me to determine whether there is any abuse being committed against the applicant.

44. I fully concur with the sentiments of the learned Judge. The 4th Respondent like any other person in the Republic of Kenya is entitled to the full protection of the law and to report any complaint of wrong doing to the police for investigation and determination. He cannot therefore be faulted for lodging a



complaint that he did, to the 1st and 2nd Respondents, who in exercise of their mandate proceeded to investigate the complaint including summoning the 2nd Petitioner, and thereafter determined that a criminal offence has been committed. The exercise by the 1st and 2nd Respondents of their mandate to investigate the complaint made to them by the 4th Respondent was legitimate and in line with their statutory mandate.

45. After due consideration of the foregoing, my view is that the Petitioners have not laid any basis for this Court to grant the orders of prohibition sought.

Whether the Petitioner should be awarded general damages

46. The Petitioners have sought damages of Kshs. 200,000/= for the alleged infringement of the 2nd Petitioner's constitutional rights. Having found, as I have, that there is nothing before this Court to warrant its intervention, and that the Petitioners have not proved their case of violation of rights, it follows that the Petitioner's claim for damages cannot be granted and the same is hereby declined.

47. In the end and in view of the foregoing, I find that the Petition dated 28.9.21 lacks merit and the same is hereby dismissed with costs.

DATED AND DELIVERED IN NAIROBI THIS 27TH DAY OF JANUARY 2023

M. THANDE

JUDGE

In the presence of: -

.....or the Petitioners

.....for the 1st- 3rd Respondents

.....for the 4th Respondent

.....Court Assistant

