



Maami v Director of Public Prosecutions & another (Constitutional Petition E10 of 2021) [2023] KEHC 17873 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17873 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CONSTITUTIONAL PETITION E10 OF 2021
CM KARIUKI, J
MAY 31, 2023**

BETWEEN

JAMES MAINA MAAMI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

JOSEPH THUO KAGORU 2ND RESPONDENT

JUDGMENT

1. In his Petition dated 20/9/2021, the Petitioner pleads that:
 - a. Sometimes around 14th August 2019, the 2nd Respondent herein filed a civil suit Nyahururu ELC No. 36 of 2019 (Joseph Thuo Kagoru – versus- James Maina Maami) against the Petitioner, which raised two significant issues, namely, whether the Petitioner is the registered owner of the suit property Nyahururu Ol Kalau Municipality Block 3/346 and whether the suit property Nyahururu Ol Kalau Municipality Block 3/346 Is The Same As Plot No. F. Olkalou Town.
 - b. In the said suit, the 2nd Respondent alleges that plot number F Olkalou had been allocated to his deceased father via a letter of Allotment Reference Number 25465/XII dated 6th January 1995 on condition that he would develop the same. However, the land was not developed, and the 2nd Respondent never produced any letters of Grant of administration indicating that the said property was part of the deceased Estate or his authority to act as an administrator.
 - c. The issue for determination under the said suit Nyahururu ELC No. 36 of 2019 (Joseph Thuo Kagoru versus James Maina Maami), is whether the Petitioner acquired ownership to the suit land fraudulently and the same as what the prosecution seeks to determine Nairobi City Court Criminal Case No. E231 of 2021 (Republic – versus – James Maina Maami) is a clear abuse of the criminal justice system.



- d. Despite the facts mentioned above and the fact Nyahururu ELC No. 36 of 2019 (Joseph Thuo Kagoru – versus – James Maina Maami) is pending hearing and determination, the 1st Respondent, with total disregard for criminal justice, went ahead and instituted Nairobi City Court Criminal Case No. E231 of 2021 (Republic -versus- James Maina Maami).
 - e. By instituting the said criminal case, the prosecution disregards criminal justice, and their actions amount to abusing legal proceedings.
2. He avers that the facts above disclose violations of *the Constitution* and states.
- i. By subjecting the Petitioner to criminal investigations while there is a suit pending hearing and determination touching on the same issues, the Respondents are acting contrary to the national values and principles, which under Article 10(1) of *the Constitution*, are binding on all state organs, state officers and public officers.
 - ii. By subjecting the Petitioners to Criminal investigations at the behest of enhancing the 2nd Respondent's interest through the criminal justice system, the respondents have failed to uphold the national values and principles of human dignity, social justice, equality, human rights, non -discrimination, good governance, integrity, and transparency contrary to the express provisions of Article 10(2) (a) and (b) of *the Constitution*.
 - iii. By subjecting the Petitioner to criminal investigations at the behest of enhancing the 2nd Respondent's interests through the criminal justice system, the respondents have infringed on the Petitioner's Right to a fair trial contrary to Article 50 of *the Constitution*.
 - iv. By seeking to deny the Petitioner his right to a fair hearing and the right to property at the behest of enhancing the 2nd Respondent's interests, the respondents are abusing the powers of the offices of the Director of Public Prosecutions contrary to Articles 10, 157 (11) of *the Constitution* as read together with sections 6 of the ODPP Act.
3. The Petition is supported by James Kimani Maami Affidavit sworn on 20/9/2021, reiterating the same grounds.
4. In rejoinder, Respondent No. 1 via Samuel Wahome Itegi, sworn and filed on 21/12/2021 states that:
- a. That Joseph Thuo Kagoru , the 2nd Respondent herein lodged a formal complaint at the Directorate of carinal Investigations headquarters of Kiambu road, that James Maina Maami, the Petitioner herein, had forged an allotment letter belonging to his deceased father and used the forged allotment letter a the Ministry of Lands, Ardhi House, Nairobi to process a Lease Document in his own name which was then forwarded by the land officials at Ardhi House to the Nyandarua District Land registry for registration.
 - b. That the 2nd Respondent bears another allotment letter which was similar to the one which bore the Petitioner's name save for it had the names of Kagoru Kambo Ndeba and not the Petitioner as the Allottee; that both allotment letters were purportedly signed by the same lands officer, Silas Kiogora Mburugu.
 - c. That the 2nd Respondent informed me that Kagoru Kambo Ndeba is his father but had since passed on. He informed me that he concluded on the succession process and had been appointed to be the sole administrator of his father's Estate and furnished me with his identity card together with a certificate of confirmation of Grant.



- d. That investigations was concluded by visiting the relevant land offices both in Nairobi and in Nyahururu, interviewing the land officer who is based at the Ministry of Lands Headquarters, Ardhi House who purportedly signed both allotment letters and after he scrutinised the signatures on both documents and consulting the records, confirmed that he did not sign the allotment letter which had been used by the Petitioner to process a title in his name.
- e. That pursuant to the above statement we forwarded the impugned letter of Allotment in the Petitioner's name together a copy of the letter of allotment in favour of the 2nd Respondent's deceased father and specimen signatures collected from Silas Kiogora Mburugu for forensic analysis. The forensic analysis confirmed that the said signature was dissimilar.
- f. That following the above investigations opinion was arrived at that the Petitioner had committed forgery of Silas Kiogora Mburugu's signature on an allotment letter and that he had used the same to process at the Ministry of Lands, Ardhi House, Nairobi the lease and consequently the Title he has.
- g. That further he was unable to produce any document to show that he made an application to be allotted the subject parcel of land.
- h. That after conducting the above investigations and interviewing the relevant witnesses, the file was forwarded to the ODPP who after reviewing file concluded that the investigator had gathered overwhelming evidence on the face of it and that the chances of obtaining a conviction were extremely high then approved the charges related to forgery preferred against the Petitioner herein.
- i. That since the forged document was presented at Ardhi House for purpose of processing the lease document at Nairobi, the Petitioner was arrested in Nyahururu and arraigned before the Chief Magistrate Court in Nairobi to answer to the Charge related to forgery.
- j. That the essence of Section 193A of the Criminal Procedure Code states that the fact that any matter in issue in any criminal proceedings is also directly in issue in any civil proceedings shall not be a ground for stay, prohibition or delay of the criminal proceedings, and especially where there is overwhelming prima facie evidence of criminal conduct and that further the mandate to charge rests with the Office of the Director of Public Prosecutions as enshrined under article 157 of *the Constitution* of Kenya and Section 5 and 6 of the ODPP Act 2013.
- k. That in addition to the above, and as admitted by the Petitioner at paragraph 24 of his Petition, the issues raised in Nyahururu ELC No. 36 of 2019 are different from the issues surrounding the Nairobi Criminal Case No. E231 of 2021, which is the forgery committed by the Petitioner.
- l. That in response to Paragraph 25 of the Petition deponent had the benefit of seeing the confirmed Grant issued to the 2nd Respondent. He saw the certified copy thereof and confirm that the exhibit marked as SW1-3 is the one.
- m. That in further response to paragraph 25, deponent also followed up with the Lands Registry who confirmed to him that if an allotment letter is cancelled, and a new one issued to a different person over the same parcel of land, the new one must have an endorsement of the particulars of the old one as per this sample annexure.
- n. That in response to the averments of paragraphs 26 27 and 28, he reiterate his averments in paragraph 15 above and confirm that criminal and civil proceedings can proceed concurrently.



The criminal case concerns itself with the criminality of the forgery and other offences as per the charge sheet performed by the Petitioner. Deponent is not privy to the particulars of the civil case against the Petitioner. In any event, the legal basis and remedies obtainable in both cases are diverse.

- o. That in response to the averments of paragraphs 29,30,31 and 32 he avers that,he is advised by the ODP, that the Locus Classicus on the threshold of Constitutional Petitions is that of Anarita Karimi Njeru Versus Republic No. 1 (1979) 1 KLR, 54 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 were alleged to be infringed"
 - p. That the Petitioner in this case has not met the threshold set out above rendering this Petition baseless and a thin-veiled attempt to shield himself from prosecution.
5. The 2nd Respondent via Affidavit sworn by himself in name of Joseph Thuo Kagoru on 17/12/2021 depones that:
- i. That he is the sole administrator and beneficiary of the Estate of the Late Kagoru Kambo Ndeba alias Isiah Kagoru alias Kagoru Kambo Mdeba who is my deceased father
 - ii. That after obtaining the said Grant, he instructed advocates on record, Messrs. Ng'etich, Chiira & Associates Advocates to help with the processing of the title deed to plot No. F Olkalou Town in his name.
 - iii. That he presented to the said firm of advocates an allotment letter reference number 25465/XII dated 6th January, 1995 in the name of Kagoru Kambo Mdeba together with the receipts evidencing proof that he have been paying for the land rates even after his death.
 - iv. That to his utter shock and dismay, his advocates informed him that the said plot was already registered and a title issued to one James Maina Maami. He immediately suspected fraud.
 - v. That his advocate conducted further due diligence at the lands and survey offices in Nairobi and discovered that one James Maina Maami had forged an allotment letter which looked exactly like the one allocated to his late father, save that he had changed the name of the genuine Allottee, his father Kagoru Kambo Mdeba, to himself James Maina Maami. Further, he had caused the same to be processed into a lease at the Ministry of Lands, Ardhi House Nairobi and consequently a certificate of lease Title was issued in his favour.
 - vi. That his advocate advised him to look for any other documents to demonstrate that his late father was in possession of the impugned property. I obtained court pleadings in Nakuru CMCC No. 1182 of 1996. Kagoru Kambo Ndeba versus Olkalou Town Council where his late father had sued the town council for encroaching on the impugned parcel of land. He also obtained a demand letter issued by Mirugi Kariuki Advocates on behalf of his late father to the Town Council of Olkalou .
 - vii. That he also obtained copies of Application letters made to the commissioner of lands together with the letters of No objection from the Commissioner of Lands dated 2nd August , 1994 and 11th September 1994 respectively.



- viii. That armed with the above documents he instituted a Civil Suit Nyahururu ELC case No. 36 of 2019 for the recovery of the above for the benefit of the Estate of the Late Kagoru Kambo Mdeba.
 - ix. That thereafter he proceeded to the police where he presented the two "almost identical" allotment letters and as the representative to the Estate of the late Kagoru Kambo Mdeba. He then reported the case of forgery.
 - x. That he recorded a statement and left the rest for the police to carry out investigations to confirm the veracity of his allegations.
 - xi. That the case was investigated and criminal charges related to forgery were preferred against the Petitioner herein.
 - xii. That through the criminal case he managed to obtain various documents in Court such as a statement by the concerned Land Officer who signed the Allotment Letter in favour of his father and purportedly signed the Petitioner's impugned Allotment Letter together with an opinion from a handwriting expert .
 - xiii. That since then he had commissioned , through his Advocates on record, an independent handwriting forensic analysis report and a surveyor's report on the property known as unsurveyed plot Number F Olkalou town vis a vis the property known as Title Number Nyahururu Olkalou Municipality Block 3/346. Both documents demonstrate forgery.
 - xiv. That he was advised by his advocates on record, which advice that there is no bar to criminal proceedings where civil proceedings are ongoing and vice versa, especially where there is overwhelming evidence of criminality as has been established in the criminal matter against the Petitioner form investigations.
 - xv. That in any event, the remedies available to me in the civil suit against the Petitioner cannot be obtained via the criminal case.
 - xvi. That save for his report to the police authorities, and the documents presented to the police he has neither interfered nor influenced the investigations of the police and the conduct of the criminal case. HE will only avail himself in the said case to give his testimony when called upon.
 - xvii. That he had never heard or known of the Petitioner until the time he was advised by his advocates on record that the he had illegally and fraudulently caused a title to be issued in his name over the impugned suit property in ELC No. 36 of 2019.
 - xviii. He has read the entire Petition and there is no allegation of violation of *the Constitution* or any law for that matter and therefore any reliefs sought against him are null and void. Further , prayer (d) as per the Petition is an attempt to gain access to the suit property through the back door whereas the Petitioner is well aware of the current orders of injunction over the suit property issued by the Honourable Court vide ELC case number 36 of 2019 at the Nyahururu Law Courts.
6. Parties were directed to canvass petition via submissions and only Petitioner and 2nd Respondent filed same.

Petitioner's Submissions

7. The Petitioner submits that ,powers to prosecute is one that the 1st Respondent draws from Article 157 of *the Constitution*. In as much as the office of the DPP is an Independent Office, it is without



doubt that the powers of the Director of Public Prosecution to initiate criminal proceedings are not unlimited. The DPP is subject to expectation set out under article .

8. These limitations have been appreciated by the Court of Appeal in Commissioner of police & The Director of Criminal Investigation Department & another V Kenya Commercial Bank Limited & 4 others [2013]eKLR.
9. While the exercise of the powers of the DPP is not subject to any person's control or direction, there are overriding considerations that would entitle a court of law to interfere with the prosecution of a matter. The Supreme Court has reiterated this position by upholding that prosecutorial power should be exercised judiciously and one of the ways through this may be achieved is for the office of DPP not to act in perpetuation of an unfair and malicious criminal complaint. Reliance is made on *Cyrus Shakhalnaga Khwa Jirongo v Soy Developers Ltd & 9 Others* [2021] eKLR .
10. It is submitted that the charging of the Petitioner at the criminal Court by the 1st Respondent amounts to a perpetuation of a malicious criminal complaint by the 2nd Respondent. That the case is purely malicious aimed at assisting the 2nd Respondent prosecute his suit at the ELC and by extension amounts to an abuse of both the court process and abuse of the powers of the DPP .

At paragraph 11 that the correspondence file for plot number F Olkalou was 168709 and not 310117;

At paragraph 12.1 that the defendant (Petitioner herein) had accepted allotment allegedly granted through the forged letter of Allotment 23 years after the allotment allegedly happened;

At Paragraph 12.2 that outstanding premium on the suit property were paid pursuant to the forged letter of allotment

At paragraph 13 That the Petitioner's letter of Allotment was an exact replica of the original Letter of Allotment issued to the Plaintiff's deceased father save for the different name of the allottee, and,

At paragraph 14 that the Plaintiff had documents belonging to his deceased father showing how he was allocated the suit property alongside others."

- i. Undoubtedly, the ELC matter revolves around the lawful allottee of the suit property between the 2nd Respondent's late father and the Petitioner. Specifically, the suit pertains to whether the Petitioner's letter of Allotment was forged. These issues were given a criminal face and raised in Nairobi City criminal case No. E321 of 2021. In response to the instant Petition an Affidavit has been sworn by one Samuel Wahome Itegi on behalf of the DPP who describes himself as a police Corporal at the Land Fraud investigations unit and the investigating officer in Nairobi criminal case 231 of 2021 and states:-

At Paragraph 7 that the 2nd Respondent had lodged a formal complaint claiming that the Petitioner had "... forged an allotment letter belonging to the deceased's father and used the forged allotment letter at the Ministry of Lands, Ardhi House, Nairobi to process a lease Document in his own name which was then forwarded by the land officials at Ardhi House to the Nyandarua District Land Registry for registration

At Paragraph 8 that the 2nd Respondent bears another allotment letter which was similar to the one which bore the Petitioner's name save for it had the names of Kagoru Kambo Ndeba (2nd Respondent's deceased father) and not the Petitioner as allottee;



At Paragraph 10 that we also interviewed the land officer who is based at the Ministry of Lands, headquarters, Ardhi House who purportedly signed both allotment letters and after the scrutinised the signatures on both documents and consulting the records, confirmed that he did not sign the allotment letter which had been used by the Petitioner to process the title in his name;

At paragraph 12 that following the above investigations, we formed the opinion that the Petitioner had committed forgery of Silas Kiogora Mburugu's signature on an allotment letter and that he had used the same to process at the Ministry of Lands, Ardhi House, Nairobi the lease and consequently the title he has; and,

At Paragraph 14 that after conducting the above investigations... concluded that the investigator had gathered overwhelming evidence on the face of it and that the chances of obtaining a conviction were extremely high then approved the charges related to forgery preferred against the Petitioner herein."

11. Clearly, the issues raised in the criminal matter are the same well before the ELC. Therefore, what is this Court to make of the fact that these two proceedings arose from the same issue? When the 2nd Respondent complained leading to the institution of the criminal suit in question, he knew the subject matter was directly and substantially at issue in ELC No. 36 of 2019 where he also was complaining of the forgery of a letter of Allotment used to acquire title. It is clear that the Criminal proceedings are meant to aid the 2nd Respondent in prosecuting the civil claim which action the Supreme Court has previously made a finding on stating that it amounts to an abuse of the powers of the DPP. Reliance is made on The Supreme Court in *Cyrus Shakhhalanga Khwa Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR.
12. The Supreme Court (supra) then went on further to state that criminal proceedings based on fraud should await outcome of the Civil proceedings as follows:

“It is indeed advisable for parties to pursue civil proceedings initially and with firm findings by the civil Court on any alleged fraud , proceed to institute criminal proceedings to bring any culprit to book.
13. See also commissioner of police & The Director of Criminal Investigation Department & Another , *Muchanga investments Ltd v Safaris unlimited (Africa) Ltd & 2 others* [2009]eKLR , *Karibu-Whytie J Sc in Sarak V Kotoye* (1992) 9 NWLR 9pt 264) 156 at paragraphs 188-189 (e) .
14. The same Court went on to give illustrations of the abuse of the judicial process to include;-
 - a. Instituting Multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
15. It is thus our firm submission that by commencing criminal prosecution against Petitioner herein was an abuse of the legal process. It is further our submission that the impugned proceedings are more of a civil nature than criminal . The Environment and Land Court, which Article 162 (2) (b) of *the Constitution*, is a court competently bequeathed with jurisdiction to hear and determine the issues forming part of the criminal proceedings. Therefore, the conclusion to be drawn from the fact that the



criminal proceeding was instituted over 1 year and 5 months after filing of the ELC civil Matter was instituted with ulterior motives.

16. The Court will note that by the time the criminal complaint was made, the parties in the civil case had all filed their respective pleadings and thus the general nature of their case and the evidence they intended to call was known. Thereafter, the 2nd Respondent would file the criminal case, and subsequently, he amended his plaint to introduce by way of a further affidavit sworn on 11th June 2021 the evidence obtained through the criminal investigation. He produced alongside other documents a forensic document examiner's report reference CID/ORG8/3/1/732-2020 which purported that the Petitioner's letter of Allotment was forged, and which report is the basis of the criminal charges filed.

17. The criminal case was an abuse of court process only intended to gather evidence of aiding the 2nd Respondent prosecute his civil claim at the ELC. This is an ulterior motive that has been held by the Court of Appeal to amount to an abuse of the legal process. The appellate Court in the case Commissioner of Police & Another V Kenya Commercial Bank Ltd & 4 Others [2013]eKLR rendered itself thus:-

“.. the decision to investigate a crime (or persecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The Court has inherent power to interfere with such investigation or prosecution process...

18. The office of the 1st Respondent is established as an independent office under Article 157 of *the Constitution*. The connotation implied by the independence is that the office is impartial. Where the powers of this office are exercised in such a manner that implies perpetuation of ulterior motives, then the impartiality is taken away and the Court ought to come to the rescue, a position aptly captured by the learned judge in Republic v chief magistrate criminal division & Another Ex-parte Mildred Mbuya Joel [2014]eKLR as follows:

“The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the Court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the Court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth.”

19. The unlimited original jurisdiction donated to the High Court by Article 165 (3)(a) of *the Constitution* allows this Honourable Court to interfere with the prosecutorial powers of the DPP and by extension allow the Petition as prayed. This is a position well elaborated by the Supreme Court in Cyrus Shakhhalanga Khwa Jirongo V Soy Developers Ltd & 9 others [2021]eKLR at paragraph 82 as follows:

“[82] Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of Article .157 (II) have not been met , then the High Court Under Article 165 9(3)(d) (ii) can properly interrogate any question arising therefrom and make appropriate orders.”

20. The Indian Supreme Court case R.P. Kapur V state of Punjab Air 1960 SC 866, went a head to lay down guidelines that the High Court ought to use in reviewing prosecutorial powers 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, or
- ii. Where it manifestly appears that there is a legal bar against the institution or continuance of, he said proceeding e.g., Want of sanction ; or
- iii. Where the allegations in the first information report or the complaint taken their face value and accepted in their entirety not constitute the offence alleged; or,
- iv. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence clearly or manifestly fails to prove the Charge.

2nd Respondent Submission

21. Issues for determination

- a. Whether the prosecution of the Petitioner amounts to a violation of his Constitution Rights.?
- b. Whether the Petitioner has satisfied the criterial to be used by the High Court to terminate criminal prosecution?
- c. Whether the Petitioner is entitled to the relies sought?

22. In matters concerning the infringement of Constitutional rights, particularly a complaint to this Honourable Court, seeking the quashing of the Complainant's prosecution, submit to the dicta set out in the locus classicus of Anarita Karimi Njeri -versus – Republic (1979)eKLR where the Court had this to say:

“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.”

23. The holding of the Court in Anarita Karimi's (supra) was upheld by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others[2013]eKLR .

24. The Petition provides little or no particulars as to the manner of the alleged Constitutional infringements by the 1st Respondent to the Petitioner.

25. The Petitioner has crystalized the alleged violation of his Constitution rights under Section E of the Petition.

26. The Petitioner has made reference to Article 10(2) (a) and (b) of *the Constitution* and submitted that, by subjecting him to criminal investigations, the Respondents have failed to uphold the rights thereunder.

27. Article 10 (2) (a) and (b) provides:

The National values and principles of governance include -

- a. Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of th people;
- b. Huma dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;



28. With due respect to the Petitioner, he has neither in the Petition nor the Affidavit in support of the Petition explained how his impending prosecution before the Chief Magistrate's Court in Nairobi has violated the aforementioned rights. He has not expressed how the national values or principles or governance have been violated by the respondents.
29. Additionally, the Petitioner has pointed the Court to Article 50 of *the Constitution*, and submitted that his rights have been violated pursuant to the criminal investigations against him at the behest of the 2nd Respondent.
30. Article 50 sets out the right to a fair hearing and stipulates its constitutional confines in the underlying and sub-articles and provisions. Again, the content and tenor of the Petition fails to explain the manner in which this right has been impeded. As a matter of fact, the Petitioner has currently been charged, and his trial ongoing. Through the criminal trial process, he will have an opportunity to proffer his defence. He has not explained how the right to defend himself has been curtailed by the prosecution or the lower Court.
31. Furthermore, as at the time of making these submissions, the Petitioner is out of custody on bond, which is proof that this right has so far been upheld.
32. The Petitioner also cited the violation of Article 157 (II) of *the Constitution* as one of the provisions which have been violated.
33. Article 157 (II) provides that:

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”
34. The above provision speaks to the independence of the 1st Respondent while carrying out its mandate and while making decisions as to whether to institute criminal proceedings or not. Reliance is made on case of *Yunus Abdul Rubi & 2 Others V Director of Public Prosecution & 2 others* [2016]eKLR.
35. The Petitioner has not demonstrated how the independence of the 1st Respondent has been compromised in the circumstances.
36. While admit that there exists a civil and criminal case founded on the same set of facts, the Petitioner has not pleaded the nexus between the two which shows the direct interference of the 1st Respondent in both cases. In any event there is no law that bars the concurrent proceedings of a criminal and civil case. Reliance is made on the case of *Raymond Kipchirchir Cheruiyot & Another V Republic* [2021]eKLR cited with approval the holding in *Kuria & 3 others Vs. AG.* [2002] 2 KLR 69, *Republic Vs. Attorney General Ex-parte Kipng'eno Arap Ngeny*, HC Civil Application No. 406 of 2001 cited with approval in the case of *Raymond Kipchirchir Cheruiyot & Another V Republic* [2021]eKLR (supra) at para 25.
37. In support of the claim that the Petitioner forged an allotment letter and used the same to process a title deed in his name, this Honourable Court will come to the irresistible conclusion, that there is overwhelming evidence pointing to the commission of a crime. Reliance is made on *Raymond Kipchirchir Cheruiyot & Another V Republic* [2021]eKLR (supra) the Court cited *Kagane vs. Attorney General* [1969] E.A 643.
38. The ODPP is not a party to the civil case before the Environment and Land Court case between the Petitioner and the 2nd Respondent.



39. The mandate to investigate crime is vested in the police under Section 24 of the [National Police Service Act](#) and once done he/she recommends prosecution to the 1st Respondent who then makes the decision on whether to charge the person or not. The Petitioner has not demonstrated with specificity, the manner in which the 2nd Respondent interfered with this process or how he come in between.
40. In view of the above, it is submitted that the Petitioner is inviting this Court to examine the evidence before both the Criminal Court in Nairobi as well as the evidence before the Environment and Land Court in Nyahururu, a task which is not within its remit.
41. It is submitted that the threshold required to meet the test a Constitutional Petition, has not been met and reliance is made on *FML& 2 others v Director of Public Prosecutions & 3 others; Registrar of Companies & 10 others (interested parties) [2021]eKLR* .
42. The crux of the Petition before this Honourable Court is the existence of a Criminal and Civil Case founded on the same set of facts. The Petitioner is the accused person in Nairobi City Court Criminal Case No E231 of 2021 where the 2nd Respondent is the Complainant. The Petitioner is also the Defendant in Nyahururu Environment and Land Court case No. 36 of 2019, where the 2nd Respondent is the Plaintiff.
43. The above is the foundation of the Petition and an attempt has been made by the Petitioner to demonstrate that the Criminal Case has been instituted by the 1st Respondent at the behest of the 2nd Respondent.
44. Nothing could be further from the truth. The two cases are diverse in nature, in that one is criminal and the other is civil. The reliefs obtainable in both cases are parallel. And we daresay that the criminal case has been instituted by the 1st defendant for the benefit of the public.
45. Moreover, there is no statute that bars the concurrent prosecution of both civil and criminal cases, howsoever founded. Concurrent civil and criminal proceedings are permissible under section 193 (A) of the Criminal Procedure Code.
46. Article 157 of [the Constitution](#) of Kenya establishes the Office of the Director of Public Prosecution. It grants that office the unfettered power to commence prosecution of anyone within the Republic of Kenya on behalf of the State. See Article 157 (6) (a).
47. Article 157 further shields the ODPP with the autonomy to conduct prosecutions independently and without the direction of any person or organ. Article 157 (10).
48. The 1st Respondent is an independent Constitutional organ mandated to perform its function without interference or influence. To insinuate that the 2nd Respondent influenced the 1st Respondent to act just by reporting a probable crime for investigations is a stretch of the imagination.
49. While discharging its mandate, the 1st Respondent ought to have regard to the provisions of Article 157 (II) of [the Constitution](#). The Court upheld this position in *Yunus Abdul Rubi & 2 Others V. Director of Public Prosecution & 2 others [2016]eKLR*.
50. What is then left for this Honourable Court to determine is whether the independence of the 1st Respondent was interfered with by the 2nd Respondent and whether as a consequence the Petitioner has met the threshold required for this Honourable Court to terminate a criminal prosecution.
51. The Supreme Court of Kenya in *Cyrus Shakhlanga Khwa Jirongo V Soy Developers Ltd & 9 others [2021]eKLR* (*an authority extensively referred to by the Petitioner) which set out the criteria to be used by the High Court before terminating any criminal prosecution.,



52. At Paragraph 83 of the judgment, the Apex Court cited with approval the Court of Appeal Case of Commissioner of Police & Another V Kenya Commercial Bank Ltd & 4 others [2013]eKLR.
53. The grounds cited by the Apex Court to be: serious abuse of power; oppressive or vexatious investigations contrary to public policy; investigations made in bad faith; or investigations used to achieve ulterior motives; and investigations used as a tool for personal score-settling.
54. Having carefully looked at the Petition before this Honourable Court, none of the aforelisted grounds has been raised to warrant the invocation of this Honourable Court's powers to terminate the criminal proceedings in Criminal Case No. E231 of 2021.
55. In paragraph 84, the Supreme Court of Kenya in Cyrus Shakhhalanga (supra) went ahead to refer to a decision of the Supreme Court of India in RP Kapur v State of Punjab Air 1960 SC 866, which laid down guidelines to be considered by the Court on when the High Court May review prosecutorial Powers. They are as follows:
 - i. Where institution/continuance of criminal proceedings against tan 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, or
 - ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g., want of sanctions; or.
 - 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; or
 - iv. Where the allegations constitute an alleged offense, there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the Charge.
56. The Petition is solely hinged on the existence of concurrent criminal and civil proceedings against the Petitioner. The Petition is not be granted as the Petitioner has invited this Court to review and decide on the evidence before the trial Court Criminal Case No. E231 of 2021 as well as the evidence before ELC Case No. 36 of 2019, courts which are best suited to be determined by respective courts as pertains to the issues in dispute between the State and the Petitioner, as well as the 2nd Respondent and the Petitioner respectively. Reliance is made on Justus Mwenda Kathenge V, Director of Public Prosecutions, and two others Petition No 372 of 2013.

Issues, Analysis, and Determination

57. After going through the pleadings, affidavits, and submissions on record, I find the Issues for determination; Whether the prosecution of the Petitioner amounts to a violation of his Constitution Rights.? Whether the petitioners satisfied the criteria to be used by the High Court to terminate criminal prosecution? Whether the Petitioner is entitled to the relief sought? What is the order as to costs?
58. In matters concerning the infringement of Constitutional rights, particularly a complaint to this Court, seeking the quashing of the Complainant's prosecution, the dicta set out in the locus classicus of Anarita Karimi Njeri -versus – Republic (1979)eKLR stated:

“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 how they are alleged to be infringed."

59. The holding of the Court in Anarita Karimi's (supra) was upheld by the Court of Appeal in Mumo Matemu v Trusted Society for Human Rights Alliance & 5 others[2013]eKLR, which went ahead and provided the standard of proof in Constitutional Petitions. The Court held as follows:

"..... The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing issues in constitutional petitions is an extension of this principle. What Jessel, M.R Said in 1876 in the case of Thorp v Holdsworth [1876]3 Ch. D. 637 at 639 holds today.

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules.... was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided as. diminishing expense and delay, especially regarding the amount of testimony required on either side at the hearing."

60. The Petitioner has set out the alleged violation of his constitutional rights under Section E of the Petition. He has referred to Article 10(2) (a) and (b) of *the Constitution* and submitted that, by subjecting him to criminal investigations, the Respondents have failed to uphold the rights thereunder. Article 10 (2) (a) and (b) provides:

The National values and principles of governance include -

Patriotism, national unity, sharing and devolution of power, the rule of law, democracy, and participation of the people;

Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized;

61. The Petitioner has neither in the Petition nor the Affidavit in support of the Petition explained how his impending prosecution before the Chief Magistrate's Court in Nairobi has violated the rights above. He has not expressed how the respondents have violated the national values or principles of governance. He provides little or no particulars as to the manner of the alleged Constitutional infringements by the Respondents to the Petitioner.
62. Regarding the 2nd Respondent, the Petitioner has referred to Article 50 of *the Constitution* and submitted that his rights have been violated in pursuit of the criminal investigations against him at the behest of the same Respondent. However, Article 50 sets out the right to a fair hearing and stipulates its constitutional confines in the underlying sub-articles and provisions. Again, the content and substance of the Petition fail to explain how this right has been impeded. It is not denied that the Petitioner is facing criminal charges, and his trial is ongoing through the criminal trial process, and that he will have an opportunity to proffer his defence. However, he has not explained how the prosecution or the trial court has curtailed the right to defend himself.
63. Furthermore, the Petitioner is out of custody on bond, proving his right has been upheld.



64. The Petitioner also cited the violation of Article 157 (II) of *the Constitution* as one of the provisions which have been violated. Article 157 (II) provides that:

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process.”

65. The above provision guarantees the independence of the 1st Respondent while carrying out its mandate and deciding whether to institute criminal proceedings. This view was observed by the Court in *Yunus Abdul Rubi & 2 Others V Director of Public Prosecution & 2 others* [2016]eKLR where the Court held that:

“..... additionally, by dint of Article 157 (II) of *the Constitution*, in exercising the powers conferred on him, the Director of Public Prosecutions is required to have regard for the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse. The foregoing makes it clear, therefore, that the office of the Director of Public Prosecutions is an independent office with the mandate to independently institute criminal prosecutions.”

66. The Petitioner has not demonstrated how the independence of the 1st Respondent has been compromised in the circumstances. Additionally, while it is admitted that a civil and criminal case is founded on the same set of facts, the Petitioner has not demonstrated the nexus between the two, which shows the direct interference of the 1st Respondent in both cases. In any event, no law bars the concurrent proceedings of a criminal and civil case.

67. The Court in *Raymond Kipchirchir Cheruiyot & Another V Republic* [2021]eKLR cited the holding in *Kuria & 3 others Vs. with approval. AG.* [2002] 2 KLR 69, where the Court emphatically stated.

“There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, such that the staying of the prosecution would best serve the public interest... it is not enough to state that because there is an existence of civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the Court is being abused or misused and indicate or show the bases upon which the Applicant's rights are under serious threat of being undermined by the criminal prosecution in the absence of concrete grounds. It is not mechanical enough that a civil suit precludes the institution of criminal proceedings based on the same set of facts. an order of prohibition cannot also be given without evidence that there is manipulation, abuse, or misuse of court process or that there is a danger to the right of the accused person to have a fair trial.”

68. The finding in *Republic Vs. Attorney General Ex-parte Kipng'eno Arap Ngeny*, HC Civil Application No. 406 of 2001 cited with approval in the case of *Raymond Kipchichir Cheruiyot & Another V Republic* [2021]eKLR (supra) at para 25 where the Court was emphatic that:

“A criminal Prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for the ulterior motive of improper purpose. Therefore, 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. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable



cause for mounting a criminal prosecution; otherwise, the prosecuting will be malicious and actionable."

69. It is incumbent upon the trial court to establish that the Petitioner forged an allotment letter and used the same to process a title deed in his name.

70. Court in Raymond Kipchirchir Cheruiyot & Another V Republic [2021]eKLR(supra), the Court cited Kagane vs. Attorney General [1969] E. A 643 held as follows:

"Where the available evidence may not be sufficient to determine the evidential test, that is, determining a realistic prospect of conviction, prosecutors should apply the "Threshold test" to decide whether to charge or not."

71. The ODPP is not a party to the civil case before the Environment and Land Court between the Petitioner and the 2nd Respondent. The mandate to investigate crime is vested in the police under Section 24 of the *National Police Service Act*, and once done; they recommend prosecution to the 1st Respondent, who then decides whether to charge the person. The Petitioner has not demonstrated, with specificity, how the 2nd Respondent interfered with this process or how he came in between.

72. This Court cannot examine the materials before both the Criminal Court in Nairobi and the evidence before the Environment and Land Court in Nyahururu, as it is not its task to do so. The Petitioner has not adduced sufficient evidence to show that the criminal proceedings were commenced with an ulterior motive and how the 1st Respondent acted in excess of the powers conferred to them.

73. On the threshold required to meet the test of a Constitutional Petition, the Court in FML& 2 others v Director of Public Prosecutions & 3 others; Registrar of Companies & 10 others (interested parties) [2021]eKLR held as follows:

"To satisfy the threshold set out in Anarita Karimi's case as submitted by the respondents, the Petitioners are required to detail the facts that led up to the violation of the mentioned rights... .."

74. The crux of the Petition before this Court is the existence of a Criminal and Civil Case founded on the same set of facts. The Petitioner is the accused in Nairobi City Court Criminal Case No E231 of 2021, where the 2nd Respondent is the Complainant. In addition, the Petitioner is also the Defendant in Nyahururu Environment and Land Court case No. 36 of 2019, where the 2nd Respondent is the Plaintiff.

75. The two cases are diverse: one is criminal, and the other is civil. Nevertheless, the reliefs that are attainable in both cases are parallel. The criminal case has been instituted for the benefit of the public. Moreover, no statute bars the concurrent prosecution of civil and criminal cases, howsoever founded. Concurrent civil and criminal proceedings are permissible by virtue of section 193 (A) of the Criminal Procedure Code.

76. Article 157 of *the Constitution* of Kenya establishes the Office of the Director of Public Prosecution. It grants that office the unfettered power to commence prosecution of anyone within the Republic of Kenya on behalf of the State. Article 157 (6) (a) provides that:

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



Article 157 further shields the ODPP with the autonomy to conduct prosecutions independently and without the direction of any person or organ. Article 157 (10) provides that:

"The director of Public Prosecutions shall not require the consent of any person or authority for the commencement of cardinal 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."

77. The 1st Respondent is an independent Constitutional organ with the mandate to perform its function without any interference or influence. To insinuate that the 2nd Respondent influenced the 1st Respondent to act just by reporting a probable crime for investigations is a stretch of the imagination. While discharging its mandate, the 1st Respondent ought to have regard to the provisions of Article 157 (II) of *the Constitution*. This position was upheld by the Court in *Yunus Abdul Rubi & 2 Others V. Director of Public Prosecution & 2 others* [2016]eKLR where the Court reasoned that:

"... it must not be lost to this Court and the parties that the powers to institute any criminal proceedings are vested in the office of the Director of Public Prosecutions by dint of Article 157(6) of *the Constitution*... But, additionally by dint of Article 157 (II) of *the Constitution*, in exercising the powers conferred on him, the Director of Public Prosecutions is required to have regard for the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse. Therefore, the foregoing makes it clear that the Office of the Director of Public Prosecutions is an independent office with the mandate to institute criminal prosecutions independently."

78. What is left for this Court to determine is whether the independence of the 1st Respondent was interfered with by the 2nd Respondent and whether, as a consequence, the Petitioner has met the threshold required for this Court to terminate a criminal prosecution.

79. The Supreme Court of Kenya in *Cyrus Shakhlanga Khwa Jirongo V Soy Developers Ltd & 9 others* [2021]eKLR (*an authority extensively referred to by the Petitioner) set out the criteria to be used by the High Court before terminating any criminal prosecution.,

80. In Paragraph 83 of the judgment, the Apex Court cited with approval the Court of Appeal Case of *Commissioner of Police & Another V Kenya Commercial Bank Ltd & 4 others* [2013]eKLR and quoted then highlighted the section below:

"By the same token and in terms of article 157(II) of *the Constitution*, quoted above, exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations. To have regard to the need to prevent and avoid abuse of the legal process. On the other hand, the Court is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the Court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it from securing the ends of justice and restraining abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090"

81. It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the law binds the police in conducting criminal investigations. The decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, intended to achieve an ulterior motive, or used as a tool for personal score-settling or vilification. The Court has



inherent power to interfere with such investigation or prosecution on process. See *Ndarua v R* [2002] 1EA 205. See also *Kuria & 3 others V Attorney General* [2002] 2KLR".)

82. The grounds cited by the Apex Court to be: serious abuse of power; oppressive or vexatious investigations contrary to public policy; investigations made in bad faith; or investigations used to achieve ulterior motives; and investigations used as a tool for personal score-settling.
83. Having carefully looked at the Petition before me, none of the aforelisted grounds has been raised to warrant the invocation of this Honourable Court's powers to terminate the criminal proceedings in Criminal Case No. E231 of 2021.
84. In paragraph 84, the Supreme Court of Kenya in *Cyrus Shakhlanga* (supra) went ahead to refer to a decision of the Supreme Court of India in *RP Kapur v State of Punjab* Air 1960 SC 866, which laid down guidelines to be considered by the Court on when the High Court May review prosecutorial Powers. They are as follows:

“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, or

Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g., want of sanctions; or.

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; or

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.”

85. His Petition is solely hinged on the existence of concurrent criminal and civil proceedings against the Petitioner. The Petition is not awardable, as the Petitioner has invited this Court to review and make a determination on the evidence before the Criminal Magistrate's Court in Nairobi City Court Criminal Case No. E231 of 2021 as well as the evidence before the Judge in Nyahururu Environment and Land Case No. 36 of 2019, courts which are best suited to determine the issues in dispute between the State and the Petitioner, as well as the 2nd Respondent and the Petitioner respectively. The Court in *Justus Mwenda Kathenge V Director of Public Prosecutions and two others* Petition No 372 of 2013 expressed displeasure with an invitation of this nature and expressed itself as thus;

it is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157 (II) of *the Constitution*, he acted without due regard to public interest and interests of the administration of justice and not taken account of the need to prevent and avoid abuse of court process...this court will be usurping the mandate of the trial court by evaluating the sufficiency of the evidence and to make a finding on whether the same can sustain a conviction.”

- i. In sum, this Court finds no merit in the Petition; thus, the same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 31ST DAY OF MAY 2023

.....
CHARLES KARIUKI

JUDGE

