



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
PETITION NO. 7 OF 2017
(FORMELY MILIMANI PETITION NO. 306 OF 2017)

IN THE MATTER OF: CONSTITUTIONAL INTERPRETATION, PROTECTION AND ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 19,20,21,22,23,27,28,40 & 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE CHIEF MAGISTRATE’S COURT ACT, 2015

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

EZEKIEL WARUINGE ALIAS NDURA WARUINGEPETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

THE CHIEF MAGISTRATE’S COURT NG’ONG2ND RESPONDENT

KIRUMBA MWAURA3RD RESPONDENT

RULING

Introduction:

1. On the 20th of June 2017, the Petitioner filed a notice of motion application and an affidavit sworn by Ezekiel Waruinge alias Ndura Waruinge on 19th June 2017. Contemporaneously, he filed a petition and an affidavit in its support.

2. The application sought the substantive orders:

(a) **That pending the hearing and determination of this application this Honourable Court be pleased to grant an order of stay, staying the proceedings of the Criminal Case Number 53 of 2016 at the Chief Magistrate’s Court at Ngong.**

(b) That pending the hearing and determination of this suit this Honourable Court be pleased to grant an order of stay, staying the proceedings of the Criminal Case Number 53 of 2016 at the Chief Magistrate's Court at Ngong.

3. The application was premised on the grounds on the face of it and in the affidavit sworn by Ezekiel Waruinge alias Ndura Waruinge on 19th June 2017.

4. In the petition, the petitioner prayed for

(a) An order of **certiorari** to remove to the High Court and quash the proceedings in Criminal Case number 53 of 2016 at the Chief Magistrate's court at Ngong.

(b) An order of **prohibition** against the 1st respondent prohibiting it from instituting any criminal proceedings against the petitioner for the same set of facts as stated herein.

(c) An order for compensation for violation of the petitioner's rights.

(d) Costs of the petition.

(e) Any other relief that this Honourable Court considers appropriate and just to grant.

5. The 3rd respondent opposed both the application and the petition through an affidavit sworn by Kirumba Mwaura on 7th July 2017 and filed on the same day.

6. On 11th October, 2017, this court issued interim conservatory orders staying the proceedings of the Criminal Case Number 53 of 2016 at the Chief Magistrate's Court at Ngong as prayed by the petitioner in the application filed on 20th June 2017.

7. Following this development, on 13th October 2017, the 3rd respondent filed a notice of motion application accompanied by an affidavit sworn by Kirumba Mwaura on 12th October 2017 for orders:

(a) That pending the hearing of this application interpartes this Honourable Court be pleased to vacate and/or set aside the orders issued on the 11th day of October, 2017 whereby the petitioner was granted a stay of proceedings against Criminal Case Number 53 of 2016 at the Chief Magistrate's Court at Ng'ong.

(b) That pending the hearing of the Petitioner's Application dated 20th June, 2017, this honourable Court be pleased to vacate and/ or set aside the orders issued on the 11th day of October 2017 whereby the Petitioner was granted a stay of proceedings against Criminal Case Number 53 of 2016 at the Chief Magistrate's Court at Ng'ong.

8. The 1st respondent filed grounds of opposition accompanied by an affidavit sworn by Geoffrey Omwenga on the 13th October 2017.

9. On the 30th of October 2017, the petitioner filed a further affidavit dated 25th October, 2017 in response to the 3rd respondent's replying affidavit sworn on 7th July 2017, the 1st respondent's grounds of opposition as well as the 1st respondent's replying affidavit both dated 13th October 2017.

10. In response to the 3rd respondent's application dated 12th October, 2017 and filed on 13th October 2017, the petitioner filed an affidavit on 8th November 2017 sworn by Ezekiel Waruinge on 2nd November 2017.

11. The 3rd respondent filed his submissions on the 8th of November 2017.

12. The petitioner filed his submissions on 8th November, 2017 and further submissions on 23rd November 2017.

13. The 1st respondent filed submissions on 4th December 2017.

The Petitioner's Case:

14. From the affidavits, it can be surmised that the gist of the petitioner's case is that the 1st respondent instituted criminal proceedings against him in regards to a dispute of land ownership he had with the 3rd respondent. The petitioner avers that he is the registered owner of the disputed parcel of land and his title has not been challenged in any court and the criminal proceedings at the subordinate court are meant to put pressure upon him to settle the land dispute in favour of the 3rd respondent and to his detriment. This, the petitioner contends, amounts to an illegality on the part of the respondents and he therefore seeks the protection of the court.

15. As per the petitioner, his right to property as guaranteed under Article 40 of the Constitution would be gravely prejudiced if the respondents are not restrained from proceeding with the criminal proceedings. As if this is not enough, the petitioner contends that his right to a fair hearing guaranteed under Article 50(1) of the constitution is being gravely violated as the respondents intend to solve a land ownership dispute in a criminal court, which is the wrong forum.

16. Accordingly, the petitioner asserts that he would be gravely prejudiced and suffer irreparable loss and damage if the 1st and 2nd Respondents were to proceed with the criminal proceedings and deliver an adverse decision in regards to him.

17. It is the petitioner's contention that he is the registered proprietor of all that parcel of land known as title number Kajiado/Kitengela/1728 and that he also owns the parcel of land title number Kajiado/Kitengela/1727 which he concedes is still in the name of Rumia Ndoho Housing Cooperative Society Limited but he has obtained consent to transfer.

18. The petitioner avers that upon obtaining the parcel of land title number Kajiado/Kitengela/1728 on or around the year 2008, he took immediate possession of the same and began substantial development on the said land by building a residential house.

19. The petitioner avers that he enjoyed quiet possession of the said parcel of land until on or around the year 2013 when the 3rd respondent appeared with a letter alleging that the petitioner had been allocated his land and that he should vacate the said land.

20. It is averred that upon this turn of events, the petitioner and the 3rd respondent pursued the matter with the lands registry in Kajiado and the Government Surveys Office where it was discovered that there occurred an error during the allocation of parcel numbers and thus the parcel of land that was meant for the 3rd respondent had been allocated to petitioner who had taken possession of it.

21. As the petitioner puts it, he agreed with the 3rd respondent that since he had done substantial development on the parcel of land that was meant to be the 3rd respondent's, he would in turn facilitate the transfer of the parcels of land title number Kajiado/Kitengela/1727 and Kajiado/Kitengela/1728 to him as compensation.

22. The petitioner avers that he duly initiated the process of transferring the said parcels of land to the 3rd respondent, however, due to a lot of bureaucracy and unforeseen frustration at Kajiado lands registry the process took an inordinate amount of time.

23. To his dismay the petitioner contends, the 3rd respondent made a report to the DCI Kajiado that he had fraudulently acquired his parcel of land. In response, the petitioner avers that he went to the DCI

Offices at Kajiado, explained to them what had happened and they decided to visit the suit premises. He avers that after several discussions and after measuring the parcel of land, the DCI officers agreed that the best course of action was for him to facilitate the transfer of the undeveloped parcel of land to the 3rd Respondent.

24. The petitioner avers that on or around the month of September 2016 the 1st respondent decided to charge him at the 2nd respondent's court with the charge of forcible detainer contrary to section 91 of the Penal Code. He contends that despite the fact that he and his counsel have on several occasions protested the institution and proceedings at the 2nd respondent's court the same has proceeded in violation of his constitutional rights.

25. The petitioner avers that he is aggrieved by the decision made by the 1st respondent to institute the criminal proceedings at the 2nd respondent's court and the proceeding of the said charge as the dispute at hand is in relation to the ownership of land and not a criminal one.

26. The petitioner avers that Article 27 (1) on its part provides that every person is equal before the law and has the right to equal protection and equal benefit of the law and in his petition contends that this right is being violated since he is being prosecuted in a criminal court yet he has committed no crime.

27. The petitioner asserts that the right to own property is guaranteed under Article 40 of the Constitution which provides that every person has the right either individually or in association with others, to acquire and own property of any description and in any part of Kenya. In his petition he avers that this right is being threatened as the 3rd respondent is seeking to irregularly institute criminal proceedings to deny him of his property.

28. The petitioner asserts that the right to a fair hearing is guaranteed under Article 50(1) of the Constitution which provides that every person use 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. He contends that by charging him with the offence of forcible detainer, the Respondents have violated this right in regards to the settlement of the land ownership dispute.

29. The Petitioner contends that the dispute between the 3rd Respondent and him is in regards to the ownership of land and is not a criminal matter and thus he should not have been prosecuted at the 2nd Respondent's court. He therefore posits that this court ought to stop the Respondents from prosecuting the Criminal case 53 of 2016 at the Chief Magistrate's court Ng'ong.

1st Respondents Case:

30. In a rejoinder the 1st Respondent's case is based upon the Grounds of Opposition accompanied by an affidavit sworn by Geoffrey Omwenga on the 13th October 2017.

31. As succinctly put by the 1st Respondent, the gravamen of its opposition to the Petition is three pointed:

a. That the Petitioner lacks locus and the Petition is incompetent and lacks merit.

b. That the Applicant herein intends to obstruct and interfere with the Statutory and Constitutional mandate of the 1st Respondent.

c. That the Applicant intends to deny the Complainants Kirumba Mwaura and Jane Wanjiku Waweru who are victims the right to a fair hearing.

32. In the words of Geoffrey Omwenga who swore an affidavit in reply to the Petition filed on 20th June

2017, sometime on the 12th February, 2014 a complaint was made at Ole Kasasi Police Post vide OB/ 10/ 12/02/2014 by the 3rd Respondent over trespass in his land and malicious damage of beacons in the said land title number Kajiado/Ololoitikoshi/Kitengela/190 by the Petitioner and his agents. Subsequently, on 18th February, 2014 the 3rd Respondent further made a report at the Directorate of Criminal Investigations Headquarters Nairobi following inaction by Ole Kasasi Police Station on his complaint, wherein the 3rd Respondent was referred to Directorate of Criminal Investigations Ongata Rongai. On this same day, the 3rd Respondent availed documents of ownership over land title number Kajiado/Ololoitikoshi/Kitengela/190 and investigations into the matter began.

33. Mr Omwenga avers that upon conducting interviews and recording statements of witnesses it was confirmed that the legal and legitimate owner of land title number Kajiado/Ololoitikoshi/Kitengela/190 was the 3rd Respondent. He avers that they proceeded to Kajiado Lands Registry seeking to authenticate the documents availed by the complainants and obtained several certified documents to wit:

(a) Mutation form lodged on 4/02/1983 for Kajiado/Ololoitikoshi/Kitengela/177 registered under Nathan Kahara which subdivided the said land into several parcels amongst them Kajiado/Ololoitikoshi/Kitengela/190.

(b) Mutation Form dated 12/09/2013 for Kajiado/Ololoitikoshi/Kitengela/190 registered under the 3rd Respondent which subdivided the said land into thirty seven (37) parcels.

(c) Thirty Seven (37) Green Cards for the subdivision of title Kajiado/Ololoitikoshi/Kitengela/190.

34. It is averred that upon perusal and scrutiny of the said documents and the statements by the witnesses the 1st Respondent endeavoured on several occasions to contact and summon the petitioner herein but he wilfully and unlawfully without any reason refused to attend our offices for an interview.

35. Mr Omwenga explains that they then revisited the Kajiado Land Registry and requested for a physical site inspection visit in the presence of the Land Surveyor, Land Registrar, the complainant (3rd Respondent) and the petitioner wherein the visit was scheduled for 18th December, 2015 and all the parties were served with summons to attend.

36. According to the 1st Respondent, on the 18th December, 2015 they attended the physical site inspection visit but the petitioner once again without any lawful justification failed to attend the said visit and said inspection proceeded and a report was made confirming that the 3rd Respondent was the legal and registered owner of land title number Kajiado/Ololoitikoshi/Kitengela/190.

37. It is further averred that sometimes in June, 2016 the officers investigating the matter were made aware of a report by the 3rd Respondent through a letter dated 10th June, 2016 that an illegal power connection had been made by Kenya Power and Lighting in their said land title Kajiado/Ololoitikoshi/Kitengela/190. Consequently, on 9th September, 2016 officers from the Kenya Power and Lighting Company visited the offices of the investigating officer Mr Omwenga and upon conducting an interview with them and through further investigations, it was discovered that the Petitioner had fraudulently connected power on the land title Kajiado/Ololoitikoshi/Kitengela/190 which was consequently disconnected and the accused charged accordingly.

38. The investigating officer acceded that the Petitioner was arrested on 22nd August, 2016 at Ongata Rongai and on being interviewed admitted to being in possession of the 3rd Respondents land Kajiado/Ololoitikoshi/Kitengela/190 and failed to provide any witnesses to support his allegations.

39. The investigating officer avers that upon analysis and examination of all the witness statements, petitioners statement, and the aforementioned documents obtained from the 3rd Respondent and the Kajiado Lands Registry it was established that Kajiado/Ololoitikoshi/Kitengela/177 was the original

Mother Title registered under Nathan Kahara who subdivided the said parcel into several parcels and sold one parcel Kajiado/Ololoitikoshi/Kitengela/190 to the 3rd Respondent and title deed issued on 15th February, 2010. The 3rd Respondent subdivided the said land Kajiado/Ololoitikoshi/Kitengela/190 into thirty seven (37) parcels and title deeds issued in 12th September, 2013 which confirms that beacons had been in place.

40. It is also averred by the 1st Respondent that it was discovered that the Petitioner had allegedly bought Kajiado/Kitengela/1728 which measures 0.20 Hectares whereas the 3rd Respondent lawfully and legally owns land Kajiado/Ololoitikoshi/Kitengela/190 which is 2.02 Hectares.

41. The Petitioner unlawfully and mischievously moved into land Kajiado/ Ololoitikoshi/Kitengela/190 sometimes in 2014 and started construction and despite being stopped by the DCI and 3rd Respondent, he declined. He is, according to the 1st Respondent's affidavit, in illegal and unlawful possession of the 3rd Respondents land suit property Kajiado/Ololoitikoshi/Kitengela/190 and has declined to vacate.

42. The deponent further averred that the 1st Respondent is an Independent Constitutional body established under Article 157 of the Constitution of Kenya, 2010 to commence, take over and prosecute Criminal case/complaint in Kenya. With regards to the Petition herein, the 1st Respondent is mandated to enforce the purpose of Article 157 and Article 50 of the Constitution of Kenya, 2010 and Section 5 and 9 of the Victim Protection Act 2014.

43. It was deponent that it was the intention of the Petitioner to deny the 3rd Respondent and Jane Wanjiku Waweru an Interested party who are victims of the unlawful actions or omissions by the Petitioner herein the right to fair hearing under Article 159 and Article 50 of the Constitution of Kenya, 2010.

44. The deponent averred that the Trial Court established under the Magistrate Court Act No. 24 of 2015 and Article 169 of the Constitution of Kenya, 2010 is best suited to hear and determine the Petitioners allegations.

45. According to the deponent, the 1st and 2nd Respondents herein have not acted ultra vires and/or infringed the rights of the Petitioner in the mandate of their constitutional and statutory obligations.

46. The deponent averred that the petitioner has failed to disclose to this Honourable Court that he is facing other charges wherein the Kenya Power and Lighting Company are the complainants and has also failed to include an interested party Jane Wanjiku Waweru who is also the registered and legal owner of Kajiado/Ololoitikoshi/Kitengela/190.

47. It was emphasized that the Petition is vexatious, incompetent and otherwise an abuse of the Court Process aimed at defeating justice and is made in bad faith.

48. The deponent sought to have the Petition dismissed with costs.

3rd Respondents Case:

49. In the 3rd respondent's affidavit, the instant application is a ploy to delay or derail the hearing and determination of Criminal Case Number 53 of 2016 against the accused/ Petitioner which was scheduled for hearing on 14th August 2017 on the grounds that the criminal case was filed on 20th August 2016 and two of the main witnesses had already given evidence and had been cross examined by defence counsel. Further, it had taken a year since the institution of criminal proceedings for the Petitioner to file the current Petition and no urgency had been demonstrated after such inordinate delay.

50 Additionally, the 3rd Respondent averred that the Petitioner had concealed material facts which the Court properly directing itself would find it a gross and intolerable abuse of the judicial process. These

facts include failing to exhibit the entire Charge Sheet thereby misleading the Court on the nature and extent of the charges proffered against the Petitioner. The Petitioner faces two additional charges of unauthorised installation of a conductor or apparatus contrary to section 64 (1) (c) of the Energy Act and Fraudulent consumption of Electrical Energy contrary to section 64 (I) (b) of the Energy Act, Number 12 of 2006. The Petitioner has conveniently kept quiet about these charges knowing fully well that an order for stay of the Criminal Case will also derail those charges.

51. To the 3rd respondent, the orders as sought are incapable of being granted as the Petitioner has not filed any substantive suit before any Environment and Land Court to assert any claim of legal or legitimate ownership of the property.

52. Concerning the line of argument that runs through the Petition and the Application that the 3rd Respondent had an agreement with the Petitioner to swap Kajiado/Ololoitikoshi/Kitengela/190 with Kajiado/Ololoitikoshi/Kitengela/1727 and 1728 the 3rd Respondent averred as hereunder:

(a) About the year 2011 it came to my attention that someone was constructing a house on our land. I contacted the District Surveyor of Kajiado District to confirm the positions of our beacons which he did and established the fact that the house under construction was wholly within our land.

(b) At this point I had been informed by one Kariuki Ngure that the house belonged to one Ndura Waruinge of the Mungiki fame (the Petitioner). Kariuki told me that the Petitioner had bought an acre of land out of a parcel of Land Title Number Kajiado/Kitengela/193 (Plot 193). The surveyor told me that the owner of plot 193 was possibly shown our land because the Registry Index Map had been wrongly inverted i.e. north was marked south and other vice versa. He recommended that we swap positions with the owner of plot 193.

(c) On that basis I wrote to the Petitioner the letter dated 12th April 2013 to the Petitioner.

(d) In response the Petitioner brought to me copies of the title documents for plots 1727 and 1728 and offered them to me to swap with the portion of our land that he had wrongfully occupied. However, the said titles were not in his name and I rejected the offer and wrote to the Petitioner a letter dated 13th June 2013. A search of the aforesaid titles also disclosed that they were not subdivisions of Plot Number 193 but of Plot Number 186 which meant that the Surveyor's recommendation to swap did not apply to the Petitioner's case.

53. The Petitioner averred that he is the co-owner of the property known as. Kajiado/Ololoitikoshi/Kitengela/190 with one Jane Wanjiku Waweru who is a complainant in the in the Criminal Case and who together with Kenya Power and Lighting Company Limited, the other complainant, have not been enjoined as Respondents.

54. With respect to the contention in the Petition and Supporting Affidavit that the Petitioner's human rights have been violated by criminalizing a civil dispute the 3rd Respondent averred that after he rejected the titles offered by the petitioner, on the 11th February 2014 the Petitioner descended on the suit property with a gang of young men and uprooted the boundary beacons and started constructing a perimeter wall whereupon the 3rd Respondent made a formal complaint at Rongai Police Station.

55. After he recorded his complaint, the 3rd Respondent avers that the District Criminal Investigating Officer, Mr Omwenga at Rongai Police Station warned the Petitioner to stop fencing the suit property. Despite the warning and in defiance the Petitioner continued and has now usurped 1 .7 acres. Thereafter the Petitioner created a way-leave over the suit property to connect power to his house, erected pig sties and constructed an access road without the 3rd Respondents consent.

56. To the 3rd Respondent, the Petitioner's conduct as enumerated above constitutes grounds for criminal charges under the Penal Code, and the Energy Act.

57. The 3rd Respondent affirmed that the exercise of the powers by the 1st Respondent under Article 157(10) of the Constitution is not to be interfered with easily unless the Petitioner/ Applicant has demonstrated malice, bias, irrationality or some other good cause on the part of the Respondents. To him, the Petitioner has not demonstrated how the continued prosecution of Criminal case Number 53 of 2016 at the Chief Magistrate's Court, Ngong, has prejudiced or is likely to prejudice his fundamental rights.

58. The 3rd Respondent further avowed that if the Petitioner started construction in 2008 as alleged in Paragraph 5 of his Affidavit, then he was constructing on a property to which he had no title and, considering that as at now the petitioner has no title to plot 1727 and that the title to plot 1728 was ostensibly obtained in 2014, nearly 6 years later, it is not plausible that he constructed on the suit property due to a genuine mistake. That therefore the 3rd Respondent believes that this is a classic case of forcible detainer of/land grabbing which is clearly a criminal act.

59. The 3rd Respondent conceded that there were tentative discussions to settle but which collapsed when the Petitioner forcibly and unlawfully destroyed beacons and fenced off whatever land he wanted. The 3rd Respondent denied that any steps were taken to transfer any plots to him by the Petitioner.

Petitioner's Response:

60. The Petitioner denied concealing any charges and averred that the charges mentioned by the 3rd Respondent are a sham as they relate to installation of electricity that was actually installed by Kenya Power and Lighting Company after he followed the due procedure and paid for the connection. The petitioner denied destruction of beacons (property) in the suit property as according to him no beacons were in place when he began building his house and he had not been charged with destruction of property. He further averred that the said mutation and the map relied upon by the 3rd Respondent were prepared after his house was already in place.

61. The petitioner reiterated that he bought the parcel of land in question and began building in the year 2008 conceding that he obtained the title to it in the year 2014. To him, the dispute with the 3rd Respondent does not establish any crime to warrant the charges levelled against him at the subordinate court.

62. The petitioner reasserted that his constitutional rights have been violated by the Respondents herein and the specific violations of those rights have been succinctly expounded on in the Petition.

63. It was deponed that the 1st Respondent it did not exercise its mandate within the provisions of the law and thus its decision to prefer charges against the Petitioner is subject to this honourable court's scrutiny.

64. In the Petitioner's view, he would not be granted a fair hearing at the subordinate court, because it is not the right forum to solve the issue at hand which is not criminal, but a land dispute and the criminal subordinate court cannot resolve the matter on its merit.

65. To the Petitioner, the police cannot determine the legal and legitimate ownership of a parcel of land as their mandate is to investigate and not determine legal issues, which is a purview of the honourable courts. Therefore, the criminal proceedings instituted at the subordinate court are evidently instituted to achieving a collateral purpose and not for the public good.

Petitioner's Submissions:

66. Mr. Ruiru learned counsel for the Petitioner submitted that what was in question is whether his application had met the threshold for granting conservatory orders. He sought to rely wholly on Odunga J's decision in **Kevin K Mwiti & Others v Kenya School of Law & Others** in regards to issuing of a conservatory order to wit:

"...The first issue for determination is whether the Petitioner has established a prima facie case.

A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a chance of success.”

67. To buttress his claim that he had established a prima facie case, the Petitioner submitted he has expressly stated under oath in his affidavit sworn on the 19th June 2017 that sometime in the year 2008 he bought two parcels of land from a named third party, he obtained a certificate of title for one parcel and is in possession of signed transfer forms and a consent to transfer for the other parcel. He further states that he immediately took possession of the parcel of lands and begun construction of a residential house.

68. Subsequently, sometime in the year 2013 the 3rd Respondent approached him and informed him that he was building on his parcel of land. The Petitioner clearly states that after some interrogations and investigations it was established that the Petitioner had been mistakenly allocated by the vendors (third party) the parcel of land that belonged to the 3rd Respondent and it was also established that this was because the deed plan that they were using had been prepared with a lot of errors. The Petitioner also states that he and the 3rd Respondent had an amicable solution to solve the mistake that had occurred, that is they would swap land parcels as the Petitioner had already begun construction.

69. However, learned counsel submitted that the Petitioner was irregularly and illegally charged before the subordinate court for forcible detainer of the parcel of land aforementioned after the 3rd Respondent unilaterally changed his mind about solving the dispute amicably. This clearly establishes that there is a land dispute between the Petitioner and the 3rd Respondent, a dispute that raises no criminal offence at all and one that cannot be solved by the criminal subordinate court and by charging the Petitioner therein. Therefore, this clearly establishes that the Petitioner's constitutional rights to a fair hearing as guaranteed under Article 50 (1) will be violated if the criminal trial challenged herein proceeds.

70. In addition, learned counsel submitted that the Petitioner invested his hard earned money in purchasing the parcels of land mentioned herein and also in building a residential house where he now lives with his family, so his right to own property as guaranteed under Article 40 of the constitution is also being threatened by the Respondents herein. It was learned counsel submissions that the preceding facts clearly establish a prima facie case.

71. The learned counsel submitted that he has succinctly outlined in the Petition how the Petitioner constitutional rights have been violated and how they are in further danger of being abused if this honourable court does not intervene and halt the criminal proceedings challenged herein. In his view, this establishes a clear prima facie case warranting the issuance of the conservatory orders.

72. It was submitted by the learned counsel for the Petitioner that he is illegally and irregularly under trial before the subordinate court and he has thus sought refuge in this honourable court as he stood to suffer a lot of prejudice if the criminal proceedings challenged herein proceeds.

73. Learned counsel further submitted that the 3rd Respondent seemed to personalize the criminal proceedings before the subordinate court, which are a purview of the 1st and 2nd Respondent, and this clearly demonstrates the Petitioner's assertions that the said criminal proceedings are being used to achieve other personal and ulterior goals other than for the public good and benefit.

74. It was also submitted that this honourable court is clothed with all the powers and jurisdiction to issue the relief it issued of an interim conservatory order to ensure that the Petitioner's constitutional rights are not further violated and threatened as the Petition herein is being ventilated.

Mr. Ruiru's submissions:

75. Mr. Ruiru in closing remarks drew the courts attention to the following cases; *Kelvin K. Mwiti & Others v Kenya School of Law & Others [2015] eKLR, the Center for Human Rights and Democracy & Others v The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012.*

76. Mr. Ruiru in addressing the court through his submissions contended that the application by the 3rd Respondent cannot stand in view of the clear provisions of the constitution.

1st Respondent's Submissions:

77. The 1st Respondent's learned counsel Mr. Akula submitted that the Petitioner in his Petition admitted that he is in illegal occupation of land title Kajiado/ Olooloitikoshi/Kitengela/190 belonging to the 3rd Respondent and Jane Wanjiku Waweru. Further he submitted that the Petitioner has admitted to being the registered owner of land title Kajiado/Kitengela/1727 and Kajiado/Kitengela/ 1728 wherein only one title Kajiado/Kitengela/1728 is registered in his name which title was issued on 23rd April, 2014.

78. As per the 1st Respondent's learned counsel, it is worth noting that the transactions with regard to the alleged sale of Kajiado/Kitengela/ 1727 were done in 18th March, 2014 contradicting the Petitioner's contention that he purchased the land in 2008. The 1st Respondent's counsel submitted that the 3rd Respondent offered to subdivide Kajiado/Olooloitikoshi/Kitengela/190 and give an equal parcel in exchange of the Kajiado/Olooloitikoshi/193 sold to the Petitioner and also compensate the Petitioner for wall construction to avert the current situation but the Petitioner wilfully declined and proceeded to illegally occupy and construct on the 3rd Respondent's land Kajiado/Olooloitikoshi/Kitengela/190.

79. It was submitted that the Petitioner has wilfully and unlawfully failed to cooperate with the police, the Kajiado Lands Registry and the Kajiado Survey and the County Commissioners office in order to arrive at a mediated settlement.

80. The 1st Respondent's counsel further argued and submitted that it reviewed the evidence as per the annexures on the supporting affidavit and preferred the charges facing the Petitioner based on the law and the Constitution.

81. According to learned counsel the 1st Respondent's counsel submits that Article 40(6) of the Constitution is clear that it does not protect or extend the rights under Article 40 to the Petitioner herein who has unlawfully and illegally hived 0.7 Ha of land from the 3rd Respondent's land title Kajiado/Olooloitikoshi/Kitengela/190. In this regard the 1st Respondent's counsel relied on the case of **John Kamau Kenneth IMpapale v City Council of Nairobi & 7 Others [2014] eKLR.**

82. It was further submitted that the Petitioner has not demonstrated that his fundamental rights have been breached by the 1st Respondent. The Petitioner has been charged with three (3) offences namely: Forcible detainer of land contrary to section 91 of the Penal Code, Cap 63; Unauthorised installing of a conductor or apparatus contrary to section 64(1)(c) of the Energy Act and Fraudulent Consumption of Electrical Energy contrary 64 (i)(b).

83. As per the 1st Respondents submissions, forcible detainer of Land is still a valid charge under the Penal Code, cap 63 and the same has neither been repealed and /or declared unconstitutional. The chares facing the Petitioner are valid in law and are criminal in nature. Nothing in law prohibits the criminal case from proceeding whether or not the complainant has commenced civil proceedings.

84. In learned counsel's arguments the 1st Respondent acted within the requirements of Article 157 of the constitution, the police availed the police file for perusal and to be given directions for which the 1st Respondent directed that the Petitioner be charged with the said three (3) offences. According to the 1st Respondent's counsel, the decision to prosecute the Petitioner was arrived at based on the availability of sufficient evidence that establishes a prima facie case which supports the charges against the Petitioner

and in the best interest of justice and public interest.

85. It was submitted by the 1st Respondent's counsel that the order of Prohibition cannot be issued since the same is overtaken by events as the 1st Respondent has already caused criminal proceedings against the Petitioner in Ngong Chief Magistrate's Court Criminal Case No.53 of 2016 wherein two (2) witnesses have testified. The 1st Respondent cited **Republic v DPP & 3 Others Ex-parte Bedan Mwangi Nduati & Another [2015] eKLR.**

86. It was further submitted that 1st Respondent in directing the prosecution of the Petitioner had not violated any rights of the petitioner or violated the provisions of the constitution. The 1st Respondent relied on the decision in **Erick Kibiwott & 2 Others v DPP & 2 Others Judicial Review Civil Application No.89 of 2010.**

87. The 1st Respondent's counsel further submitted that it was a surprise that the Petitioner was not challenging the two (2) other offences which form count 11 and III in the Criminal Case No.53 of 2016 pending at the Chief Magistrate's Court at Ngong which emanate from the land title Kajiado/Ololoitikoshi/Kitengela/190 the property of the 3rd Respondent in question. Accordingly, it is also submitted that the police in this matter have not only established a reasonable suspicion but have established sufficient evidence that establishes a prima facie case against the Petitioner and the 1st Respondent's decision to prosecute was reasonable and in the public interest. It was submitted that the trial court is the best arena to canvass and challenge the evidence obtained by the Respondents in order to accord all parties a fair trial.

88. The learned counsel for the 1st Respondent submitted further and posed the following issues:

Whether the Petitioner's fundamental rights as alleged under the causation have been infringed? Secondly, whether the Petitioner have demonstrated sufficient interest or rights to persuade this court exercise discretion in his favour for the remedy of conservatory orders?

89. In answer to the first question learned counsel placed reliance on the principles elucidated in the cases of **John Kamau Kenneth IMpapae v City Counsel of Nairobi & 7 Others [2014] eKLR.**

90. This case brought out the legal proposition that a Petitioner cannot make a claim over a property which they do not own so as to seek constitutional protection under Article 40 (6) of the Constitution.

91. The learned counsel further submitted that upon perusal of the petition he observed that the orders as framed do not fit within the grounds known in law to be issued to the Petitioner. He emphasized and submitted that prohibition cannot be issued because there is already a prosecution ongoing before the Magistrate Court at Ngong. To support this he relied on the case of **Republic v DPP & 3 Others Exparte Bedan Mwangi Nduati & Another [2015] eKLR.**

92. Learned counsel further submitted that the Office of the DPP which is a creature of the constitution under Article 157 is the only legal entity recognized in law and entitled to the public in our criminal justice system. It is his contention that in exercising the mandate of prosecuting the ODPP is not subject or control from any other authority unless in the clearest of circumstances. To support this argument the learned prosecution counsel relied on the case of **Kipoki Omutasur v Inspector General of Police & 5 Others [2014] eKLR.**

93. The learned prosecution counsel in summarizing up reiterated the facts of the petition, the authorities cited and indicated to this court that the notice of motion is not reliable in favour of the Petitioner.

The 3rd Respondent's Submissions:

94. Mr. Otiende for the 3rd Respondent submitted that the Petitioner is not entitled to the orders sought in view of concealment of material facts on the dispute. Learned counsel gave a chronology of events on the

subject matter to support the argument that the indictment of the Petitioner with the offence of forcible detainer is justified.

95. In this proposition learned counsel relied on the case of *Aviation and Airport Services Workers Union K v Kenya Airport Authority [2014] eKLR, Stephen Takuanyi v David Mbutia Githure & 2 Others HCCC No. 363 of 2009.*

96. It was further the concern of Mr. Otiende that any grant of interim or interlocutory conservatory orders by this court will prejudice the rights of the respondent in the ongoing trial before the Magistrate Court at Ngong.

97. Mr. Otiende has referred to the following cases to support his contention that the Petitioner's notice of motion does not warrant issuance of conservatory orders; *Giella v Cassman Brown & Co. [1973] EA 358, Cynamid Co. v Ethicon Ltd [2001] 1 WLR 194, Gatirau Peter Mkuya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR, Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education HCCA NRB 399 of 2015 eKLR, Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 3 Others NRB HCCR 249 of 2016 [2016] eKLR.*

98. In the words and submissions of Mr. Otiende, it is quite apparent from the judgements of these superior courts the Petitioner has not met the criteria to be considered for the relief of conservatory nature.

99. In addition Mr. Otiende further submitted that the material before court does not support the prosecution of the Petitioner is adverse or malicious. In this regard he relied on the case of *Kuria & 5 Others v A.G. [2002] 2 KLR 69, George Joshua Okungu & Another v Chief Magistrate Court, Anti-Corruption Court at Nairobi Petition No. 227 and 230 of 2009.*

100. According to the learned counsel contention the Petitioner has invoked various provisions of the constitution to show an infringement or a violation which does not exist. He invited this court to be guided by the decision in the case of *Ananita Kamau Njeru v The Republic Petition No. 1 of 1979 KLR 154 (1976 – 80)* and *Stephen Nyarungi Onsomu & Another v George Magoha & 7 Others [2014] eKLR.*

101. It was further learned counsel argument and submissions that the Petitioner/Applicant has not satisfied all the elements in both the notice of motion and even in the main petition so to speak for this court to entertain the matter.

Analysis and Determination:

102. I have considered the arguments and submissions of all the parties involved and to my mind the bone of contention in this matter is that the Petitioner finds the decision by the 1st Respondent to institute criminal proceedings against him is aimed at achieving certain extraneous goals other than those recognised under the Constitution and the Office of the Director of Public Prosecutions Act and it is ultra vires and constitutes an abuse of the legal process.

103. The questions presented in this petition are twofold:

(a) Whether the Petitioner has a prima facie case to warrant this court exercise discretion to issue conservatory orders.

(b) Whether this court in pahanonic overview of the entire petition can give directions in the matter in the interest of justice as to the proposed reliefs in the petition at the interlocutory stage.

104. The reference point in the entire petition is the Kenyan constitution 2010 more specifically on redness of a denial, violation and infringement or threat to right, fundamental rights and freedom.

105. In Black's Law Dictionary, 8th Edition at page 330 Bryan Garner defines the constitution in the following manner:

“The fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines this scope of government sovereign powers, and guarantees individual civil rights and civil liberties.”

106. In this case i am confronted with pleadings alleging that Article 19, 27, 28, 40, 56, 65 and 259 (1) of the Constitution have been threatened or infringed to the determination of the petition. That the rights and liberties inconformity with the constitution which lies at the heart of the Republic of Kenya ought to be safeguarded in favour of the applicant/petitioner.

107. The provisions of the constitution at issue in this case can be restated in summary as follows:

“Under Article 19, the rights and fundamental freedoms as an integral part of Kenya’s democratic state and as a framework for social, economic and cultural polices is outlined that the rights and fundamental freedoms in the bill of rights belong to each individual and are not granted by the state.”

108. Article 20 (2) ***“every person shall enjoy the rights and fundamental freedoms in the bill of rights to the greatest extent consistent with the nature of the right or fundamental freedom.”***

109. In Article 22 (1) ***“every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened.”***

110. The jurisdiction and reliefs which may be granted in proceedings filed and brought pursuant to Article 22 are provided for under Article 23. They include:

Declaratory rights, an injunction, conservatory order, an order for compensation, an order for judicial review. The petitioner has argued in both the notice of motion and the petition that his right to own property guaranteed under Article 40 has been violated, threatened and infringed by the respondents.

111. Secondly the Petitioner argues that the decision to charge him with the offence of forcible detainer contrary to section 91 of the Penal Code amounts to discrimination, violation of his inherent right to human dignity and respect. The Petitioner also alleges the guarantee of equal protection and equal benefit of the law is at stake following the actions by the respondents. He also further alleges that his right to a fair hearing under Article 50 of the Constitution has not been in accordance with the principles of the constitution and fundamental justice.

112. This therefore places the burden on the part of the Petitioner to prove that there has been a deprivation of the rights under the particularized articles of the constitution. Secondly, that the deprivation, violation or infringement was not and is in contravention of the constitution.

113. The first question which begs for an answer is whether the Petitioner has a prima facie case to entitle him with the relief of conservatory order under Article 23 of the Constitution.

114. The minimal criteria required to prove a prima facie case in cases of this nature has been set out by the Supreme Court. In the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others eKLR** as follows:

“Conservatory orders bear a more decided public law connotation. For these are orders to facilitate ordered functioning within public agencies as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private – party issues as the prospects of irreparable harm occurring during the pendency of a case; or high probability of success in the applicant’s case for orders of stay. Conservatory orders consequently should be on the inherent merits of the case, bearing in

mind the public interest, the constitutional values and the proportionate magnitude and priority levels attributable to the relevant causes.”

115. In another case of the *Center for Rights Education and Awareness CREAM & 7 Others v The Attorney General & Others Petition No. 16 of 2011 J Musinga* as he then was stated inter alia that “*at the interlocutory stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution.*”

116. In my view therefore the interim conservatory orders may only be made at the hearing supported by evidence in sufficient detail to prove:

(1) The rights to be protected.

(2) The nature of the declarations or reliefs sought in the main petition.

(3) The circumstances that give rise to that violation requiring an interim measure of conservatory orders.

117. What constitutes a prima facie case with a probability success is a question which the English Court in the case of *American Cyanamide v Ethicon [1975] ALLER 504* held inter alia as follows:

“It is a case which is not frivolous or vexatious. The evidence and material presented must satisfy a serious question of law and fact to be tried at the hearing. The applicant who seeks conservatory orders must show that he has a case which raises triable issues. It should be borne in mind that considering whether to grant conservatory orders the court should not focus on what will be the actual outcome but probability of success.”

118. It is trite law that the burden of proof rests upon the party who asserts the particulars of the claim to adduce evidence to support the prima facie case. The basic complaint by the petitioner in this case relate to a dispute over ownership of land with the 3rd Respondent.

119. Given the features of the dispute a criminal complaint was reported and investigated by DCIO Ongata Rongai. According to the replying affidavit by IP Geoffrey Omwenga, the lead investigating officer the claimant’s evidence was sufficiently strong to warrant an indictment of the Petitioner.

120. It was against this background that a charge sheet on forcible detainer contrary to section 91 of the Penal Code was formulated resulting in the Petitioner being arraigned before the Chief Magistrate Court at Ngong.

121. Faced with these offences the investigating agency inferred that it was permissible to charge and prosecute the Petitioner with various crimes under the law. The Petitioner objection is on the ground that by charging him with a criminal offence he is being discriminated and treated in unusual manner. This to him accounts to unfair treatment, discrimination and unreasonable exercise of discretion by the 1st Respondent.

122. In the language of the Petitioner the criminal case before court which has already commenced and proceedings should be stayed by an order of prohibition. Secondly, the decision by the 1st Respondent to prefer charges and prosecute him should be quashed by an order of certiorari.

123. The legal overview of the entire case; both affidavit and documentary evidence forms the basis upon which to establish the elements of a prima facie case.

124. An order of prohibition is being applied and sought for a case already filed, commenced and proceedings against the Petitioner. The question I ask myself is whether given the criteria in *Munya Case*

on grant of conservatory orders, the petitioner does have an inherent case on the merits to be determined?

125. I pause to emphasise that from the perusal the material before me i find no iota of evidence that such case exist which has a probability of success in favour of the petitioner.

126. It is well settled in our jurisdiction that the objective of any criminal prosecution is not to obtain a conviction, but to prevent available credible evidence in a fair and public hearing in a court or impartial tribunal or body. (See Article 50 (2) of the same Constitution).

127. As the petitioner opposes the ongoing trial he has to remember that under Article 50 (2) (a) of the same constitution he is presumed innocent until the contrary is proved.

128. When i consider the specific complaints made by the petitioner there is no substance that he would not receive a fair trial before the magistrate court at Ngong to warrant an intervention by this constitutional court for a remedy of judicial review. That burden of justifying intrusive trespass, violation, or infringement of particular fundamental rights is on the person affected.

129. In the instant case the context is the arrest, indictment and prosecution of the petitioner with a criminal offence known in the Penal Code.

130. In the light of the above i am of the conceded view that there is no prima facie case that the petitioner is being prosecuted on the basis of palpably false evidence, or the respondent did so for extraneous considerations.

131. The standard issuance for the writ of prohibition and certiorari as a remedy under the constitution is well illustrated in the case of *Kenya National Examination Council v Republic Exparte Geoffrey Githinji Njoroge & Others Civil Appeal No. 266 of [1996/1997] eKLR*. The court held as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision. Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein against in excess of jurisdiction or in contravention of the laws of the land. It does not however, lie to correct a course, a procedure of an inferior tribunal, or a wrong decision on the merit of the proceedings while an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is within jurisdiction or in excess of jurisdiction/or where the rules of natural justice are not complied with or for such like reasons.”

132. I find these principles applicable to the facts of the petition before me. In the matter before the magistrate court there are witnesses who have already recorded statements. The petitioner has already been charged and the trial commenced. In the final analysis he would have an opportunity to cross-examine the prosecution witnesses and if need be state his defence in the instituted offences.

133. The petitioner has not placed sufficient evidence in which he demonstrates that the prosecution is frivolous, vexatious or abuse of the court process. The 1st and 3rd respondents in their affidavit evidence have justified that there are plausible grounds to justify, arrest, indictment and prosecution of the petitioner. In my view there are constitutional guarantees to the petitioner under Article 50 of the constitution which would safeguard his rights to a fair hearing.

134. My second consideration is whether the applicant having failed the first hurdle at the interlocutory stage, there is need to wait and decide the petition on the merits.

135. I pause the question; is there a reasonable degree of likelihood that the petitioner alleged claim would succeed at a full hearing?

136. There is no doubt that the court is endowed with inherent power to protect and regulate administration of justice as provided for under section 1B of the Civil Procedure Act.

137. It is also crystal clear that the courts derive their authority from the constitution itself. Under Article 159 (2) it provides as follows:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles:

(a) **Justice shall be done to all in respective of status.**

(b) **Justice shall not be delayed.**

(c)

(d) **Justice shall be administered without undue regard to procedural technicalities.”**

138. I have carefully considered the preliminary issue on conservatory orders. In my view i find it fitting in the interest of justice to review the entire pleadings pursuant to section 1B of the Civil Procedure Act and Article 159 of the Constitution to determine whether contentious issues exist to be tried separately at a future date.

139. It follows therefore necessary to intervene in this case by relying on the petition, affidavits and the disclosure materials to the extent of asserting the existing law on the matter.

140. The inherent power of the court to regulate its own procedures and just administration of justice was well illustrated in the following English case law:

In one of the earliest cases *Cocker v Tempest [1847] MXW 502* the court held:

“The power of each court over its own process is unlimited; it is a power incident to all courts, inferior as well as superior, were it not so the court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion.”

141. In a more recent case from the same jurisdiction **Lord Diplock** in *Bremer Vulcan v South India Shipping [1981] AC 909 at 977 – C-H* observed as follows:

“The High Court’s power to dismiss a pending action for want of prosecution is but a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilised system of government requires that the state should make available to all citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided in our courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff’s choice; if he chooses to do so, the defendant has no option in the matter, his subjection to the jurisdiction of the court is compulsory, so, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its culpability of arriving at a just decision of the dispute.”

142. These principles of English Law extracted from the above judgements suffice to give me the principles to deal with the dispute so that justice is done.

143. It is now well settled law that in judicial review the concern is not with the merits of the decision but rather with the procedure through which the decision was reached. **Odunga J** emphasised this point in **Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** when he stated that:

“Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant 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.”

144. The Petitioners position is that the institution of criminal proceedings was a ploy by the 3rd Respondent to gain undue advantage over him in what is a civil land dispute and not a criminal one. A look at the factual matrix as laid out in the preceding paragraphs reveals a different story. It is factual that there exists a land dispute between the Petitioner and the 3rd Respondent. It is also correct that efforts were undertaken to resolve the issue. However, it is clear to me that despite said efforts being made, the Petitioner continued to act in bad faith.

145. I find that despite the existence of the land dispute, it is noteworthy that the Petitioners actions amounted to an offence under the law. As such, the existence of a civil dispute does not preclude the Petitioner from being charged with a criminal offence if it is found that he is indeed culpable for said offence.

146. I agree with the court’s findings in **Republic v Director of Public Prosecutions & 2 others Ex-parte Joseph Gathuku Kamuiru & another [2014] eKLR** where it was stated that:

“Whether a prosecution will be quashed or prohibited will therefore depend on the facts of each case. 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 193A of the Criminal Procedure Code, Cap 75 is clear on this.”

147. Instructively, the Court in **Kuria & 3 Others V. Attorney General [2002] 2KLR 69** had this to say:

“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. There is 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 the 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 of 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 set of facts”

148. The issue this court is faced with is whether the 1st Respondent wielded its Constitutional mandate in a proper manner. Article 157(10) of the Constitution stipulates that:

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

149. Instances in which a court may interfere with the exercise of the 1st Respondents powers have been clearly enumerated in law. In ***Peter Ngungiri Maina v Director of Public Prosecutions & 2 others [2017] eKLR*** the Honourable Justice Ngugi quoted Odunga J who opined thus:

“It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive, the Court may interfere. The Court can only intervene in the following situations:

- 1. Where there is an abuse of discretion;***
- 2. Where the decision-maker exercises discretion for an improper purpose;***
- 3. Where the decision-maker is in breach of the duty to act fairly;***
- 4. Where the decision-maker has failed to exercise statutory discretion reasonably;***
- 5. Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;***
- 6. Where the decision-maker fetters the discretion given;***
- 7. Where the decision-maker fails to exercise discretion;***
- 8. Where the decision maker is irrational and un reasonable.”***

150. With due regard to the Petitioners conduct, I have no doubt in my mind that the 1st Respondents actions to charge the Petitioner with a criminal offence are meritorious as well as in consonance with its mandate as stipulated under Article 157 of the Constitution of Kenya. This court is therefore reluctant to appropriate the powers of the 1st and 2nd Respondent to look into whether or not the Petitioners actions warrant a criminal charge.

151. I endorse the courts position in ***Republic v Attorney General & 4 others Ex-Parte Kenneth Kariuki Githii [2014] eKLR*** to wit:

“The court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process.

That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration.”

DETERMINATION:

152. From the above reasons the following orders shall abide:

- (1) The interim relief for conservatory orders is hereby declined.**
- (2) The intended relief for issuance of the writs of prohibition and certiorari in respect to Criminal Case No. 53 of 2016 at the Chief Magistrate’s Court at Ngong also fails at the doorstep of the petitioner’s petition.**
- (3) The Chief Magistrate’s Case No. 53 of 2016 partly heard be remitted to the Chief Magistrate at Ngong for disposal and determination.**
- (4) The costs of this litigation be borne by the petitioner to the respondents respectively.**

It is so ordered.

Dated signed and delivered at Kajiado on the 20th Day of December 2017

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R NYAKUNDI

JUDGE

In the presence of:

Mr. Ruiru for the Applicant

Mr. Otiende for the 3rd Respondent

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant