



**Njenga v Inspector General of Police & 3 others; Kimani (Interested Party) (Petition 441 of 2019)
[2023] KEHC 487 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 441 OF 2019

M THANDE, J

JANUARY 27, 2023

BETWEEN

MARTIN MUNENE NJENGA PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

ANGELA NYAKIO KIMANI INTERESTED PARTY

JUDGMENT

1. By a Petition dated 31.10.19, the Petitioner seeks the following reliefs:
 - I. An order restraining the respondents from arresting, charging, detaining, or in any way interfering, or harassing the petitioner and his Real Estate and Construction businesses.
 - II. Damages
 - III. That the respondents pay costs to the petitioner
2. The Petitioner's case as set out in the Petition and his supporting affidavit sworn on even date and supplementary affidavits sworn on 7.11.19 and 27.10.2020, is that he owns and operates a



land development company by the name, Munene Njenga Development Company Limited (the Company), of which he is the managing director. The Company has completed several real estate projects in several areas of Kenya including Karen, Kikuyu and Tana River. In 2016, the Company launched an off plan real estate project called The Gold Apartments, in Suna Estate. The economic conditions arising after capping of bank interest rates made the project unattractive to banks. However, various investors including the Interested Party came on board, signed agreements and started paying monies into the project. Due to the down turn of the real estate market and a slow down of the Kenyan economy, the project ran into delays and the Interested Party demanded a refund of her money. In spite of the Petitioner explaining to her that the Company was making every effort to complete and further that she was bound by the contract she signed, which contained a clause providing for delay, the Interested Party reported the matter to the police. This led to his arrest him and he was thereafter released on police bond and given a court date.

3. The Petitioner claims that the Police did not analyse the commercial transaction documents given to them and are fraudulently using the criminal justice system to coerce him to pay back moneys not legally claimable, thereby turning a commercial transaction into a criminal matter. He accused the Police of usurping the powers of the Director of Public Prosecutions (DPP) by making a decision to charge him, as a tool to extort money from him at the behest of the Interested Party. In the process, his rights under Articles 21, 25(c), 27(1), 28, 39, 40, 47, 49(1) (d), 157(11), 156(6) and 244 of the Constitution have been violated. He thus seeks the Court's protection from illegal and improper use of police power to intimidate him and the Company.
4. The Respondents opposed the Petition vide a replying affidavit sworn on 28.2.2020 by No. 65625 SGT Frankline Kiraithe, a police officer attached to the Directorate of Criminal Investigations, Serious Crime Unit. He deposed that on 16.8.19, the Interested Party, made a report that the Petitioner had obtained money totalling to Kshs. 3.8 Million from her, by falsely pretending that he was in a position to sell her an apartment within Dagoretti in Nairobi. He obtained a copy of the agreement between the Interested Party and the Company dated 25.6.16. The apartment was neither developed nor surrendered to her as promised by the Petitioner. Further despite the Interested Party paying instalments towards the developing of the property, nothing has been done on site. On 6.9.19, he obtained a court order to investigate the Petitioner's bank accounts in Stanbic, Equity and Credit Banks, which investigation revealed that the Interested Party had deposited the sum of Kshs. 3.8 million into the said accounts belonging to the Company. From the findings the Petitioner was charged on 8.11.19 in Milimani CMCC Criminal Case No. 1909 of 2019 and 1910 of 2019 with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code and issuing a bad cheque contrary to section 316 A of the Penal Code respectively. On 7.11.19, this Court issued an order restraining the Respondents from arresting, charging detaining or interfering or harassing the Petitioner. This order was however served upon them after the Petitioner had been charged. The Respondents therefore contend that the Petitioner is using the said court order to stop his prosecution in other criminal cases. Further that the Petition does not raise any violations of the Petitioner's fundamental rights and freedoms by the Respondents.
5. In grounds of opposition dated 21.1.2020, the 4th Respondent contends that the Petitioner has not demonstrated before the Honourable Court how the Respondents have violated his constitutional right; that in arresting the Petitioner, the Police acted in accordance with the mandate set out in the National Police Service Act; that the power to prosecute is under Article 157 of the Constitution, vested in the Office of the DPP, an independent constitutional office that is only subject to control of the court based on the principles of illegality, irrationality and procedural impropriety; that what is before this Court are matters of disputed facts which are purely within the jurisdiction and assessment of the investigating authority and any intervention by the High Court before a prosecution or judgment



- would be premature; that the conduct of the Respondents does not constitute any violation of the Petitioner's rights; that the Petition is frivolous, vexatious, incompetent and improperly before the Court and an abuse of the court process.
6. The Petition is also opposed by the Interested Party vide her replying affidavit sworn on 13.3.2020. She deposed that the Petition is premature, incompetent, bad in law and fatally defective, for the reasons that under Articles 245(4), 157(6) and (10) of *the Constitution*, the 1st, 2nd and 3rd Respondents are to independently determine the mode of inquiry into and the method of dealing with complaints of criminal conduct including investigations and prosecution; that the real matters in dispute are for hearing and determination by the trial court upon which determination the Petitioner can appeal if aggrieved. Following her complaint and referral of the matter by the 2nd Respondent to the 3rd Respondent, which has since instituted prosecution against the Petitioner, he is obligated to appear before the trial court to answer to the charges. The Interested Party further deposed that in the alternative the Petitioner is obliged under Article 159(2)(c) of *the Constitution*, to exhaust the mechanisms available to him under *the Constitution* and Criminal Procedure Code.
 7. The Interested Party further deposed that, she paid a deposit of Kshs. 3,800,000/= to the Company for the purchase of Apartment No. C9 on Title No. Dagoretti/ Riruta/5271 (the property). She got to know from Francis Njue Kivuti, one of the registered owners of the property, that neither the Petitioner nor the Company had any authority to sell or otherwise deal in the property in any manner or form. Accordingly, the Petitioner's actions undeniably fall firmly within the realm of criminal conduct. She made a complaint to the 2nd Respondent which led to his being charged. She further deposed that whereas she is in the process of instituting a civil claim against the Company for breach of contract, such civil claim would be separate and distinct from the criminal proceedings and is not a bar to criminal proceedings.
 8. The Interested Party contends that although the Petitioner alleges infringement of his rights under Article 47, 25, 49 and 21 of *the Constitution*, he has failed to set out, with any reasonable precision that which he complains of, the specific constitutional provision that has been breached and the manner in which the said rights have been infringed by the Respondents and/or the Interested Party. She urged that the Petition be dismissed with costs to the Interested Party.
 9. In rejoinder, the Petitioner filed supplementary affidavits sworn on 7.11.19 and 27.10.2020. The contents of the former affidavit, are not related to the matter herein. In the latter affidavit, the Petitioner reiterated his earlier averments. He denied the allegation by the Interested Party that the contract has stalled and that the transaction is a calculated ploy to fraudulently obtain the money from her under false pretence. He further averred that he is keen on selling the apartment to the Interested Party and that the obligations under the contract with her are yet to crystallize. In view of this, the Interested Party's instructions to the DCI to arrest the Petitioner to coerce him to refund the amount paid is misuse and abuse of police power and contravenes Section 14 of the *National Police Service Act*.
 10. I have given due consideration to the parties' pleadings and submissions. The following issues arise for determination: -
 - i. Whether this Court has jurisdiction.
 - ii. Whether the Respondents acted in excess of and in abuse of their powers and violated the rights of the Petitioners.
 - iii. Whether the Petitioner is entitled to the orders sought.



Whether this Court has jurisdiction

11. Article 23(1) of *the Constitution*, has conferred upon this Court the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Under Article 165(3)(a), this Court has unlimited original jurisdiction in criminal and civil matters. Under Clause (3)(b), the Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Additionally, under Clause (3)(d)(iii) the Court has jurisdiction to determine the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.

12. The locus classicus on jurisdiction is the case of Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1., where Nyarangi, JA. stated:

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.

13. In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court held as follows:

(68). A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

14. From the cited authorities, one can readily see that it is a truism that jurisdiction is everything. Jurisdiction gives a court the power, authority and legitimacy to entertain a matter before it.

15. The Interested Party’s contention that this Court lacks jurisdiction is informed by the existence of the criminal case against the Petitioner. It is trite law that proof of a criminal charge is made at trial. In Uwe Meixner & Another v Attorney General [2005] eKLR, the Court of Appeal expressed itself on the issue as follows:

The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the *Evidence Act*. There are also constitutional safeguards stipulated in section 77 of *the Constitution* to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the Judicial Review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.

16. The question that confronts this Court is whether the existence of a criminal case and the fact that the trial court is best equipped to deal with the sufficiency and quality of evidence in support of a charge would in itself strip this Court of jurisdiction. The answer is clearly in the negative. This Court must be careful not to interfere with the mandate of the trial court as this would subvert the law regulating criminal trial. This is however not to say that this Court lacks jurisdiction to entertain



the Petition before it. In any event quite apart from the Petitioner seeking an order restraining the Respondents from arresting, charging, detaining, or in any way interfering, or harassing the Petitioner and the Company, he has also claimed breach of his rights and fundamental freedoms which this Court must consider and make a determination. In view of the foregoing, I find and hold that this Court has the requisite jurisdiction to hear and determine this matter.

Whether the Respondents acted in excess and in abuse of their powers and violated the rights of the Petitioner

17. The Petitioner submitted that the conduct of the 1st and 2nd Respondents of arresting him and coercing to pay back the money to the Interested Party is an abuse of power and infringement of the Petitioner's rights as guaranteed under Articles 25(c), 27(1), 28, 39, 40, 47 and 49(1)(d) of *the Constitution*. He further contended that the discretion of the DPP under Article 156 of *the Constitution* to institute and undertake criminal proceedings must be exercised judiciously.
18. The Respondents' case is that the Respondents have independence in the performance of their functions. Under Article 245(4) of *the Constitution* and Section 35 of the National Police Service the 1st and 2nd Respondents have the powers to investigate any criminal complaint made to them regardless of the fact that the alleged offence was committed in the course of a commercial transaction. Further that no person may give direction to the 1st Respondent with respect to investigation of any offence or enforcement of the law against any particular person.
19. Article 245(1) of *the Constitution*, establishes the office of the 1st Respondent. Clause (4) provides for the mandate and autonomy of the 1st Respondent 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. Section 28 of the *National Police Service Act* establishes the 2nd Respondent while Section 34 of the said Act provides for the functions of the Director.
20. Investigations of crime and apprehending offenders are a statutory function of the 1st and 2nd Respondents. Section 35 of the *National Police Service Act* provides that the Directorate of Criminal Investigations established under Section 28 of the Act, shall have the following functions:
 - a. collect and provide criminal intelligence;
 - b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;
 - c. maintain law and order;
 - d. detect and prevent crime;
 - e. apprehend offenders;
 - f. maintain criminal records;
 - g. conduct forensic analysis;
 - h. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*;
 - i. co-ordinate country Interpol Affairs;



- j. investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
 - k. perform any other function conferred on it by any other written law.
21. The statutory mandate of the 1st Respondent is to, inter alia, summon at a police station or office, any person believed to have information which may assist in the investigation of an alleged offence. Section 52(1) provides:
- A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.
22. It is well settled that constitutional and statutory bodies such as the Respondents herein, must be given the space to discharge their mandate and to exercise their discretion in doing so. In the case of *Tom Dola & 2 others v Chairman, National Land Commission & 5 others* [2020] eKLR the Court of Appeal spoke to this issue and stated:
- In *Pevans East Africa Ltd & Another v. Chairman, Betting Control & Licensing Board & 7 Others* [2018] eKLR, this Court emphasised, and we reiterate, that where *the Constitution* has vested specified functions in a state institution or organ, the courts will not readily interfere with the discharge of that mandate unless it is demonstrated that the institution or organ in question has acted ultra vires or in breach of *the Constitution* or the law.
23. And in the case of *Republic v Commissioner of Police & Another Ex-Parte Michael Monari & Another* [2012] eKLR, where 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.
24. While constitutional and statutory bodies must be allowed to discharge their mandate unhindered, such discharge must be within the confines of *the Constitution* and the law. In this regard, our superior courts have often been called upon to examine the lawfulness of the discharge by the Respondents, of their mandate and make pronouncements thereon. The common thread running through a long line of decisions is that where a person has been arrested and charged following investigations, there must be justification, to avoid arbitrariness. Where the arrest and prosecution of a person is warranted, it cannot be said that such person's rights and fundamental freedoms have been violated.
25. In the case of the case of *Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others* [2016] eKLR, the Court of Appeal stated:
- 46. 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.

26. Similarly, 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.

27. Odunga, J. (as he then was) considered the same issue in the case of *Agnes Ngenesi Kinyua aka Agnes Kinyua v Director of Public Prosecution & another* [2019] eKLR and stated:

67. Therefore, the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. The mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, adopting an equivocal approach to investigations by deliberately denying a suspect an opportunity to put forward his version before a person is arraigned in court surely amounts to maladministration of justice. Similarly, where exculpatory evidence is presented to the police in the course of investigation and for some reasons known to them they deliberately decide to ignore the same one may be justified in concluding that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power.

28. Article 157(1) of *the Constitution* establishes the Office of the 3rd Respondent. Under Clause (6) and Section 5(1)(b) of the *Office of the Director of Public Prosecutions Act*, the 3rd Respondent exercises State powers of prosecution and may institute and undertake criminal proceedings before any court (other than a court martial), take over and continue any criminal proceedings commenced in any court and discontinue any criminal proceedings at any stage before judgment is delivered. Article 157(10) and Section 6 of the Act insulates that 3rd Respondent from interference from any quarter and stipulates that the 3rd Respondent 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. This independence is however not absolute. Under



Article 157(11), the 3rd Respondent is required in the discharge of the aforesaid mandate, to have regard to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.

29. In the case of *The Director of Public Prosecution & 7 Others* [2013] eKLR, Odunga, J. (as he then was) accentuating the independence of the 3rd Respondent in the exercise of his constitutional mandate stated:

The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for interfering with those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision-making process.

The learned Judge went on to state:

It follows that the office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to control by the Court based on the aforesaid principles of illegality, irrationality and procedural impropriety.

30. For the Court to interfere with the work of the 3rd Respondent, it must be demonstrated that the conduct constitutes an abuse of process. This was the holding in *Republic v Director of Public Prosecutions & 2 others Ex-Parte Stephen Mwangi Macharia* [2014] eKLR where again Odunga, J. (as he then was) stated:

The general rule in these kinds of proceedings is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of *the Constitution*. Therefore mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not, on its own and without more, a ground for halting such proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who contends that he has a good defence in the criminal trial ought to be advised to raise the same in his defence before the criminal trial instead of invoking this Court's jurisdiction with a view to having this Court determine such an issue as long as the criminal process is being conducted bona fides and in a fair and lawful manner. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

31. It is well settled that the 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. 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.

32. I fully concur with the sentiments of the learned Judge. The Interested Party 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. Accordingly, the Interested Party cannot be faulted for lodging a complaint that she did to the 1st and 2nd Respondent, who in exercise of their mandate proceeded to investigate the complaint and 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 Interested Party, was legitimate. Similarly, the decision of the 3rd Respondent, upon conclusion of the investigations by the 1st and 2nd Respondent to charge the Petitioner was done in the lawful exercise of his constitutional and statutory mandate.
33. On the claim that he has been subjected to harassment and intimidation by the 1st and 2nd Respondents, the Petitioner was required to place before the Court cogent proof of the existence of the facts that he asserts and also that his fundamental rights and fundamental freedoms under the Bill of Rights were violated by the Respondents. This is the requirement in Section 107 of the Evidence Act, which provides:
 - (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.
34. The burden of proof on a petitioner in a constitutional petition was addressed by the Supreme Court in the case of Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR. The Court stated as follows:

Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
35. The Petitioner has invoked the provisions of Article 22(1) to institute the proceedings herein claiming that his rights and fundamental freedoms in the Bill of Rights has been denied, violated or infringed, or is threatened by the Respondents. Although the Petitioner has listed numerous articles of the



Constitution, alleging violation of his rights, he has not demonstrated the manner in which the Respondents have violated the said rights, as required in the principle set out in the case of Anarita Karimi Njeru v Republic [1979] eKLR, where the Court stated:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

Whether the Petitioner is entitled to the orders sought

36. Article 165(6) and (7) of the Constitution, confers upon this Court supervisory jurisdiction over subordinate courts and tribunals individuals, bodies and authorities as follows:

- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

37. The jurisdiction of this Court over the Respondents is not in doubt. As indicated herein, the Petitioner has not demonstrated the Respondents acted outside or in excess of their respective constitutional and statutory mandate to warrant the interference of this Court. No evidence has been placed before the Court to show that the criminal proceedings against the Petitioner constitute an abuse of process to justify the Court putting a halt to the proceedings.

38. The grounds upon which the prosecution may be prohibited were considered in Director of Public Prosecutions v Martin Maina & 4 Others [2017] eKLR, where the Court of Appeal stated:

40. The learned Judge was alive to the fact that the judicial power of quashing criminal proceedings has to be exercised very sparingly, as held by the Supreme Court of India in STATE OF MAHARASTRA & OTHERS v ARUN GULAB GAWALI & OTHERS (supra). In the same matter the Court outlined grounds upon which orders prohibiting criminal prosecution may be granted. They are as follows:
 - (I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
 - (II) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
 - (III) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and



- (IV) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.”

The court went on to state:

The power of quashing criminal proceedings has to be exercised very sparingly with circumspection and that too in the rarest of rare cases.”

39. Odero, J. held a similar view in the case of Jamal Shariff Swaleh v Director of Public Prosecution & 4 others [2014] eKLR:

It is only where there has been shown to be an abuse of court process or a breach of *the constitution* that the courts will act to interfere with the discretion of the Director Public Prosecutions. In the case of Kenya Commercial Bank Limited & 2 Others – Vs. Commissioner Of Police And Another, Nairobi Petition No. 218 Of 2011 (unreported) Hon. Majanja J. held that:

“The office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to *the constitution* and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under *the constitution*.” [my emphasis].

40. After due consideration of the facts herein, the law and the authorities cited, my view is that the Petitioner has not laid any basis for this Court to bring to a halt the criminal proceedings against him.
41. The Petitioner has in his submissions raised the twin issues as to whether there exists a legally binding contract between him and the Interested Party and whether there has been a breach of the said contract. With respect, this Court is concerned with questions as to whether there has been breach of a party’s rights and fundamental freedoms under the Bill of Rights or of *the Constitution* itself. Whether there exists a contract between the parties or not and whether there has been breach of the same are not issues for consideration and determination by this Court.
42. I now turn to the issue of costs. Rule 26(1) of the Mutunga Rules provides that the award of costs is at the discretion of the Court. Sub Rule (2) provides that in exercising its discretion in this regard, the Court must be mindful not to discourage any person or hinder their access to the Court to determine their rights and fundamental freedoms. The Petition was filed not in the public interest but in the private interest of the Petitioner.
43. In the end and in view of the foregoing, I make a finding that the Petitioner has not met the threshold for grant of the orders sought. Accordingly, the Petition dated 31.10.19 is hereby dismissed with costs.

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

M. THANDE

JUDGE

In the presence of: -

.....for the Petitioner



.....for the Respondents
.....for the Interested Party
.....Court Assistant

