



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 13 OF 2020

IN THE MATTER OF: ARTICLE 10, 22, 23, 27, 28, 29, 40, 47, 48, 50 and 165 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 376 OF 2020 AT MALINDI

BETWEEN

ENRICO QUERCIOLI.....1ST PETITIONER

MAURIZIO CALLARI.....2ND PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE DCIO MALINDI SUBCOUNTY.....2ND RESPONDENT

HON. CHIEF MAGISTRATE.....3RD RESPONDENT

AND

MARIA ANGELA.....INTERESTED PARTY

CORAM: Hon. Justice Reuben Nyakundi

Mr. Matini of Machuka & Co. Advocates for the Petitioners

Mr. Karita for the Interested Party

Mr. Alenga for the Director of Public Prosecutions

Mr. Mkala for The Hon. Attorney General

RULING

Introduction

The petitioners, under Certificate of Urgency, on 14th July 2020 filed a Notice of Motion contemporaneously with a petition both dated 8th July 2020. The motion was supported by the sworn affidavit of the 1st petitioner, **Enrico Quercioli** dated 10th July 2020 while the petition was accompanied by a Verifying Affidavit and a statement in Support of the petition.

When the matter came up on the 15th of July 2020, upon perusing the Notice of Motion and accompanying documents, the Court certified the matter urgent; set aside the warrant of arrest pending against the 1st petitioner instead varying it for a summons requiring attendance; directed that all interlocutory applications be served for inter-partes hearing; directed that the issues of conservatories orders be disposed of by way of written submissions which the respective parties were directed to file; and set a mention for compliance for 27th July 2020.

In open court on 27th July 2020, upon hearing of the Notice of Motion and accompanying documents, the Court went on to direct that the Interested Party and the Director of Public Prosecutions (DPP) file a reply to the main petition within 21 days. The Court also set 20th August 2020 for a pre-trial conference and directed that summons requiring attendance be served through the well-known emails as well as through DHL in lieu of physical service.

Subsequently, on 14th August 2020, the DPP filed a replying affidavit sworn by **PC Cavin Otieno**. The DPP also filed submissions dated 7th August 2020.

At the pretrial conference held on 20th August 2020 in open court, it was ordered that the final conference for compliance be held on 16th September 2020 and that status quo be maintained until further directions from the court. On 16th September, **Mr. Karita** Counsel for the Interested Party was cited with a Notice to Show cause for a failure of compliance and directed to appear before the Court on 21st September 2020.

When the matter was mentioned on the 21st September 2020, the Court enlarged the time within which the Interested Party was to file his suit papers and for the exchange of responses. It allowed Parties to file appropriate rejoinders by way of supplementary affidavit upon such service by the Interested Party. Parties would thereafter each have 7 days within which to file their submissions before the matter was mentioned for case management compliance on 5th October 2020.

On 27th October 2020, the Hon. Attorney General, through State Counsel **Mr. Mkala**, entered appearance on behalf of the 3rd respondent and filed grounds of opposition dated 23rd October 2020.

29th October 2020 is when the matter was next mentioned in Court. On this occasion, the Court granted the petitioners leave to put in any necessary materials notwithstanding the Interested Party taking liberty to file within time. It was also directed that the Parties would be at liberty to respond to any issues raised by **Mr. Karita** for the Interested Party. The Court set 23rd November 2020 as the final date for highlighting submissions.

On 12th November 2020, the petitioners went on to file a further affidavit sworn by the 1st Petitioner on 10th November together with submissions dated 9th November 2020.

By the by, on the 23rd of November 2020, the matter came up before the Court and in the presence of Counsel for all the parties the Court noted that the Interested Party had been given adequate time to respond to the application/petition. The Court hence reserved its decision for 10th February 2021. However, due to circumstances beyond the control of the Court, the Judgment could not be rendered on the material date.

Despite being availed adequate time, the Interested Party did not file any responses to the petition. The 3rd respondent only filed their grounds of opposition but took no further part in the matter.

This Ruling relates to the application dated 8th and filed on 14th July 2020.

The Petitioners' Case

The petitioners describe themselves as adults of sound mind working for gain in Italy, with the 1st petitioner further averring that he is a resident of Watamu and that he has the consent of the 2nd petitioner to act on his behalf in the petition. The gist of the petitioners' case as surmised from the grounds espoused therein and in the attendant affidavits is as follows.

The 1st petitioner averred that he is the lawful registered owner of a half share of a ground floor apartment standing on portion No. 1040 Watamu (the subject property), having acquired the same lawfully and through due process from the previous owner **Maria Coppo (deceased)** an Italian national. He states that sometime in the year 2015, he was introduced to **Maria Coppo (deceased)** by one **Franco Vernassa** who had expressed her willingness to sell the ground floor of the said property and after having entered into negotiations with the deceased, it was agreed that he purchase the said property from her at a sum of Ninety-Six Thousand Euros.

It is averred that vide a sale agreement between the 1st petitioner as purchaser on the one part and **Maria Coppo (deceased)** as vendor on the other part, the vendor during her lifetime disposed off the ground floor of the said apartment to the 1st petitioner. The agreed Consideration in the sum of Ninety-Six Thousand Euros was duly and fully paid vide numerous cheques in favor of the deceased after which the 1st petitioner avers he moved into the property and took safe and vacant possession and ownership thereof. The 1st petitioner avers that in compliance with the terms of the transaction which was all along made in utmost good faith, the deceased then caused the said property to be transferred into his name.

It is contended that both the sale agreement and transfer documents were duly executed by the vendor who willingly and without any undue influence signed and executed the said transfer while competent to contract and that the deceased in the remainder of her lifetime never complained or alleged any fraudulent dealing on the 1st petitioner's part.

According to the 1st petitioner, pursuant to the sale agreement made in the presence of the 2nd Petitioner who had equally captured part of the transaction of execution on video, he paid the full agreed purchase price into the vendors bank account and got the property transferred to him and thereby became the lawful owner of subject property by virtue of the sublease dated 22nd December 2017.

The 1st Petitioner maintains that it was within her constitutionally guaranteed right of ownership to property under Article 40 for **Maria Coppo (deceased)** to sell her own half share of the property that she owned as equal owner in common with **Lucia De Fabianis (deceased)** who was her husband. He therefore maintains that having acquired title as an innocent purchaser for value and without any notice of defects in the vendor's title nor capacity he did not commit any fraud in acquiring the subject property.

According to the petitioner, he later came to learn that the Interested Party visited the Land Registrar's offices in Mombasa seeking to cancel and or revoke the valid transfer made to him by falsely alleging fraud as the reason for such revocation. Consequently, the 1st petitioner avers, the Land Registrar directed him through a written correspondence to surrender the title over the property for purposes of it getting cancelled. That he then responded by a letter dated 7th May 2020 but did not receive any feedback thereby prompting him to file ELC Civil Case 46 of 2020.

The 1st petitioner avers that he came to learn that sometime in the month of April 2020, one **Franco Vernassa** who had introduced him to **Maria Coppo** was arrested and charged before court with conspiracy to defraud, **Lucia Defabianis(deceased)** who was the husband to **Maria Coppo (deceased)**. It is contended by the 1st petitioner that being certain of the limited role **Vernassa** played in getting him to meet with the deceased vendor, he swore an affidavit averring that there was no way **Vernassa** could be charged for an offence of the nature considering the entirety of the circumstances under which the transaction was undertaken.

The averment is made that late in the course of the month of June 2020, it was made known to the 1st petitioner that on the 25th June 2020 warrants of arrest were issued in criminal case no 376 of 2020 against the petitioners concerning allegations of fraud in relation to the sale of the subject property.

It is contended that save that there is a criminal case number 242 of 2020 in which he had explained the process under which he had acquired half share of the subject property, the 1st petitioner has never been summoned by the police to answer to any complaints of fraud. That the petitioners have never recorded any statements nor is there proof that they had been summoned by the police to answer to such allegations and have failed to appear before them thus prompting issuance of the arrest warrants.

The case is advanced that there is now a real likelihood that the Interested Party wanted to have the petitioner's arrested and charged before court to ruining their reputations and intimidate the 1st petitioner into handing over the subject property while at the same time scaring the 2nd petitioner from testifying in the 1st petitioner's favor considering that the 2nd petitioner was a witness to the entire transaction.

According to the 1st petitioner, despite this information having been made available by his counsel to the prosecution in relation to criminal case no. 242 of 2020, the said office has in blatant disregard of the law preferred nonexistent charges against the petitioners. He charges that no prima facie evidence has been availed to him in relation to the alleged fraudulent dealing with **Maria Coppo** so as to warrant a criminal trial.

It is contended that the current petition raised weighty issues touching on breach of fundamental rights and freedoms including the 1st petitioner's right to acquire and own property as enshrined under article 40 of the constitution of Kenya. Indeed, it is contended that having legally and through due process acquired the subject property, the act of charging him was aimed at depriving him of the subject property.

On the basis of these set of facts, the petitioners aver that their rights have been threatened with violation and outrightly violated. It is contended that the manner and facts upon which the criminal proceedings have been instituted by the 1st and 2nd respondents against the petitioners are a total violation of the law. The petitioners averred that the warrants for their arrest issued in criminal case 376/2020 on the 25th June 2020 at Malindi were illegal as they had not committed any known offence in law.

It is averred that the 1st respondent in his capacity as the chief government prosecutor in charge of all criminal proceedings on behalf of the state has no just nor probable cause to order for the arrest, charge and subsequent prosecution of the petitioners as the same are baseless and unfounded in law. According to the Counsel for the petitioners', their right to fair administrative action as envisaged under Article 47 of the Constitution is being breached by the respondents herein.

It is contended that the petitioners were ambushed and remain unaware of the charges preferred against them as they have neither been summoned to answer to any charge before the DCIO nor have appeared before the Honorable Court to answer to the said charge. The said charges are a serious affront to justice and an infringement on the petitioner's right to fair administrative action and negate their rights to a fairing bearing as they have already been presumed guilty.

It is further contended that the issuance of the arrest warrant for the apprehension of the petitioners is clearly a breach of their fundamental rights under article 28 which envisages that every person has inherent dignity and the right to have the dignity respected and protected. Whilst Article 29 guarantees the right to every person to freedom and security which includes the right not to be deprived of freedom arbitrarily or without just cause. The arrest warrants issued against the petitioner' are clearly a violation of such freedoms.

These are the arguments upon which the applicants/petitioners pray for:

1. Spent

2. Spent

3. Pending the hearing and determination of the substantive constitutional petition, a conservatory order be issued against the 1st and 2nd respondents, their agents, servants, employee and/or any other person acting on their behalf from proceeding ,with

criminal case no.376/2020 registered before the chief magistrates Court at Malindi.

4. Spent

5. Pending inter-parte hearing and determination of the petition, the Hon. Court be pleased to issue Orders staying and or lifting the execution and or enforcement of the warrants of arrest issued against the 1st and 2nd petitioner in relation to the issues and or matters raised or related to those in criminal case no.376/2020 at Malindi or any other matter related to the subject of the said charge sheets.

6. Any order that the Honourable Court deem fit and just to grant.

The 1st Respondents Case

No. 93819 PC Cavin Otieno of Malindi Police Station (DCI) deposed on behalf of the 1st respondent as the current investigating officer together with **PC Mwenda** who he intimated was currently on leave and familiar with the facts giving rise to this matter.

He averred that on the 16th November, 2018, **Maria Angela De Fabianis**, an Italian national based at Watamu made a report at Malindi police station of forgery and uttering false documents which was recorded in the occurrence book. This report, it was contended, led to the instigation of investigations by the DCI that included visiting the scenes of crime at the suit property. At the Suit Property, PC Otieno averred that he found the 1st petitioner who intimated that he had legally bought the house from **Maria Coppo (deceased)** and directed them to his advocate **K. Lughanje**.

PC Otieno asserts that on 19th November 2018 he visited the firm of **K. Lughanje** in order to confirm from said advocate whether he had witnessed the sale agreement between **Maria Coppo** and **Enrico Quercioli**. It was further contended that **Lughanje** through his written statement admitted to have received in his office on 22nd December, 2017 the 1st petitioner and **Mr Habib Muhamed** who came with a Power of Attorney drawn By **Michira & Co Advocates** with the donee being **Julius Charo Muturi**. They also had a provisional certificate of title in respect to **Title number 46208/1** which had been lost. Additionally, they had a sale agreement drawn in Italy between the 1st petitioner and **Maria Coppo (deceased)**.

It was averred that **Mr. Lughanje** attested to the transfer of lease in the absence of the vendor, **Maria Coppo** and that he handed the document to **Habib Mohamed** who was to take them to Mombasa Land registry for the transfer to be effected.

The deponent made the case that he visited the lands office Mombasa together with **PC Ann** to enquire how the suit property was transferred. He contended that the Lands Registrar Mombasa issued them with certified copies of the following documents: certified copy of transfer of lease between **Maria Coppo** and **Enrico Quercioli** dated 22nd December, 2017, a certified copy of provisional Certificate of Title in respect of **Title Number CR.46208/1**, an Application for provisional Certificate of Title and receipt of payment, a Certified copy of a police abstract in respect of title, certified copy of Kenya Gazette dated 15th December, 2017 notifying members of the public of loss of lease certificate in respect to **L.R 1040 Watamu**, a certificate of official search dated 9th February 2010 showing that the registered owners of **Plot No.1040 Watamu** were **Lucio De Fabianis** and **Maria Coppo**, a certified copy of official search dated 7th November 2018 which showed the owner of the **Plot No 1040** to be **Lucio De Fabianis** and **Enrico Quercioli** and a copy of green card in respect title number 46208.

It was further stated that on 16th November 2018 when the Complainant was recording her statement, she disclosed to the deponent that she was in possession of the original certificate of **Title No 46208** and at no particular time had it been lost. Additionally, she revealed that **Maria Coppo (Deceased)** had together with **Lucio De Fabianis (Deceased)** jointly bought the property from **Habib Mohamed** in the year 2009 and that her father (**De Fabianis**) later died in the year 2011 leaving the complainant, her mother **Maria coppo** and her two nephews as the only beneficiaries of the **Estate of Lucio De Fabianis** and which estate she was an administrator.

The deponent averred to having been shown by the Interested Party a psychiatrist report dated 14th August 2014 which showed that **Maria Coppo** was not in a state of mind to enter into a contractual agreement. He averred that he suspected that the property was fraudulently transferred to 1st petitioner from **Maria Coppo**. That on 23rd November 2018 he visited the firm of **Philip Michira Advocates**, with an aim of establishing whether he was the one who drew the power of attorney that was used to fraudulently transfer the suit property.

According to the deponent, **Mr. Michira** through his written statement denied ever drawing such a Power of Attorney between **Maria Coppo** and **Julius Charo Muturi**. He explained that **Mr. Michira** further stated that the only Power of Attorney he drew was between the Interested Party and **Julius Charo Muturi** but the same was not signed by both parties and hence was not registered.

It was further averred that 20th November 2018, the said **Julius Muturi** who was working as a gardener at Maria Angela's house also recorded his statement and he also confirmed that the power of attorney which had been prepared by **Michira advocate** was not signed by either party as a result of disagreement between him and his employer.

The deponent, averred that he visited Watamu police station to enquire how the police abstract which was used to obtain provisional Certificate of Title was obtained. That with the assistance of the officer who had issued that abstract **PC Ernest Chege**, he was able to get one **Zablon Assa Konde** who in his written statement admitted to have been sent by his boss one **Habib Mohamed** to Watamu Police station to collect an abstract for loss of title belonging to one **Lucio De Fabianis**.

It is the deponents attestation that on 19th November 2018 he met with 1st petitioner in the office of his advocate **K. Lughanje** where he recorded his statement. That in his statement the petitioner disclosed to the deponent that he was informed about the sale of the suit property

by **Franco Vernessa**, the accused person in criminal case no 242 of 2020, when he had visited Watamu in January 2017. That **Franco Vernessa** put the 1st petitioner in touch with **Maria Coppo (deceased)** who was the vendor and the 2nd petitioner who was an administrator of **Maria Coppo's** properties.

According to the police officer, the 1st petitioner indicated in his written statement that immediately he flew back to Italy they met with **Maria Coppo** and 2nd Petitioner and they entered into sale agreement for the sale the suit property for 95000 Euros which the 1st petitioner paid by depositing two cheques in the account of **Maria Coppo**.

The averment is that in February 2019 the deponent wrote a letter to the land registrar Mombasa with a view of getting to know how the suit property devolved from **Maria Coppo (deceased)** to the 1st petitioner. That through a letter dated 12th July 2020 the land registrar clarified that no power of attorney was used to transfer the said property and parties to sale agreement signed the transfer documents and their signatures were attested by an advocate. The deponent states that he notified the registrar of Lands Mombasa of the suspected fraudulent transfer of the suit property and by a notice dated 5th February 2020 the Registrar Mombasa notified the 1st petitioner of his intention to revert the title to the bonafide owners **Lucio De Fabian** and **Maria Coppo**.

According to the investigating officer, he forwarded the police file for advice to the office of The Director of Public Prosecutions and through a letter dated 14th January 2020 he was directed to charge **Habib Mohammed** and **Franco Vernessa** with conspiracy to defraud contrary to section 317 of the penal code. **Franco Vernessa** was charged before Chief Magistrate Malindi on 25th March 2020 with an offence of conspiracy to defraud contrary to section 317 of the Penal code and he pleaded not guilty.

It is averred that the complainant in this case complained to the 1st respondent and the police file was recalled for review. On 8th of June 2020 the deponent avers he received a letter from the 1st respondent directing him to further charge the petitioners after it was established that they had been involved in the said fraud. To this end, the deponent averred that on 25th June 2020 he prepared their file and through **CR. 376 of 2020** a warrant of arrest was issued against the petitioners.

The deponent averred that the 1st respondent acted within its constitutional mandate and did not infringe on any of the fundamental rights of the petitioners. That it had not been succinctly pointed out the specific violation alleged. It was further contended that the merits or demerits of the decision of the ODPD could only be determined by this honourable court after evidence had been adduced. The position was that the charges preferred against the petitioner were not an abuse of the court and that the decision to prosecute was based on sound evidence, facts and the law.

It was further contended that the petitioners had sufficient safeguards pursuant to Article 50 of the constitution of Kenya to ensure that they had a fair trial. That this Honourable Court could not usurp the role of the trial court.

In closing it was averred that the notice of motion should be dismissed accordingly and the petitioners ordered to take plea forthwith and the matter set down for hearing and proceeds to its logical conclusion.

The Grounds of Opposition by the 3rd Respondent

On behalf on the 3rd respondent **Mr. Mkala** advanced the following grounds of opposition:

- 1. That the application does not disclose evidence of any professional misconduct by Honourable Chief magistrate.*
- 2. . That this petition against the 3rd respondent is mischievous, scandalous and an abuse of the Court process intended to scandalize, shame embarrass and bring the Chief Magistrate to disrepute for conducting their professional duties.*
- 3. That it is essential in all courts that the judicial officers who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear of any action being brought against them for carrying out their duties*
- 4. The Chief magistrate is immune from prosecution for commission or omission while in the course of his/her official business.*
- 5. That the petition offends Article 160 of the Constitution of Kenya and the same should be dismissed as against the 3rd respondent.*

The Submissions

On behalf of the petitioners, **Mr. Matini** addressed the issue of whether the vendor **Maria Coppo** had the capacity and power to sell the suit property. It was contended that she did by virtue of it being a joint tenancy which wholly devolved to her upon the death of her husband. Reliance was placed on: **Moses Bii v Kericho District Land Registrar & Another (2015)**, **Daniel Murithi Angaine v Stanley Mutwiri Angaine & another (2016)** eKLR, **Benson Mutuma Muriungi Ceo. Kenya Police Sacco And Sarah Kagwira (2016)** eKLR; **Samson Kariuki Njengi & another v Tom Kelvin Mogeni va Mogeni & Co. Advocates [2020]** eKLR.

As to whether there was any fraud regarding the sale and transfer of the suit property, it was the petitioners' averment that both the sale agreement and transfer documents were duly executed by the vendor and without any undue influence and for valid and valuable consideration. Regarding the powers/duties of the 1st respondent in relation to the investigation, arrest and intended prosecution of the

petitioners, it was submitted that the powers of the DPP were drawn from Article 157 of the Constitution. Reliance was placed on **Republic v Director of Public Prosecutions & 2 others Ex parte Zablou Agwata Mabea (2017) eKLR** and **Edgar Kagoni Marsigulu & others v Director of Public Prosecutions & another Law Society of Kenya & another (Interested Parties) (2019) KLR**

For the powers/duties of the 2nd respondent in relation to the investigation, arrest and intended prosecution of the petitioners, the cases cited were: **Kenneth Kanyarati & 2 others v Inspector General of Police Director of Criminal Investigations Department & 2 others [2015]**; and **Mohamed Gulam Husein Fazal Karmali & Another -vs- The Chief Magistrate's Court, Nairobi & Another (2006) eKLR**

The 1st respondent's submissions as advanced by counsel cited the mandate of the DPP as articulated under Article 157 of the constitution as well as Section (6) of the DPP Act. In contending with the mandate of the DCIO to investigate complaints the cases relied upon were: **Kenya Commercial Bank Ltd and 2 others v Commissioner of police and another Nairobi Petition No.218/2012(2013) eKLR**; **Republic vs. commissioner of police and another exparte William Ruto and another v Attorney General HCCC NO. 1192 of 2004**; **Republic vs. commissioner of police and another exparte Michael Monari and Another.**

For a definition of what constituted irrationality as a ground to suspend the exercise of mandate by the 1st respondent, the cases cited were: **Bukobe Gymkhana club (1963)1 E.A 478** and **Diamond Hasham Lalji and another v AG and 4 others (2018) eKLR.**

Analysis and Determinations

With utmost lucidity as to the pleadings filed in support of and against the application and Petition and having apprised myself of the arguments contained in the submissions advanced by Counsel **Mr. Matini** and **Mr. Alenga** for the Petitioners and 1st respondent respectively, I am of the view that the issue that falls for determination is whether there is any merit to the Petitioners prayers for temporary injunctive relief.

In my ruminations, I will first describe the respondents respective mandates in their investigation and subsequent institution of a criminal charge against the petitioners. I will then consider whether the applicants are entitled to the conservatory orders they seek by analyzing the extent, if any, to which the petitioners' rights have been or are threatened to be violated by the respondents.

A court tasked with considering whether or not a criminal prosecution ought to be suspended must expogiate principles that are now trite. Firstly, the court ought to exercise maximum caution in reaching its verdict lest it prejudices the intended or pending criminal proceedings. Coterminal with this, the court should be alive to the fact that it must not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions and neither should it curtail with the investigatory powers of the Directorate of Criminal Investigations. That being said, the court may obtrude should it become apparent that the discretion accorded to the 1st and 2nd respondent is the execution of their mandate is being exercised unlawfully and in bad faith; such as where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence. These principles are not novel. In **Eunice Khalwali Miima v Director Public of Prosecutions & 2 others [2017] eKLR** the Court stated:

“The circumstances under which the Court will grant stay of a criminal process in these kinds of proceedings is now well settled. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. 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.”

Germane in this regard is the position taken in **Republic v Grace Wangari Bunyi (Sued as the Administrator of the Estate of the Late Obadiah Kuira Bunyi) & 7 others Exparte Moses Kirruti & 28 others [2018] eKLR** where the Court held:

“It is important to note that the discretion given to the Director of Public Prosecutions to undertake investigation and prosecute criminal offences is not to be taken for granted or lightly interfered with and must be properly exercised. In the same respect, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions. The mere fact that their high chance of success as regards the intended or ongoing criminal proceedings does not count, it not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned merits of the case but to address defects in decision making process by a decision making body. However, the court may only intervene were the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence and the justice system such as with a view to forcing a party to submit to a concession of a civil dispute, the court will not hesitate to bring such proceedings to a court.”

A familiar position was also taken in **George Joshua Okungu & Another v The Chief Magistrates Court, Nairobi & Another [2014] eKLR** where it was held:

“50. The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process

undertaken bona fides since that defence is always open to the Petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the Petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763 and Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)."

Regarding the duty of the investigatory agencies, in this case the 2nd respondent, it is not in doubt that where it is suspected that a criminal offence has been committed, the police do have a duty to investigate any complaint once it has been made. The DCIO need only establish a reasonable suspicion that an offence has been committed in order to prefer charges. This stance is evident in **Republic v Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** held:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene"

The prosecutorial powers of DPP are constitutionally and statutorily provided for under **Article 157 (10) of the Constitution and Section 4 of the Office of the Director of Public Prosecution Act No. 2 of 2013**, which provides that the DPP does not require the consent of any person or authority to commence any criminal proceedings and in exercise of his/her powers and functions, shall not be under the direction or control of any person or authority. The exercise of that power is however subject to Subsection (11) of Article 157 and Section 4 of the DPP Act, which provides that in exercise of the said power, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process. Only in circumstances where it is manifest that the DPP acted unlawfully by failing to exercise their own independent discretion; acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual will the High Court intervene.

In the case of **Diamond Hasham Lalji & Another v A.G. & 4 others [2018] eKLR** which this Court was referred to by both Counsel, the Court of Appeal stated:-

"[34] It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2) (d)(ii) of the Constitution ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.

The DPP is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law. (Matululu and Anor v. DPP [2003] 4 LRC 712). Further, authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction."

I further seek to associate myself with the decision in **R v Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** the Court held that:

"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. 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 prosecution will be malicious and actionable".

Having set out the mandate of the 1st and 2nd respondent through the preceding judicial authorities, I now turn my focus to establishing whether the applicants' prayer for conservatory orders halting their prosecution are worthy. In order to do this, I need only establish whether they have demonstrated a prima facie case with a chance of success and whether, should the prayer sought be denied, they stand to suffer real prejudice. Given that conservatory orders have a public law leaning, a decision to grant them rests on the inherent merits of the case; taken in tandem with the public interest, the constitutional values, the proportionate magnitudes, and priority levels attributable to the relevant causes.

My duty at this interlocutory juncture is not to delve into the merits of the petition as that is not within the province of the Court. This position is not novel. The Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** succinctly sets it out thus:

"[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the

supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

Additionally, in **Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR** it is held:

"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

In **Speedex Logistics Limited & 2 others v Director of Criminal Investigations & 3 others [2018] eKLR** the learned judge held:

"15. It has severally been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly, in determining this application, this Court is not required, and is in fact forbidden from making any definite and conclusive findings on either fact or law. I will therefore not make any determinations on matters of fact or law as that would have the effect of prejudicing the hearing of the main Petition."

Again, in **Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General Nairobi Petition No. 16 of 2011**, the Court held:

"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

The Majority bench in **The Centre for Human Rights and Democracy & Others v The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, held:

"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."

In view of the judicial authorities set out above, my first task is to establish whether the Applicants have established a prima facie case. A prima facie case is not a case which must succeed at the hearing of the main case. Nonetheless, it is not a case which is frivolous. As such, an applicant must show that they have a case which discloses arguable issues; and in a case alleging violation of rights, arguable constitutional issues. This was the decision in **Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR**.

Does the applicants' plight raise arguable constitutional issues? To answer this, I will restate the pertinent facts of the case. It is averred that vide a sale agreement between the 1st petitioner as purchaser on the one part and **Maria Coppo (deceased)** as vendor on the other part, the vendor during her lifetime disposed off the ground floor of the said apartment to the 1st petitioner. The agreed Consideration in the sum of Ninety-Six Thousand Euros was duly and fully paid vide numerous cheques in favor of the deceased after which the 1st petitioner avers he moved into the property and took safe and vacant possession and ownership thereof. The 1st petitioner avers that in compliance with the terms of the transaction which was all along made in utmost good faith, the deceased then caused the said property to be transferred into his name.

According to the 1st applicant, both the sale agreement and transfer documents were duly executed by the vendor who willingly and without any undue influence signed and executed the said transfer while competent to contract and that the deceased in the remainder of her lifetime never complained or alleged any fraudulent dealing on the 1st petitioner's part.

The 1st respondent on the other hand avers that the land registrar clarified that no power of attorney was used to transfer the suit property and parties to sale agreement signed the transfer documents and their signatures were attested by an advocate. It is on this basis that it is charged that there was suspected fraud.

As I see it, while it is not in doubt that the 1st respondent has the mandate to charge the applicants where they decide that an offence worthy of such charge has been committed and the 2nd respondent is expected to investigate every complaint once it has been made, in the current instance it is my considered view that the applicants have made a prima facie case for themselves. I say so because from my gleaning of the pleadings and from the testimony of the 1st applicant, he has established that the suit property passed to him through due process. He has a valid title in his name after duly paying the requisite consideration for the suit property. He also averred that the sale was conducted and

concluded while the deceased was alive and she had not at anytime complained. He further maintained that he had been in possession of the property since the conclusion of the agreement.

By the fact that the 1st petitioner has a prima facie good title to the property, I am inclined to give him some leeway. Article 40 of the Constitution of Kenya protects one's rights to own property. His ownership of the suit property in my estimation is an arguable constitutional issue. Therefore, I find that the petitioners have established a case for the grant of the conservatory orders by virtue of his title and accordingly his right to own property is under question.

Being of the above persuasion it also follows that there is an arguable case to question whether the 1st and 2nd respondents actions were circumspect their respective mandates with both the decision to charge and the investigations into the Applicants.

In the upshot, it is my finding, and I do so hold that the petition of 8th July 2020 on a prima facie level, raises constitutional issues relating to the right to own property as well as the exercise of the mandate of the DPP and the DCIO. This is certainly worthy of further interrogation. The 1st and 2nd applicants are therefore deserving of the conservatory order lifting their warrants of arrest and putting a hold to their prosecution pending the hearing and determination of the main petition. The application dated 8th July 2020 therefore succeeds in terms of prayers 3 and 5.

It is so ordered.

DATED , DIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the 1st respondent