



**18THE REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E068 OF 2021**

**BETWEEN**

HON.FML.....1<sup>ST</sup> PETITIONER  
EMILY NKIROTE BUANTAI.....2<sup>ND</sup> PETITIONER  
ATTICON LIMITED.....3<sup>RD</sup> PETITIONER

**VERSUS**

DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT  
DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT  
MJK.....4<sup>TH</sup> RESPONDENT

**AND**

REGISTRAR OF COMPANIES..... 1<sup>ST</sup> INTERESTED PARTY  
BARONS ESTATES LIMITED..... 2<sup>ND</sup> INTERESTED PARTY  
NONIKO HOLDINGS LIMITED..... 3<sup>RD</sup> INTERESTED PARTY  
COLLINS KIPCHUMBA NGETICH.....4<sup>TH</sup> INTERESTED PARTY  
DOROTHY CHEPKURUL.....5<sup>TH</sup> INTERESTED PARTY  
BILLY ODERO ONYANGO..... 6<sup>TH</sup> INTERESTED PARTY  
JOSEPH GITONGA M'LIMBINE.....7<sup>TH</sup> INTERESTED PARTY  
DOUGLAS KAILANYA.....8<sup>TH</sup> INTERESTED PARTY  
FAMILY BANK LIMITED..... 9<sup>TH</sup> INTERESTED PARTY  
EXPORT PROCESSING ZONES AUTHORITY.....10<sup>TH</sup> INTERESTED PARTY  
REGISTRAR OF LANDS..... 11<sup>TH</sup> INTERESTED PARTY

## JUDGMENT

### The Petition

1. The petitioners filed a petition dated 4<sup>th</sup> March 2021. The petition was later amended and filed on 9<sup>th</sup> March 2021. The amended petition is filed under Articles 22(1), 23(1) & (3), 159(2)(a)(e), 165(3)(b)(d), (6) & (7) and 258 of the Constitution for the alleged contravention of Articles 3, 10(1) & (2), 19, 20, 21(1), 25(c), 27(1) & (2), 29, 35, 40, 47(1), 50(1), 50(2)(a, b, c, j, k), 79, 157(11) and 249 of the Constitution.

2. The amended petition seeks the following orders: -

*i. A declaration do issue to the effect that any intended arrest, charge and prosecution of the petitioners and/or institution of criminal proceedings against the petitioners in relation to all pending civil, commercial and family suits namely;*

*a) High Court of Kenya at Nairobi (Commercial Division) Civil Suit No.E138 of 2018 ;Barons Estate Ltd vs. Atticon Ltd & 6 Others;*

*b) High Court of Kenya at Nairobi (Family Division) Civil Suit 17 of 2019 (OS) (Previously High Court of Kenya at Meru (Family Division) Civil Suit No.37 of 2018; MJK vs FML;*

*c) High Court of Kenya at Nairobi (Commercial Division) Civil Suit E086 of 2019; Gulf African Bank Ltd. Vs. Atticon Ltd & 4 others;*

*d) High Court of Kenya at Nairobi ( Commercial Division) Civil Suit E316 of 2020; Linkit Ltd vs Brenda Mithika Mwenda;*

*e) High Court of Kenya at Nairobi (Commercial Division) Civil Suit No.E029 of 2019; Noniko Holdings Ltd & 2 Others vs. Atticon Ltd & 6 others;*

*f) Milimani Commercial Chief Magistrate's Court Miscellaneous Civil Suit No.1044 of 2018; MJK vs FML;*

*g) Milimani Commercial Chief Magistrate's Divorce Cause No.272 of 2019 (Previously ,Meru Chief Magistrate's Court Divorce Cause No.26 of 2018) MJK vs FML; and*

*h) All other civil, commercial and/or family disputes that are currently pending before various courts and tribunals between the petitioners and 4<sup>th</sup> Respondent and interested parties (and their proxies).*

*is an infringement and an affront to the Constitution of Kenya, 2010 and infringement of the petitioner's rights under Articles 10(2), 27, 28, 29, 38, 47, 48 and 50 of the Constitution.*

*ii. An order of prohibition be issued prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents together with their agents from investigating or recommending the prosecution of the petitioners based on matters revolving around the credit facilities, bank securities and changes on the ownership and control of Atticon Limited pending the outcome and further orders in the following ongoing litigation;*

*a) High Court of Kenya at Nairobi (Commercial Division) Civil Suit No.E138 of 2018 ;Barons Estate Ltd vs. Atticon Ltd & 6 Others;*

*b) High Court of Kenya at Nairobi (Family Division) Civil Suit 17 of 2019 (OS) (Previously High Court of Kenya at Meru (Family Division) Civil Suit No.37 of 2018; MJK vs FML;*

*c) High Court of Kenya at Nairobi (Commercial Division) Civil Suit E086 of 2019; Gulf African Bank Ltd. Vs. Atticon Ltd & 4 others;*

*d) High Court of Kenya at Nairobi ( Commercial Division) Civil Suit E316 of 2020; Linkit Ltd vs Brenda Mithika Mwenda;*

*e) High Court of Kenya at Nairobi (Commercial Division) Civil Suit No.E029 of 2019; Noniko Holdings Ltd & 2 Others vs. Atticon Ltd & 6 others;*

*f) Milimani Commercial Chief Magistrate's Court Miscellaneous Civil Suit No.1044 of 2018; MJK vs FML;*

*g) Milimani Commercial Chief Magistrate's Divorce Cause No.272 of 2019 (Previously ,Meru Chief Magistrate's Court Divorce Cause No.26 of 2018) MJK vs FML; and*

*h) All other civil, commercial and/or family disputes that are currently pending before various courts and tribunals between the petitioners and 4<sup>th</sup> Respondent and interested parties (and their proxies).*

iii. *An order of compensation of the petitioners do issue for the infringement of the petitioner's rights under Articles 10(2), 27, 28, 38, 47, 48 and 50 of the Constitution of Kenya, 2010.*

iv. *An order of compensation to the petitioners for general damages for the distress, mental anguish and contravention of their various fundamental rights and freedoms caused by the actions of the respondents.*

v. *An order of exemplary and punitive damages do issue against the respondents.*

vi. *The costs of this petition to be awarded to the petitioners.*

vii. *Any other or further orders, writs and directions this honourable court considers appropriate and just to grant for the purposes of enforcement of the petitioners fundamental rights and freedoms.*

### **Background of the case**

3. This case revolves around the assertion that the petitioners in the month of October 2018 discovered fraudulent changes in the 3<sup>rd</sup> petitioner's directorship, shareholding and share capital. The petitioners proceeded to notify the Registrar of Companies. The Registrar informed the relevant parties of this issue and sought their response before making a determination in the matter. The 7<sup>th</sup> and 8<sup>th</sup> interested parties in a letter dated 19<sup>th</sup> October 2018 and 22 October 2018 to the Registrar made know that they had not been part of the meeting that passed the resolution to effect these changes. With no response from the 5<sup>th</sup> and 6<sup>th</sup> interested parties the Registrar ensued to inform the parties that the illegal documentation would be expunged. Soon after, the petitioners lodged their complaint with the 2<sup>nd</sup> respondent calling for investigation into the matter.

4. The petitioners state that the complaint lodged with the 2<sup>nd</sup> respondent has not been investigated this far. Instead the 2<sup>nd</sup> respondent summoned the petitioners as reported by the 2<sup>nd</sup> interested party in its suit. According to the petitioners the 1<sup>st</sup> and 2<sup>nd</sup> respondents are intent on arresting, charging and prosecuting them. The petitioners state that the 2<sup>nd</sup> interested party's criminal claim is without legal foundation as this court's commercial division has since dismissed the 2<sup>nd</sup> interested party's issues concerning the validity of the credit facilities and alleged fraudulent securities as will soon be seen in the petitioners affidavit in support. In addition, the petitioners say that the 2<sup>nd</sup> interested party's suit amongst the others is properly before competent courts awaiting determination.

5. The petition is founded on the grounds that the 1<sup>st</sup> and 2<sup>nd</sup> respondents intent to arrest, charge and prosecute the petitioners is negated by the following facts:

i. *Their apparent ulterior motive due to their avoidance of the High Court's ruling on the issues, the biased treatment against them in favour of the 4<sup>th</sup> respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties suit, harassing and intimidating the 1<sup>st</sup> petitioner to change his stand and double standards displayed;*

ii. *The 2<sup>nd</sup> respondent's failure or omission to conduct objective investigations of the petitioner's complaints against the 4<sup>th</sup> respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested party and instead preferring to investigate this parties complaints;*

iii. *The 2<sup>nd</sup> respondent's refusal to objectively consider the petitioner's complaints against the 4<sup>th</sup> respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested party;*

iv. *The 4<sup>th</sup> respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested party's improper influence in the matter; and*

v. *Their failure to consider relevant matters including, the alleged marital and family relationship between the 1<sup>st</sup> petitioner and the 4<sup>th</sup> respondent; the pendency of the ongoing suits before various courts; the findings of the court in the suits and failure to wait for the final determination in this suits; the petitioner's complaints against the 4<sup>th</sup> respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested party and the abuse of power by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in light of the nature of the suits which fall outside the criminal law jurisdiction.*

6. The amended petition is supported by the averments in the sworn affidavits of the 1<sup>st</sup> petitioner and 2<sup>nd</sup> petitioner both dated 9<sup>th</sup> March 2021. The 2<sup>nd</sup> petitioner in her affidavit in support reiterated and emphasized the 1<sup>st</sup> petitioner's averments in support of the petition.

7. The 1<sup>st</sup> petitioner while reiterating their grounds as stated in the petition says that in March 2021, he was notified of two documents submitted in his office by a whistleblower. The contents revolved around the 2<sup>nd</sup> respondent's inquiry vide a letter to the 1<sup>st</sup> respondent whether he would make a decision to charge based on a draft charge sheet with 38 counts which was the second document. He reveals that the charges were based on the validity of the credit facilities and securities as well as the fraudulent change of the 3<sup>rd</sup> Petitioner's ownership and control.

8. On 8<sup>th</sup> March 2021, the 1<sup>st</sup> petitioner was summoned by the 2<sup>nd</sup> Respondent but he was not able to comply due to official duties and illness. He says that he was made aware of his imminent arrest through the local dailies that published the story on 8<sup>th</sup> March 2021. The petitioner while reiterating the grounds in the petition opines that the respondents actions violate his right against discrimination by virtue of the numerous suits and not in line with Article 157 of the Constitution. In addition he says that their actions have violated their legitimate expectation.

9. Borrowing from the 2<sup>nd</sup> interested party's application *in Nairobi HCCC No.E138 of 2018; Barons Estate Limited vs. Atticon Limited & 5 others* the petitioner avers that one of the reliefs sought was a temporary injunction. This was to first restrain the respondents from selling or reconstructing Atticon Limited. Secondly to release to the court all the title documents to assets allegedly held illegally by the 3<sup>rd</sup> petitioner as security. He states that this prayer was declined by the court but the 2<sup>nd</sup> interested party still made another application on 29<sup>th</sup> September 2020 on the issue of release of the securities which she had given the 3<sup>rd</sup> petitioner to secure credit facilities. This too was dismissed by the court. The petitioners on this premise argue that regardless of this fact the respondents still pursued them, which to them is discriminatory.
10. Sometime in October 2018, the petitioners discovered fraudulent changes in the 3<sup>rd</sup> petitioner's directorship, shareholding and share capital. This was exposed by the Board's resolutions dated 28<sup>th</sup> April 2017. As indicated in the background of this case the petitioners reported this discovery to the Registrar of Companies on 18<sup>th</sup> October 2018.
11. Soon after they learnt of Account Number 0900xxxx under the Gulf African Bank Limited that was opened in the 3<sup>rd</sup> petitioner's name following a Board resolution passed on 16<sup>th</sup> March 2018. This information was brought to light following the filing of *Nairobi HCC No.E086 of 2019; Gulf African Bank Limited v Attion Limited and 4 others*. The alleged directors took out a loan facility of Ksh.20, 000,000 which was secured by a tender, the transaction having been authorized by a letter dated 11<sup>th</sup> April 2018. According to the petitioners this amount and other monies from various businesses totaling Ksh.22, 000,000 was then channeled to the Gulf Bank Limited Account.
12. The 7<sup>th</sup> interested party who is purported to have signed the letter dated 11<sup>th</sup> April 2018 distanced himself from the signature through a letter addressed to the Gulf Bank Limited party dated 25<sup>th</sup> October 2018. Following this unearthing the 2<sup>nd</sup> petitioner reported the matter to the 2<sup>nd</sup> Respondent's Banking Fraud Investigations Department. This was done vide a letter dated 23<sup>rd</sup> May 2019.
13. On 23<sup>rd</sup> October 2019, the 2<sup>nd</sup> respondent's Director of Banking Fraud Investigations Department inquired about the petitioners complaint from the firm of Musyoki Mogaka & Company Advocates. They appear for the 4<sup>th</sup> respondent, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> interested parties in this matter. The petitioners state vide a letter dated 14<sup>th</sup> October 2019 that the firm informed the department that the matter had been investigated by its sister department. The department found that the issue was the fraudulent use of the titles of the land belonging to its clients. These had been used as security for credit facilities advanced by the 9<sup>th</sup> interested party to the 3<sup>rd</sup> petitioner. In addition the advocates noted that the matter also dealt with the facility that was advanced to the 3<sup>rd</sup> petitioner by Gulf African Bank Limited.
14. The 1<sup>st</sup> respondent who had been copied in the communication clarified that the 2<sup>nd</sup> respondent's inquiry file with reference to matters raised by the firm related to investigations concerning forgery of bank documents used to obtain credit facilities from the 9<sup>th</sup> interested party. Further the fraudulent removal of directors of the 3<sup>rd</sup> petitioner while the Banking Fraud Investigations File touched on opening and operation of the 3<sup>rd</sup> petitioner's account at Gulf African Bank was suspicious. In essence he noted that the two matters could not be consolidated as misunderstood by the firm.
15. Against this backdrop the petitioners complain that the 1<sup>st</sup> respondent did not cancel its advisory to the 2<sup>nd</sup> respondent in the letter dated 13<sup>th</sup> February 2020. Based on this advisory the 2<sup>nd</sup> respondent Serious Crimes Department went on to take over the matter from the Bank Fraud Department. The petitioners state that the matter has not been actioned this far. Further they note that the draft charge sheet merged the issues and as a result they are the subject of arrest and prosecution.
16. The petitioners state that despite the 2<sup>nd</sup> respondent being made aware of the long-standing wrangles as between the 1<sup>st</sup> petitioner and the 4<sup>th</sup> respondent and by extension the 3<sup>rd</sup> petitioner and 5<sup>th</sup> interested party in various suits, he proceeded to convert the same into criminal matters with an intention of embarrassing him. This is because the 2<sup>nd</sup> respondent was notified that the 2<sup>nd</sup> interested party's advocates had confirmed that their clients had willingly given their titles to act as securities for facilities advanced to the 3<sup>rd</sup> petitioner and around July 2020 wrote to the bank requesting, they lift the encumbrances registered against the titles. The petitioners state that this discloses that there was no fraud on their part.
17. The petitioners vide a letter dated 25<sup>th</sup> February 2021 by their advocates wrote to the 2<sup>nd</sup> Respondent complaining of his biased conduct towards them by acting at the beckoning call of the 4<sup>th</sup> respondent and ignoring and concealing their documents.
18. The petitioners further note that the 4<sup>th</sup> respondent in her sworn affidavit in *High Court Originating Summons No.37 of 2018; MJ v ML(In matter of Matrimonial Properties Act)* alluded that the 2<sup>nd</sup> Interested party as willingly gave its securities to the 3<sup>rd</sup> petitioner for consideration. It is their contention that there is nothing to indicate the commission of a criminal offence regarding utilization of the securities belonging to the 2<sup>nd</sup> interested party. The petitioners also inform that their specimen signatures have been obtained from them as regards the alleged forgery of the documentation as indicated in the charge sheet. In addition, that the 2<sup>nd</sup> interested party's letter dated 2<sup>nd</sup> October 2018 to the 9<sup>th</sup> interested party clearly indicates that the issue was commercial in nature.
19. The 1<sup>st</sup> petitioner states that he is also being victimized due to his political affiliations. That he is perceived as a member of the 'tangatanga' wing of the Jubilee Party, whose members are deemed to be allied to the deputy president and as a result face the government's rage. He states that the 4<sup>th</sup> respondent being aware of all this has sought to take advantage of the present case adding that it is for this reason that the Kenya Revenue Authority has started its investigations into the 3<sup>rd</sup> petitioner's operations.
20. The petitioners believe that the 1<sup>st</sup> petitioner's arrest, charge, and prosecution is based on misuse of the 1<sup>st</sup> and 2<sup>nd</sup> respondent's powers and incorrect underpinnings, which threatens to violate the 1<sup>st</sup> petitioner's fundamental rights.

21. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed grounds of opposition dated 3<sup>rd</sup> May 2021 in response to the petitioner's petition dated 9<sup>th</sup> March 2021. The grounds are as follows:

- i. The prayers sought are unconstitutional as they seek to curtail their constitutional mandate which is against public interest and the administration of criminal justice.*
- ii. The petitioners have not adduced evidence to show that the criminal proceedings were commenced with an ulterior motive and how they acted in excess of the powers conferred to them.*
- iii. The petitioners have failed to demonstrate how substantial injustice will be occasioned if the criminal proceedings continue.*
- iv. The veracity of the facts raised by the petitioners can only be ascertained at the trial court which tests the facts and evidence. Accordingly the trial court is best suited to make a determination on the matter.*
- v. By virtue of Article 157 of the Constitution, the 2<sup>nd</sup> respondent can only institute criminal proceedings once an offence is committed. Moreover that a fundamental right can only be limited under Article 24(1) of the Constitution for reasonable and justifiable reasons in an open society.*
- vi. The 1<sup>st</sup> petitioner has failed to satisfy the threshold set out in the case of Anarita Karimi Njeru v Republic (1979) as he has merely stated his rights failing to demonstrate how each of his specific rights has been or will be infringed upon if the criminal proceedings proceed. It is argued that his case fails the ripeness test.*
- vii. Concurrent civil and criminal proceedings are permissible by virtue of Section 193(A) of the Criminal Procedure Code.*
- viii. This court ought not to usurp the mandate of the trial court by determining the substance of the issues in this case.*
- ix. The mere fact that there is a criminal prosecution does not negate the petitioners fundamental rights and freedoms as guaranteed by the Constitution and their presumption of innocence.*
- x. The petition is misconceived and vexatious as the petitioners have failed to demonstrate how either the 1<sup>st</sup> or 2<sup>nd</sup> respondents acted illegally, unreasonably, ultra vires contrary to natural justice and consequently should be dismissed.*

22. The 3<sup>rd</sup> respondent filed the following grounds of opposition dated 22<sup>nd</sup> April 2021:

- i. The petition seeks to limit the constitutional and statutory powers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' mandate.*
- ii. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' work as espoused in the petitioners pleadings was done in good faith based on Article 157(6) of the Constitution, Section 5 and 6 of the Office of the Director of Public Prosecutions Act and Section 35 of the National Police Service Act.*
- iii. The 1<sup>st</sup> respondent is bound by the provisions of Article 10 and 157(11) of the Constitution while carrying out his mandate.*
- iv. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' constitutional mandate can only be interfered with by the Court where it is proven that they acted contrary to their mandate.*
- v. The petitioners have failed to adduce evidence to prove that the 2<sup>nd</sup> respondent in carrying out his function acted arbitrarily in conducting the investigations against them. Moreover that he violated their rights with the ongoing investigations against them.*
- vi. An allegation of violation or threatened violation of fundamental rights and freedoms does not warrant grant of the remedies sought since the petitioners must prove real danger that is imminent to warrant the court's intervention.*
- vii. This court and petitioners cannot anticipate the result of the ongoing investigation. Further that if the investigations culminate into an arrest and prosecution, both processes fall within legal processes provided by law. This in essence does not take away the petitioners rights under Articles 22, 49 and 50 of the Constitution.*
- viii. Both civil and criminal proceedings can run concurrently by dint of Section 193A of the Criminal Procedure Code.*
- ix. The Court in entertaining this matter would be assuming the role of the 1<sup>st</sup> respondent to review the case as presented by the 2<sup>nd</sup> respondent in making the decision to charge. This essentially would be usurping the 1<sup>st</sup> and 2<sup>nd</sup> respondents constitutional mandate. In a nutshell grant of the orders sought would be equal to making a determination of the matter.*
- x. The petitioners have failed to adduce evidence that they will suffer prejudice and their rights violated if the investigations proceed.*

*xi. The petition is based on an unsubstantiated apprehension with the sole purpose to frustrate the investigations against them and so without merit. It should then be dismissed.*

23. The 4<sup>th</sup> respondent, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties filed their response to the petition through their preliminary objection (P.O.) dated 10<sup>th</sup> May 2021. The grounds raised for the P.O. are:

*i. The petitioners petition dated 4<sup>th</sup> March, 2021 is a non-starter, misguided, misconceived and frivolous as they both run afoul and contravene Section 193A of the Criminal Procedure Code cap 75 Laws of Kenya.*

*ii. The petitioners petition dated 4<sup>th</sup> March, 2021 is bad in law as it seeks to improperly interfere with the constitutional powers of the office of the Director of Public Prosecution as enshrined under Article 157 of the Constitution.*

24. The 5<sup>th</sup> and 6<sup>th</sup> interested parties filed their response to the amended petition dated 9<sup>th</sup> March 2021 vide a sworn replying affidavit by the former dated 12<sup>th</sup> April 2021. It is averred that a complaint was lodged by the directors of the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties with the 2<sup>nd</sup> respondent, who summoned them with regards to this complaint. They were interrogated and their statements recorded.

25. The 5<sup>th</sup> interested party depones that owing to the petitioners' suit, she stands to suffer great prejudice that cannot be compensated by way of damages. She urges the court to dismiss the amended petition with costs to them.

26. The 7<sup>th</sup> interested party did not file any documents, but indicated to the court on 15<sup>th</sup> March, 2021 that he supported the petitioners' case. The 9<sup>th</sup> and 11<sup>th</sup> interested parties did not file any documents. They sought not to take a stand in the matter as per the court record dated 11<sup>th</sup> May 2021.

27. The petitioners filed written submissions and a list of authorities dated 13<sup>th</sup> April 2021 and further supplementary submissions and a list of authorities dated 10<sup>th</sup> May 2021 all by C. B. Mwangela advocate. Counsel states that the petitioners state that the issues for determination are whether the petitioners' fundamental rights and freedoms were violated or likely to be violated, whether an order of prohibition should issue, whether the petitioners are entitled to compensation and general damages and whether exemplary and punitive damages should be granted.

28. On the first issue, counsel submits that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' intentions are premised on improper factual grounds. This threatens the 1<sup>st</sup> and 2<sup>nd</sup> petitioners' right to human dignity as envisaged under Article 28 of the Constitution. To buttress this point reliance was placed on the case of **Samuel Rukenya Mbura & Others v Castle Brewing Kenya Limited & Another (2006) eKLR** where it was observed that inhuman treatment is an action that is barbarous, brutal and cruel while degrading punishment is that which brings a person in dishonor or contempt. Addition dependence was placed on the cases of **Ahmed Issack Hassan v Auditor General(2015)eKLR** and **Dawood and another v Minister of Home Affairs and others( CCT 35/99)(2000)ZACC 8**

29. Discussing the right to fair administrative action under Article 47 of the Constitution, the petitioners submit that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents were unfair and done in bad faith, since they commenced their investigations based on issues spinning from the credit facilities, securities and fraudulent change of directorship of the 3<sup>rd</sup> petitioner which emanate from a contractual commercial relationship. Moreover it is submitted that the 2<sup>nd</sup> respondent's failure to investigate the petitioners complaint while prioritizing the 4<sup>th</sup> respondent's complaint is unfair and biased. In support counsel relied on the case of **Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and Others (2013) eKLR** where the court observed that:

*“...the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes.”*

Counsel also relied on the cases of **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR**, **Associated Provincial Picture Houses v Wednesbury Corporation (1948)1 KB** and **Philip K. Tunoi & Another vs. Judicial Service Commission & another(2016) eKLR**

30. According to the counsel the respondents' actions are selective and discriminatory with the effect of violating their rights to equality and freedom from discrimination under Article 27 of the Constitution. To emphasize this point reliance was placed on the English case of **Willis v the United Kingdom Application no. 36042/97** where the European Court of Human Rights noted that discrimination means treating differently without any objective and reasonable justification for persons in similar situations.

31. It is further submitted that the 1<sup>st</sup> petitioner is a victim of political intolerance which in essence violates his political rights as provided for under Article 38 of the Constitution. To buttress this argument counsel cited the case of **Republic v Director of Public Prosecutions & another Ex pate Kamani & Others (2015) eKLR** where it was held that:

*“...where the respondent is shown not to be acting independently but just reading a script prepared by someone else or that he has been pressured to go through the motions. The courts will not hesitate to terminate the proceedings in such circumstances.”*

32. Counsel has submitted that the intended criminal proceedings by the 1<sup>st</sup> and 2<sup>nd</sup> respondents amount to abuse of power, because the 1<sup>st</sup> respondent has recommended arrest of the petitioners based on the 4<sup>th</sup> respondent's complaint despite the ongoing court cases. While it is

acknowledged that both civil and criminal proceedings can run concurrently the petitioners submit that it is the respondents intention that is in issue and which they deem to be a total disregard of Article 157(11) of the Constitution.

33. To support this argument counsel relies on the case of **Republic v the Judicial Commission into the Goldenberg Affair and 2 Others ex parte Saitoti HC Misc. Application 102 of 2006** where it was held that:

*“it is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defense he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants fundamental rights.”*

34. Other decisions relied on include: **Republic v Chief Magistrate’s Court at Mombasa Ex parte Ganijee & Another [2002] 2 KLR 703; Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No.25 of 2002 [2009] KLR 229; Stephen Oyugi Okero v Chief Magistrate’s Court at Milimani Law Courts & Another, Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and others (Supra), Republic vs. Minister for Home Affairs and others Ex parte Sitamze Nairobi HCCC No.1652 of 2004 [2008] 2 EA 323, Kuria & 3 others v Attorney General [2002] 2 KLR 69.**

35. On the issue of oppressive nature of the respondents actions, it is submitted that the intended criminal charges are planned to harass and oppress the petitioners as they revolve around issues already in various courts. To support this assertion counsel cited the case of **G. B. M. Kariuki v Attorney General [2016] eKLR** where the court opined that:

*“the law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any prosecution arm of the government is not a mere conduit for complainants. The police must act impartially and independently in respect if a complaint...”*

They further relied on the cases of **Kuria & 3 others v Attorney General (Supra), Gulam & another v Chief Magistrate’s Court and another [2006] eKLR** and **Joram Mwenda Guantai v the Chief Magistrate [2007] 2 E.A. 170.**

36. On the third issue, it is their submission that having established that their fundamental rights have been violated, it their prayer that this court grants them general damages. Reliance was placed on the case of **Senator Johnstone Muthama v Director of Public Prosecutions & 2 Others; Japheth Muriira Muroko (Interested Party) [2020] eKLR** where it was held that:

*“...it is now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental rights under the Constitution.”*

He further relied on the case of: **Edward Akong’o Oyugi & 2 Others v Attorney General [2019] eKLR.**

37. It is the petitioners’ contention that the grant of exemplary and punitive damages by the court will deter repetition of such violations. Further that enjoyment of these rights must be respected. To buttress this argument counsel relied on the case of **Miguna Miguna v Fred Okengo Matiang’I Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 others; Kenya National Commission on Human Rights (Interested Party) [2018] eKLR** where it was held that:

*“...an award ought in proper cases to be made with a view to deterring a repetition of breach or punishing those responsible for it or even securing effective policing of the constitutionally enshrined rights by rewarding those who expose breach of them with substantial damages.”*

38. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed written submissions dated 5<sup>th</sup> May 2021 by prosecution counsel Beryll Marinda. Counsel submitted that the 1<sup>st</sup> respondent is a constitutional office established under Article 157(6) of the Constitution and Section 4 of the Office of the Director of Public Prosecutions Act. That the 1<sup>st</sup> respondent is required to pay attention to Article 157(11) of the Constitution while carrying out his mandate. This was emphasized by the court in the case of **Yunus Abdul Rubi & 2 Others v Director of Public Prosecution & 2 others [2016] eKLR** where it was stated 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....additionally by dint of Article 157(11) 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.”*

39. It is submitted that the 2<sup>nd</sup> respondent is a constitutional office under Article 245(1) of the Constitution. 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 1<sup>st</sup> respondent who then makes the decision on whether to charge the person or not.

40. Considering this, the respondents argue that the petitioners are inviting the court to examine the evidence which is a preserve of the trial court. To support this argument counsel cited the case of **Justus Mwenda Kathenge v Director of Public Prosecutions and 2 others, petition No.372 of 2013** where it was held that:

*“it is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article*

***157(11) of the Constitution he acted without due regard to public interest and interests of 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.”***

41. Counsel argues that the arrest and prosecution of the petitioners in and of itself is not unlawful as the petitioners are entitled to rights under the Constitution. Further that the two processes operate in public interest and embodiment of the rule of law. Relying on the case of **Elory Kraneveld v the Attorney General & 2 Others, Nairobi petition No.153 of 2012** counsel argues that the Constitution should be read holistically to discern its real meaning. Also referred to is the case of **Michael Monari & Another v Commissioner of Police & 3 others Miscellaneous Application No.68 of 2011**.

42. It is submitted that the petitioners have simply stated the provisions of the Constitution but have fail to demonstrate how the said provisions were violated. This they assert is the legal threshold as set out in the case of **Andrew Okoth Onanda v Inspector General Police & 2 others [2018] eKLR** which cited the case of **Anarita Karimi Njeru v Republic [1979] KLR 154** with approval.

43. To support their argument on discrimination in the investigations and prosecution, reliance was placed on the case of **Joshua Kulei and 5 others v Attorney General and 4 Others Petition No.66 of 2012** where it was held that:

***“...it is within the mandate of the DPP to elect whom to prefer charges against and this court has no jurisdiction to direct him with respect thereto. More importantly the decision to prefer charges against one person as opposed to another is not itself without more, sufficient to lead to an order of prohibition against a prosecution.”***

44. On separation of powers, it is submitted that other than checking other organs of the government, any interference must be guarded against and justified. In the case of **Dr. Alfred N. Mutua v. The Ethics and Anti-Corruption Commission & Others, Misc. Application No.31 of 2016** it was noted that, interference should only be where it is shown that there was violation of the Constitution. Counsel supported this with the case of **Director of Public Prosecutions V Humphrey [1976] 2 ALL ER 497 at 511 and Njuguna S. Ndung’u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR**.

45. Counsel submitting on Section 193(A) of the Criminal Procedure Code placed reliance on the case of **Ashish Kampani v Director of Public Prosecution & 3 others [2016] eKLR** where it was held that the fact that a dispute has both civil and criminal elements is not per se a ground for terminating on-going criminal proceedings. The Court essentially intervenes where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law. The Court noted that this was what the drafters of Section 193 A of the Criminal Procedure Code anticipated. It is Counsel’s submission that the petition is an abuse of the court process, since it is focused on circumventing the criminal justice system and curtailing the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ constitutional mandate.

46. The 3<sup>rd</sup> respondent filed written submissions dated 3<sup>rd</sup> June 2021 through Grace Mutindi Senior State Counsel. She submits that the issues for determination are whether the investigations, the intended arrest and prosecution violate the petitioners’ rights and whether the petitioners are entitled to the reliefs sought. On the first issue, counsel submits that the petition is bent on interfering with the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ constitutional mandate as espoused under Article 157 and 245 of the Constitution. That their mandate is spelt out in the Office of the Director of Public Prosecutions Act No.2 of 2013 and National Police Service Act Cap 84. It is emphasized that both offices are guided by the fundamental principles promoted in the Constitution.

47. He contends that the 2<sup>nd</sup> respondent’s authority to investigate has so far been recognized by the courts. To underscore this argument, reliance is placed on the cases of **Thuita Mwangi & 2 others v Ethics & Anti-corruption Commission and 3 others [2013] eKLR**, **David Ndulo Ngali & 2 others v DPP & 4 others [2015] eKLR**, **Erick Kibiwott & 2 others v Director of Public Prosecutions & 2 others (JR No.89 of 2010)** and **Republic v Commissioner of Police and another ex parte Michael Monari & another [2012] eKLR**. The courts commonly observed that the police have a duty to investigate on any complaint once it is made. Otherwise they would be failing in their mandate to detect and prevent crime. Additionally reliance was placed on the case of **Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR**.

48. Borrowing from the law and authorities relied upon it is submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ undertakings were legal actions and can only be challenged if it is proven that they acted ultra vires or contrary to constitutional values and principles. This is the position in the numerous cases cited in support. The authorities are: **Koinange v Attorney General and others [(2007) 2 EA 256**, **Justus Mwenda Kathenege v. Director of Public Prosecutions & 2 others [2014] eKLR** and **Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others [2019] eKLR**.

49. Counsel while dismissing the petitioners selective discriminations claims submits that under Article 157(10) and Section 6 of the ODPP Act the 1<sup>st</sup> respondent cannot be directed by any person on whether or not to prosecute while the 2<sup>nd</sup> respondent under Article 245(4) (a) (b) of the Constitution is granted independence to investigate. To buttress this argument reliance is placed on the case of **Stephen Ndambuki Muli & 3 others v Director of Public Prosecutions & another [2016] eKLR** where it was held that:

***“...it is within the mandate of the DPP to elect whom to prefer cases against and this Court has no jurisdiction to direct him with respect thereto.”***

Also referred to is the case of **Godfrey Mutahi Mgunyi v. Director of Public Prosecutions and 4 others, Petition No.428 of 2015**.

50. The A.G. filed submissions dated 3<sup>rd</sup> June, 2021. Counsel submits that at this point the petition is merely speculative as the 1<sup>st</sup> respondent is yet to charge and as for now cannot determine whether the 1<sup>st</sup> respondent will abuse his mandate as outlined under Article 157(11) of the Constitution and Section 4 of the ODPP Act. It is their case accordingly that the petitioners have failed to demonstrate how their fundamental rights were violated to merit this court’s intervention.

51. On Section 193A of the Criminal Procedure Code counsel submits that the prohibition relief sought ought not to be granted as the law dictates that both can run concurrently. Further that the matters can only be determined during the trial. To support this point he relied on the case of **Republic v Director of Public Prosecutions & 2 others ex parte Joseph Gathuku Kamuiru & another [2014] eKLR** where it was held that:

*“...the existence of civil proceedings arising out of the same set of facts is however not in itself a bar to commencement or continuation of criminal proceedings. Section 193 A of the Criminal Procedure Code is clear on this.”*

Further reliance is placed on the cases of **Republic v Director of Public Prosecutions & 3 others ex parte Bedan Mwangi Nduati & another [2015] eKLR** and **Michael Monari case (supra)**.

52. Counsel further submits that although the petitioners aver that their rights under Articles 27, 28, 38 and 47 of the Constitution have been violated, they fail to demonstrate how this was done. To support this he cites the cases of **Anarita Karimi Njeru v. Republic (No.1) [1979] 1 KLR 154** and later **Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR**. He adds that the alleged rights are not absolute as can be limited by the Constitution and the law. Furthermore, that while the 1<sup>st</sup> petitioner claims his political rights have been violated he did not produce evidence to that effect. He argued that if there is a dispute between the 1<sup>st</sup> Petitioner and his political party the same should be determined by the Political Parties Disputes Tribunal as provided under the Political Parties Act, 2011.

53. Counsel finally submits that the petitioners have failed to present a case that merits this court's intervention. Further that an arrest and prosecution do not negate the petitioners' rights under Articles 22, 49 and 50 of the Constitution. It is on this premise that they conclude that the case is unmerited and an abuse of the court process.

54. The 4<sup>th</sup> respondent in conjunction with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties filed written submissions dated 24<sup>th</sup> May 2021 through Musyoki Mogaka & Co. Advocates. They submit that the issues for determination are whether the amended petition is arguable, whether grant of the orders sought in the petition are in the public interest and interest of justice and lastly, who is to bear the costs of the petition.

Counsel reiterated that the 1<sup>st</sup> respondent's mandate is provided for in the Constitution under Article 157. In addition, he submits that the petitioners' case fails to reveal a cognizable constitutional controversy as pronounced by the Supreme Court in the case of **George Mike Wanjohi v Steven Kariuki [2014] eKLR**, which they relied on in support.

55. On the effect of Section 193 A of the Criminal Procedure Code, counsel sought to rely on the cases of **Republic v. Chief Magistrates Kilgoris, ex parte Johana Kipngeno Langat [2021]** and **Director of Public Prosecutions V Kuldip Madan & another [2009] eKLR**. It is argued that the investigations and intended prosecution of the petitioners is as a result of forgery of documents and their unjust enrichment through the illegal abuse of the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties' property. They contend that granting the reliefs sought would be against public interest. Either way they state that the petitioners are entitled to their constitutional rights hence their apprehension is uncalled for.

56. Finally it is submitted that grant of the orders sought would be in direct violation to Section 193A of the Criminal Procedure Code and their rights under the Victim Protections Act, 2015. Counsel contends that the mentioned statutes enjoy legitimacy and protection from the Constitution so granting them would be against public interest.

57. The 5<sup>th</sup> and 6<sup>th</sup> interested parties filed submissions dated 12<sup>th</sup> April 2021 through Anyango & Opiyo Advocates. Counsel submitted the issues for determination to be whether there is a bar and prohibition in law to instituting proceedings for matters in issue in any pending civil proceedings and whether under the doctrine of judicial restraint this court lacks jurisdiction to interfere with the powers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. He submitted that while the parties reiterated and aligned themselves with the dictates of Section 193A of the Criminal Procedure Code it is their position that the petitioners have not argued that the charges are not *coherent charges* as provided under sections 134 to 137 of the Criminal Procedure Code. As such the matter should be subjected to trial. Counsel in addition argues that the other courts in this matter are not the suitable forums considering the ingredients of the charges preferred against the petitioners.

58. It is his contention that it is a mockery of justice for the petitioners to seek prohibition orders. Counsel relied on the case of **William v. Spautz [1992] 66 NWS LR 585** where it was held that:

*“The purpose of criminal proceedings generally speaking is to hear and determine finally whether the accused engaged in conduct which amounts to an offence and on that account is deserving of punishment.”*

59. According to counsel grant of the orders sought is not merited as no evidence has been adduced to prove illegality, irrationality, and impropriety on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. To buttress this point reliance was placed on the case of **Kuria & 3 Others -V- Attorney General (2002) 2KLR** where it was held thus:

*“It is not enough to simply state that because there is an existence of a 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 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 a 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.”*

60. Counsel submits that justice must be done to both the complainant and the accused and so where there is evidence upon which the 1<sup>st</sup> respondent can make the decision to charge, it is not for the court to inquire into the sufficiency of the evidence since it ought not to usurp

the role of the trial court in determining the merits of the criminal case as esteemed in the **Michael Monari case** (*supra*) which they cited in support. As such it is submitted that a prohibition order in the circumstances of this case must be used sparingly and exceptionally as appreciated in the case of **Goddy Mwakio & Another V R [2011] 2KLR**. Counsel contends that the petitioners have not demonstrated any exceptional circumstances to merit grant of the prohibition orders.

61. It is counsel's submission that this court by virtue of Article 165 ought to exercise restraint on exercising jurisdiction over matters within the purview of the 1<sup>st</sup> and 2<sup>nd</sup> respondent as mandated by the Constitution. He argues that owing to the principle of separation of powers the court cannot usurp the power of the 1<sup>st</sup> and 2<sup>nd</sup> respondents by determining the issues raised in this petition. On that note it is submitted that the petitioners have not demonstrated that the 1<sup>st</sup> and 2<sup>nd</sup> respondents exercised their mandate outside the ambit of the law to warrant this court's intervention. He relied on the case of **Justus Kariuki Mate and Another vs Martin Nyaga Wambora and Another [2017] eKLR**, to support this argument.

62. The 10<sup>th</sup> interested party filed submissions and a list of authorities dated 28<sup>th</sup> September 2021 through Kipkenda & Co. Advocates opposing the amended petition. Counsel identified the issues for determination to be whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted within their mandate and whether the concurrent civil and intended criminal proceedings were merited.

63. He reiterates the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as established in the Constitution and the law. He contends while relying on the **Michael Monari case** (*supra*) that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not act in a manner to permit this court's intervention. Additionally he argues that while the 2<sup>nd</sup> respondent can recommend charges the 1<sup>st</sup> respondent is first required to review and weigh the evidence before making the decision to prosecute someone. To buttress this point he placed reliance on the case of **Raymond Kipchirchir & another v. Republic [2021] eKLR** where it was held that:

*"...In exercising this mandate the Director of Public Prosecutions (DPP) is required to review and determine the prosecutability of any matters forwarded for their actions...The decision must however be made judiciously in all cases."*

He further relied on the case of **Douglas Maina Mwangi v. KRA & Another, Constitutional Petition No.528 of 2013**.

64. Counsel echoes similar sentiments as those of the respondents with regards to Section 193A of the Criminal Procedure Act. He referred to the following cases:

(i) **Commissioner of Police & Director of Criminal Investigation Department & another v Kenya Commercial Bank LTD**(*supra*);

(ii) **Republic v. Director of Public Prosecutions & 2 others ex parte Francis Njakwe Maina & another [2015] eKLR**.

65. Counsel further submits that it is the petitioners' burden to prove that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' actions in the face of existing civil proceedings were erroneous and as a result an abuse of the court process. It is argued that the petitioners have failed to submit any evidence to support the claim that the proceedings were initiated with an ulterior motive, malice, intimidation, bias, double standards, improper influence and unfairness.

### **Analysis and Determination**

66. I have duly considered the parties' pleadings, submissions, authorities cited and the law. It is my view that the issues that stand out for determination are as follows:

i. ***Whether civil and criminal proceedings can run concurrently;***

ii. ***Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted within their mandate considering the 1<sup>st</sup> issue;***

iii. ***Whether the petitioners' fundamental rights and freedoms were threatened or violated specifically under Articles 27, 28, 29, 38, 47 and 50 of the Constitution; and***

iv. ***Whether the petitioners are entitled to general, exemplary, and punitive damages.***

### **Issue No. (i) Whether civil and criminal proceedings can run concurrently**

67. The respondents, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 10<sup>th</sup> interested parties in this matter have submitted that the law permits that both civil and criminal proceedings can run concurrently.

68. The law on this issue is provided under Section 193A of the Criminal Procedure Code Cap 75. This Section reads as follows:  
***Concurrent criminal and civil proceedings***

***Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.***

69. The parties to buttress their arguments in this issue relied on a plethora of authorities that are well known and affirm the position as espoused under Section 193A of the Criminal Procedure Code. The authorities are namely: *Ashish Kampani v Director of Public Prosecution & 3 others [2016] eKLR*; *Republic v Director of Public Prosecutions & 2 others ex parte Joseph Gathuku Kamuiru & another [2014] eKLR*; *Republic v Director of Public Prosecutions & 3 others ex parte Bedan Mwangi Nduati & another [2015]*; *Republic v Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR*; *Republic v. Chief Magistrates, Kilgoris; ex parte Johana Kipngeno Langat [2021]*; *Director of Public Prosecutions V Kuldip Madan & another [2009] eKLR*; *Kuria & 3 Others-V-Attorney General [2002] 2KLR*; *Commissioner of Police & Director of Criminal Investigation Department & another v Kenya Commercial Bank LTD [2013] eKLR* and *Republic v. Director of Public Prosecutions & 2 others ex parte Francis Njakwe Maina & another [2015] eKLR*.

70. This is the position correspondingly held in foreign jurisdictions. A case in point is that of the Supreme Court of India in *P. Swaroopa Rani vs. M. Hari Narayana (AIR 2008 SC 1884)*. The Court while discussing this issue noted as follows:

**“13. It is, however, well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case. [See *M.S. Sheriff v. State of Madras AIR 1954 SC 397*, *Iqbal Singh Marwah v. Meenakshi Marwah (2005) 4 SCC 370* and *Institute of Chartered Accountants of India v. Assn. of Chartered Certified Accountants (2005) 12 SCC 226*].”**

71. I do not find it necessary to rehash the authorities which were ably cited by the parties save to say I find no distinguishing circumstance in this matter. This is the position in law. The obvious question to be determined next is whether the circumstances of this case bar this court from intervening or whether they necessitate this court’s intervention.

**Issue No.(ii) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent acted within their mandate in light of the 1<sup>st</sup> issue**

72. Stemming from the first issue the petitioners state that although it is correct that civil and criminal proceedings can run concurrently, this court is permitted by virtue of Article 165(6) of the Constitution to exercise supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.

73. The Director of Public Prosecutions derives his powers from Article 157(6) of the Constitution which is recapped in the Office of the Director of Public Prosecutions Act, 2013(ODPP Act) under Section 5. Article 157(6) provides:

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

***a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;***

***b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and***

***c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).***

74. To exercise this power objectively and independently the 1<sup>st</sup> respondent is under sub – Article 10 granted the following scope which is also echoed in the ODPP Act under Section 5 It provides:

***(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.***

75. The 2<sup>nd</sup> respondent on the other hand obtains his power from Article 245 of the Constitution which establishes the National Police Service Act, 2011 (NPS Act) creates his office. To guarantee independence of this organ, Article 245(4) provides:

***The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to--***

***a. the investigation of any particular offence or offences;***

***b. the enforcement of the law against any particular person or persons; or***

***c. ....***

76. Section 28 of the (NPS Act) establishes the office of the 2<sup>nd</sup> respondent as follows:

***There is established the Directorate of Criminal Investigations which shall be under the direction, command and control of the Inspector-General.***

77. The functions of the 2<sup>nd</sup> respondent are accordingly provided under Section 35 of the (NPS Act) as follows:

- a. *collect and provide criminal intelligence;*
- b. *undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;*
- c. *maintain law and order;*
- d. *detect and prevent crime;*
- e. *apprehend offenders;*
- f. *maintain criminal records;*
- g. *conduct forensic analysis;*
- h. *execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;*
- i. *co-ordinate country Interpol Affairs;*
- j. *investigate any matter that may be referred to it by the Independent Police Oversight Authority; and*
- k. *perform any other function conferred on it by any other written law.*

78. It is certain from a reading of the Constitution and enabling statutes that both the 1<sup>st</sup> and 2<sup>nd</sup> respondents' mandate is grounded in the Constitution. Supplementary to this is their enjoyment of absolute independence as they carry out their role. This is a factor that has been appreciated by the courts, which as a result are generally reluctant to interfere with the stated mandate.

79. Lenaola J. (*as he then was*) in the widely cited case of **Justus Mwenda Kathenge** (*supra*) with regards to the constitutional mandate of the 1<sup>st</sup> respondent held at paragraph 8 of the determination as follows:

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

***(i) he has acted without due regard to public interest,***

***(ii) he has acted against the interests of the administration of justice,***

***(iii) he has not taken account of the need to prevent and avoid abuse of Court process.***

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

80. Ogola J. in the case of **Daniel Ogwoka Manduku** (*supra*) as cited by the 3<sup>rd</sup> respondent appreciated the 2<sup>nd</sup> respondent's mandate while citing other authorities as seen below:

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

***51. Odunga J. in Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR, said with regard to the power of the police to investigate:***

***“42. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and 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.”***

***In Pauline Adhiambo Raet v. DPP & 5 Ors., [2016] eKLR, a case where breach of right to equality was alleged to have been violated by investigations of an offence, Onguto J. held, and I agree, that-***

***“I have also been unable to see how in investigating an alleged criminal conduct or activity there could be discrimination or a practice of inequality before the law. The respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the interested party in this case. In so doing, it is a legal mandate they would be undertaking.”***

81. From the foregoing it is clear that the courts will generally not interfere with the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. However, where the circumstances of a case justify an intervention, the court will not hesitate to do so in the interest of justice. The Constitution itself anticipated these situations as can be seen under Article 165 (3)(d) (ii) of the Constitution, which states as follows:

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

***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.***

82. Further the 1<sup>st</sup> respondent while exercising his constitutional power is mandated under Article 157(11) of the Constitution to act as follows:

***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.***

83. Likewise, Section 4 of the ODPP Act outlines the following as the 1<sup>st</sup> respondent’s guiding principles:

- a. ***The diversity of the people of Kenya;***
- b. ***impartiality and gender equity;***
- c. ***the rules of natural justice;***
- d. ***promotion of public confidence in the integrity of the Office;***
- e. ***the need to discharge the functions of the Office on behalf of the people of Kenya;***
- f. ***the need to serve the cause of justice, prevent abuse of the legal process and public interest;***
- g. ***protection of the sovereignty of the people;***
- h. ***secure the observance of democratic values and principles; and***
- i. ***promotion of constitutionalism.***

84. Odunga J. while discussing the delicate balance between instigation of criminal proceedings by the 1<sup>st</sup> respondent and this court’s intervention in the case of **Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another [2019] eKLR** stated as follows:

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

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

85. The court went further to state that:

***“50. It is therefore clear that whereas the discretion given to the Respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal***

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

86. Perusal of the material presented before this Court is necessary to ascertain whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents adhered to the dictates of the law. What is clear is that the petitioners case revolves around their complaint that the 3<sup>rd</sup> petitioner's particulars were fraudulently charged and soon thereafter learnt of the existence of Account no. xxxx held at the Gulf Bank Limited. They say this account was used to take out credit facilities by the alleged directors. On the other hand, the 2<sup>nd</sup> interested party's criminal claim constituted the fraudulent use of its titles of land as security for credit facilities advanced by the Family Bank to the 3<sup>rd</sup> petitioner and the credit facility advanced to the 3<sup>rd</sup> petitioner by Gulf African Bank. The 1<sup>st</sup> respondent in their communication to the 2<sup>nd</sup> interested party's advocate did indeed acknowledge that the two matters were different and could not be merged.

87. What emerges from the petitioners documents in support is that first, the parties relationship was contractual in nature based on their commercial relations with each other which was well noted by Okwany J in her determination in **Barons Estate Limited v Atticon Limited & 5 others [2019] eKLR and Barons Estate Limited v Atticon Limited & 5 others [2020] eKLR** which is a public document for this Court's reference. Okwany J notes in both rulings under paragraph 10 and 39 of the rulings that the supposed titles were given voluntarily. This was affirmed by the 2<sup>nd</sup> interested party's letter dated 2<sup>nd</sup> October 2018 to the 9<sup>th</sup> interested party that indicated they had pledged their land and surrendered its titles.

88. As has been found severally, this court cannot ascertain the veracity of the claims of the parties in this matter as this is the preserve of the trial court. What however this court takes note of is the material placed before it. The preceding account reveals pertinent information concerning this case which as it was well within the knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

89. It's against this backdrop that I question whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents actions were founded in good faith taking into consideration the prerequisites of Article 157(11) of the Constitution and Section 4 of the ODPP Act. Lenaola J in the case of **Justus Mwenda Kathenge (supra)** after summarizing a plethora of cases speaking to this topic came to the following conclusion:

*"The reasoning in all the above cases would lead to only one conclusion; whereas the DPP has the ultimate discretion in determining which complaint should lead to a criminal prosecution, where that power is seen to have been manifestly abused, the High Court can intervene by powers conferred by Articles 165(3)(d)(ii) of the Constitution and stop that abuse, including where the Court system is being used to settle scores and to put an accused person to great expense in a case which is clearly not otherwise prosecutable."*

90. The Court of Appeal in the case of **Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited (Supra)** while upholding the High Court's decision pronounced as follows:

*"...in 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. The court on the other hand 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, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution. See Githunguri V. Republic [1985] LLR 3090.*

*It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute 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. See Ndarua V. R. [2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR 69.*

91. The Court went ahead to express itself as follows:

*"While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith...It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court...."*

**(iii) Whether the Petitioners' fundamental rights and freedoms were threatened or violated specifically under Articles 27, 28, 29, 38, 47 and 50 of the Constitution**

92. From the above analysis it is clear that the petitioner, 4<sup>th</sup> respondent, 2<sup>nd</sup> – 4<sup>th</sup> interested parties raised complaints with the 2<sup>nd</sup> respondent. The same needed to be investigated by the 2<sup>nd</sup> respondent and a decision made by the 1<sup>st</sup> respondent on whether to charge

anyone or not. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are under no obligation to disclose every step taken in the investigation to the complainants or this court. Any challenges and/or shortfalls should be raised with the trial court. On the other hand the 2<sup>nd</sup> respondent has a duty to properly investigate the complaints raised by the petitioners, and balance the evidence against that which they have in respect of the complaints by the other parties. Thereafter they can decide on the way forward on the advice of the 1<sup>st</sup> respondent.

93. I base this opinion on the fact that there are already numerous cases of a civil nature between the parties, stemming from family and contractual relationships. The court has however not been presented with sufficient material to make it stop the investigations and/or the arrest or charging of any party. To do so would be to usurp the powers of the 2<sup>nd</sup> respondent.

94. It is the petitioners contention that the 1<sup>st</sup> and 2<sup>nd</sup> respondents intended arrest and prosecution with relation to the ongoing civil, commercial and family suits is a contravention of their rights as provided under Articles 27, 28, 29, 38, 47 and 50 of the Constitution. The respondents on the other hand in their grounds of opposition assert that the process of arrest and prosecution are processes provided by law and in essence do not take away the petitioners rights under Articles 22, 49 and 50 of the Constitution. Secondly, they contend that the petitioners have failed to satisfy the threshold set out in the case of **Anarita Karimi Njeru v Republic (1979)**. This is because they have merely stated their rights failing to demonstrate how each of the specific rights have been or will be infringed upon if the criminal proceedings proceed. It is accordingly argued that their case fails the ripeness test.

95. 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. For the claim of the right to fair hearing, they should show that the dispute was not resolved by the application of the law, and neither was it decided in a fair and public hearing before a court or impartial tribunal. If it is discrimination to show that their treatment in the process was not equal to what persons in a similar position receive. If it is human dignity to show for instance degrading treatment. If it is the right to fair administrative action they should show they were not accorded an opportunity to be heard, nor given reasons for actions taken out against them that would have adverse effects on them.

Article 27 of the Constitution on equality and freedom from discrimination provides that:

1. *Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
2. *Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*
- (3).....

96. In the case of **John Harun Mwau v Independent Electoral And Boundaries Commission & another [2013] eKLR** the scope of this right was expounded upon as follows at paragraph 33:

*“...It must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of Article 27 of the Constitution. It is my view that the regulation is justified and reasonable. I am therefore in agreement with the sentiments of Khanna J in the case of State of Kesata & Anor v N. M. Thomas & others 1976 AIR 490, 1976 SCR(17906 where he stated as follows;*

*“The principle of equality does not mean that every Law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its Laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.”*

97. The next right on dignity which is found in Article 28 of the Constitution provides that:

*Every person has inherent dignity and the right to have that dignity respected and protected.*

This right was well pronounced and analyzed in the case of **Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited [2021] eKLR** where various opines were expressed as follows:

*“50. As regards the right to dignity, in Ahmed Issack Hassan vs. Auditor General [2015] the Court held that:*

*“...the right to human dignity is the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated”. See Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) SCR (2) 516.*

98. The court proceeded to state at paragraph 54 that:

***“In Kennedy vs. Ireland [1987] IR 587 as cited in Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic & 10 Others [205] KLR it was held that:***

***“The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.”***

99. The next right in issue is the right to freedom and security in person under Article 29 of the Constitution, which states that :

***Every person has the right to freedom and security of the person, which includes the right not to be--***

- a. deprived of freedom arbitrarily or without just cause;***
- b. detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;***
- c. subjected to any form of violence from either public or private sources;***
- d. subjected to torture in any manner, whether physical or psychological;***
- e. subjected to corporal punishment; or***
- f. treated or punished in a cruel, inhuman or degrading manner.***

100. Mativo J. in the case of ***M W K v another v Attorney General & 3 others [2017] eKLR*** underscored the weight of this right as follow:

***“51. So important is the right not to be subjected to cruel, inhuman or degrading treatment or punishment that under Article 25 of the Constitution, it is one of the Rights that may not be limited.”***

101. In addressing the issue of political rights under Article 38 of the Constitution, the relevant sub-article for purposes of the present matter is as follows:

- 1. Every citizen is free to make political choices, which includes the right--***
  - a. to form, or participate in forming, a political party;***
  - b. to participate in the activities of, or recruit members for, a political party; or***
  - c. to campaign for a political party or cause.***

102. With reference to Articles 27, 28, 29 and 38 of the Constitution, the petitioners in their pleadings have not in any way demonstrated precisely how these rights have been infringed. The rights are stated without any material to support their existence. This is because the facts relied upon do not bear nor satisfy the elements alluded to in these Articles. There is no evidence of malice, unlawful actions, want of authority, harassment or intimidation by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. There is also no evidence of manipulation by the 4<sup>th</sup> respondent, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties. Moreover, there is no evidence of influence of his political stand used against the 1<sup>st</sup> petitioner.

103. This as a consequence renders their arguments of violations of these rights unsustainable. Furthermore, their argument fails the threshold set out for constitutional petitions. Regarding this matter, I associate myself with the insight provided by Lenaola J (as he then was) in the case of ***Eliud Nyauma Omwoyo & 2 others v Kenyatta University [2014] eKLR*** at paragraph 50 where he cited several authorities with approval:

***“...in Mathew Okwanda v Minister of Health and Medical Services and 3 Others Pet No. 94 of 2012 Majanja J in agreement with the decision in Anarita Karimi Njeru v Attorney General 19790 KLR 154 stated;***

***“The fact that the case was one that involved enforcement of economic and social rights did not however relieve the petitioner of the responsibility to plead a case that disclosed a violation of fundamental rights and freedoms with due particularity, as in such matters a petitioner had to plead with particularity that of which he complained, the provision said to be infringed and the manner in which the particular right was violated.”***

***In Trusted Society of Human Rights Alliance v Attorney General and Others Pet No. 229 of 2012 (unreported) the Court noted that;***

***“It was not necessary to set out the violations with mathematical precision but in a manner that will enable the respondent have notice of the allegations and defend himself or herself and to enable the court adjudicate the violation.”***

***In Daniel Chacha Muriri v Attorney General Petition No.41 of 2011 eKLR the Court stated;***

***“Availability of other available avenues for redress of grievances does not however prevent the petitioner from approaching this court alleging breach of his fundamental right and freedom. Such claim must however be precisely stated and the particular provision infringed to enable this court, sitting as a constitutional court to address the grievances and frame appropriate reliefs.”***

104. Moving over to the other rights, the petitioners claim that their rights under Articles 47 and 50 of the Constitution were violated. Article 47 of the Constitution of Kenya provides as follows:

***a. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***b. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

105. Further under the Fair Administrative Actions Act, No. 4 of 2015 which gives effect to this Article provides redress to aggrieved parties as follows:

#### **Section 7**

***(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to—***

***a. a court in accordance with section 8; or***

***b. a tribunal in exercise of its jurisdiction conferred in that regard under any written law.***

Section 7(2) sets out the grounds under which an administrative action may be reviewed.

106. The prominence of fair administrative action as a constitutional right was appreciated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and others (CCT16/98) 2000 (1) SA 1** at paragraphs 135-136 where it was held as follows:

***“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”***

107. Closely related although different to the right to fair administrative action is the right to fair hearing as set out under Article 50(1) of the Constitution. This Article provides that:

***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

108. The Court of Appeal in the case of **Mbalu Mutava (supra)** discussing and differentiating the two principles opined as follows:

***“22. ...Although on the surface, the three principles appear to refer to the same thing, on deeper examination they are of different legal character and their application may not be necessarily the same. Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. “Fair hearing” in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body.***

***It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise.”***

109. Guided by the law and cited authorities, I note from the petitioners pleadings and the annexures that they notified the 1<sup>st</sup> interested party of the change of particulars of the 3<sup>rd</sup> petitioner in a letter dated 18<sup>th</sup> October 2018. The 1<sup>st</sup> interested party acted on the complaint. They went ahead to lodge a complaint with the 2<sup>nd</sup> respondent on the alleged fraudulent change and the account held at Gulf Bank Limited on its behalf in a letter dated 23<sup>rd</sup> May 2019. The 1<sup>st</sup> respondent responding to the 4<sup>th</sup> respondent's, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties' advocates communication to the 2<sup>nd</sup> interested party, notified them in a letter dated 13<sup>th</sup> February 2020 that the complaints were separate and

distinct.

110. The petitioners advocates in their further communication to the 2<sup>nd</sup> respondent dated 27<sup>th</sup> July 2020 listed the facts revolving around the case. The record does not reflect any response from the 1<sup>st</sup> or 2<sup>nd</sup> respondent. The petitioners advocates in their letter dated 25<sup>th</sup> February 2021 addressed to the 2<sup>nd</sup> respondent highlighted the petitioners grievance that their complaint had not been actioned. Moreover, their light of the turn of events in the matter. No evidence was adduced by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to the contrary.

111. From the foregoing discussion it is clear that there is an unresolved issue bothering the petitioners. It is however not this court's duty to determine whether the petitioners are guilty or not as already emphasized. This mandate belongs to the trial court as presented by the 1<sup>st</sup> respondent. It is however, the duty of this court to determine whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents employed the laid down constitutional principles and values as is necessary when carrying out their mandate. The 1<sup>st</sup> and 2<sup>nd</sup> respondents as espoused in the first issue turned a blind eye to relevant facts which is one of the elements that should be considered if the right to fair administrative action is to be intact.

112. The result of this oversight would reasonably in turn affect and threaten the right to a fair trial as would be premised on inopportune facts. The respondents moreover overlooked the petitioners concerns through their various communication even in light of the fact that their decision would have adverse effects on the petitioners. In addition to this the 2<sup>nd</sup> respondent failed to respond to the petitioners communication as per the court record.

113. It is appreciated that the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> respondents is empowered by the Constitution and this court would be quite hesitant to interfere. This however can only occur where there was no violation of fundamental rights and freedoms as safeguarded by the Constitution. I find that the 2<sup>nd</sup> respondent ought to have fully investigated the petitioners' complaint before even considering charging them. There was therefore a violation of the petitioners' rights to fair administrative action.

#### **Issue No. iv. Whether the petitioners are entitled to general, exemplary, and punitive damages**

114. Among the reliefs sought the petitioners pray that they be awarded general, punitive, and exemplary damages. Are they entitled to these damages?

The Court of Appeal while addressing the question of damages in the case of **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR** pronounced as follows:

*“...the South African Case of Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:*

*“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.*

*“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”.....The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is “just and appropriate” in Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 to include, a remedy that will :*

- i. Meaningfully vindicate the rights and freedoms of the claimants;*
- ii. employ means that are legitimate within the framework of our constitutional democracy;*
- iii. be a judicial remedy which vindicates the right while invoking the function and powers of a court; and*
- iv. be fair to the party against whom the order is made.*

*Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”*

115. Similarly, the court in the case of **Irene Donna Shamala v NIC Bank Limited [2021] eKLR** opined as follows:

**“56....In awarding general damages, the Court is required to provide a justification for the figure arrived at. Support for this statement is found in the decision of Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another [2019] eKLR where it was held that:**

**“96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Courts. The following principles clearly emerge from decided cases;**

**i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;**

**ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;**

**iii. This remedy would be available when it is the only practicable mode of redress available;**

**iv. Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable.**

116. I am guided by the above decisions and see no reason to depart from them. I am of the view that an award of general damages is not merited in light of the foregoing analysis and circumstances of this case. What is apparent from the material placed before this court is that this suit’s intention is geared towards ensuring that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are estopped from violating the petitioners’ rights which they have partially succeeded in. They have however failed to justify why they should be granted these damages.

117. As to punitive and exemplary damages, it is important to state that these are damages which are normally awarded where the respondents’ conduct aggravated the violation of the petitioner’s rights. They are normally awarded to punish the respondent, primarily where the conduct was motivated by malice. I find that in the instant case the respondents actions did not amount to such as no evidence was adduced as earlier stated to prove this exacerbation.

118. In the circumstances of this case, I am guided by the decision of the Court of Appeal in the case of **Bank of Baroda (Kenya) Limited v Timwood Products Ltd [2008] eKLR** which sets out the principles for awarding exemplary damages as follows:

**“...in Kenya such damages are awardable only under two circumstances, namely:-**

**“(i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and**

**(ii) where the defendant’s action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff – see OBONGO & ANOTHER V. MUNICIPAL COUNCIL OF KISUMU [1971] EA 91 which approved and applied the principles of the English case of ROOKES V. BANARD & OTHERS [1964] AC 1129.”**

Also see **Abdulhamid Ebrahim Ahmed Vs. Municipal Council of Mombasa [2004] eKLR**.

119. Having found that the 2<sup>nd</sup> respondent did not fully act or investigate the petitioners’ complaint lodged with him, I direct him to act on the same and forward his findings to the 1<sup>st</sup> respondent within 90 days. During the 90 days the 1<sup>st</sup> and 2<sup>nd</sup> respondents shall not charge or arrest the petitioners. Save for the above, I find no merit in the petition which I hereby dismiss with costs.

Orders accordingly.

**DELIVERED ONLINE, SIGNED AND DATED THIS 30TH DAY OF NOVEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.**

**H. I. ONG’UDI**

**JUDGE OF THE HIGH COURT**