



Steyn & 18 others v Officer Commanding Magadi Police Station & 5 others; Nielsen & 2 others (Interested Parties) (Petition 210 of 2011) [2023] KEHC 219 (KLR) (Constitutional and Human Rights) (26 January 2023) (Judgment)

Neutral citation: [2023] KEHC 219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 210 OF 2011
HI ONG'UDI, J
JANUARY 26, 2023**

BETWEEN

PHILIP STEYN & 18 OTHERS PETITIONER

AND

OFFICER COMMANDING MAGADI POLICE STATION 1ST RESPONDENT

OFFICER COMMANDING NGONG POLICE STATION 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

CONSTABLE BENSON BARAZA 4TH RESPONDENT

THE CHIEF MAGISTRATE KIBERA LAW COURTS 5TH RESPONDENT

THE ATTORNEY GENERAL 6TH RESPONDENT

AND

PETER BONDE NIELSEN INTERESTED PARTY

JAMES GITAU SINGH INTERESTED PARTY

NGURUMAN LIMITED INTERESTED PARTY

JUDGMENT

Introduction

1. The petition herein is an old matter that dates back to the year 2011. The Court record reflects that the parties filed all their pleadings and submissions. It was however noted that the 1st and 2nd interested parties pleadings were not found in the Court file and attempts to retrieve them from the parties



advocates were futile. Be that as it may, the instant determination will be based on the available pleadings, evidence and submissions which have afforded this Court an opportunity to discern the substance of the case.

The Petition

2. The petitioners filed a petition dated 19th October 2011 which was later amended and filed on 20th July 2019. The petition was filed under Articles 20(1),(2),(3) & (4), 21(1),22(1) & (2), 23(1) & (3),258(1) and 259(1) of the Constitution for the alleged contravention of Articles 25(c), 27(1) and (2), 35(2), 47(1) and 50(1) and (2) of the Constitution. Accordingly, the petitioners seek the following orders:
 - i. A declaration that the petitioners fundamental right to a fair trial under Article 50(2)(e) of the Constitution has been denied, violated and or infringed and threatened with violation and infringement by the frequency and frivolity of the 3rd respondent's applications for adjournment made on 12th October 2010, 29th November 2010, 20th January 2011, 14th March 2011, 15th March 2011, 2nd June 2011, 1st August 2011 and 10th October 2011, the said respondents perceived reluctance to proceed expeditiously with hearing of the said criminal proceedings, the 5th respondent's decisions and rulings on 12th October 2010, 29th November 2010, 20th January 2011, 14th March 2011, 15th March 2011, 2nd June 2011, 1st August 2011 and 10th October 2011 allowing the said adjournments and actual bias and or apparent bias on the part of the 5th respondent.
 - ii. A declaration that the petitioners fundamental right under Article 50(1) of the Constitution to have the criminal proceedings instituted and undertaken by the 3rd respondent against them decided by the 5th respondent in a fair hearing before an independent and impartial tribunal has thereby been denied, violated and infringed by the 5th respondent's actual and or apparent bias.
 - iii. A declaration that the petitioners right to be heard has been violated by the 1st, 2nd and 3rd respondents' decision and or acts of omission and commission comprised in the said respondents' negligence, failure and or refusal to record statements from any of the petitioners could instigate and or institute the charges against the said petitioners.
 - iv. A declaration that the 1st and 2nd respondents acted unreasonably within the meaning of the term under the Wednesbury's principle of unreasonableness by their decision and or acts of omission and commission comprised in the said respondents' negligence, failure and or refusal to record statements from any of the petitioners before the 1st, 2nd, and or 3rd respondents could instigate and or institute the charges against the said petitioners.
 - v. A declaration that the 1st, 2nd and 3rd respondents violated, denied and infringed the petitioners fundamental right to access information under the provisions of Article 35(2) of the Constitution by their decision and or acts of omission and commission comprised in the said respondents' negligence, failure and or refusal to record statements from any of the petitioners before the 1st, 2nd and or 3rd respondents could instigate and or institute the charges against the said petitioners.
 - vi. A declaration that consequently, the prosecution undertaken by the 3rd respondent against them is oppressive, vexatious and an abuse of the process of the Court by reason of the said denial, violation and infringement of the petitioners said fundamental right under Article 35(2) of the Constitution.



- vii. A declaration that any administrative action which the 1st, 2nd and or 3rd respondent were to undertake as against the petitioners in pursuance of the prosecutorial powers conferred upon the said respondents ought to have been lawful, reasonable and procedurally fair.
- viii. A declaration that insofar as the 1st, 2nd and or 3rd respondents acts of omission and commission comprised in their neglect, failure and or refusal to record statements from any of the petitioners before the said respondents could instigate and or institute and undertake the criminal proceedings against the said petitioners amounts to a denial, violation and infringement of the petitioners fundamental right to access to information under the provisions of Article 35(2) of the *Constitution*, the said respondents have accordingly denied, violated and infringed the petitioners' fundamental right under Article 47(1) to an administrative action that is lawful.
- ix. A declaration that insofar as the 1st, 2nd and 3rd respondents acts of omission and commission comprised in their neglect, failure and or refusal to record statements from any of the petitioners before the said respondents could instigate and or institute and undertake the said criminal charges and proceedings against the said petitioners amounts to acting unreasonably within the meaning of the term under wednesbury's test of unreasonableness, the said respondents have accordingly denied ,violated and infringed the petitioners fundamental right under Article 47(1) to administrative action which is reasonable.
- x. A declaration that insofar as the 1st, 2nd and 3rd respondents acts of omission and commission comprised in their neglect, failure and or refusal to record statements from any of the petitioners before the said respondents could instigate and or institute and undertake the said criminal charges and proceedings against the said petitioners amounts to acting unreasonably within the meaning of the term under wednesbury's test of unreasonableness, the said respondents have accordingly denied ,violated and infringed the petitioners fundamental right under Article 47(1) to administrative action which is procedurally fair.
- xi. A declaration that consequently, the prosecution undertaken by the 1st, 2nd and or 3rd respondents against the petitioners is therefore oppressive, vexatious and an abuse of the process of the court by reason of the said denial, violation and infringement of the petitioners said fundamental right under Article 47(1) of the *Constitution*.
- xii. A declaration that the 1st and 2nd respondents acted in bad faith and in abuse of the prosecutorial powers conferred upon them by law by their decision and or acts of omission and commission comprised in their negligence, failure and or refusal to record statements from any of the petitioners before the 1st, 2nd and 3rd respondent could instigate and or institute the criminal charges against the said petitioners.
- xiii. A declaration that the 1st and 2nd respondents failed to treat the petitioners as equals to the complainant and CPL.Benson Baraza, Elisha Sharrai,capl.alex K.chemursoi,wilson Narorua, Apc Jackson Orumdi, Lenana Ole Kudate, Jarso Godana Didi, Koinange Lolkinyei, Matipei Kipas, Lepicha Nalle, Jackson Kordune Nemush and Mark Jenkins who the 3rd respondent intended to call as witnesses to establish the complaint by their decision and or acts of omission and commission comprised in their negligence, failure and or refusal to record statements from any of the petitioners and to record statements only from the complainant said witnesses.
- xiv. A declaration that consequently, the 1st and or 2nd respondents have denied violated and infringed the petitioners' fundamental right of equality before the law under Article 27(1) of the *Constitution*.



- xv. A declaration that by failing to accord the petitioners the same protection and benefit of the law under the said Section 22 of the [police Act](#) Cap.84 (now repealed) and or Article 35(2) of the [Constitution](#), which the 1st and 2nd respondents had accorded the said complainant and the twelve(12)witnesses when recording their statements, the said respondents have denied, violated and infringed the petitioners fundamental right under Article 27(1) of the [Constitution](#) to equal protection and equal benefit of the said provisions of law.
- xvi. A declaration that accordingly, the prosecution which has been undertaken by the 1st, 2nd and or 3rd respondents against the petitioners in consequence of the said denial, violation and infringement of their said fundamental right under Article 27(1) of the [Constitution](#) to equal protection and benefit of the law is not the fair trial envisaged and guaranteed under the provisions of Article 50(2) of the [Constitution](#).
- xvii. A declaration that Peter Bonde Nielsen could not at law lodge any lawful criminal complaint for any offense under the Penal Code allied to causing injury to the property comprised in Title No.Narok/Nguruman/Kamorora/1 or any part or portion thereof.
- xviii. A declaration that Peter Bonde Nielsen cannot lodge such a complaint, before a court of competent jurisdiction establishes that he is in fact lawfully in occupation of the property comprised in Title No.Narok/Nguruman/Kamorora/1 and or is otherwise the proprietor of the said property and every part thereof.
- xix. A declaration that the property comprised in Title No.Narok/Nguruman/Kamorora/1 is not a public place or public premises within the meaning of the term under Section 2 of the [Penal Code](#) wherefore the petitioners cannot at law commit any offence against public tranquility under Chapter IX of the [Penal Code](#) while being thereupon.
- xx. A declaration that insofar as they are either directors, employees, servants and or agents of Nguruman Limited, prosecution of the petitioners by the 1st, 2nd and or 3rd respondent for any offence against causing injury to the property comprised in Title No.Narok/Nguruman/Kamorora/1 under Chapter XXXIII of the Penal Code including that of malicious damage to the property contrary to Section 339(1) of the [Penal Code](#) would be contrary to public policy stipulated in legislative privilege under Section 27(a) of the [Registered Lands Act](#) expressed by Parliament as belonging or appurtenant to Nguruman Limited's registration as the absolute proprietor of the said property.
- xxi. A declaration that insofar as they are either directors, employees, servants and or agents of Nguruman Limited, prosecution of the petitioners by the 1st, 2nd and 3rd respondent for any offence against public tranquility under Chapter IX of the Penal Code while the said petitioners are upon the property comprised in Title No. Narok/Nguruman/Kamorora/1 including that of threatening breach of peace or violence under Section 95(1)(b) of the Penal Code or incitement to violence and disobedience of the law under Section 96 thereof would be contrary to public policy stipulated in legislative privilege under Section 27(a) of the [Registered Lands Act](#) expressed by Parliament as belonging or appurtenant to Nguruman Limited's registration as the absolute proprietor of the said property.
- xxii. A declaration that by arresting and thereafter detaining the 1st to 17th petitioners on 28th August 2010 for allegedly committing the offense of threatening breach of peace or violence under Section 95(1)(b) of the [Penal Code](#), the 1st and or 4th respondents denied, violated and infringed and the said petitioners fundamental right to freedom and security of their persons and in



particular their right not to be deprived of their freedom arbitrarily and or without a just cause under Article 29(a) of the Constitution.

- xxiii. A declaration that by arresting and thereafter detaining the 1st, 2nd and 18th petitioners on 28th August 2011 for allegedly committing the offence of malicious damage to property contrary to Section 339(1) of the Penal Code, the 1st and 4th respondents deprived the said petitioners of their fundamental right to freedom and security of their person and in particular their right not to be deprived of their freedom arbitrarily and or without a just cause under Article 29(a) of the Constitution.
- xxiv. A declaration that by arresting and thereafter detaining the 19th petitioner on 15th March 2011 for allegedly committing the offence of incitement to violence contrary to Section 96 of the Penal Code, malicious damage to property contrary to Section 339(1) thereof and creating disturbance in a manner likely to cause breach of peace contrary to Section 95(1)(b) thereof respectively, the 1st and 4th respondents denied, violated and infringed the said petitioner of his fundamental right to freedom and security of his person and in particular his right.
- xxv. A declaration that consequently, the 1st, 2nd and or 3rd respondents have exercised the prosecutorial powers conferred upon them at law in bad faith and abuse thereof.
- xxvi. A declaration that the criminal proceedings instigated, instituted and undertaken by the 1st, 2nd and or 3rd respondents before the 5th respondent against the petitioners are vexatious, oppressive and an abuse of court process.
- xxvii. An order of certiorari do issue to bring into the High Court the decision of the 1st, 2nd and or 3rd respondent contained and reflected in the charge sheet filed on 31st August 2010 in Kibera Chief Magistrate Criminal Case No.3603 of 2010 to instigate institute and undertake before the 5th respondent criminal proceedings against the 1st to 17th petitioners for an alleged offence of creating disturbance in a manner likely to cause breach of peace contrary to Section 95(1)(b) of the Penal Code in respect of Count I therein and as against the 1st, 2nd and 18th petitioners respectively for an alleged offence of malicious damage to property contrary to Section 339(1) thereof in respect of Count II therein for the purpose of being quashed and the said charges and proceedings undertaken before the 5th respondent thereupon be quashed.
- xxviii. An order of certiorari do issue to bring into the High Court the decision of the 1st, 2nd and or 3rd respondent contained and reflected in the amended charge sheet filed on 15th March 2011 in Kibera Chief Magistrate Criminal Case No.981 of 2011 to instigate, institute and undertake before the 5th respondent criminal proceedings against the 19th petitioner in respect of an alleged offence of incitement to violence contrary to Section 96 of the Penal Code in respect of Count I, malicious damage to property contrary to Section 339(1) thereof in respect of Count II and creating disturbance in a manner likely to cause breach of peace contrary to Section 95(1)(b) of the Penal Code in respect of Count II respectively for the purpose of being quashed and the said charges and proceedings undertaken before the 5th respondent thereupon be quashed.
- xxix. An order of prohibition directed to the 6th respondents' prohibiting him and or any other magistrate from hearing or further hearing or determining Kibera Chief Magistrate Criminal Case No.3603 of 2010: *Republic v. Philip Steyn and 17 others* and or Kibera Chief Magistrate Criminal Case No.91 of 2011: *Republic v Moses Loontasati Olooluwaya* as consolidated on 2nd June 2011 or otherwise and or the charges thereon and or any of them.



- xxx. The 5th respondent forthwith refunds or causes the cash bails paid by the petitioners on 31st August 2010 and or 15th March 2011 to forthwith refund to them or to their order.
- xxxi. General damages.
- xxxii. Exemplary damages.
- xxxiii. Aggravated damages.
- xxxiv. Interest on (xxx), (xxxi) and (xxxii) above at Court rates from date of judgement until payment in full.
- xxxv. Such other or further relief as this Honourable Court may deem just and fit to grant.
- xxxvi. Costs of this petition.

The Petitioners' Case

3. The crux of this petition as supported by the 1st petitioner's, operations manager's affidavit in support of even date is that the petitioners' rights under Articles 27(1) and (2), 35(2), 47(1) and 50(1) and (2) of the Constitution were violated by the respondents herein for the reasons detailed below. The petition was also supported by the 19th petitioner's affidavit in support which reiterated the contents of the 1st petitioner's supporting affidavit.
4. He commenced by informing that the 2nd to 18th petitioners are employees of Nguruman Limited, the 3rd interested party while the 19th petitioner is its director and chairman. He made known that the 3rd interested party is the registered proprietor of the property comprised Title No. Narok / Nguruman/ Kamorora /1 and its business revolves around an aerodome known as Laro Airstrip located at Narok District in Rift Valley. In addition, the 3rd interested party holds Permit No. 27542 granted by the Water Resources Management Authority to abstract water from Olobotiro river and rivers, Engare Kiti (I) and Engare Kiti (II) Rivers which also flow through other parts of the property.
5. He deposed that the Kenya Civil Aviation Authority (KCAA) in a letter dated 11th December 2009 informed the 3rd interested party that its aerodome license had expired and required the aerodome to be inspected prior to renewal of the license as indicated in KCAA Aeronautical Information Circular No.3 of 2007. The 3rd interested party in compliance, on 28th December 2009 paid the license renewal fees and inspection fees at the rate of Ksh.20000 for both.
6. It was averred that the KCAA inspected Laro Airstrip on 19th March 2020 and in a letter detailing its findings dated 29th March 2010 informed that several shortcomings had been noted. It required the shortcomings to be rectified, a further re-inspection be done before issuance of the license. The 3rd interested party in compliance informed KCAA that Koka, Laro and Olbitiro airstrips would be closed for the indicated repairs and maintenance. It is at this point that the 3rd interested party engaged the 1st to 18th petitioners to carry out these works.
7. He deposed that on the material day, 26th August 2010 when they were to commence, the petitioners were not able to access Laro Airstrip to carry out the repair works. This is because their access into the Airstrip was obstructed by armed rangers who are said to be employees of a Danish national called Jan Bonde Nielsen and were accompanied by his son, the 1st interested party. This led to an altercation between the parties. It was stated that the 1st interested party and his father occupied Ol Donyo Laro Estate illegally and that the 3rd interested party had in that regard instituted legal proceedings in the High Court at Nakuru to secure their eviction.



8. When they were able to start the repair works the 1st respondent, the 4th respondent, the 1st interested party's father and his Counsel came to the property with a helicopter said to be owned by the Nielsen family. The 1st respondent proceeded to ask the 19th petitioner to produce the documentation authorizing the 1st to 18th petitioner to carry out the repair works. He also ordered the 19th petitioner to cease the repair works owing to an order he had received. The petitioners refused to comply with the said order which they did not recognize.
9. He deposed that this defiance led to more police being deployed in the aerodrome without the 3rd interested party's consent. He pointed out that one Inspector Tum and Chief Inspector Mark Leleruk proceeded to question the 19th petitioner on the ownership of the property. The 1st to 18th petitioners soon after were arrested on 28th August 2010 by the 4th respondent under the instruction of the 1st respondent and taken to Magadi Police Station in Land rovers belonging to the 1st interested party. That following the arrest, the police did not require the petitioners to make any statement or submit any information that would assist in the investigations.
10. He deposed further that the 1st to 18th petitioners were on 31st August 2010 charged and this marked the start of the criminal proceedings vide Kibera Chief Magistrate Criminal Case No.3603 of 2010. The Charges were: Count I - creating disturbance in a manner likely to cause breach of peace contrary to Section 95(1)(b) of the Penal Code against the 1st to 17th petitioners. Count II - Malicious damage to property contrary to Section 339(1) of the Penal Code against the 1st, 2nd and 18th petitioners. The petitioners denied the charges and were released on cash bail.
11. It was deposed that prosecution of the case before the 5th respondent was conducted on 12th October 2010, 29th November 2010, 20th January 2011, 14th March 2011, 15th March 2011, 2nd June 2011, 1st August 2011 and 10th October 2011. The matter was adjourned severally at the instance of the 3rd respondent, who acted under the influence of the 1st and 2nd interested parties. Further that as at 15th March 2011 only the 1st interested party who testified as PW1 had given his evidence in chief.
12. On 15th March 2011 an application for amendment of the charges by way of substitution was made. This affected all the petitioners in various counts. During the hearing on 6th June 2011, the 1st and 2nd respondents arrested the 19th petitioner. This was in respect of an alleged offense of incitement to violence contrary to Section 96 of the Penal Code; Malicious damage to property contrary to Section 339(1) of the penal code and Creating disturbance in a manner likely to cause breach of peace contrary to Section 95(1) (b) of the Penal Code, (Counts I, ii & iii respectively).
13. The petitioners are aggrieved that the 1st and 2nd respondents by their decision and acts of omission to record statements from any of them before instigating the criminal proceedings acted unreasonably. They contend that had they been given an opportunity to record statements the truth about the ownership of the property and / or shares of the 3rd interested party would have come out clearly. He deposed that the Court of Appeal in Nairobi Milimani HCCC No.332 of 2010 determined that the 1st interested party's claim in the property was not for an interest on the property but was in respect of equal ownership of the assets of the partnership part of which comprise the shares of the 3rd interested party and so could not attach to the assets of the 3rd interested party which includes the property.
14. The petitioners in support of the amended petition filed a further affidavit dated 30th July 2014 sworn by the 19th petitioner who deposed that the 1st interested party's father was not the owner of the impugned property and had even sworn an oath on 3rd December 1996 that he did not own property in Kenya. Considering this it was deposed that the criminal complaint was lodged on a false and fraudulent basis.



15. He further deposed that the 1st interested party made the criminal complaints against the petitioners based on falsified information. He informed that the Court of Appeal on 4th April 2014 set aside the ruling and orders of injunction that had been obtained by the 1st interested party's father on 30th March 2012 in Nairobi Milimani HCCC No.332 of 2010. This he averred was because the Court found that the 1st interested party's father did not have any interest in the 3rd interested party's property among other findings.
16. He deposed further that after the Court of Appeal's finding the 1st interested party, his father and servants between 4th April 2012 and 18th May 2014 committed waste on the impugned property by willfully and maliciously vandalizing, looting and destroying the Oldonyo Laro Lodge which the 1st interested party in his affidavit had claimed belonged to his father. They soon after vacated the property and delivered vacant possession of the derelict lodge to the 3rd interested party. He deposed that the 1st interested party acted maliciously and without probable cause when he made a false and malicious complaint against the petitioners to the 1st to 3rd respondents. He averred that the criminal charges were brought and continued by the 3rd respondent in bad faith and with an ulterior motive as it lacked a proper cause.

The 1st, 2nd, 3rd, 4th and 5th Respondents' case

17. The respondents in response to the petition filed the following grounds of opposition dated 10th February 2012:
 - i. The petition is misconceived, frivolous, vexatious and incompetent and an open abuse of the court process and should thus be dismissed with costs.
 - ii. No sufficient grounds have been adduced to warrant the grant of the orders sought.
 - iii. The petition is full of falsehoods and the petitioners are guilty of material non-disclosure which in effect disentitles them to the orders sought.
 - iv. The petition has not met the requisite threshold in like matters to warrant the grant of the orders sought.
 - v. The matters pleaded and contained in the petition are evidence and the defences of the petitioners in the criminal charges they are facing in the subordinate court and they should be raised before the trial court and not the High Court in the manner herein.
 - vi. By arresting the petitioners and subsequently preferring criminal charges against them, the 1st, 2nd, 3rd and 4th respondents were performing and executing their duties and mandate under the relevant establishing legislation and in accordance with the law and as such no fault or wrong doing can be deduced from their said actions.
 - vii. Criminal charges were preferred against the petitioners after a valid complaint was lodged with the law enforcement agencies and after intensive investigations were conducted and which investigations revealed the commission of criminal offences under the laws of Kenya and in the circumstances, the orders sought are meant to stall the operations of the respondents in the execution of their mandate under the relevant establishing legislation.
 - viii. By virtue of the operation of the principle of separation of powers, the orders sought cannot be granted.



- ix. The grant of adjournments or other orders by judicial officers in any proceedings is a matter of judicial discretion thus if the petitioners were aggrieved by the criminal proceedings then the appropriate avenue available was for them to appeal or revision under the relevant legal provisions which the petitioners have not utilized.
- x. The petitioners cannot complain about the number of witnesses to be called by the State during the prosecution of the case as the purpose of any proceedings before a court of law is to do justice to the parties by calling all relevant witnesses and processes which the respondents are legally obligated to adhere to.
- xi. The respondents are and have always been ready, willing and able to conduct the proceedings expeditiously and in the manner provided by the laws of Kenya.
- xii. No material has been presented before the court to show that, the applications for adjournment were frivolous or that the respondents have been reluctant to proceed with the matter. Further that the applications were made before Counsel for the petitioners who made their submission on and Court made a determination on merit.
- xiii. The matters complained of under paragraphs 59, 60, 61, 64 and 65 of the petition are procedural matters which were necessary for the proper adjudication of the criminal case and in the interests of justice and hence cannot be said to have violated the rights of the petitioners.
- xiv. Only the trial Court can decide whether or not there is sufficient evidence to warrant a conviction in respect of the charges preferred against the petitioners. The matters referred to in paragraphs 76, 77, 101, 102, 103, 104, 105, 106, 109 and 112 of the petition amongst others are matters of evidence which are not relevant to the nature of the instant petition.
- xv. There are no legal provisions compelling investigating agencies to record statements from suspects and accused persons. In any event, the petitioners did not volunteer or offer themselves to record statements with the investigating agencies.
- xvi. No sufficient evidence has been presented before the High Court to show that the respondents have infringed on the constitutional and fundamental rights of the petitioners.

The 6th Respondent's case

18. The 6th respondent also filed its grounds of opposition in response to the petition dated 19th December 2011 on the ground that:
 - i. The fundamental rights and freedoms protected in the [Constitution](#) are to be enjoyed to the greatest extent consistent with the nature of the right or fundamental freedom.
 - ii. The petition does not disclose any denial, violation, infringement or threat to the petitioner's fundamental rights and freedoms.
 - iii. The 1st to 5th respondents are sanctioned by law to investigate the commission of crimes, charge and prosecute the perpetrators of such crimes in protection of the public interest.
 - iv. The petition amounts to an abuse of the Court process as there is an automatic right of appeal to the High Court in case any party is dissatisfied with the decision of the Magistrate's Court.
 - v. The petition is incompetent, incurably defective and the prayers sought untenable as they amount to an impediment of justice.



The 1st Interested Party's case

19. The 1st interested party in response filed a replying affidavit dated 16th February 2012, (This was not in the court file and was not available on request) and a further affidavit dated 10th March 2016 in response to the amended petition.
20. In the further affidavit, it was deposed that the complaint in Kibera Criminal Case No.3603 of 2010 was not based on his father's interest in the impugned property but the crimes of assault and incitement to violence which he said the petitioners committed. On this basis he argued that the complaint was not lodged on a fraudulent basis as stated by the petitioners. He further deposed that his father did not have a personal interest in the impugned property but just the interests of the family as per a trust. He denied the assertions raised in the amended petition.

The 2nd Interested Party's case

21. The 2nd interested party filed a replying affidavit dated 16th February 2012, (This was not in the court file and was not availed upon request by the Court).

The 3rd Interested Party's case

22. The 3rd interested party through its director, Herman Steyn filed a replying affidavit dated 21st February 2013 in response to the petition. It reiterated and emphasized the contents of the petitioners' case. He deposed that the 3rd interested party is the registered proprietor of the property Title No. Narok/ Nguruman / Kamorora /1. Further that the 3rd interested party is a holder of Aerodome Clearance Certificate Ref. OPS/ADK/2454/182 in respect of the aerodrome referred to as Laro at Narok District, Rift Valley where Laro Airstrip is situated. Further that the 3rd respondent has a Permit No.27542 from the Water Resources Management Authority to abstract water from Olobotiro River, Engare Kiti(I) and Engare Kiti(II) rivers.
23. He supported the petitioners averments on the issue of licences and inspection, payment of Shs.40,000/= and the occurrences thereafter. He further deposed on the account of events as stated by the petitioners in their account that led to the filing of Kibera Chief Magistrate Criminal Case No.3603 of 2010 and Kibera Chief Magistrate Criminal Case No.981 of 2011. He averred that the 1st, 2nd, 3rd and 4th respondents did not interview the 3rd interested party or any of its directors with regard to the criminal cases, thus relevant information on the impugned property was left out.
24. Making reference to the 1st interested party's replying affidavit dated 19th February 2012 he noted that its contents in relation to Nairobi Milimani HCCC No.332 of 2010 did not constitute the substance of the complaint before the 1st, 2nd, 3rd and 4th respondents. Furthermore, that the 4th respondent's statement dated 29th August 2010 through PC Elisha Shirrai, CPL. Alex K. Chemursoi, APC Wilson Narorua and APC Jackson Orumdi confirmed that these officers did not record statements from the petitioners, conduct interviews on the 3rd interested party's directors or investigate the true ownership in the impugned property.
25. In light of this, he deposed that the 1st to 4th respondents' decision to prosecute the petitioners was not based on any probative evidence. In the same way, it was not legally possible to sustain a claim against the petitioners as lodged by the 1st interested party as he was not an aggrieved party in the context of this case. As a result it was deposed that the 1st, 2nd and 3rd respondents were using the criminal justice system to pursue civil feuds in Nakuru HCCC No.103 of 2009 between the 3rd interested party and Ol donyo Laro Estate Limited in which the 1st interested party is a shareholder and director, Nakuru HCCC



No.120 of 2010 between the 3rd interested party and Jan Bonde Nielsen and Nairobi Milimani HCCC No.332 of 2010 between the 1st interested party's father and certain 3rd respondent's shareholders. He deposed that the criminal complaint was marred with an ulterior motive to intimidate the 3rd interested party.

The Petitioners' submissions

26. On behalf of the petitioners the firm of A.F.Gross and Company Advocates filed written submissions dated 14th October 2021 and a list of authorities dated 19th April 2021. On the first issue of the alleged violation of Article 35(2) of the Constitution, Counsel submitted that the failure by the 1st and 2nd respondents to record statements from the petitioners infringed this right. Furthermore, that this omission by the 1st, 2nd and 3rd respondents denied the petitioners an opportunity to contradict any information that they were given by the 1st interested party which it claimed could have been untrue or misleading in relation to the complaint. He relied on *De Souza v Tanga Town Council* (1961) EA 377, in support.
27. Counsel submitted that the repealed Police Act required the 1st to 4th respondents to record statements from the petitioners before bringing criminal charges against them. He argued that the respondents ought to have acted in good faith by hearing all parties before instigating the criminal proceedings. They therefore violated Article 50(2) of the Constitution. He finally argued that the prosecution against the petitioners was oppressive, vexatious and an abuse of the Court process.
28. Counsel submitted that the petitioners case raises real questions which are not theoretical and hence satisfied the principles set out in the case of *Matalinga and others v. Attorney General*(1972)E.A. 518. He noted that the High Court as seen in the case of *John Muritu Kigwe and another v the Attorney General* Nairobi HCCC No. 223 of 2000 (unreported) held that where it is shown that the prosecution was launched without affording the applicants a reasonable opportunity to present their side of the case, the subsequent prosecution is not in exercise of the quasi-judicial power of the Attorney General. Similar reliance was placed on the case of *Jared Benson Kangwana v Attorney General* Nairobi HCMCA No.446 of 1995 (unreported).
29. On the second issue on whether the 1st to 4th respondents violated the petitioners right to equality and freedom from discrimination under Article 27(1) of the Constitution, Counsel answered in the affirmative. He argued that decision makers should act in a broadly consistent manner as held in the case of *R (O' Brien) v Independent Assessors* (2007) 2 AC 312 and treat all cases alike in exercising administrative discretion as held in the case of *N V. Secretary of State for the Home Department* (2005) 2 AC 296. Also see
 - i. *HTV Ltd v Price Commission*(1976)ICR 170
 - ii. *R v Ministry of Agriculture Fishing & Food ex p Hamble Fisheries (Offshore) Ltd* (1995) 2 ALL ER 714.
30. He further submitted that the 1st to 4th respondents violated the petitioners' right to freedom and security of person under Article 29(a) of the Constitution by depriving them their freedom in a manner that was not fair owing to the case made out herein above. In support reliance was placed on the case of *S v Coetzee and others* (CCT50/95)(1997) ZACC where it was noted that freedom concerns two aspects. The first deals with the reasons for which the State may deprive someone freedom and second is the manner in which a person is deprived their freedom thus the court has to question whether the procedure followed to deprive a person liberty is fair.



31. Relying on several authorities, counsel submitted that the respondents failed to carry out proper investigations, failed to consult other bodies and hence did not balance the evidence before them to make them charge the petitioners.
32. Counsel on the next point submitted that the 1st to 4th respondents had made unsustainable conclusions of fact which constituted an error of law. The reason he gave is that there was no comprehensible justification for charging the petitioners who are servants of the 3rd interested party who is the registered proprietor of impugned property. Similarly that there was no evidence to show that the 1st interested party was the registered proprietor of the property to support the 1st to 4th respondents' decision to charge the petitioners with any offence of causing injury to the property.
33. He further submitted that the 1st interested party could not premise the criminal complaint on the 3rd interested party's agricultural land. He contended that under Section 6(1)(a) of the Land Control Act, the 1st interested party's dealing with the property would have been void for all purposes unless the relevant land control board had given its consent. It was noted that these consents were never sought. He cited Hirani Ngaithe Githire v Wanjiku Munge (1976-80) 1KLR 1132 where the Court held that there was no consent of the Land Control Board making the defendant's tenancy illegal and void.
34. In view of this, Counsel stressed that the 1st interested party could not initiate any criminal proceedings against the petitioners so as to give effect to his illegal and unlawful occupation of the 3rd interested party's property as provided in the principle *ex turpi causa non oritur action*. He cited Heptulla v Noormohamed (1984) KLR 580 where it was held that no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a transaction which is illegal.
35. Counsel in addition submitted that the petitioners were entitled to immunity and privilege from prosecution by the respondents by virtue of Section 27 of Registered Lands Act Cap.300 which provides that ownership consists of innumerable rights over property for example the rights of exclusive enjoyment, of destruction, alteration and alienation and of maintaining and recovering possession of the property from all other persons. This right is hence enjoyed by the 3rd interested party who is the sole proprietor of the impugned property. He thus argued that there was no criminal responsibility on the part of the petitioners in respect of an offense relating to the impugned property since the acts done were in respect of an honest claim of right.
36. It was submitted that Article 47(1) of the Constitution provides that there should be procedural fairness in administrative actions. As such Counsel argued that the petitioners were entitled to an administrative action that was procedurally fair by the 1st to 4th respondents which was never done. He further submitted that the petitioners' right to a fair trial under Article 50(2) (e) of the Constitution had been violated by the 5th respondent, which allowed nine adjournments based on the 3rd respondents' applications in Kibera Chief Magistrate Criminal Case No.3603 of 2010. As a result only one witness had testified, by the time this petition was filed.
37. To this end, Counsel submitted that the prosecution against the petitioners was oppressive, vexatious and an abuse of the process of the Court. In support he relied on the case of Bato Star Fishing (pty) LTD v Minsiter of Environmental Affairs and Tourism and others (CCT 27/03) (2004) (4) SA 490 (CC).

The 1st, 2nd, 3rd and 4th Respondents' submissions

38. The above respondents through prosecution Counsel, Victor Mule filed written submissions dated 28th March 2013 which were later re-filled on 21st January 2014 with a list of authorities. On the first issue counsel submitted that the matter had been brought to Court prematurely. He pointed out



that the substance of the petition formed the petitioners' defense which can only be canvassed before the trial court and not the constitutional court. In view of this he submitted that the respondents' execution of their duty could not be deemed to be unconstitutional.

39. In support reliance was placed on the case of *Surjit Singhunjam v the Principal Magistrate Kibera* (Miscellaneous Application No.519 of 2005) where it was held that the police have a duty to investigate any complaint once made. Also see:

- i. *Republic v the Chief Magistrate Ex parte Helmut Rame* (Miscellaneous Civil Application No.152 of 2006)
- ii. *Bryan Yongo v Attorney General* (Civil case No.61 of 2006).

Counsel thus argued that only the trial court can take the evidence submitted by the petitioners and not this court.

The 6th Respondent's submissions

40. The 6th respondent filed written submissions dated 14th February 2013 through its Counsel, Esther Muchiri. She submitted that the 1st to 4th respondents have the mandate to investigate crimes, charge and prosecute accused persons in protection of public interest and were therefore only doing their duties in line with Section 24 of the *National Police Service Act*. As such the police cannot be prohibited from executing their statutory functions as sought by the petitioners in reference to Kibera Chief Magistrate Criminal Case No.3603 of 2010; *Republic v Philip Steyn & 17 others* and Kibera Chief Magistrate Criminal Case No.981 of 2011; *Republic v Moses Loontasati Ololowuaya*. It was asserted that the prayer for prohibition was an abuse of the Court process as the petitioners have an automatic right of appeal to the High Court.

41. It was further submitted that the petition had not disclosed any denial, violation, infringement or threat to the petitioners' fundamental rights and freedoms since the respondents were only carrying out their duty.

The 1st and 2nd Interested Parties submissions

42. The 1st and 2nd interested parties through the firm of LJA Associates filed written submissions dated 22nd April 2013 and a list of authorities dated 23rd April 2013. It was submitted that the petition was misconceived and bad in law since the affidavits in support were full of falsehoods calculated at misleading the Court in relation to violation of Article 50(2)(e) of the *Constitution*. Counsel noted that the petitioners had withheld material information.

43. To begin with it was noted that the petitioners had not disclosed the real reasons for the various adjournments in the criminal suits which Counsel highlighted in detail. He noted that the adjournments were not marred with bias as deposed by the petitioners as applications were made in the presence of all the parties and their counsel had an opportunity to make presentations before a verdict was issued. Further that the 5th respondent's discretion in the matter had been exercised judiciously. On the second point it was submitted that the petitioners' allegation that the trial was conducted at the direction and influence of the 1st and 2nd interested parties and letter dated 3rd May 2011 was misplaced as the letter had been issued in good faith and disclosed to all the parties and advocates present in the trial.

44. In relation to violation of Article 50(2) (e) of the *Constitution* counsel submitted that the petitioners had not met the threshold set out in *Anarita Karimi Njeru v Republic* (1979) KLR 54 as they must not only state their case precisely but also demonstrate how these rights have been infringed. Similar



reliance was placed on the case of *Benson L.Vioya v George Wesonga, Suleiman Sumba & 2 others* (2012) eKLR.

45. Counsel while submitting on the alleged violation of Article 35(2) of the *Constitution*, stated that the petitioners claimed that the 1st, 2nd and 3rd respondents failure to take and record statements from them and allow them an opportunity to contradict the information issued by the State to the 1st interested party is contrary to the dictates of the provision which is a guarantee of access to information held by the State to the public. Counsel argued that this provision does not apply to investigations and preliminary reports so as to ensure that the trial Court hears the matter on its merits. It was noted that the process was not conducted on a whim as insinuated by the petitioners. In support reliance was placed on the case of *Republic v Commissioner of Police & another Ex parte Michael Monari & another* (2012) eKLR where it was held that before instituting criminal proceedings there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case.
46. It was noted further that the operative law at the time, the *Police Act*, Cap 84 (repealed) did not have guidelines on how the investigations were to be conducted. Similarly, that the petitioners' reliance on evidence of ownership of the impugned property in this matter was not in issue, and neither the Police nor this Court can determine its veracity. Lastly that the argument does not explain the particulars of the offences the petitioners were charged with. In view of this it was argued that the 1st, 2nd and 3rd respondents acted reasonably.
47. On Article 27(1) and 47(1) of the *Constitution* counsel noted that the respondents are granted discretion in the manner in which they conduct their investigations. It was contended that this discretion had been exercised reasonably. In addition, Counsel noted that the petitioners had failed to demonstrate how the actions or omissions of the 1st, 2nd and 3rd respondents had infringed this right to warrant this Court's intervention. To this end, Counsel submitted that the instant petition was an attempt by the petitioners to obtain the orders which they failed to secure in the other pending matters which is an abuse of the Court process.

3rd Interested Party's submissions

48. The 3rd interested party through its advocates, Mohammed Muigai Advocates filed written submissions dated 21st February 2013 where Counsel begun by submitting that the High Court under Article 165(3) of the *Constitution* has jurisdiction to determine questions of whether a right or a fundamental right has been infringed while Article 165(6) vests the High Court with supervisory jurisdiction over subordinate courts or persons or bodies exercising judicial or quasi-judicial authority such the 1st 2nd and 3rd respondents. To buttress this position reliance was placed on the case of *Republic v Judges and Magistrates' Vetting Board & Others ex parte Lady Justice Jeanne W. Gacheche & others* (Judicial Review Application No.295 of 2012).
49. On the 1st to 4th respondents' duty to conduct sufficient inquiry, Counsel submitted that the respondents were under a duty to take reasonable steps to acquaint themselves with the relevant material before instituting the criminal charges against the petitioners which they failed to do. Moreover it was noted that these respondents did not consult other bodies such as the District Land Registrar (Narok) to establish whether the 1st interested party is the registered proprietor of the impugned land and held the relevant Aerodome Clearance Certificate and permit to abstract the water from Olobotiro River. It was therefore argued that the investigations were not carried out thoroughly and in a balanced way which in the end led to instigation of the criminal proceedings without hearing the petitioners.



50. On the next issue counsel submitted that the 1st to 4th respondents had instigated the matter against the petitioners based on evidence which lacked probative value capable of supporting any conviction against the petitioners. This is because the 1st interested party's replying affidavit under paragraph 14 did not constitute the substance of his complaint before the 1st to 4th respondents hence the same was an afterthought in an attempt to justify the 1st to 4th respondents' arbitrary decision. Counsel stated that this was confirmed by the statements of the policemen who investigated the matter. It was additionally argued that the 1st interested party's testimony was hearsay evidence as he gave an account based on what his father told him.
51. Counsel submitted that the 1st to 4th respondents' decision was premised on their finding that the 1st interested party was the owner of Laro Airstrip and licensed to abstract water from the Olobotiro River. In view of this and while relying on the remedies under judicial review counsel noted that the Court can invalidate a decision which was based on incorrect facts and absence of evidential foundation such as the case herein.
52. It was further submitted on the next point that the prosecution of the petitioners was an abuse of the Court process because the complaint was based on the 1st interested party's claim of possession of the impugned property which is agricultural land. As per Section 6(1) (a) of the *Land Control Act* any dealing with agricultural land situated in a land control area is void, if there is no consent, which is the case here. In support counsel relied on *Hirani Ngaithe Githire v Wanjikue Munge* (1976-80) 1KLR 1132.
53. Counsel further submitted that the criminal charges against the petitioner were contrary to public policy since the proceedings were giving effect to the 1st interested party's illegal and unlawful occupation of the 3rd interested party's property. Counsel noted this was against the principle of *ex turpi causa non oritur action*. While relying on Section 27(a) of the *Registered Lands Act* he submitted that the 3rd interested party had the right to destroy his own property and hence cannot be liable under criminal law for such destruction. This right extended to the directors, employees, servants and agent of the 3rd interested party. On this premise, he concluded that the criminal proceedings were instigated in bad faith and with an ulterior motive.

Analysis and Determination

54. From the parties' pleadings and submissions, I find the issues that stand out for determination to be as follows:
- i. Whether this Court has jurisdiction to entertain the issues raised herein;
 - ii. Whether the respondents violated the petitioners constitutional rights under Articles 27(1)&(2), 29(a), 35(2), 47(1) and 50(1) &(2) of the *Constitution*; and
 - iii. Whether the petitioners are entitled to the reliefs sought.

Issue No. (i). Whether this Court has jurisdiction to entertain the issues raised herein

55. I find it prudent to address this issue first owing to the nature of the instant petition. It is worthy to note that jurisdiction is a legalistic concept as it derives its force from the law. It is the law that donates jurisdiction to a court. Courts do not therefore enjoy absolute power but only that which is donated by the law. The Supreme Court has on a number of occasions addressed its mind in this respect. In the



case of *In the Matter of Interim Independent Electoral Commission* [2011]eKLR the Supreme Court opined as follows;

“[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent....

[30] ...jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*.”

56. The High Court’s jurisdiction to entertain matters is found in Article 165(3)(d) of the *Constitution* which provides as follows:

(3) Subject to clause (5), the High Court shall have—

- a. unlimited original jurisdiction in criminal and civil matters;
- b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. 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;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
 - v. any other jurisdiction, original or appellate, conferred on it by legislation.

57. The *Constitution* under Article 162 establishes two more Courts of equal status with the High Court which exercise jurisdiction over environment and land matters and employment and labour relations. This Article provides as follows:

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

- a. Employment and labour relations; and
- b. The environment and the use and occupation of, and title to, land.



58. As a result of Article 162 of the Constitution, the High Court is barred in Article 165(5)(b) of the Constitution from exercising jurisdiction conferred to the special courts. This Article provides as follows:

The High Court shall not have jurisdiction in respect of matters-

b) falling within the jurisdiction of the courts contemplated in Article 162(2).

59. It is discernable that one of the petitioners' grievances is its claim that the criminal complaint raised by the 1st interested party is not legally sustainable because the true proprietor or owner of the impugned property, Title No. Narok / Nguruman/ Kamorora/1 is the 3rd interested party. Undoubtedly this Court is not vested with the requisite jurisdiction to make a determination with reference to the impugned property so as to affirm or verify the petitioners' claims in that regard. I say so because the Constitution exclusively grants that jurisdiction to the Environment and Land Court which estops this Court from making any determination on the ownership of title to the property.

60. This notwithstanding, it is duly noted from the adduced evidence that the issue of proprietorship is a matter that has been the subject of determination in the Courts dating back to the year 2009 and has been adjudicated upon. I make reference to Nguruman Limited V Ol Donyo Laro Estate Limited [2011] eKLR (Civil Case No. 103 of 2009) at the High Court and Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR (Civil Appeal No. 77 of 2012) at the Court of Appeal.

61. That said, this Court's jurisdiction in the instant matter is limited to a determination on whether the respondents violated the petitioners' constitutional rights under the cited Articles. This will accordingly be determined in the following discussion.

Issue No. (ii). Whether the respondents violated the petitioners constitutional rights under Articles 27(1) & (2), 29(a), 35(2), 47(1) and 50(1) &(2) of the Constitution

62. The petitioners' key complaint is that the respondents violated their constitutional rights in arresting and instigating criminal proceedings against them. This assertion was based on a number of issues which I would like to highlight:

- a. The 1st to 4th respondents failed to record statements from the petitioners hence violating Article 35(2) of the Constitution.
- b. The 1st to 4th respondents violated the petitioners' right against discrimination under Article 27(1) of the Constitution by recording the 1st interested party and 12 witnesses, witness statements yet failed to record the petitioners' statements.
- c. The 1st to 4th respondents in arresting the petitioners violated their right to freedom and security of person under Article 29(a) of the Constitution.
- d. The 1st to 4th respondents failed to conduct sufficient inquiry into the matter and circumstances surrounding the complaint before charging the petitioners.
- e. The 1st to 4th respondents failed to grant the petitioners any opportunity to rebut the evidence or information supplied by the 1st interested party and an opportunity to be heard before instigating the criminal proceedings which violated their rights under Articles 47(1).
- f. The 5th respondent violated their right to a fair trial under Article 50 (2)(e) of the Constitution in the manner in which it conducted the criminal proceedings.



- g. The criminal claim was based on an illegitimate claim which the respondents actioned wrongfully.
63. In light of these factors the petitioners argued that the respondents had instigated the criminal proceedings in bad faith and with an ulterior motive owing to evidence which lacked probative value capable of supporting any conviction against them. Their case was supported by the 3rd interested party.
64. The respondents plus the 1st & 2nd interested parties strongly opposed the petitioners' case stating that the petition was an abuse of the Court process. They highlighted the 1st to 4th respondents mandate to investigate crimes, charge and prosecute accused persons in protection of public interest hence their actions were in line with the law. The 1st interested party submitted that the petitioners case was premised on falsehoods in an attempt to mislead the Court to believe that the 1st interested party had an interest in the impugned property. It was further argued that the petitioners had failed to demonstrate how the respondents had violated their rights in line with the principles in the *Anarita case (supra)*.
65. To answer this question, this Court must first examine the mandate of the respondents to ascertain whether, their actions or omissions in this matter went contrary to the *Constitution* and law. The mandate of the police and prosecution is founded on the *Constitution*.
66. With reference to the 1st, 2nd and 4th respondents, the police, is the organ charged with the maintenance of national security in Kenya under Article 239 (1) (c) of the *Constitution* and is referred to as the National Police Service under Article 243. The National Police Service is commanded by the Inspector General as provided in Article 245(1) (b). Article 245(4), (a) of the *Constitution* provides one of the functions of the Inspector General as follows:
- (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
- a. The investigation of any particular offence or offences;
- b. the enforcement of the law against any particular person or persons; or
67. Prior to the enactment of the *National Police Service Act*, the Police Act Cap.84 provided for the duties, powers and privileges of the police under Part III of the Act. This is the statute that covered the matter complained of herein. The functions of the police under Section 14 of the Act were as follows:
- 14.
- (1) The Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.
68. Further Section 14A provided that:
1. The force shall perform its functions under the overall direction, supervision and control of the Commissioner of Police, and shall be impartial and objective in all matters and in particular in all political matters and shall not accord different treatment to different persons on the basis of their political opinions.
2. No police officer shall subject any person to torture or to any other cruel, inhuman or degrading treatment.



3. Any police officer who contravenes the provisions of this section shall be guilty of a felony.
69. A perusal of this part with reference to investigation of crimes provided under Section 22(3) of the Act as follows:

Any police officer may record any statement made to him by any such person, whether such person is suspected of having committed an offence or not, but, before recording any statement from a person whom such police officer has decided to charge or who has been charged with committing an offence, the police officer shall warn such person that any statement which may be recorded may be used in evidence: Provided that any such statement shall, whenever possible, be recorded in writing and signed by the person making it after it has been read to him in a language which he understands and he has been invited to make any correction he may wish.

70. The 3rd respondent, the Director of Public Prosecutions derives his powers from Article 157(6) of the Constitution which is recapped in the Office of the Director of Public Prosecutions Act, 2013(ODPP Act) under Section 5. This sub-Article provides as follows:

The Director of Public Prosecutions shall exercise State powers of prosecution and may--

- a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
71. To exercise this power objectively and independently the 3rd respondent is under Article 157(10) granted the following powers which is also echoed in the ODPP Act under Section 5: It provides:-
- (10) 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.
72. It is certain from a reading of the Constitution and enabling statutes that the 1st to 4th respondents' mandate is grounded in the Constitution. Supplementary to this is their enjoyment of absolute independence as they carry out their functions without any direction from any person or organ. This is a factor that has been appreciated by the courts. The Courts as a result are generally reluctant to interfere with their mandate unless it can be demonstrated that the mandate carried out was contrary to the dictates of the Constitution and the law.
73. In the case of Justus Mwenda Kathenge v Director of Public Prosecutions & 2 others [2014] eKLR with regards to the constitutional mandate of the 3rd respondent, the Court held as follows:

“It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11):



- i. he has acted without due regard to public interest,
- ii. he has acted against the interests of the administration of justice,
- iii. he has not taken account of the need to prevent and avoid abuse of Court process.

These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1st Respondent. I say so taking into account the following decisions where the issue has been addressed;”

74. With reference to the police, the Court in the case of *Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others* [2019] eKLR while citing other authorities with approval stated as follows:

“The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.”

Also see:

- i. *Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others* [2016] eKLR,
- ii. *Pauline Adhiambo Raget v. DPP & 5 Ors.*, (2016) eKLR,

75. From the foregoing it is clear that the courts will generally not interfere with the respondents mandate, but where the circumstances of a case justify an intervention the court will not hesitate to do so in the interest of justice. the *Constitution* itself anticipated this situations as can be seen under Article 165 (3) (d) (ii) of the *Constitution*.

- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--
 - (ii) 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.

76. While discussing the delicate balance between instigation of criminal proceedings by the 3rd respondent and this court’s intervention the Court in the case of *Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another* [2019] eKLR opined as follows:

“ 42. It is bears repeating that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. In a petition such as this the court ought not to transform itself into the trial court. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court.

43. ... 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.”

The court went further to state that:

“ 50. However, it must be emphasised that a constitutional petition challenging prosecution does not deal with the merits of the case but only with the process. The Court in such proceedings is mainly concerned with the question of fairness to the petitioner in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution’s evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.”

77. A perusal of the material presented before this Court shows that the petitioners’ case revolves around their complaint that they were fraudulently charged as a result of circumstances not in the respondents’ knowledge which is that the 1st interested party lacked a legitimate claim against them. What emerges from the petitioners annexures in this regard is that the complaints arose out of an altercation between the petitioners and the 1st interested party and its employees that escalated to a point where police officers were called in to intervene. It was the result of this altercation that lay the foundation of the criminal charges.
78. In my understanding, a reading of Section 22(3) of the Police Act discloses the Section was not drafted in mandatory terms. A police officer may decide whether or not to record statements of any person. In addition it is discernable that other than the persons compelled to come to the police station to record statements, this category caters for persons who willingly present themselves to the police to record the statements. This means, the police could not compel the petitioners to record statements however had they presented themselves to the police, the police would have recorded their statements upon informing them of the possibility of the information being used against them. This essentially means that persons who cannot be compelled must effect this provision by availing themselves to the police.
79. A perusal of the material placed before this Court does not indicate that the petitioners presented themselves to the police for purposes of recording any statements and they were denied the opportunity. Furthermore it should be appreciated that this provision does not provide a comprehensive procedure on how to carry out investigations as submitted by the petitioners. In fact as is discernable from the law the 1st to 4th respondents are granted the independence to carry out their mandate in their discretion hence were not obligated to give any information to the petitioners or consider their evidence before making a decision. Considering this the police cannot be deemed to have violated the right to information. In any event whatever information the petitioners have would form part of their defence.
80. The decision or justification to charge or prosecute a party as seen in the cited law and case law lies on the prosecution based on the facts and circumstances of a case paying regard to the dictates of Article 157(11) of the Constitution. The Constitution and the enabling Act do not mandate the 3rd respondent



to accord a person an opportunity to be heard or rebut the evidence received or collected before a charge is effected. This is because the 3rd respondent is granted independence to carry out its mandate without direction from any person or organ.

81. The petitioners argued that the 1st to 4th respondents paid regard to unreasonable factors before instigating the criminal charges and were seen to be under the influence and control of the 1st and 2nd interested parties. To prove this allegation the petitioners are required to satisfy the constitutional threshold set out for constitutional petitions. This means that a party that alleges violation of his or her rights must plead with reasonable precision the manner in which the rights have been violated. This was appreciated by the Court in the case of *Meme v Republic* [2004] eKLR which restated the position in the *Anarita Karimi Case* (*supra*) as follows:-

“Where a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant’s instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complaints without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants”.

82. An examination of the evidence adduced by the petitioners discloses details surrounding the impugned property and the commercial mutual relations between the 1st and 3rd interested parties. As discussed above, a test of the veracity of these averments in light of this case is not a preserve of this court. Notwithstanding the numerous allegations that the respondents violated the law and constitutional rights, the petitioners failed to adduce evidence showing that the respondents carried out their duty contrary to what is required in law.
83. The petitioners claimed that the police were being influenced and directed by the 1st interested party but failed to demonstrate how this happened and what irrelevant factors were considered before the decision to charge them was arrived at. In my view production of letters addressed to the respondents raising these complaints or concerns could have sufficed in the circumstances of this case, but none was availed. If the petitioners were dissatisfied with orders made by the 5th respondent they should have appealed against them and not filed a constitutional petition. The petitioners faulted the investigation process but did not prove their attempt to contact the 1st, 2nd or 4th respondents to state their case. I say so because they did not attach any correspondence seeking to produce their evidence or their actual presence at the police station.
84. Had such necessary evidence been adduced the same would have given this Court an opportunity to interrogate it and make a determination. In this regard it is my humble view that the petitioners did not satisfy the threshold of a constitutional petition and neither did they discharge their burden of proof on their allegations. This as a consequence renders their arguments of violation of their rights unsustainable.
85. In light of these circumstances, I am satisfied that although the petitioners assert due process was breached, they have not satisfied the burden of proof which rests on them to show that the conduct of the respondents was contrary to that dictated by the law. The 1st and 2nd interested parties’ influence in the process has also not been established. It is my humble view that, they have not adduced sufficient evidence to show the unconstitutional exercise of police power and prosecutorial power which may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing



the ends of justice as noted in the case of *Diamond Hasbam Lalji v Cargill Kenya Limited* [2019] eKLR.

86. The arrest, investigations and prosecution carried out by the respondents cannot therefore be condemned as they were both procedural and lawful. All that the petitioners and the 3rd interested party have presented before this Court is their defence to the charges facing them. This court is called upon to desist from entertaining matters it would be required to only deal with at the Appeal level. The 3rd respondent should be allowed to present to the trial court the evidence it has in respect of the charges. The petitioners through their counsel will then have an opportunity to cross examine the witnesses and if placed on their defence they will have an opportunity to testify and state their case before the trial court.
87. I find that the respondents did not violate the petitioners' rights as envisaged under Articles 27(1) & (2), 29(a), 35(2), 47(1) & 50 (1) & (2) of the *Constitution*. The petitioners are therefore not entitled to any of the reliefs sought in this petition (dated 19th October 2011) and amended on 30th July 2014) which is hereby dismissed with costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 26TH DAY OF JANUARY 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

