



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 379 OF 2015

BETWEEN

KENNETH KANYARATI 1ST
PETITIONER

JACKSON KANYARATI 2ND
PETITIONER

RYAN PROPERTIES 3RD PETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE THE

DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT.....1ST
RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

PHILIP JALANG 3RD RESPONDENT

JUDGMENT

Introduction

1. Yet again into focus has been brought the powers of the Inspector General of Police and the Director of Public Prosecutions to investigate and prosecute individuals on behalf of the State.
2. The Petitioners in their Petition dated 9th September 2015 seek the orders of prohibition to restrain the 1st and 2nd Respondents from carrying out investigations or instituting criminal prosecution regarding the purchase price deposits paid by the 3rd Respondent to the Petitioners or their agents and which is in respect of a Sale Agreement now the subject of determination before the Environment and Land Court. An order of certiorari to quash the ongoing investigations as well as quash an earlier order obtained before the Chief Magistrate as part of the investigations is also

sought. Finally, a declaration that the continued investigation of the Petitioners in relation to matters pending before the Environment and Land Court is a threat to the Petitioner's right to a fair trial. The Petitioners also seek exemplary damages.

3. The Petition was supported by the affidavits of the 1st and 2nd Petitioners who are both directors of the 3rd Petitioner.
4. The Petition was opposed by the Respondents with Replying Affidavits filed on behalf of the 1st and 2nd Respondent on the 1st October 2015 and on behalf of the 3rd Respondent on 23rd September 2015.

Background facts and Chronology

5. The 1st and 2nd Petitioners who are siblings are real estate developers and investors through the 3rd Petitioner. In 2012, they embarked on developing a residential estate in Nairobi's Karen suburbs. Various units in the estate which was being constructed on Land Reference No. 12767 were up for sale. Various parties including the 2nd Respondent exhibited interest. Some were ultimately invited to purchase the units under development. The invitation was accepted by few. Formal offers were made and firm acceptances received. The agreements were then executed.
6. The 3rd Respondent executed a sale Agreement on or about 3rd September 2012. The 3rd Petitioner executed the same sale agreement ("the Agreement") on or about 10th October 2012. The Agreement provided for part payment of the purchase price. The detailed Agreement also provided for both the construction commencement date as well as a construction completion date. Of the stated purchase price of Kshs.33,000,000/=, the 3rd Respondent paid an aggregate of Kshs.17,250,000/= to either the Petitioners or their agents. There was however delay in commencing the construction. The 3rd Respondent also had concerns. They were various. He raised them with both the Petitioners and the Petitioners' agents. Ultimately and inevitably the transaction fell through on April 2015.
7. The 3rd Respondent unable to wait any longer and unhappy with various aspects of the transaction and in particular of the fact that even the construction of the residential unit which the 3rd Respondent had agreed to purchase had not been commenced nearly one year later, accused the 3rd Petitioner of breach of contract. The 3rd Respondent demanded a refund of the amount he had paid to the Petitioners/Petitioner agents. The 3rd Respondent also demanded compensation for the financial value loss of his projected investment. That was on 23rd April 2013.
8. Then followed a flurry of electronic mail communication between the parties' advocates. On 17th May, 2013, the 3rd Petitioner denied the allegations of breach of contract and instead placed the 3rd Respondent on Notice. The 3rd Petitioner accused the 3rd Respondent of breach. It was claimed that a payment of Kshs.7,500,000/= had not been paid on its due date. When the notice of 17th May 2013 was not heeded by the 3rd Respondent, the 3rd Petitioner by a letter dated 18th June 2013 notified the 3rd Respondent that the 3rd Petitioner had rescinded the contract and also forfeited 10% of the purchase price. The 3rd Petitioner made no mention of the remainder of the purchase price which the 3rd Respondent has paid. The 3rd Petitioner also made it clear that it would re-sale the Unit the 3rd Respondent had committed himself to. The 3rd Respondent protested.
9. An attempt to refer the now simmering dispute to arbitration failed. The 3rd Respondent then accusing the Petitioners and their agents of fraud as well as misrepresentation lodged and breach of contract lodged a civil claim on the Environment and Land Court. The civil claim was ELC Suit No.1252 of 2013 lodged on 16th October 2013 (**"the ELC Case"**)
10. While the ELC Case was pending the 3rd Respondent on or about 17th August 2015 also lodged a complaint with the 1st Respondent. The Petitioners were summoned to appear before the 1st Respondent's investigating Officers. It is the process of such investigations by the 1st Respondent and a presumed intended prosecution that prompted the instant Petition.
11. The Petitioners not only moved the court through the substantive Petition but also sought to have the court issue interlocutory conservatory orders to restrain the 1st and 2nd Respondent from

- investigating or prosecuting the Petitioners.
12. With the parties' consent the interlocutory application was dispensed with and the Petition fast tracked for hearing. In the meantime the court ordered the 1st and 2nd Respondents not to prosecute the Petitioners.

The Petitioners' case

13. The Petitioners case is contained in the Petition and the three affidavits sworn by the 1st and 2nd Petitioners.
14. The Petitioners contend that the 3rd Respondent who had failed or neglected to heed a transaction completion notice had opted to move the court through the ELC Case seeking damages from the Petitioners. The Petitioners also further contend that the 3rd Respondent defamed the 1st Petitioner through a letter dated 14th July 2015 and directed to the 1st Petitioners employer, resulting in the Petitioners also threatening to sue the 3rd Respondent in defamation.
15. The Petitioners contend that the 3rd Respondent's actions were to simply put pressure on the Petitioner to fully refund the amounts the 3rd Respondent had paid as part of purchase price.
16. The Petitioner aver that whilst the ELC Case was still pending determination, the 3rd Respondent, again with a view to pressurizing the Petitioners into paying the 3rd Respondent, lodged a complaint with the 1st Respondent. The intent was also to have the 1st and 2nd Petitioners arrested and arraigned in court.
17. The Petitioners assert that the 1st Respondent has acted with malice.
18. In particular, the Petitioners point out that the 1st Respondent's refusal to take cognizance of the 1st Petitioner's statement and also the 1st Respondent's action of obtaining court orders to investigate the 3rd Petitioners' bank accounts are acts of malice, in the circumstances of the case.
19. The Petitioners contend that by proceeding with a parallel criminal process, the intention is to put pressure on the Petitioners to compromise the ELC Case. In these respects, it is contended that the Petitioners' right to fair trial is being violated. Such action it is contended by the Petitioners is equivalent to an abuse of the process of the court.
20. The 1st and 2nd Petitioners also contend that their right to human dignity has been violated by the Respondents criminalizing a civil dispute and branding the 1st and 2nd Petitioners as criminals.
21. The Petitioners add that the threats of arrest and incarceration are also inhuman and degrading contrary to Article 29(f) of the Constitution. Further it is stated that the Petitioners' right to privacy has been infringed contrary to Article 31 of the Constitution and that the 1st Petitioners right to employment is also in jeopardy in the event of the 2nd Respondent preferring criminal charges against the 1st Petitioner.
22. The Petitioners state that the criminal investigation process is being used in bad faith and that a prudent and cautious prosecutor must demonstrate that there is a reasonable and probable cause for mounting a criminal prosecution before proceeding to mount one. In the instance case, there was no reasonable and probable cause with the result that the ongoing investigation and the intended prosecution to be stalled and the 1st Respondent's officers investigated for not having exercised any prudence or caution.

1st and 2nd Respondents' case

23. The 1st and 2nd Respondents' case is contained in the affidavit filed on 1st October 2015 and sworn by Daniel Njuki a police officer attached to the Central Police Station Nairobi.
24. The 1st and 2nd Respondents state that the Petitioners' rights under the Constitution have not been violated. The 1st and 2nd Respondent state that the 3rd Respondent lodged a complaint on or about 14th August 2015 with the 1st Respondent alleging that an offence of obtaining by false pretences had been committed by the Petitioners. The 1st Respondent officers duly and actively interviewed the 1st and 2nd Petitioners in the presence of their lawyer and the 3rd Respondent with a view to

- investigating the complaint further. The 1st Respondent had also recorded a statement by the 3rd Respondent.
25. Further, the 1st Respondent applied for and obtained court orders to access the 3rd Petitioners bank account with CFC Stanbic Bank and on 5th September 2015 the said bank availed the relevant bank account statement. However, before the 1st Respondent could complete the investigations the Petitioners moved to court.
26. The 1st and 2nd Respondents contend that the Petition is premature as investigations are yet to be completed. The 1st and 2nd Respondents also assert that they were merely exercising their constitutional and statutory mandates in investigating the complaint lodged by the 3rd Respondent and the instant Petition is intended to intimidate and prevent such process.
27. The 1st and 2nd Respondents finally contend that the mere existence of or pendency of civil proceedings is not a bar to any criminal proceedings being instituted and prosecuted.

3rd Respondent's case

28. The 3rd Respondent swore and filed a long winded affidavit on 23rd October 2015 stating his case. The case may be recapped as follows.
29. The 3rd Respondent also contends that on the facts before the court the Petition is premature and an abuse of the process. The 3rd Respondent states that none of the Petitioners' rights under the Constitution have been violated.
30. The 3rd Respondent outlines certain key facts to this case. They are that the 3rd Respondent and the Petitioners ("the transaction parties") got commercially engaged in 2011. The 3rd Respondent was convinced to purchase from the 3rd Petitioner a property known as Unit 7 which was to be constructed as LR No. 12767. The unit was to be constructed in accordance with the building plans dated June 2010 which the 3rd Respondent had inspected. The construction was to commence on 5th March 2012 and be completed by September 2013. The agreed purchase price was Kshs.33,000,000/=. It was payable in instalments and the 3rd Respondent was expected to initially pay the equivalent of 55% thereof. The transaction parties executed the Agreement. The 3rd Respondent paid to the Petitioners Kshs.17,250,000/= reflecting approximately 52.25% of the purchase price. These facts were not resisted by Petitioners.
31. The 3rd Respondent then states that the Petitioners never commenced the construction either in time or at all. The 3rd Respondent also states that the Petitioners never surrendered to the 3rd Respondent a counterpart copy of the executed Agreement. The 3rd Respondent also states that the Petitioners altered the building plan including making a reduction to the plinth size of Unit 7. The 3rd Respondent finally states that the Petitioner unilaterally altered the Agreement including the covenant relating to the completion date.
32. According to the 3rd Respondent, he demanded answers and when the Petitioners or the agents gave no satisfactory answers, the 3rd Respondent sought a refund of the amounts he had paid towards the purchase price.
33. Events then moved pretty quickly. When no refund was made but instead the 3rd Petitioner insisted on forfeiting a portion of the purchase price, the 3rd Respondent filed an ordinary civil claim; the ELC Case. Then, later as a law abiding citizen, the 3rd Respondent states that he also reported the case to the police as the 3rd Respondent believed that there was fraud and deceit on the part of the Petitioners. The 3rd Respondent contends that it was his duty to report crime and he violated no rights of the Petitioners.
34. Finally, it is also the 3rd Respondents case that the 1st and 2nd Respondents are independent offices empowered to ensure law and order and further help deter crime in Kenya and that it is in the public interest that the 1st and 2nd Rare let free to deal with fraudulent characters generally. The 3rd Respondent also asserts that fraudulent acts can be the basis for both civil and criminal cases.

Arguments

35. The Petition was argued by way of oral and written submissions on 9th November 2015. Mr. Allen Gichuhi appeared for the Petitioners while Mr. Gitonga Muranga urged the 1st and 2nd Respondents case. The 3rd Respondent's case was argued by Mr. Ouma.

Petitioners' submissions

36. The Petitioners, foremost, submitted that the facts as set out in the Petition have not been controverted by 1st and 2nd Respondents and consequently there was prove of violation of rights. Then the Petitioners submitted that the 3rd Respondent had perjured himself by stating that the 1st Petitioner is the one who introduced him (3rd Respondent) to the project. It was then submitted that there was no privity of contract between the 1st and 2nd Petitioners of the one hand and the 3rd Respondent.
37. It was then urged that the 3rd Respondent having filed a civil claim against the 3rd Petitioner, the 3rd Respondent is also invoking the criminal justice system was indeed simply abusing the same and was intent in using the same for his own means which was to secure payments of a civil debt.
38. In any event, counsel continued, the 1st and 2nd Respondents could not investigate the alleged offence of obtaining money by false pretences when the complaint made was based on a lie that the 3rd Respondent had no formal sale agreement. Finally, the Petitioner submitted that the issues raised by the 3rd Respondent are all pending for determination in ELC Case.
39. The Petitioners' counsel made reference to various decided cases. In particular the court was urged to take particular note of the decision in the case of **Investment & Mortgage Bank Limited –v- Commissioner of Police and 3 others [2013] eKLR** where the court stopped the police from investigating a civil dispute that was pending in court and restated the courts' inherent powers to stop criminal proceedings where appropriate. Particular reference was also made to the cases of **Jared Benson Kangwana –v- Attorney General HCCC No. 446 of 1995 (unreported)** and **David Mathenge Ndirangu V- Director of Public Prosecution & 3 others [2013] eKLR**.
40. Both stood for the proposition that criminal investigation or criminal prosecution should not be permitted by the court when their purpose is to exert pressure on the party to a civil claim to submit to judgment or forego a dispute. The case of **Musyoki Kimanthi -v- Inspector General of police and others [2014] eKLR** was also referred to advance and support the same proposition.

1st and 2nd Respondent's submissions

41. Mr. Muranga, counsel for the 1st and 2nd Respondents, submitted that the Respondents had acted in good faith pursuant to the powers conferred by the Constitution. Outlining how the 1st and 2nd Respondent work, counsel stated that the Respondents had an obligation to look into any complaint once it was made and investigate the same. Counsel added that the investigations were still ongoing and the Petitioners coming to court amounted to interference with the Respondents' work.
42. Mr. Muranga further submitted that mere existence of the ELC Case was not sufficient to bar the investigations or prosecution of the Petitioners. Public interest, counsel continued, dictated that crime be investigated once reported. Counsel finally submitted that the prayer to quash the magistrate's order was an abuse of the process as the Petitioners ought to have filed a judicial review application instead.
43. Counsel referred the court to the cases of **R. -v- Monopolies and Mergers Commission Ex parte Argyll Group PLC [1986] 1 WLR 763** and **Re Bivac International SA Bureau Veritas [2005] 2 EA 45** for the proposition that in exercising its discretion whether or not to grant stay of a criminal justice process the court had to take into account the needs of good administration and in the instant case justice demanded that the process be left to continue. Counsel also referred the court to the case of **Douglas Maina Mwangi V- D.P.P. & another [2013] eKLR** in support of the submission that the Director of Public Prosecutions is an independent office who exercises independent judgement and who ought not be interfered with unless it was shown that the exercise

- of such judgement is contrary to the Constitution and in bad faith.
44. Mr. Murunga concluded his submissions by stating that the Petitioners had not proved that the investigations were a threat to the rights of the Petitioners.

3rd Respondent's submissions

45. Mr. Ouma for the 3rd Respondent associated himself with the submissions made on behalf of the 1st and 2nd Respondents.
46. Counsel then noted that the 3rd Respondent had good reason to lodge a complaint with the 1st Respondent on the Petitioners' conduct. Counsel also submitted that the Petitioners had simply "*thrown around Articles of the constitution without showing how they were violated.*" Instead counsel stated that Articles 244 and 245 of the Constitution compelled the 1st Respondent to ensure that law and order was maintained while Article 157 gave the 2nd Respondent the right to carry out independent investigations then decide whether or not to institute criminal proceedings.
47. Mr. Ouma referred the court to various decided cases. Particular reference was made to the case of **R –v– Attorney General and 4 Others, Ex Parte Kenneth Kariuki Githii [2014]eKLR** for the proposition that the court should not usurp the constitutional mandate of the Director of Public Prosecutors to investigate and undertake prosecutions and also for the proposition that the fact that an applicant claims to have a good defence to criminal proceedings should not entitle one to stay or prohibition of the proceedings. Counsel also made specific reference to the case of **R. v Commissioner of Police and Another, Ex parte Erick Mwirigi Mbaabu [2014] eKLR** where it was held that the concurrent existence of criminal proceedings and civil proceedings is, ipso facto, not 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. Counsel stated that the Petitioners had not shown that to be the case in the instant Petition.

Petitioners' Rejoinder

48. In a brief rejoinder, Mr. Kigata who appeared with Mr. Allen Gichuhi for the Petitioners maintained that the court had jurisdiction to stay investigations or prosecution where abuse was shown and in the instant case the abuse was patent.

Discussion and Determination

49. Having considered the parties' respective arguments with the pleadings in the background, I am satisfied that the main question for determination in this Petition is whether the investigations being undertaken by the 1st Respondent violate the Petitioners' rights and freedom as guaranteed by the Constitution. It being noted that there is yet no decision on whether or not the Petitioners ought to be arraigned in court and charged with criminal conduct, a determination of the question as to the legality and constitutionality of the investigations being undertaken will also determine the issue of the intended prosecution.
50. In determining the identified question, the flowing related issue is also whether the Petitioners' have demonstrated violation of their rights or threats to violate their rights under Article 29(f), 31 and 50 of the Constitution. Of course, the burden of proving violation or threat of violation is upon the Petitioners: See **Anarita Karimi Njeru Vs- Republic (1976 – 80) I KLR 1272**. The Petitioners must also demonstrate the manner in which the Respondents have violated their rights: see **Matiba v Attorney General [1990] KLR 666**.
51. The Petitioners' complaints as can be understood from the Petition and the supporting affidavit is that subjecting the 1st and 2nd Petitioners to investigation and arrest or incarceration amount to inhuman and degrading treatment contrary to Article 29 (f) of the constitution. Secondly, it is the Petitioners' view that attempts to investigate the purely private and civil transaction between the 3rd Respondent and the 3rd Petitioner which is the subject of civil litigation in the ELC case would also violate the Petitioners' right to fair trial contrary to Article 50 of the Constitution. Finally it is urged that in the 1st Respondent obtaining orders to investigate the 3rd Petitioner's bank accounts, the same violated the Petitioners' rights to privacy contrary to Article 31 of the Constitution.

52. It was the Petitioners case that the basis of the investigation are flawed and any consequent results which in any event would be a nullity would only assist in violating the Petitioners rights as the 1st and 2nd Petitioners would be arrested and incarcerated on basis of such a flawed investigatory process. The Petitioners particularly attacked the 3rd Respondent for lodging a complaint on the basis of an untruth that the 3rd Respondent had dealt with the 1st Petitioner and further on the basis of pre contractual documents.
53. For starters, the 1st and 2nd Respondents have powers to investigate alleged criminal offences. Such powers are obtained under the Constitution and in particular Articles 157(4) and 245(4) of the Constitution. The powers to investigate may also be said to be obtain under Article 252(1) (a) of the Constitution, which is to the effect inter alia, that each holder of an independent office may conduct investigation of its own initiative or on a complaint made by a member of the public. There is no doubt that the offices of the Director of Public Prosecutions as well as of the Inspector General of Police are Independent offices outlined in and protected by constitutional provisions.
54. Further, the National Police Service which consists of the Kenya Police Service and the Administration Police Service: See Article 243(2) of the Constitution is under the independent command of the 1st Respondent. Pursuant to the provisions of Article 243 (4), the National Police Service Act (Cap 84) has been legislated and the statute has under Section 24, detailed the various functions of the Kenya Police Service. The functions include but are not limited to maintenance of law and order, protection of life and property, investigation of crimes, collection of criminal intelligence, prevention and detection of crime as well as apprehension of offenders. Consequently, investigation of crime is one of the key functions of the 1st Respondent both under the Constitution and the relevant statute.
55. The Office of Director of Public Prosecutions Act, No. 2 of 2013 on the other hand too, and in furtherance of Article 157 (12) of the Constitution, has clearly spelt out the powers of the 2nd Respondent in investigating any allegation of criminal conduct. The 2nd Respondent also exercises independently the state powers of prosecution: See Article 157(6) of the Constitution.
56. A closer reading of both the National Police Service Act as well as the Office of the Director of Public Prosecutions Act and Articles 157 and 245 of the Constitution would reveal that the Kenya Police Force and by extension the 1st Respondent have the mandate to investigate criminal activities or conduct. Such investigations are to be undertaken under no other persons directions save for the Director of Public Prosecutions who may issue directions: see Article 157(4). Such investigations may be voluntarily initiated by the police force or upon prompting by a member of the public through a complaint or a report but must not be influenced in any manner. Such investigation too must be undertaken within the confines of the Constitution as well as with statutory provisions and limitations: see for example Article 244 (c) of the Constitution and generally Part VII of the National Police Service Act (Cap 84).
57. The 1st and 2nd Respondents have a constitutional compulsion to investigate crime but as the compulsion has a constitutional underpinning where it is abused or performed contrary to constitutional or statutory provisions then the court has powers under Articles 23 and 165(3) (d) (II) of the Constitution to intervene. The court must however be reluctant to interfere where any constitutional organ or office is undertaking a Constitutional compulsion: see **Kenya Commercial Bank Ltd & 2 Others v Commissioner of Police & Another HCCP No. 218 of 2011[2013]eKLR**.
58. It is evident consequently that investigation of crime has a constitutional underpinning with proper statutory structures. It is to ensure that persons are not simply dragged to court and charged with offences only to turn out that there was no basis for the prosecution in the first place. The mere fact therefore of an investigation being undertaken by the 1st Respondent would not itself be unconstitutional and a party must prove much more than the investigation process alone. As was stated by Ngugi J in **Peter Ngaki Njagi Vs. Officer Commanding Station (OCS) Kasarani Police Station, and others NBI HCCC No. 169 of 2012 [2013] eKLR**

“(12).....an investigation into alleged commission of an offence does not amount to violation of a constitutional right. Indeed, neither does arrest and prosecution, for those are all part of the criminal justice system which is sanctioned by the Constitution.”

59. But the fact that it is a constitutional compulsion does not also equate the position that investigations will be conducted without any basis.
60. Where there is no basis for the investigations to be commenced or conducted, then in my judgment abuse of process or powers of investigation may be presumed and ultimately deduced. The 2nd Respondent or the 1st Respondent for that matter ought to be satisfied that there is reasonable ground to believe that criminal conduct or activity has taken or is about to take place. Where consequently it is demonstrated or shown to the court that on the facts as laid before it no reasonable person would deduce that that an offence was committed or is likely to be committed then in appropriate circumstances the court may intervene.
61. The Petitioners have attempted to demonstrate exactly that. Submissions were made to the effect that the 1st Respondent proceeded to commence investigations on the basis of falsehoods peddled by 3rd Respondent that there was no sale agreement and further even after realizing that there was no privity of contract between the first two Petitioners and the 3rd Respondents. It was stated that the 1st Respondent did not contest these facts and consequently the same must be used against them.
62. I am unable to agree.
63. The facts do not paint the same picture. In so much as the court must refrain from deducing and introspecting facts, in my view, I can see no fault in the 1st Respondent having commenced or instituted the investigations even at the behest of the 3rd Respondent. Foremost, the 1st Respondent was enjoined to consider and determine whether the 3rd Respondents complaint merited an investigation: **R Vs. Commissioner of Police and Another Ex parte Michael Monari & Another (2012) eKLR**
64. A decision was arrived at that it did. It cannot be said that no reasonable person in the circumstances could have reached a contrary decision. The Petitioner too did not attempt to so argue.
65. Secondly it is not disputed that the Petitioners never surrendered a copy of signed agreement to the 3rd Respondent. I did not have the benefit of seeing the initial statement of the 3rd Respondent to the 1st Respondent's officer but I have no doubt that the statement could only allude to facts as they were, including the that that the 3rd Respondent did not have with himself a copy of the signed sale Agreement.
66. The Petitioners also contended that the criminal process was being used in a manner that is civil. The assertion was that it was being used to assist the 3rd Respondent to bully the Petitioners into submission and to have the Petitioners settle the ELC Case. The Petitioners stated that this was evident in the 3rd Respondent conduct where the 3rd Respondent had even attempted to influence the 1st Petitioners employer.
67. There is no doubt that the criminal justice process should never be used for any other reason than to secure law and order and to fairly bring criminals to account for their activities. Where the process is being used to achieve another goal the court is then entitled to intervene and stay the process: See **Kuria & 3 others Vs. Attorney General [2002] 2 KLR 69** and also **Jared Benson Kangwana -v- Attorney General HCCC No. 446 of 1995 (unreported)** .
68. In the case of **R. v Chief Magistrates' court Mombasa Ex parte Ganijee and Another (2002) 2 KLR 703** it was held that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a

fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

69. Pausing there it is to be noted, in my judgment, that the courts discretion to interfere with the criminal justice process and actually stay the process is not an indictment of the police force. Neither is it punishment nor discipline being meted to the police force or to the Director of Public Prosecutions where the proceedings have been instituted. It is also not a disapproval of the conduct of the Director of Public Prosecutions or the police force. Rather, the interference if any, is intended to assist in upholding constitutional values and to ensure that fair treatment is accorded to all.
70. The Petitioners also state that the criminal investigations were raising the same issues already being deliberated upon in the ELC case. The Petitioners held the view and so argued that their rights to a fair trial under Article 50 would be compromised and violated. The Respondents take was that concurrent civil and criminal proceedings are perfectly in order.
71. The starting point is Section 197A of the Criminal Procedure Code expressly provides for situations where criminal and civil proceedings may run concurrently. That is not contested by either party. It must also not be contested, in my view, that where it is impossible to give an accused person a fair trial when the two proceedings are running concurrently, it is necessary to protect the integrity of the criminal justice system by the court's intervention and stay of the criminal proceedings.
72. Once again, the burden is on the Petitioner to demonstrate and show how his right to a fair trial will be prejudiced.
73. Reviewing the instant case, it is clear that the investigations are not complete. The 1st Respondent is yet to make a decision to recommend the Petitioners prosecution. The 2nd Respondent himself is yet to receive such recommendations and himself determine whether prosecution would be a proper avenue. In my view, the Petitioners are overtly too speculative. As the Petitioners have not suggested that the investigations have interfered or violated their rights before the prosecution stage especially the rights with Article 49, I am unable to find any violation or threatened violation of the Petitioners constitutional rights. On the facts too before me, I am unable to find any evidence to show that in lodging a complaint with the 1st Respondent, the 3rd Respondent was driven by other reasons other than to report what he believed to have been criminal activities and conduct still yet to be confirmed by the 1st Respondent.
74. I have already held that in conducting investigations, the 1st Respondent must operate within the confines of law. The 1st Respondent must where necessary obtain warrants: see **Section 118** of the **Criminal Procedure Code (Cap 75)**. He must obtain court orders. He must issue summons for parties suspected of engaging in criminal activities or prospective witnesses to appear before the Kenya Police Service for interrogation. Suspects must be informed of their rights under Article 49, even if they are not to be placed under arrest.
75. The Petitioners have contended and argued that in the 1st Respondents accessing the 3rd Petitioners bank accounts there was interference with their right to privacy guaranteed under Article 31 of the Constitution. It would be important foremost to point out that the rights under Article 31 is not one of the absolute rights under Article 25 of the Constitution of Kenya. The Petitioners have indeed acknowledged that the 1st Respondent did not simply trespass on the 3rd

Petitioners bank account but only accessed the same following a court order : see S. 64 of the National Police Service Act.

76. I did not hear the Petitioners complain that the Order by the court was irregularly obtained. I did not hear the Petitioners attempt to challenge the court order that it was obtained on the basis of some undisclosed material facts. Further, it is factually on record that the 1st Respondent obtained the court orders regularly and the statements of the bank accounts were thereafter surrendered to the 1st Respondent without the court order being challenged. The court order was not unlawful and it was not demonstrated otherwise. The 1st Respondent was also statute bound under section 51 (1) (b) of the National Police Service Act to obey and execute the same. The process of applying for and obtaining a court order was within the wider investigatory process.
77. I am unable to fault the 1st Respondent or to find for the Petitioners that their right under Article 31 was violated.

Conclusion

78. I come to the conclusion that the Petitioners have not established to the required standard that their rights under the Constitution have been violated. The parties spent a substantial portion of their pleadings as well as submissions trying to show that one was criminally culpable or alternatively that there was no criminal culpability but only a simple land transaction dispute already being litigated before a competent court of law. I am satisfied that it is not the business of the court to identify the points of investigation. Neither is it the business of this court to wander into the merits and demerits of any intended or prospective prosecution. As was stated in **R Vs. Commissioner of Police and Another Ex parte Michael Monari & Another (2012) eKLR**

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges.”

79. I would add that likewise the Director of Public Prosecutions is enjoined to undertake and institute prosecution of offenders once there is sufficient evidence. It is not for the court to determine the sufficiency of the evidence for the prosecutor and direct whether or not the prosecution should be instituted or undertake, that is for the Director of Public Prosecutions and the trial court. Where the Director of Public Prosecutions fails to act he is guilty of ignoring constitutional compulsions as well as the societal interest that those accused of crime are fairly adjudged by a court of law.
80. The investigations in the instant case are yet to be completed. I am not for a moment persuaded that the Petitioners will be prejudiced in any way. I note too that there are adequate statutory safeguards and which must be adhered to with a view to ensuring the parties rights are protected.

Disposition

81. The reserved question as to whether or not the Petitioners rights under Article 29, 31 and 50 have been infringed has to answered, in the circumstances of this case, in the negative.
82. The Petition consequently fails and is dismissed.

Costs

83. Costs ordinarily follow the event with discretion to the court to direct otherwise if the successful party is guilty of some sort of misconduct relating to the litigation: see **Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd [1951] 1 All E R 873,874**.
84. I see no reason why the Respondents should be denied costs. The Petitioners will pay the costs of the dismissed Petition to the Respondents. It is so ordered.

Dated, delivered and signed at Nairobi this 15th day of December 2015

J.L.ONGUTO

JUDGE