



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 44 OF 2020**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(1), 3(1), 27(1) & (2), 29 (a), 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: BREACH OF THE PROVISIONS OF ARTICLE 157 (11) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ARTICLE 258 OF THE CONSTITUTION OF KENYA, 2020, RULES 3, 4, 10, 11 AND 20 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW**

**BETWEEN**

**1. ASHOK LABSHANKER DOSHI**

**2. PRATIBHA ASHOK DOSHI.....PETITIONERS**

**VERSUS**

**1. DIRECTOR OF PUBLIC PROSECUTIONS**

**2. DIRECTOR OF CRIMINAL INVESTIGATIONS**

**3. THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE**

**4. THE HON. ATTORNEY GENERAL.....RESPONDENTS**

**AND**

**GREENVIEW LODGE LIMITED.....INTERESTED PARTY**

**JUDGMENT**

1. The Petitioners in the petition herein dated 6/7/2020 allege to be business people living and working in Mombasa. They have filed this petition against the Respondents who are government agencies as described in the petition and who are alleged to have violated the constitutional rights of the Petitioners.

2. The Petitioners' case is that they are the lawful registered owners of all that property comprised in Grant No. I.R. No. 56396 being Land Reference No. 209/3850 (hereinafter also called "*the suit property*"). According to the Petitioners, the suit property was originally owned by a company known as **Greenview Lodge Limited** who sold it to yet another company called **Magnum Properties Limited** before it was finally transferred to the Petitioners in 2018 for the consideration of the sum of KShs. 150,000,000/- (Kenya Shillings One Hundred and Fifty Million). Petitioners aver that despite having sold the suit property to Magnum Properties Limited for value consideration, Greenview Lodge Limited and its Director, one **Jennifer Nthenya Mwikwa**, have lodged numerous and incessant complaints to various Government institutions including the Respondents herein alleging that the property was fraudulently transferred to Magnum Properties Limited and subsequently to the Petitioners and that stamp duty was not paid. According to the Petitioners, these complaints have been investigated by

various Government agencies including the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein who, the Petitioners aver, ultimately found the same to be unfounded. Greenview Lodge Limited also lodged a civil suit being Environment and Land Court Case NBI No. 559 of 2011 against Magnum Properties Limited and its advocate, Mr. Harit Sheth but the said case was dismissed.

3. The Petitioners state that despite the criminal complaints having been found to be unfounded and the civil suit having been dismissed, Jennifer Nthenya Mwikwa and Greenview Lodge Limited have continued to use Government offices including the Respondents herein to advance and achieve their objective of repossessing the suit property from the Petitioners. Indeed, the Petitioners allege, the Land Registrar vide an Entry No. 16 registered against the title on 13/2/2020 cancelled the Petitioners' title to the suit property at the instigation of Jennifer Nthenya Mwikwa and Greenview Lodge Limited.

4. The Petitioners obtained stay orders against the cancellation of their title on 23/6/2020 and the service of the said order upon the Land Registrar has now prompted the Respondents to hunt the Petitioners with an intention to arrest and prosecute them. The Petitioners aver that the intended and imminent arrest and prosecution of the Petitioners is in bad faith, driven by ulterior motives, is against the interest of the criminal justice system and is in utter breach of the Petitioners' rights as guaranteed by the Constitution. This is so because:

- i. The allegations of fraud and offences relating to stamp duty have been investigated before and found to be baseless.
- ii. While the Respondents themselves have not only investigated the complaints and dismissed the same, the very Respondents keep on entertaining the same complaints from Jennifer Nthenya Mwikwa and Green View Lodge Limited years on end.
- iii. The fact that the Petitioners' intended arrest has coincided with the Land Registrar's cancellation of their title and the arrest is now being executed just a few days after the Land Registrar was served with an order staying the cancellation of the Petitioners' title is a clear indication that the Respondents are now being used by Jennifer Nthenya Mwikwa and Green View Lodge Limited to intimidate the Petitioners so that they can withdraw the ELC Case and abandon their fight to protect the suit property.
- iv. Following the cancellation of the Petitioners' title and before the stay was obtained, the Land Registrar had gone ahead to register the suit property in the name of Green View Lodge Limited.
- v. It is not just a mere coincidence that the Petitioners' imminent arrest is coming at a time their title has just been revoked and the property returned to **Green View Lodge Limited**. The motive is to use the criminal system to silence the Petitioners completely. The Respondents should not allow themselves to be used to achieve such ulterior goals which are way outside the legal mandates of the Respondents.
- vi. The complaints keep on coming from Jennifer Nthenya Mwikwa and **Green View Lodge Limited** and will not stop unless this Court intervenes.

#### **Violation of The Constitution and the Law**

5. The Petitioners aver that by seeking to arrest and prosecute the Petitioners and to pursue the same complaints which had been investigated by Government agencies including the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and dropped as being unfounded, the Respondents have breached the Petitioners' constitutional rights, acted unreasonably, in bad faith, in utter abuse of the legal process and the criminal process and against the interests of administration of justice, in that under Article 157 (11) of the Constitution the 1<sup>st</sup> Respondent, in exercising the power to institute criminal charges, must have regard to the interests of administration of justice and the need to prevent and avoid abuse of the legal process. Therefore, the Respondents, being public officers, are enjoined by Article 47 of the Constitution to observe fairness in their actions. It is alleged that the Respondents have failed to observe fairness because they are apparently favouring Jennifer Nthenya Mwikwa and Green View Lodge Limited and abusing the criminal process so as to intimidate the Petitioners with a view to ensuring that the suit property is taken over by Jennifer Nthenya Mwikwa and Green View Lodge Limited. Further, the Petitioners state that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's intention to arrest and charge the Petitioners is in violation of the 1<sup>st</sup> Respondent's mandate under Article 157 (11) of the Constitution. Therefore, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' action is in breach of Article 3 of the Constitution which mandates them to respect, uphold and defend the Constitution.

6. Further, the Petitioners state that the Respondents have abused the criminal process, have acted in bad faith, maliciously and with ulterior motive. This is worsened by the Respondents alleged failure to act on recommendations that Jennifer Nthenya Mwikwa be charged with criminal offences. However, the Respondents instead are pursuing innocent Petitioners to charge with unproved offences.

7. The Petitioners state that under Article 244 of the Constitution, the 2<sup>nd</sup> Respondent is mandated to strive for the highest standard of professionalism, to comply with constitutional standards and to be of highest possible standards of competence while discharging the duties of his office. The failure to pursue and prosecute the person who had been found culpable and instead pursuing the Petitioners who are the innocent parties is in utter violation of Article 244 of the Constitution.

#### **Damage to the Petitioners' reputation**

8. The Petitioners aver that preferring criminal charges against a person is a serious matter which not only threatens one's liberty but also has an impact on that person's image in the society. The Petitioners aver that they are renowned investors and business people of national and international repute. By seeking to arrest and prosecute the Petitioners in an unfair, reckless, baseless and in utter disregard of past investigative findings, the Respondents are likely to cause the Petitioners' reputation to be demeaned in a manner that is in breach of their constitutional right to dignity. The Petitioners' business interests is likely to be immensely affected as a result of the negative publicity that is likely to ensue from their reckless and baseless arrest.

9. The petition is supported by the affidavit of **Ashok Doshi** sworn on 6/7/2020, a supplementary affidavit sworn on 8/10/2020 and another affidavit sworn on 14/9/2020 by **Jimmy Mutinda**.

10. The Petitioners pray for the following orders:

(a) A declaration be and is hereby issued that any intended summons, arrest, charges, prosecution, questioning, investigation, harassing and intimidation of the Petitioners on account of any alleged criminal offences or fraud relating to or concerning title, ownership, dealings and stamp duty of the property known as Land Reference No. No. 209/3850 (Grant No. I.R. No. 56396) is unconstitutional, violates the Petitioners' constitutional rights, is in bad faith, is an abuse of the criminal justice system and therefore unlawful, null and void.

(b) An order of prohibition and permanent injunction be and is hereby issued restraining the Respondents, whether by themselves agents and servants and/or whomsoever is acting under their authority or instruction, from arresting, charging, prosecuting, summoning, questioning, investigating, harassing and intimidating the Petitioners herein on account of any alleged criminal offences or fraud relating to or concerning title, ownership, dealings and stamp duty of the property known as Land Reference No. No. 209/3850 (Grant No. I.R. No. 56396).

(c) The costs of this Petition be provided for.

(d) Any further relief or order that this Honourable Court shall deem just and fit to grant.

### **Inter-locutory proceedings**

11. Together with the application the Petitioners filed a Notice of Motion dated 5/6/2021 which sought interim conservatory orders against the arrest and prosecution of the Petitioners by the Respondents on the allegation of fraud pending the determination of this petition.

12. By an order herein issued on 9/7/2020 the court granted anticipatory bail/bond pending arrest of cash Kshs. 1,200,000/= or bond of Kshs. 2,000,000/= to expire upon the Petitioners being arraigned in court, in which case the trial court was to set fresh bond terms. However, there is no evidence that the Petitioners were ever arraigned in any court.

13. On 16/3/2021 Petitioners' counsel Mr. Ojwang informed the Court that they were ready to file submissions to the petition, thereby bypassing the application dated 5/7/2020. All parties accepted the proposal and so the Court gave directions on filing of submissions to the petition.

14. Before that, the Interested Party herein did on 27/7/2020 file a Notice of Motion seeking to be enjoined to this petition. That application was allowed on 29/7/2020 and Greenview Lodge Limited joined this petition as the Interested Party.

15. Subsequently, the Interested Party vide a Notice of Motion dated 17/11/2020 sought to have this petition transferred to be heard and determined at the Constitutional and Human Rights Division of the High Court of Kenya at Nairobi. That application was dismissed through a ruling herein dated 17/12/2020, thereby paving way for the hearing of this petition.

### **Response to Petition**

16. Despite fully participating in the proceedings herein the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not file a Replying Affidavit to the petition. The 1<sup>st</sup> Respondent, the DPP, however filed a response to the Notice of Motion dated 5/7/2020 and urged the same to be deemed applicable to the petition.

17. On their part the Interested Party with the leave of the Court was allowed to have their affidavit sworn on 27/7/2020 in support of their application dated 27/7/2020 be deemed as a response to the petition.

18. The 1<sup>st</sup> Respondent filed Grounds of Opposition on 8/7/2020 opposing the petition and stating:

(a) That the orders sought by the Applicant/Respondent are premature in nature, there is no evidence on record that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent intend to maliciously investigate and arrest the Petitioners and subsequently charge them arbitrary;

(b) That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have powers under Article 157 and Article 244 and 245 of the Constitution of Kenya to investigate and prosecute any criminal offence;

(c) That there is material non-disclosure by the Petitioners to demonstrate that the Respondents have violated the constitutional rights of the Petitioner;

(e) That any action so far taken by any of the Respondents does not contravene the constitution or any other law and therefore the petition/application is brought without merit, is calculated to interfere with enforcement of criminal law and the protection of the rights of the complainant;

(f) That the non-joinders of the Greenview Lodge Limited and Magnum Properties Limited who have been adversely mentioned in the application as Interested Parties leading to non-disclosure of facts; (sic)

(g) That Article 49(1) (h) of the constitution of Kenya 2010 and Section 124 of the Criminal Procedure Code provide for remedy for release on bond terms, and therefore the rights of the Petitioners are guaranteed and protected by the law;

(h) That the orders sought have far reaching consequences on the powers of the 2<sup>nd</sup> Respondent under the constitution and this honourable court is not clothed with supervisory powers to direct 1<sup>st</sup> and the 2<sup>nd</sup> Respondent on the nature of Evidence available to prefer charges against the Petitioners.

19. On its part the Interested Party filed a replying affidavit sworn on 27/7/2020 by **Jennifer Nthenya Wambua** and a further affidavit sworn on 11/11/2020. The Interested Party states that the petition is tainted with malafides, non-disclosure of material facts, misrepresentation of material facts and the same is totally devoid of merit and should be dismissed with costs.

20. The Interested Party states that it is the legitimate and bonafide proprietor of that parcel of land known as L. R. No. 209/3850 situate in Nairobi; that it was allocated the suit property known as L. R. No. 209/3850 situate long processional way, Nairobi by the Government of the Republic Kenya on 13th march 1986 through allotment. (Annexed and marked as "JW-2" was a copy of the letter of allotment reference 52895/192.). Upon allocation, the Interested Party applied to the Ministry of Lands for leave to liquidate the allocation fees of Kshs. 3,051,360 - by way of instalments of Kshs. 50,000 and the leave was duly granted. (Annexed and marked "JW-3" was the letter from the Ministry granting permission to liquidate the allocation fees by instalments.). By July 1992, the Interested Party had paid a total of Kshs. 1,050,000/= towards liquidation of the allocation fees but following the death of one of the directors the late Peter Mwikya Kathima, who was the husband of the deponent, the deponent was constrained to look for prospective purchaser for the said property. She subsequently identified a prospective purchaser being the 1<sup>st</sup> Petitioner through his company Magnum Properties Limited. The 1<sup>st</sup> Petitioner persuaded her to use his Advocate Messrs Harit Sheth Advocates to act for both of them in the intended transaction for the proposed purchase of the suit property for the proposed selling price of Kshs. 120,000,000/=, but the intended purchase did not go through as they did not receive the intended selling price of Kshs. 120,000,000/= yet in utterly fraudulent circumstances the Petitioners' company Magnum Properties Limited purported to obtain a grant I. R. No. 56396 over the property, yet Magnum Properties limited was not the allottee of the said property from the Government.

21. The Interested Party avers that this matter has received extensive and lengthy investigations by internal departments of the Ministry of Lands and Settlement, National Land Commission and other government agencies all returning unanimous findings that the purported transfer to Magnum Properties was unprocedural, irregular and fraudulent; that following the complaints by the Interested Party the Ministry of Lands remitted to them a letter dated 7/3/2012 indicating that they had forwarded copies of receipt No. C. 409683 of Kshs. 1,200,000 dated 26/8/1992 alleged to have been paid by Magnum Properties and receipt No. C. 410606 of Kshs. 5,513,860 dated 25/8/1992 alleged to have been paid by Harit Sheth to enable the criminal investigation department to investigate the same. (Annexed and marked as "JW-4" was a copy of the said letter dated 7/3/2012 and annexed and marked "JW-5 a and b" are copies of the said alleged receipts no. C 409683 and C.410606). By a letter dated 24/1/2012 from the Ministry of Lands, the Interested Party was informed that the Ministry of Lands had commenced serious investigation on the matter and the main plan record in the Ministry showed the land still belonged to Green View Lodge Limited and that the receipt No. C. 409683 and C. 410606 were forgeries and did not originate from the Ministry. (Annexed and marked as "JW-6" was a copy of the said letter dated 24/1/2012.). Further, by a letter dated 16/4/2013 the Interim County Secretary, Nairobi County confirmed that the purported payment of Kshs. 175,000/= alleged to have been paid to the then Nairobi City Council was never paid. (Annexed and marked as "JW-7" was a copy of the said letter dated 16/4/2013.). By a letter dated 27/10/2011, the Attorney General wrote to the Permanent Secretary requesting for a speedy resolution of this matter. (Annexed and marked as "JW-8" was a copy of the said letter dated 27/10/2011.). By an advisory legal opinion dated 22/4/2016 the legal advisor to the Cabinet Secretary advised the Cabinet Secretary to implement an earlier advisory dated 17/3/2015 and specifically made a finding that the letter of allotment in the Ministry records was in the name of the Interested Party, Green View Lodge Limited. (Annexed and marked as "JW-9" was a copy of the said letter dated 22/4/2016.). By an internal memo dated 15/11/2016, Principal State Counsel C.N. Menge advised the lands secretary, *inter-a-lia* that the Chief Registrar should issue a new title in the name of Interested Party, Green View Lodge Limited. (Annexed and marked as "JW-10 was a copy of the said internal memo dated 15/11/2016). By a letter dated 8/9/2017, the Chairman, National Land Commission advised the Chief Land Registrar, Ministry of Lands and Physical Planning that the Chief Land Registrar was in a position to correct a situation created in the registry while investigation should be done internally to identify at what point and by who the fraudulent transfer was made. (Annexed and marked as "JW-11 was a copy of the said internal memo dated 8/9/2017). By a letter dated 25/6/2018, the office of the Attorney General wrote to the Principal Secretary, Ministry of Lands and Physical Planning calling for a resolution of the long standing matter. (Annexed and marked as "JW-12 was a copy of the letter dated 25/6/2018).

22. The Interested Party states that the Petitioners have deliberately misrepresented the true tenor and meaning of the orders made in the ELC Case No. 559 of 2011 under paragraph 11 of the supporting Affidavit yet by the ruling exhibited as "annexture AD3" the High Court in a ruling upon an application for deposit of security of costs made about 6 years following the institution of the said suit ordered Interested Party to deposit a total of 25,000,000 as security of costs within 45 days or in default the suit to stand dismissed. The Interested Party could not raise such a colossal sum of 25,000,000 as security of costs leading to the dismissal of the suit without hearing it on its merits. Thus the Petitioners through their company Magnum Properties drove away the Interested Party from the seat of justice. The only option left to the Interested Party was to follow up with the Director of Criminal Investigations. Their Advocates on record wrote the letter dated 25/5/2018 to the Chief Land Registrar, Ministry of Lands requesting them to implement the findings of their internal investigations and take steps to ensure a grant of title was issued to the Interested Party following the allotment letter dated 13/3/1986. (Annexed and marked as "JW-13 was a copy of the said letter dated 25/5/2018). Following above complaint, the Land Registrar Mr. R. K. Kalama served a notice dated 21/6/2018 to all parties including the Ex-parte Applicants' company Magnum Properties Limited to appear before him on 19/7/2018 with all relevant documents on the transaction. (Annexed and marked as "JW-14 was a copy of the said notice dated 21/6/2018 which letter has also been annexed in the petitioners' supporting Affidavit and therein marked as 'AD8'.)

23. The Interested Party states that they complied with the Registrar's directions aforesaid and on 24/7/2018 attended the offices of the said Registrar accompanied by their advocates. Formal hearing was conducted before the Registrar and each party was given and afforded an opportunity to substantively present their case. Upon conclusion of the hearing before the Registrar, Petitioners' lawyers proposed that since the matter was subject of investigations by Directorate of Criminal Investigations all parties should await the outcome of those investigations and be prepared to be bound by the outcome of those investigations. The results of the investigations show that the Interested Party are the lawful owners of the suit property. Therefore, it is clear that the petition contains material non-disclosures and misrepresentation of material facts.

24. The Petitioners are aware that the 1<sup>st</sup> Respondent has recommended their prosecution as seen from the letter annexed in the supporting Affidavit dated 31/1/2020 where 1st respondent recommends their prosecution for conspiracy to defraud government of Kshs. 1.2 million, forgery of receipt No. C.409683, making a document without authority contrary to Section 357 of the Penal Code and fraud of stamp duty. This is the only letter by the 1<sup>st</sup> Respondent recommending prosecution of the Petitioners for the disclosed offences and the allegations by the Petitioners that a recommendation was made that Jennifer Nthenya Mwikwa be prosecuted yet she was the complainant are totally unfounded, and that the purported letter by Mr. C. K. Ngetich for Chief Land Registrar referred to under paragraphs 17 (xi) of the supporting affidavit is clearly untenable and grossly untrue as the numerous internal investigations by the Ministry of Lands referred in the preceding paragraphs all confirm the processes were fraudulent and Mr. C. K. Ngetich could not have failed to see these reports while making the purported letter and that the Ministry of Lands through its numerous internal reports and the Directorate of Criminal Investigations have already confirmed that the said sum of Kshs, 5,513,680 and stamp duty was not paid, and the receipts thereof are forgeries, and the letter dated 6/5/2020 by C. K Ngetich is unsupported by any evidence.

25. The Interested Party's case is that the petition herein is incompetent and ought to be dismissed "*in limine*" on the following grounds that

- No constitutional rights violation of the Petitioner have been demonstrated as recommendation to prosecute the Petitioners was made following lengthy and extensive investigations.

- The Petitioners have failed to show any constitutional rights

infringed by the Respondents.

- The functions of the 1<sup>st</sup> Respondent are guided by Article 157 of the constitution and is not subject to any direction or instruction by the petitioner or any other person.

### **Submissions**

26. The petition was canvassed by way of written submissions which were highlighted. The Petitioners filed submissions on 12/11/2020 and supplementary submissions on 25/6/2021. The 1<sup>st</sup> Respondent filed submissions on 14/6/2021; the 2<sup>nd</sup> to 4<sup>th</sup> Respondents filed their submissions on 15/6/2021 while the Interested Party filed submissions on 21/6/2021.

### **The Determination**

27. I have carefully considered the petition and opposition to it. I have also considered the rival submissions and authorities cited in support thereof, and the issues raised by parties for determination. In my view, the following issues emerge for this Court's determination.

- (i) Whether there is adequate response to the petition; and if not, whether by that dint alone the petition succeeds.

- (ii) Whether Petitioner's constitutional rights have been violated.

- (iii) Whether the Court can stop the arrest and prosecution of the Petitioners.

- (iv) Whether there is adequate response to the petition; and if not, whether by that dint alone the petition succeeds.**

28. **Mr. Oluga**, learned counsel for the Petitioners, submitted that there is no substantive response to the petition by way of an affidavit by the Respondents and that being so, the petition is not opposed. Further, counsel submitted that the factual situations deponed to in the Petitioners' affidavits have not been challenged by the Respondents. Counsel submitted that the consequence of that non-responsiveness is that the Petitioners have been vindicated and that this Court should allow the petition as prayed. Counsel further submitted that the orders sought herein are against the respondents and that the response by the Interested Party is not adequate to displace the factual dispositions herein by the Petitioners since the Interested Party is a peripheral party to these proceedings. To support this submission counsel cited the ruling I delivered herein on 17/12/2020 in which I observed that the Interested Party was a peripheral entity which cannot dictate to this Court to transfer this petition to another jurisdiction. None of the Respondents addressed me on this issue. In my view however, constitutional petitions are a special kind of pleadings, and are constitutionally made flexible to enable those whose rights have been violated to access the seat of justice without undue regard to procedural technicalities. It is notable, however, in this petition, that all the Respondents have participated in these proceedings right from inception when the Court dealt with interlocutory applications and decided thereon. Further, the 1<sup>st</sup> Respondent filed a response to the Notice of Motion dated 6/7/2020 by the Petitioners for conservatory orders. The Respondents also filed submissions in the petition. It is true, however, that the Respondents did not file affidavit response to the factual issues raised in the petition.

29. Be that as it may, the Petitioners still have the duty to prove their petition to the required standard, and the mere absence of an affidavit response to the petition does not entitle the Petitioners to the orders they seek. Orders are only grantable upon adequate proof of pleadings. The above notwithstanding and disregarding the fact that the Interested Party herein is a peripheral entity, the Interested Party is still a party to this petition, and has on its part filed affidavit in response to the petition which merits the consideration of this Court.

### **(ii) Whether Petitioners' constitutional rights have been violated**

30. The Petitioners alleged that their right to enjoy ownership of their property, being the suit property, has been violated by the Respondents. The Petitioners alleged continuous and consistent harassment by the Respondents over the suit property which the Petitioners

allege to be the lawful owners thereof. The Petitioners narrate how they lawfully acquired the suit property from the Interested Party, and allege that the directors of Interested Party are using the Respondents for ulterior motive, mainly to unlawfully retain the suit property. It is averred that arising from the investigations done by the Respondents, the suit property has been unlawfully returned to the Interested Party, and now the Respondents intend to arrest and charge in court the Petitioners with fraud.

31. It must be noted however, that the right afforded to citizens under the constitution are guaranteed to certified issues or cases where there is no controversy, or where the coercive state agencies are being misused for ulterior motive. In the petition, the Petitioners seek to stop their arrest and charge pursuant to investigations by the Respondents that disclose possible criminal offences. The disclosure of the criminal offence is not a product of this constitutional court. It is a product of independent investigative agencies. To stop the arrest and prosecution of Petitioners, this Court must be satisfied that *prima facie*, the Petitioners are being falsely prosecuted; that the allegation of fraud against them is a clear figment and imagination of the Respondents, and that any innocent bystander looking at these proceedings will, without further prompt, acclaim the injustice of the intended prosecution. However, this is not the case in this matter. While the trial of the intended criminal indictment, if it takes place, will be in the criminal forum, this constitutional court cannot purport to afford the parties the forum to determine their guilt, innocence or entitlement.

32. The Petitioners are in this Court to protect what they believe are their constitutional rights and freedoms. The Interested Party also arrived in this Court with what appears *prima facie* to be an arguable case of a constitutional right being taken away by the Petitioners.

33. On their part, the Respondents aver that their investigations show that the Petitioners have committed criminal offences and should be arrested and charged. This constitutional court therefore has the duty to balance the rights of these three groups. How does it do that? It must do that by first of all recognizing that it lacks the capacity and the legal tools to know for certain who is the lawful owner of the suit property. Secondly, it asks itself whether there is another lawful agency who can determine whether or not the allegations of fraud are correct. Thirdly, it asks itself whether the responsible independent investigating agencies have completed their investigations. Fourthly, the Court must not assume a criminal trial, or make decisions which might prejudice the criminal trial. Fifth, the Court must also not make a decision which stifles the operation of other independent agencies. Sixth, the Court must realize that any allegations of fraud can be vindicated in a full criminal trial where every party is able to participate and provide proof.

34. In the matter before the Court it is clear to me that while I cannot tell who is the rightful owner of the suit property through these proceedings, the grant of the prayers sought in this petition will forever deny the Interested Party the opportunity to seek justice in a matter in which the Interested Party believes it has the right to the suit property.

35. Constitutional petitions in which parties claim that their rights are being violated must be categorized to include situations where the coercive agencies of the state are threatening to violate, or are violating protected rights, as opposed to a situation like in this petition, where private individual's right is also being threatened by alleged unlawful actions on the part of the Petitioners. The Interested Party was not originally party to these proceedings. They had to apply to be joined hereto upon the realization that their fundamental right to property was under threat. And although the Interested Party is not a priority party herein it has the right to the protection of its property. And that right can be achieved only through a fair, competent and procedural prosecution of the Petitioners to determine whether or not the allegations of fraud in their acquisition of the suit property is correct. So therefore, this constitutional Court cannot stand on the path meant to establish the truth one way or the other.

(iii) **Whether the Court can stop the arrest and prosecution of the Petitioners.**

36. Mr. Oluga, learned counsel for the Petitioners cited my decision in **Hassan Ali Joho v The Inspector General of Police & 3 Others – Petition No. 15/2017** as authority for the order to stop arrest and prosecution of Petitioners herein. In my view however, the Joho petition is clearly distinguishable. Throughout that petition the theme was the consistent public harassment of the Petitioner on issues which were not known or documented, and over issues in the political arena. In the instant petition, the Petitioners are threatened with arrest and arraignment over allegations of fraudulent acquisition of a private property, and failure to pay lawful stamp duty thereon. These are not issues which this Court can decide. There is already a criminal court which will conduct a trial, during which the Petitioners will defend themselves, so they will receive a fair hearing. Further, to purport to stop the prosecution of the Petitioners would appear to visit an injustice, and to impair another right, that is, the right of the Interested Party to know the outcome of the allegations of fraud in a fair and procedural criminal forum provided for by the law.

37. In **Kuria & 3 Others v Attorney General [2002] 2 KLR 69** it was held that:

**“A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.....In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the Applicants might not get a fair trial as provided under Section 77 of the Constitution...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the Applicants might not get fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts.”**

38. Article 157

**(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of**

*criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.*

*(11) 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.*

39. In the case of **Michael Monari & Another [2012] eKLR** Warsame J held, *inter-a-lia*, that:

**“Under Article 157(4) of the Constitution, the Director shall have power to direct the police to investigate any information or allegation of criminal conduct and it is mandatory for the police to comply with any directions given by the Director of Public Prosecutions. Under Article 157 (10), the Director of Public Prosecutions shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the directions or control of any person. It is clear in my mind that 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 need only establish reasonable suspicion before preferring the charges. The rest is for the trial court ...”**

#### **Conclusion**

37. Arising from the foregoing paragraphs of this Judgment it is the finding of this Court that the petition has not been proved in the standards required by law. The petition lacks merit. The orders sought cannot be granted. The petition is dismissed with costs to the Respondents and the Interested Party.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF SEPTEMBER, 2021.**

**E. K. OGOLA**

**JUDGE**

**RULING DELIVERED VIA MS TEAMS IN THE PRESENCE OF:**

**MR. GITHINJI FOR INTERESTED PARTY**

**MS. ANYUMBA FOR 1ST RESPONDENT**

**MR. OLUGA FOR PETITIONERS**

**MS. MUMBI HOLDING BRIEF EREDI FOR 2ND, 3RD AND 4TH RESPONDENTS**

**MS. PERIS COURT ASSISTANT**