



REPUBLIC OF KENYA



**Musembi & 2 others v Chief Magistrate Court, Milimani Law Courts &
12 others; Owino & 5 others (Interested Parties) (Environment & Land
Petition E019 of 2013) [2025] KEELC 4242 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4242 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E019 OF 2013**

OA ANGOTE, J

MAY 29, 2025

**IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29,
31, 48, 49, 50, 53 AND 159 OF THE CONSTITUTION OF KENYA 2010.**

**IN THE MATTER: THE CONTRAVENTION OF THE FUNDAMENTAL
RIGHTS AND FREEDOMS OF THE PETITIONERS UNDER ARTICLE
25, 27, 28, 40, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: RULES 4, 23 AND 24 OF THE CONSTITUTION
OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS) (PRACTICE & PROCEDURE) RULES, 2013**

AND

**IN THE MATTER OF: SECTION 4, 6 AND 12 OF THE
FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015**

BETWEEN

CISSY KALUNDE MUSEMBI 1ST PETITIONER

PRISCA NZULA WAMBUA 2ND PETITIONER

ANTONY MASENO ANABAKA 3RD PETITIONER

AND

THE CHIEF MAGISTRATE COURT, MILIMANI LAW

COURTS 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

**THE DIRECTOR, DIRECTORATE OF CRIMINAL INVESTIGATIONS 3RD
RESPONDENT**



THE HON ATTORNEY GENERAL	4 TH RESPONDENT
DAVID NJENGA SAMSON KURIA	5 TH RESPONDENT
HENRY NJOROGE NJENGA	6 TH RESPONDENT
SAMUEL NJUGUNA CHEGE	7 TH RESPONDENT
HORIZON HILLS LIMITED	8 TH RESPONDENT
AUREUM LIMITED	9 TH RESPONDENT
JIMMY RICHARD WANJIGI	10 TH RESPONDENT
IRENE SINZA WANJIGI	11 TH RESPONDENT
NICOLAUS OSURI OTIENO	12 TH RESPONDENT
THE CHIEF LAND REGISTRAR	13 TH RESPONDENT

AND

CATTWRIGHT JACOB OWINO	INTERESTED PARTY
VALENTINE JELIMO KIBIRE	INTERESTED PARTY
LAWRENCE NJOGU MUNGAI	INTERESTED PARTY
KEPHA ODHIAMBO OKONGO	INTERESTED PARTY
MARTIN ESAKINA PAPA	INTERESTED PARTY
KENROID LIMITED	INTERESTED PARTY

JUDGMENT

Introduction

1. Vide a Petition dated 2nd May 2023, the Petitioners have sought the following reliefs:
 - i. A declaration be and is hereby issued that the Respondents have violated the Petitioners' rights guaranteed under Articles 25, 27, 28, 40, 47 and 50 of *the Constitution*.
 - ii. A declaration be and is hereby issued that the 2nd, 3rd, 4th and 12th Respondents have in the manner in which they have investigated, charged, prosecuted and handled complaints arising from ownership and acquisitions by the 1st Petitioner of land known as Land Reference Number 1870/11/200 IR No. 65800 and in acting in manner that directly interferes with integrity of proceedings Milimani ELC Case No. 100 of 2019; Kenroid Limited v Aureum Limited & 8 Others and ELC Number 227 of 2019; Cissy Kalunde Musembi v Aureum Limited, Chief Land Registrar and the Attorney General violated the provisions and spirit of Article 10 of *the Constitution*.
 - iii. A Declaration be and is hereby issued that the proceedings in Nairobi Criminal Case No. E1264 of 2021: Republic v Cissy Kalunde Musembi and Nairobi Criminal Case No. E289 of 2023; Republic v David Njenga Samson Kuria & 9 others are unfounded, malicious, oppressive and as against the Petitioners and therefore unconstitutional.



- iv. Spent- An order of prohibition prohibiting the Respondents from continuing with the prosecution of the Petitioners in Nairobi Criminal Case No. E1264 of 2021: Republic v Cissy Kalunde Musembi and Nairobi Criminal Case No. E289 of 2023: Republic v David Samson Kuria & 9 others pending the hearing and determination of Nairobi ELC Case No. 100 of 2019: Kenroid Limited v Aureum Limited & 8 others and Nairobi ELC Case No. 227 of 2019: Cissy Kalunde Musembi v Aureum Limited, Chief Land Registrar.
 - v. An order of Certiorari does issue quashing the decision to charge and institute criminal proceedings against the Petitioners and to quashing the charge sheets in Milimani Chief Magistrate Criminal Case No. E1264 of 2021: Republic v Cissy Kalunde Musembi and Milimani Chief Magistrate Criminal Case No. E289 of 2023: Republic v David Njenga Samson Kuria & 9 others.
 - vi. An order of prohibition directed to all Respondents prohibiting them from reopening or purporting to reopen, bringing, instigating, instituting or carrying out any criminal proceedings against the Petitioners in connection with the sale of the suit property better described as Land Reference Number 1870/ 11/200 IR No. 65800.
 - vii. Damages for violation of the Petitioners' fundamental rights and freedoms.
 - viii. The Respondents be and are hereby directed to bear the costs of this Petition.
 - ix. Such other orders that this Honourable Court may deem expedient to meet the ends of justice.
2. The Petitioners have filed this Petition, challenging their prosecution in Nairobi Chief Magistrate Criminal Case No. E289 of 2023 Republic vs David Njenga Samon Kuria & 9 others, in which the complainant is Aureum Limited, as well as Nairobi Chief Magistrate Criminal Case No. E1264 of 2021: Republic vs Cissy Kalunde Musembi, where the complainant is Horizon Hills Limited C. 110776.
 3. It is the Petitioners' case that the investigation and the decision to prosecute them by the DCI and the DPP in the two criminal suits is not impartial as it is being used to further the determination of two civil cases ELC Case No. 100 of 2019: Kenroid Limited vs Aureum Limited & 8 others and ELC Case No. 227 of 2019 Cissy Kalunde Musembi vs Aureum Limited, Chief Land Registrar and the Attorney General, which are still pending in this court.
 4. These civil suits concern the ownership of Land Reference Number 1870/11/200 IR No. 6500 measuring 0.3314 Ha situated at General Mathenge Road, Westlands Nairobi County (the Suit Property).
 5. The Petitioners assert that the 1st Petitioner purchased the suit property from the 9th Respondent after undertaking the necessary due diligence; that the 1st Petitioner was informed that the 6th Interested Party, Kenroid Limited, had lodged a complaint with the Chief Land Registrar in respect to the suit property and that the 6th Respondent later filed Nairobi ELC Case No. 100 of 2019, claiming ownership of the suit property and that the 1st Petitioner subsequently filed Nairobi ELC 227 of 2019 also laying claim to the suit property.
 6. The 1st Petitioner deponed that she paid a deposit for the suit property; that the balance of the purchase price of Kshs 128 million is yet to be paid as she await the resolution of the civil suits filed before making the payment and that Horizon Hills Limited lodged a complaint at the DCI for withholding the remainder of the purchase price.



7. The 1st Petitioner deposed that she sought the help of the DCI to investigate the authenticity of the grants held by the parties; that the said investigation were carried out by Detective Corporal Nicolaus Osuri who prepared a report in favour of Aureum Ltd, the 9th Respondent, and that detective Osuri was biased, incompetent and unprofessional.
8. It is the Petitioners' case that they filed two complaints against the detective at the ODPP's office and at the DCI and following the complaints, the file was allocated to Patrick Khaemba, a senior investigating officer to review the same and that in his investigations, detective Khaemba found that detective Osuri had concealed crucial information with an intention of helping Aureum Ltd, the 9th Respondent, steal the suit property from the 1st Petitioner.
9. The Petitioners contend that the 1st, 2nd, 3rd, 4th and 13th Respondents, who are state and public officers, are bound by the national values and principles of governance under Article 10 of *the Constitution* and that however, by their actions, they denied them natural justice.
10. They also argue that the institution, continuation of criminal investigations and their subsequent prosecution by the Respondents despite all the overwhelming evidence to the contrary is a blatant violation and limitation of their right to a fair trial in contravention of Article 25(c) of *the Constitution*.
11. It is the Petitioners' case that the 1st, 2nd, 3rd and 13th Respondents have irreparably infringed upon their entitlement to fair administrative action as the institution and continuation of criminal investigations and their subsequent prosecution without any credible evidence and solely at the behest of the 5th-12th Respondents is a violation of their right to fair administrative action in contravention of Article 47 of *the Constitution*.
12. The Petitioners assert that the 3rd Respondent has contravened Article 244 of *the Constitution* which sets out the objectives of the National Police Service to include prevention of corruption, promote and practice transparency and accountability and to comply with constitutional standards of human rights and fundamental freedoms.
13. It is further asserted that the 1st Petitioner had legitimate expectations that her rights to peaceful and quiet enjoyment of the suit property would be protected as guaranteed by Article 40 of *the Constitution* and Sections 24 and 25 of the *Land Registration Act*, and that she would be afforded procedural fairness and protected from arbitrary arrest, detention and loss of property.
14. Through her supporting affidavit, the 1st Petitioner deposed that in 2018, she acquired legal interest in the suit property, Land Reference Number 1870/11/200 IR No. 65800 measuring 0.3314Ha situated at General Mathenge Road, Westlands from the 9th Defendant at a consideration of Kshs. 220,000,000/-.
15. She states that the firm of Wambua & Maseno Advocates LLP undertook reasonable due diligence by conducting a search at the Land Registry on 18th April 2018; that the search confirmed the existence of the suit property and that the land was owned by Horizon Hills Limited. It is the 1st Petitioner's case that the existence of Deed Plan No. 17545 confirmed it to be genuine; that several searches were also conducted at the Registrar of Companies between 2018 and 2019 which confirmed the existence of Horizon Hills Limited registration number C.110776, whose directors are the 5th, 6th and 7th Respondents and that the Director of National Registration of Persons through a letter dated 17th July 2018 confirmed that the national identity cards of the directors were genuine.
16. It is the 1st Petitioners case that she thereafter paid Kshs. 30 million towards the purchase price on 14th September 2018 via RTGS to the law firm's bank account; that she made a further sum of Kshs.



- 24 million on 19th November 2018 to the law firm's account and the last two instalments of Kshs. 25 million and Kshs. 20 million in cash to the law firm and that whereafter, her advocates issued a professional undertaking to Horizon Hills Limited in respect to the balance of the purchase price, being Kshs. 128 million upon completion.
17. It is the deposition of the 1st Petitioner that she paid stamp duty of Kshs. 14 million and registered a transfer dated 7th November 2018 in the grant as entry No. 8 and was later granted vacant possession in December 2018.
 18. According to the 1st Petitioner, it was later, while she undertook renovations on the suit property, that Jimmy Richard Wanjigi and Irene Sinza Wanjigi, the directors of Aureum Limited invaded the suit property and a fracas ensued; that she reported the incident to DCI Parklands Police Station and was informed that Aureum Ltd equally laid claim to the ownership of the property and that she subsequently received summons from the Chief Land Registrar notifying her of a lodged complaint in respect of the suit property.
 19. The Petitioners assert that while the complaint was pending before the Chief Land Registrar, on 22nd March 2019, the 6th Interested Party, Kenroid Limited, filed Nairobi ELC Case No. 100 of 2019 Kenroid Limited vs Aureum Limited & 8 others and joined the 1st Petitioner as the 9th Defendant; that Kenroid is claiming a purchaser's interest in the suit property having purchased the land from Aureum and that this suit is partially heard and is still pending before this court.
 20. The 1st Petitioner deposed that she subsequently filed Nairobi ELC No. 227 of 2019 Cissy Kalunde Musembi vs Aureum Limited, Chief Land Registrar and the Attorney General, where she laid claim to the suit property and this suit is also partially heard and is still pending hearing and determination.
 21. It is the 1st Petitioner's assertion that she remains in possession of and occupation of the suit property pursuant to the injunctive orders issued on 17th September 2019 in Nairobi ELC No. 100 of 2019, restraining the Defendants from constructing, developing, selling, leasing, transferring, mortgaging and/or in any manner whatsoever interfering with all or any part of LR No. 1870/11/200 IR Number 65800/1 pending the hearing and determination of the suit and that furthers orders were issued directing the Chief Land Registrar not to entertain any transfer or subdivision of the suit property pending hearing and determination of the suit.
 22. It was submitted that the 2nd Petitioner, due to constant harassment, threats and intimidation by the DCI officers at the behest of the directors of Horizon Hills Limited, sought a conservatory order barring her intended arrest and prosecution on account of performance of her duties as an advocate through Nairobi High Court Constitutional Petition No. 231 of 2019 Prisca Wambua vs Inspector General of Police & 2 others and that Makau J, by a ruling of 9th October 2019, restrained the DCI and the DPP from arresting, charging, intimidating, unreasonably interfering with the 2nd Petitioner's practice or in any way unreasonably interfering with the liberty of the 2nd Petitioner on account of her duties as an Advocate of the High Court of Kenya in the conveyance of the subject property.
 23. The 1st Petitioner asserts that through a letter dated 15th April 2021, her advocates requested the DCI for a copy of the Final Report on the investigations related to the suit property; that her advocate was provided with the report dated 3rd May 2021 prepared by P.M. Khayemba, which found that the 1st Plaintiff's grant is genuine while the grant in the name of Aureum was found to be a forgery and was withheld by the DCI for purposes of prosecution in criminal proceedings.
 24. In the report, it was deposed, Owino Jacob Cattwright, a Senior Lands Registration Officer at Ardhi House affirmed that he had transferred the grant in the 1st Petitioner's name on 7th November 2018



and that it was also declared that Himanshu Velji Premchand Dhodhia was the architect of the forgery scheme and the report highlighted the reasons thereof.

25. The 1st Petitioner averred that Jimmy Wanjigi, on behalf of Aureum Limited, then lodged a complaint against the 1st-3rd Petitioners, 5th-7th Respondents and the 1st-5th Interested Parties in respect to the suit property; that the DCI then arrested the 1st-3rd Petitioners, 5th-7th Respondents and the 1st-5th Interested Parties and arraigned them in court on 27th April 2023 before the 1st Respondent in Nairobi Criminal Case No. E289 of 2023 Republic vs David Njenga Samson Kuria & 9 others for several charges including conspiracy to defraud Aureum Limited contrary to Section 317 of the *Penal Code*; forgery contrary to Section 345 of the *Penal Code*, giving false information to a person employed in public service contrary to Section 129(b) of the *Penal Code* and procuring registration of land by false pretense contrary to Section 329 of the *Penal Code*.
26. The Petitioners contend that the criminal process relates to the issue of ownership of the suit property with more than four purported landowners who are using the DCI to intimidate, unleash violence and threaten or silence each other while they conspire to alienate the suit property and that the court should intervene and halt the unlawful process.
27. The 1st Petitioner deponed that the charges against her and the other Petitioners are selective, partial, discriminatory, unreasonable, an abuse of court process, abuse of constitutional and statutory powers and constitutes an illegal exercise of discretion.
28. It is her argument that the complainants in the criminal proceedings have since 2019 been afforded sufficient remedies and opportunity to air their grievances in ELC Case no. 100 of 2019 and in ELC Case No. 227 of 2019 and that procedural fairness behooved the Respondents file their document in the civil cases and counterclaim either for the suit property or the balance of the purchase price.
29. It is stated that the DCI is well aware of the ongoing cases because through a letter dated 7th April 2022, the 1st Petitioner's advocates lodged a complaint to the DPP over her malicious prosecution and called the DPP's attention to the court order issued in ELC Case No. 100 of 2019 and ELC Case No. 227 of 2019 and that the DPP however chose to continue with the criminal proceedings against her, which are motivated by mischief, mala fides and coercion to pay the balance of Kshs. 128 million. Further, it was contended, the DCI is actively participating in the pending suits in ELC Case No. 100 of 2019 and ELC No. 227 of 2019.
30. The 1st Petitioner avers that the Respondents' action of arresting, charging and prosecuting the Petitioners, whereas there are part heard cases pending before this court is in contempt of court and that the Respondents are affecting and interfering with integrity of the civil proceedings.

Responses to the Petition

31. The 2nd Respondent opposed the Petition vide Grounds of Opposition dated 29th April 2024. He contended that:
 - i. The Petition does not disclose a cause of action against the 2nd Respondent and that the 2nd Respondent acted within *the Constitution* and the law in deciding to charge the Petitioners in CMCC E1264 of 2021.
 - ii. The prayers sought are unconstitutional as they seek to prevent the Director of Public Prosecutions from exercising his mandate as provided under Article 157 of *the Constitution*.
 - iii. Under Article 157(10) of *the Constitution* as read with Section 6 of the Office of the Director of the Public Prosecution Act, 2013, the 2nd Respondent does not require the consent of any



person or authority for the commencement of criminal proceedings and in the exercise of these powers or functions.

- iv. Section 24 of the *National Police Service Act* mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed, thus the investigation and decision to charge the petitioners was constitutional.
 - v. The Petitioners have not adduced reasonable evidence to show that the proceedings in CMCC E1264 of 2021 are mounted for an ulterior motive and in bad faith and are therefore unconstitutional.
 - vi. The Petitioners must demonstrate that substantial injustice would otherwise result if the criminal suit is not stayed. They contend that the trial court is an impartial arbiter and should be given an opportunity to determine the impugned lower court matter on merit.
 - vii. The Director of Public Prosecutions made the decision to charge while having regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process as per Article 157(11) of *the Constitution*.
32. The 3rd, 4th and 12th Respondents filed a Replying Affidavit dated 5th July 2023, sworn by Detective Corporal Nicolaus Osuri Otieno, a police officer at the Directorate of Criminal Investigations and one of the investigating officers in respect of the suit property.
 33. Detective Osuri deposed that it was not true that the 1st Petitioner is the legal and registered owner of the suit property, but rather, it was the 9th Respondent, whose director was the 11th Respondent, wife to the 10th Respondent and that the 11th Respondent purchased the suit property from the previous directors of Horizon Hills Limited C. 131937 namely Mohamed Hassanali, Kaneez Noorani and Mohamed Hussein Noorani, and not the 5th, 6th and 7th Respondents.
 34. He deposed that the 2nd and 3rd Petitioners are a couple and are both advocates of the High Court of Kenya, running the law firm of Wambua & Maseno LLP Advocates, and that the criminal investigations by the 3rd Respondent revealed that the 2nd and 3rd Petitioners are facilitators of fraud through a fraudulent conveyance process to deprive the 9th Respondent of its property.
 35. He contended that the 5th, 6th and 7th Respondents have never been Directors of the 8th Respondent of certificate of Registration No. 110776 whose records at the Registrar of Companies belong to Bosorana Limited and not Horizon Hills Limited; that records revealed that they had attempted to change the name in 2014 from Bosorana Limited to Horizon Hills Limited but this was detected and that 5th in April 2018 they were assisted in computer forgery and falsification of records at the Registrar of Companies.
 36. Detective Osuri averred that the 10th and 11th Respondents are a couple holding property registered in the name of Aureum Limited, Certificate Registration No. C.131937, which name changed from Horizon Hills Limited, and that Aureum Limited paid a sum of Kshs. 154 million as the purchase price of the land parcel.
 37. He deposed that both the 10th and 11th Respondents were prosecution witnesses in Nairobi Criminal Case No. E289 of 2023 Republic vs David Njenga Samson Kuria and 9 others.
 38. Detective Osuri affirmed that DCI inquiry File No. 1 of 2021 was opened against the 12th Respondent and others under the undue influence of the Petitioners by one Jacob Muchai, a Senior Superintendent of Police (SSP) under instructions of the former Director DCI in efforts to intimidate and blackmail



- the 12th Respondent to apply for expunging of replying affidavits by the state in ELC No. 100 of 2019 and ELC No. 227 of 2019 in favour of the Petitioners, contrary to the available evidence, facts and law.
39. He asserted that the 1st Petitioner was arrested and arraigned in court by Chief Patrick Khaemba in Police Case File No. CR. 121/78/2021 Court File No. 1264/2021 pending before the Chief Magistrate's Law Courts No. 1 at Milimani, Nairobi. He denied being aware of any investigation conducted by the Internal Affairs Unit of the National Police Service as alleged by the Petitioners.
 40. Detective Osuri stated that the 5th, 6th and 7th Respondents could not transfer the suit property as all the purported conveyance records were investigated and found to be forgeries. These are the Certificate of Title LR No. 1870/II/200 IR No. 65800/1 and that the investigations revealed that there was no genuine purchase of the suit property by the 1st Petitioner.
 41. According to Mr. Osuri, the monies paid by the 1st Petitioner was a reward to the 2nd and 3rd Petitioners and the 5th, 6th and 7th Respondents on their role in trying to legitimise a fraudulent conveyance process; that the 9th Respondent through the 10th and 11th Respondents therefore had all the rights to file a complaint with the Chief Land Registrar, and that the 6th Interested Party had the right to file Nairobi ELC No. 100 of 2019.
 42. The deponent asserts that the 5th, 6th and 7th Respondents, though privy to the outcome of the investigations by the 3rd Respondent, were assisted by Detective Patrick Khaemba to file a report ref. CID/ORG/8/3/1/757/2019 and CID/ ORG/8/3/1/827/2019 dated 29/8/2019 and that the investigation report by the 12th Respondent working under the 3rd Respondent is purely based on facts, evidence and the law and was undertaken within his duties under the [*National Police Service Act*](#) and [*the Constitution*](#).
 43. He stated that Himanshu Velji Premchad Dodhia is one of the previous owners of the suit property whose transfer and Grant of Title the 1st Petitioner forged and that he is a crucial witness in the criminal case.
 44. He deponed that the investigations were conducted within the tenets of [*the Constitution*](#) and statutory law and in strict compliance with the [*National Police Service Act*](#) and that Section 193A of the [*Criminal Procedure Code*](#) allows for concurrent criminal and civil proceedings.
 45. He pleaded that the 3rd Respondent reviewed Police Case File CR 121/34/2022 Court file No. E051 of 2022 and vide a letter reference number ODPP/CAM/13/1/625 dated 4th April 2023, gave directions on withdrawal of the case under Section 87(a) of the [*Criminal Procedure Code*](#).
 46. It was his deposition that the letter directed the charging of the 1st, 2nd and 3rd Petitioners, the 5th, 6th and 7th Respondents, and the 1st, 2nd, 3rd, 4th and 5th Interested parties herein and that the 10th and 11th Respondents were to be treated as prosecution witnesses in police case file No. CR. 121/128/2023 Court File No. E289 of 2023, which has been stayed by this court pending hearing and determination of this Petition.
 47. The 11th Respondent swore a Replying Affidavit dated 30th May 2023 on behalf of the 9th Respondent and with the authority of the 10th Respondent. She deponed that she is a Director of the 9th Respondent company.
 48. The 11th Respondent contended that the Petition reek of forum shopping by the Petitioners to undermine the due process of the law and to defeat justice; that the [*Criminal Procedure Code*](#) does not bar the institution of criminal proceedings against a party merely because there are existing civil proceedings and that the prosecution of the Petitioners in the criminal proceedings will not have a



- bearing on the civil proceedings because the presiding officers will independently determine the suits before them.
49. She contended that this Petition does not meet the threshold for constitutional petitions as enunciated in the Anarita Karimi case and that the Petitioners have not demonstrated the manner in which any of their alleged rights have been violated or threatened with violation.
 50. She maintained that state investigative agencies had conducted their own investigations and had established probable cause that the Petitioners and others were culpable of criminal offences and that it was not for the Petitioners to rush to this court to stop their prosecution yet the same had been pursued within the confines of *the Constitution*.
 51. It is her argument that these proceedings are meant to undermine the due process of the law and to delay their trial, as well as the just and fair determination of the proceedings against them; that the 1st Petitioner cannot assert that she is the registered owner of the property when investigations have found that she attempted to fraudulently acquire the suit property and that the 1st Petitioner has not been able to demonstrate how she acquired the suit property and paid valuable consideration towards its acquisition.
 52. She denied that the intended prosecution of the Petitioners was discriminatory and argued that it was not upon an accused person to assert that she/he should not be prosecuted on the basis that some other person has not been prosecuted for an offense.
 53. The 1st Petitioner, through a Further Affidavit sworn on 19th July 2023, responded to the 11th Respondent's Replying Affidavit as follows: that while it is true that the *Criminal Procedure Code* does not bar the institution of criminal proceedings merely because there are existing civil suits, the exception is where investigations are meant to illegally secure the outcome of civil proceedings, as is the Respondent's objective in this case.
 54. The 5th Interested Party, Martin Esakina Papa, asserted in his Supporting Affidavit dated 16th May 2023, that in the charge sheet dated 23rd April 2023, the 3rd Respondent intended to charge him with the offence of conspiracy to defeat justice contrary to Section 117(a) of the *Penal Code*.
 55. Martin Esakina Papa swore that he is the founder of the business called Global Forensic Security Services from 2009 to date; that he is a qualified documents examiner by training, having acquired his training from the DCI Training School in 1997 and that he served in the National Police Force until 2004 when he retired and ventured into private employment to date.
 56. He indicated that in April 2019, he received a call from Prisca Wambua, the 2nd Petitioner, who confirmed that she had obtained his contacts online, and was in need of a forensic examiner to handle some work relating to some documents and that he was able to handle the assignment based on his training, skill and experience and he formerly took instructions to examine the signatures on 15 documents. He then completed a report and upon receiving payment, he issued a receipt for the fees paid by the 2nd Petitioner's law firm.
 57. He stated that he was later informed that the report had been filed in court as part of the documents comprising the 1st Petitioner's evidence in ELC No. 227 of 2019 and that he could be required to attend court as an expert witness later on and that he later came to realize that the documents were also related to ELC No. 100 of 2019.
 58. The 5th Interested Party averred that he had never been privy to any transaction with respect to the suit property and that he does not know any of the parties; that in March 2020, he received a call from Detective Nicholas Osuri that he wanted to meet him in his office over a land fraud matter he was



investigating and that he was surprised when on 8th May 2023, Detective Osuri informed him of charges against him and ordered him to appear before DCI detectives for arraignment.

59. He deposed that there are two conflicting factions within the Directorate of Criminal Investigation in the proceedings surrounding this suit property, with each faction driving separate agenda results in rival proceedings in court, in both the subordinate and superior courts, which are yet to be determined.
60. He affirmed that as an expert witness, he is qualified by his knowledge, skill, experience, training and education and that the approval of charges against him are born out of an ill-intended exercise perpetrated by Nicholas Osuri, the 12th Respondent. The Petition was canvassed through written submissions.

Submissions

61. The Petitioners' Counsel submitted that under Article 157(6) of *the Constitution*, the Director of Public Prosecution is clothed with powers to institute and undertake criminal proceedings against any person before any court, other than a court martial, in respect of any offence alleged to have been committed and that these powers are discretionary and must be exercised properly, reasonably and judiciously.
62. Counsel relied on the Supreme Court case of *Jirongo vs Soy Developers Ltd & 9 Others* [2021] KESC 32 (KLR) and the Court of Appeal case of *Commissioner of Police & Another vs Kenya Commercial Bank Ltd & 4 Others* [2013] eKLR where the courts interpreted and applied Article 157(11) of *the Constitution*.
63. Counsel also relied on the cases of *Benard Mwikya Mulinge vs Director of Public Prosecutions & 3 others* [2019] eKLR and *Thuita Mwangi & 2 others vs Ethics & Anti-Corruption Commission & 3 others* [2013] eKLR where the courts stated that the DPP must exercise his discretion within the confines of *the Constitution*.
64. The Petitioners' Counsel submitted that from the charge sheet in CMCC Case No. E1264 of 2021, it is evident that the motive behind the charges was to apply pressure and compel the 1st Petitioner to settle the balance of the purchase price despite the pendency of the ownership dispute of the suit property before this court and that this amounts to abuse of court process and warrants this court to safeguard the Petitioners' fundamental rights by quashing the criminal proceedings.
65. Counsel relied on the cases of *Thuita Mwangi & 2 Others vs Ethics & Anti-Corruption Commission & 3 Others* and *Kuria & 3 others v Attorney General* [2002] 2 KLR 69 where the court held that this court has power to prohibit the continuation of the criminal prosecution if the said proceedings are instituted for other means other than the honest enforcement of criminal law.
66. It is the Petitioners' submission that Nairobi CMCC No. E1264 of 2021 is a civil dispute without any criminal element; that the substratum of the criminal charges relates to ownership of the suit property where several people are claiming ownership and that the complainants are using the criminal proceedings to advance their civil claims regarding ownership of the suit property, which amounts to abuse of court process and abuse of the prosecutorial powers vested in the ODPP, in disregard to the provisions of Article 157(11) and Article 10 of *the Constitution*.
67. Counsel urge that the directors of Horizon Hills Limited should have counterclaimed for the suit property or the balance of the purchase price in the subsisting civil suits and that they have filed a complaint against the 1st Petitioner's advocates before the Advocates Complaints Commission, demanding they honour the professional undertaking by releasing the balance of the purchase price.



68. Petitioners' Counsel urged this court to be guided by the holding in Republic vs Chief Magistrate's Court at Mombasa ex parte Ganijee & another [2002] 2 KLR 703, where it was held that criminal charges should not be allowed to stand if their predominant purpose is to further an ulterior purpose.
69. They argued that although Section 193A of the *Criminal Procedure Code* allows for concurrent litigation of civil and criminal proceedings arising from the same issues, criminal proceedings should not be used to resolve civil disputes. Counsel sought to rely on the Court of Appeal case of Commissioner of Police & the Director of Criminal Investigation Department & Another vs Kenya Commercial Bank & 4 Others [2013] eKLR and the Supreme Court case of Jirongo vs Soy Developers Developers Ltd & 9 Others [2021] KESC 32 (KLR).
70. Counsel for the 2nd Respondent submitted that the 2nd Respondent acted within the law in making the decision to charge the Petitioners; that the prayers sought by the Petitioner are an onslaught on the 2nd Respondent's mandate and are therefore unconstitutional and that Section 193A of the *Criminal Procedure Code* provides that concurrent criminal and civil proceedings are allowed in law.
71. Counsel for the Petitioners urged that the institution of Nairobi CMCC E1264 of 2021 and Nairobi CMCC E289 of 2023 is not a violation of the Petitioners' rights and are therefore properly instituted and that this court should accordingly allow them to proceed to their logical conclusions. Counsel relied on the case of Republic vs Chief Magistrate Criminal Division & Another ex-parte Mildred Mbuya Joel [2014] eKLR.
72. The 2nd Respondent's Counsel submitted that the Petitioners' suit offends the doctrine of exhaustion, as the Petitioners have not exhausted the administrative remedies available to them when they were aggrieved by the 2nd Respondent's actions, before seeking redress from a court of law.
73. Counsel relied on the cases of Geoffrey Muthiga Kabiru & 2 others vs Samuel Munga Henry & 1756 others [2015] eKLR, Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) and Douglas Maina Mwangi vs Kenya Revenue Authority and another HC Constitutional Petition No. 528 of 2013.
74. The 2nd Respondent submitted that the prayers sought by the Petitioners could best be adjudicated before the Judicial Review Division of the High Court under Order 53 of the Civil Procedure Rules 2010, as the Petitioner is challenging the decision of the 2nd Respondent to charge the applicants that the orders of prohibition and certiorari sought by the Petitioners are a preserve of the Judicial Review Division of the High Court.
75. Counsel sought to rely on the case of Douglas Maina Mwangi vs Kenya Revenue Authority and Another HC Constitutional Petition No. 528 of 2018.
76. Counsel for the 5th Interested Party submitted that the gist of the intended charges brought against him is that he was unqualified as a forensic examiner to examine documents and make a report forensic report.
77. Counsel submitted that the offending report is an expert report comprising the opinion of the maker, meant to be tested in evidence during the hearing of the suit and in the end, the court can disregard the opinion in the report or adopt it. Counsel relied on Section 48 of the *Evidence Act* on expert opinions. They also relied on the Court of Appeal case of Mutonyi vs Republic (1982) KLR 203.
78. Counsel contended that there is no logical reason at this point to incriminate a report which has not been tested in evidence, yet the issue of ownership of the suit property is pending determination; that



- should the court be persuaded to uphold the 5th Interested Party's report, it is clear that prejudice will be occasioned to him and that from the findings of the civil suit, the criminal cases will be determined.
79. Counsel for the 9th, 10th and 11th Respondents submitted that the Petition does not meet the threshold set out in the case of *Anarita Karimi Njeru vs Republic (1976-1980) KLR 1272* and that in that case, it was held that a party seeking constitutional remedy is required to set out with reasonable precision that which is complained of, noting which constitutional provisions have been infringed and how they have been infringed.
80. Counsel urged that the Petitioners have not demonstrated the manner in which their alleged rights have been violated or threatened with violation. Counsel relied on the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR* on the need for preciseness of constitutional petitions.
81. Counsel submitted that the termination of the intended prosecution of the Petitioners would frustrate the rule of law and that the Petitioners would, at the trial, be accorded an opportunity to challenge the veracity of the evidence including whether the evidence was properly obtained.

Analysis and Determination

82. Having given careful consideration to the Petition, responses and submissions filed by the parties, the following issues arise for this court's determination:
- a. Whether this court has jurisdiction to determine this Petition.
 - b. Whether the court satisfies the specificity test set out in the *Anarita Karimi Njeru Case*.
 - c. Whether the 3rd and 12th Respondents conducted their investigations lawfully.
 - d. Whether the 2nd Respondent lawfully directed the prosecution of the Petitioners and the Interested Parties
 - e. Whether the Plaintiff's prayers should be granted.
83. This Petition concerns the criminal prosecution of the Petitioners and other parties in Nairobi Criminal Case No. E1264 of 2021 and Nairobi Criminal Case No. E289 of 2023, which they assert has been selective, discriminatory and in breach of their rights to fair administrative action and the right to a fair hearing. They also contend that the investigations conducted by the DCI and the eventual decision to prosecute them was in violation of Article 10 of *the Constitution*.
84. The Petitioners argue that there is no sufficient evidence to warrant their prosecution and that the criminal suit is not impartial because it is being used to further the determination of two civil cases ELC Case No. 100 of 2019: *Kenroid Limited vs Aureum Limited & 8 Others* and ELC Case No. 227 of 2019 *Cissy Kalunde Musembi vs Aureum Limited, Chief Land Registrar and the Attorney General*, which are still pending hearing and determination. These civil suits concern the ownership of Land Reference Number 1870/11/200 IR No. 65800.
85. ELC Case No. 100 of 2019 was filed by Kenroid Limited, the 6th Interested Party in this matter, against Aureum Limited and its directors, Horizon Hills Limited C.110776 and its directors, and Cissy Kalunde Musembi. Kenroid Limited is claiming that it purchased the suit property from Aureum Limited. It has sought for specific performance of the sale agreement between itself and Aureum Limited, a permanent injunction against all the Defendants in that suit, including the 1st Petitioner herein, from dealing with the suit property and eviction orders against the Defendant or any of the



- employees or proxies on the suit property. In the alternative, it is seeking for a refund of the deposit paid with interest.
86. The 1st Petitioner has on her part filed ELC Case No. 227 of 2019 against Aureum Limited, the Chief Land Registrar and the Attorney General, asserting that she purchased the suit property from Horizon Hills Limited C.110776 and that the claim by the 1st Defendant, previously Horizon Hills Limited C.131937 to the suit property is a product of fraud.
 87. In the said suit, the 1st Petitioner has sought for an order of permanent injunction restraining the 1st Defendant from dealing howsoever or interfering with the suit property as well as an order under Section 80 of the [Land Registration Act](#), cancelling any and all registration of titles held by the 1st Defendant over the suit property.
 88. The 1st Petitioner has alternatively sought that the Chief Land Registrar and the Attorney General pay to her the market value of the suit property as compensation.
 89. ELC Case No. 100 of 2019 and ELC Case Co. 227 of 2019 were consolidated and area at an advanced stage of hearing.
 90. This Petition is supported by the 5th Interested Party, who was also charged alongside the Petitioners in CMCC E289 of 2023 for the offence of conspiracy to defeat justice contrary to Section 117(a) of the [Penal Code](#).
 91. In his opinion, there are two conflicting factions within the Directorate of Criminal Investigation in the proceedings surrounding the suit property, with each faction driving separate agenda.
 92. According to the 5th Interested Party, as an expert witness, he is qualified by his knowledge, skill, experience, training and education and that it is only the court in the pending ELC cases that is entrusted with determining whether to admit or exclude expert testimony, and scrutiny of the proffered expert's qualifications.
 93. The 2nd Respondent asserts that it acted within [the Constitution](#) and the law in deciding to charge the Petitioners in CMCC E1264 of 2021 and that the prayers sought are unconstitutional as they seek to prevent him from exercising his mandate as provided under Article 157 of [the Constitution](#).
 94. The DPP argued that the Petitioners have not adduced reasonable evidence to show that the proceedings in CMCC E1264 of 2021 were mounted by his office for ulterior motive and in bad faith.
 95. The 3rd, 4th and 12th Respondents, on their part, argue that the investigations were conducted within the tenets of [the Constitution](#) and statutory law and in strict compliance with the [National Police Service Act](#). They also contend that Section 193A of the [Criminal Procedure Code](#) allows for concurrent criminal and civil proceedings. This argument has also been propounded by the 9th, 10th and 11th Respondents.
 96. The 11th Respondent contended that the prosecution of the Petitioners in the criminal proceedings will not have a bearing on the civil proceedings because the presiding officers will independently determine the suits before them. She states that investigative agencies had conducted their own investigations and had established probable cause that the Petitioners and others were culpable of criminal offences.

a. Whether this court has Jurisdiction to determine this Petition

97. The 2nd Respondent has challenged the jurisdiction of this court in its submissions. They contend that the prayers sought by the Petitioners could best be adjudicated before the Judicial Review Division of



the High Court under Order 53 of the Civil Procedure Rules 2010, as the Petitioner is challenging the decision of the 2nd Respondent to charge the applicant.

98. It is a well settled principle of law that jurisdiction is everything, and without it this court cannot move. In the case of Owners of The Motor Vessel “Lillian S vs Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) Nyarangi, JA stated that:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

99. Further, the Supreme Court of Kenya, in the case of Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] KESC 8 (KLR) stated:-

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

100. The 2nd Respondent’s contention must be seen in the context of the transformation of judicial review under Article 47 of *the Constitution* of Kenya 2010. While in the pre-2010 dispensation judicial review was strictly a common law remedy for checking administrative action, following the 2010 Constitution, the nature of judicial review was transformed as it obtained a constitutional foundation under Article 47 on fair administrative action, and under Article 23, which provides that an order of judicial review is one of the remedies for correcting constitutional violations.

101. The Court of Appeal in *Judicial Service Commission vs Mbalu Mutava & Another* [2014] eKLR considered the transformation of administrative justice under *the Constitution* as follows:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected to article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

102. The Supreme Court in the case of *Communications Commissions of Kenya vs Royal Media Services Ltd* [2014] eKLR articulated the duality of judicial review processes in Kenya as follows:

“However, notwithstanding our findings based on the common law principles estoppel and res-judicata, we remain keenly aware that *the Constitution* of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing



their grievance as a constitutional question, the 1st, 2nd and 3rd Respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of articles 22 and 23 of *the Constitution*...The famous United States Supreme Court Case of Marbury v Madison 5 US 137 (1803) established the principle of the possibility of judicial review of legislation, and at the same time the key place of the courts in the upholding of the US Constitution. This principle is enshrined in our Constitution (articles 23(3)(d) and 165(3)(d)). A close examination of these provisions shows that our Constitution requires us to go even further than the US Supreme Court did in Marbury v Madison (Marbury). In Marbury, the US Supreme Court declared its power to review the constitutionality of laws passed by Congress. By contrast, the power of judicial review in Kenya is found in *the Constitution*."

103. The institution of this Petition under Articles 23 and 47 of *the Constitution* is therefore lawful as under Article 23(3)(f) of *the Constitution*, the remedies of judicial review such as prohibition and certiorari may be granted in proceedings where it is claimed that rights have been denied, violated or threatened.
104. Additionally, under Section 13(3) of the *Environment and Land Court Act*, this court is duly vested with the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
105. Further, this court has jurisdiction to hear and determine judicial review suits, which are no longer the exclusive preserve of the Judicial Review Division of the High Court.
106. Accordingly, this court is clothed with the lawful and proper jurisdiction to hear and determine this Petition, where the Petitioners allege that their rights have been infringed.

b. Whether this suit satisfies the specificity test set out in the Anarita Karimi Njeru

107. The specificity test was aptly articulated in the case of Anarita Karimi Njeru vs Republic (1979) eKLR as follows: -

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

108. Similarly, in the case of Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR the court stated that: -

“(42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (cap 21) and



section 3A and 3B of the *Appellate Jurisdiction Act* (cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

109. In the Petition before this court, the Petitioners have mentioned several provisions of the law, but their Petition is anchored on the alleged violation of Article 10 by state officers, being the 1st, 2nd, 3rd, 4th and 13th Respondents and the alleged infringement of the Petitioners’ right to fair administrative action and right to fair hearing under Article 47, Article 50 and Article 25(c) of *the Constitution* through the actions of the 1st, 2nd, 3rd and 13th Respondents of continuing investigations and prosecuting the Petitioners without credible evidence.
110. This court is satisfied that the Petitioners have through their Petition set out with clarity the Articles of *the Constitution* that have been allegedly violated by the Respondents, and the facts supporting the same. That being so, it is the finding of this court that this Petition meets the threshold for a constitutional Petition as enumerated in the *Anarita Karimi Njeru* case cited above.

C. Whether the Petitioners failed to exhaust available remedies

111. The 2nd Respondent also submitted that the Petitioners failed to exhaust remedies under Section 5(4) (e) of the *Office of the Director of Public Prosecutions Act*. Under this Section, it is prescribed that the Director of Public Prosecutions has the power to review a decision to prosecute, or not to prosecute, any criminal offence.
112. The High court underscored the significance of the doctrine of exhaustion of remedies in Kenya’s civil legal system in the case of *Benard Murage vs Fine Serve Africa Limited & 3 Others* [2015] eKLR in the following words:
- “Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.”
113. The High Court in the above case was guided by the Court of Appeal’s determination in *Speaker of National Assembly vs Njenga Karume* [2008] 1 KLR 425, where it held as follows:
- “In our view there is considerable merit...that where there is clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”



114. Such alternative remedies refer to primary dispute resolution mechanisms such as tribunals or other quasi-judicial fora. Section 5(4) (e) of the ODPP Act does not conform to the definition of a dispute resolution mechanism, as it refers to the discretion that is to be exercised by the Director of the Public Prosecution.
115. In any case, this section does not provide that a party can make an application for a review of a decision to prosecute to the Director of Public Prosecution. For this reason, the Petitioners' Petition cannot be faulted for failure to exhaust any such available remedy as none has been shown to exist.

D. Whether the 3rd and 12th Respondents lawfully conducted their investigations

116. The Directorate of Criminal Investigations is established under Section 28 of the *National Police Service Act*. The functions of the directorate are set out in Section 35 of the Act and they include undertaking investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crimes, cybercrimes, among others.
117. Under Article 10 of *the Constitution*, the Directorate of Criminal Investigations and its state officers are bound by the national values and principles of governance in the implementation of their roles. These national values and principles are articulated in Article 10(2) as including:
- “(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development.”
118. In this matter, the 3rd Respondent, the Directorate of Criminal Investigations, was enjoined to investigate the ownership of the suit property following the filing of complaints by the 1st Petitioner and by the directors of Aureum Limited.
119. From the evidence adduced by the parties, investigations into the ownership of the suit property were carried out by two detectives, who had antithetical recommendations. The first round of investigations was conducted by Detective Nicholus Osuri, the 12th Respondent to this suit, while the second round was conducted by Detective Patrick Khayemba.
120. Detective Nicholus Osuri concluded from his investigation that the 9th Respondent was the bona fide purchaser of the suit property and that the Petitioners fraudulently obtained title to the property. He annexed several documents to his Replying Affidavit from his investigation which spanned the period between 2019 and 2020.
121. These documents included forensic audit reports from the Registrar of Companies, which found that the registration the company registration number No. C.110776 was allocated to Bosorana Limited, a company registered on 2nd July 2004, whose directors were David Njenga Samson Kuria, Henry Njoroge Njenga and Samuel Njuguna Chege. The report also showed that Aureum Limited C.131937 was registered on 24th November 2006 and its directors are Irene Nzisa Wanjigi and Tyl Limited.
122. A further report dated 7th June 2019 was adduced by Joyce Koech from the Business Registration Services. She asserted that Bosarana Limited was registered under registration number C.110776 on 2nd July 2004 while Horizon Hills Limited registration number C.131937 changed its name to Auruem



- Limited on 24th November 2006. She indicated that Bosarana Limited attempted to change its name to Horizon Hills Limited through a name change application on 31st July 2014, but the application was never approved.
123. The 12th Respondent also presented the Memorandum and Articles of Association of Horizon Hills Limited dated 3rd November 2004, in which the directors are indicated as David Njenga Samson, Henry Njoroge Njenga and Samuel Njuguna Chege. The Memorandum and Articles of Association dated 30th July 2009 with respect to Tyl Limited were also annexed.
 124. He also adduced in the report the government printer's report ref. DGP/DCI/VOL.11/194 dated 25th April 2019 which found that the grant held by the 1st Petitioner was fraudulent while that held by the 9th Respondent was genuine. No reasons were adduced for these findings. The court has also perused the other documents annexed on the report of Detective Osuri.
 125. The issue at hand is the manner in which the investigations were undertaken by the 3rd Respondent and the 12th Respondent. Upon the 12th Respondent's finding that the 1st Petitioner's title was fraudulent, the Petitioners filed two complaints against the Detective at the ODPP's office and at the DCI. Following the complaints, the file was allocated to Detective Patrick Kayemba who conducted the second round of interviews. The Petitioners have adduced a report dated 3rd May 2021 sent to them by the 3rd Respondent upon her request.
 126. Detective Khayemba's report concluded that the grant issued to the 1st Petitioner was genuine while that of the 9th Respondent was to be withheld for the purposes of prosecution in criminal proceedings.
 127. Detective Kayemba noted that without the advantage of a physical file or CR12, it was not possible to ascertain the proper directors or shareholders of Horizon Hills Limited No. C131937. He also stated that it was highly unprocedural and strange, noting that the directors had alleged that they had dutifully been filing Company Annual Returns for eight years.
 128. He also noted that though Tabitha Thuo Nyamweru alleged that C.110776 belonged to Bosarana Limited and was registered to Gerald Maina Ngayu and David Mugambi, she did not have any paperwork to show how it changed its name to Horizon Hills Limited, and that she also could not explain why searches at the Company Registry showed that company registration No. C.1107766 was assigned to Horizon Hills Limited.
 129. A report was sent to the Attorney General dated 21st January 2021, indicating the findings that the Detective Khayemba had found that the 1st Petitioner's title was genuine and that the 9th Respondent's title was a product of fraud.
 130. The High Court in *Ololoso & another vs Inspector General of Police & Another* [2023] KEHC 25855 (KLR) rightly cautioned that:

“The exercise of the function of investigation should not be oppressive or in abuse of the process and purpose of criminal investigation to bring suspects to book. Oppression may take many and different forms depending on the circumstances of each case. But, may include, use of much or excessively intrusive tools, methods and techniques not permitted or authorized in law or which by their nature completely routs the protection of fundamental freedoms and rights in the Bill of Rights such as torture or threat to torture methods. Abuse include; to procure or force a settlement of a civil claim or debt or personal scores; and in some cases, to cover police failures or merely to please or sooth a curious public or political audience.”



131. The Petitioners contend that in the filing of Nairobi Criminal Case No. E1264 of 2021 and Nairobi Criminal Case No. E289 of 2023, their rights to fair administrative action and their right to fair hearing have been infringed.
132. The Court of Appeal in *Judicial Service Commission vs Mbalu Mutava & another* [2015] KECA 741 (KLR) defined the right to a fair administrative action and drew a distinction between it and the right to fair hearing as follows:
- “Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. “Fair hearing” in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body”
133. Article 50(1) of *the Constitution* provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
134. Article 47(1) prescribes that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This provision was enacted through the Fair Administrative Actions Act.
135. The Respondents contend that concurrent civil and criminal proceedings are not prohibited by law. This is provided for under Section 193A of the *Criminal Procedure Code* which governs the operation of such a scenario. It provides:
- “Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”
136. Courts have upheld this provision, to the extent that where it is proved that criminal prosecutions is being conducted with an ulterior motive, in bad faith or contrary to *the Constitution* or to statute, such criminal prosecution ought to be halted.
137. The Supreme Court in *Jirongo vs Soy Developers Ltd & 9 Others* [2021] KESC 32 (KLR) held that where the prosecutorial powers are not exercised in line with Article 157(11), the High Court, and by extension the Environment and Land Court can interrogate the questions arising therefrom and make an appropriate order. It stated:
- “Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3) (d)(ii) can properly interrogate any question arising therefrom and make appropriate order.”



138. In the case of Alfred Lumiti Lusiba vs Pethad Ranik Shantilal & 2 Others (2016) eKLR it was noted that:

“The conclusion that one can draw from Section 193A of the *Criminal Procedure Code* together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.”

139. This was similarly held in the case of Douglas Maina Mwangi vs Director of Public Prosecutions & Another [2013] KEHC 4434 (KLR):

“When dealing with the decision as to whether or not to prosecute, the office exercises independent judgment and this court cannot interfere unless it is shown that the exercise is contrary to *the Constitution*, in bad faith or amounts to an abuse of process.”

140. The Commissioner of Police & Another vs Kenya Commercial Bank Ltd & 4 Others [2013] eKLR persuasively found that the High Court can stop a process that may lead to abuse of power:

“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of article 157(11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090. It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v R* [2002] 1EA 205. See also *Kuria & 3 others v Attorney General* [2002] 2KLR.”

141. Further, abuse of power was defined in the case of *Keroche Industries Limited vs Kenya Revenue Authority & 5 Others* Nairobi HCMA No. 743 of 2006 (2007) 2 KLR 240 which cited *Reg vs*



Secretary of State for the Environment Ex Parte Nottinghamshire Country Council [1986] AC and held that:

“A power which is abused should be treated as a power which has not been lawfully exercised... A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers.”

142. This court is duly guided by the foregoing laws and authorities. The question for this court’s consideration is whether there was sufficient evidence to support the charging of the Petitioners and other parties in Nairobi CMCC E1264 of 2021 and Nairobi CMCC E289 of 2023, and whether the 2nd Respondent lawfully exercised its mandate in instituting these suits.
143. As per the reports dated January and May 2021, prepared by Patrick Khayemba, the recommendations of the investigation was that the 1st Petitioner’s title was genuine and the 9th Respondent’s title was fraudulent. However, by the latter half of 2021, the Petitioners were charged in Nairobi CMCC E1264 of 2021.
144. This suit, CMCC No. E1264 of 2021, is solely against the 1st Petitioner, Cissy Kalunde, and the complainants are the Directors of Horizon Hills Limited, David Njenga and Henry Njoroge who are the 5th and 6th Respondents in this suit. The 1st Petitioner was in this case charged with the offence of conspiring to defraud Horizon Hills Limited of the suit property by falsely pretending she was capable to purchase the suit property at the price of Kshs. 220 million. She was also charged with the offense of obtaining registration of land by false pretense contrary to Section 320 of the *Penal Code* and forcible detainer contrary to Section 91 of the *Penal Code*.
145. Further, in 2023 through CMCC NO. E289 of 2023, the 1st and 3rd Petitioners, 5th-7th Respondents and the 1st -5th Interested Parties were arraigned in court on multiple charges which concerned the alleged attempt to defraud Aureum Limited of the suit property.
146. The pivot in deciding to charge the 1st Petitioner and to withdraw the charges against the 9th Respondent and its directors can only be traced to a letter by the Director of Public Prosecutor dated 4th April 2023, in which he reviewed Police Case File CR 121/34/2022 and Court file No. E051 of 2022 and gave directions for the withdrawal of the case against the 9th, 10th and 11th Respondents under Section 87(a) of the *Criminal Procedure Code*.
147. The letter further directed the charging of the 1st, 2nd and 3rd Petitioners, the 5th, 6th and 7th Respondents, and the 1st, 2nd, 3rd, 4th and 5th Interested parties herein. The DPP also directed that the criminal suits, CMCC E1264/2021 and CMCC E289 of 2023, to be merged and all the documents to be properly serialized. He directed that the 10th and 11th Respondents were to be treated as prosecution witnesses.
148. Vide the said letter, the DPP exercised his power of review under Section 5 of the ODPP Act. He acknowledged the report by the initial investigation’s team, and proceeded to list persons who, from his assessment of the evidence and law, bear the greatest criminal culpability. These were the 5th-7th Respondents, the Petitioners and the 1st to 5th Interested parties to this suit. The DPP then directed that a separate file be opened for purposes of investigating the DCI officers who opened the multiple files for investigations, knowing the risk of obtaining contradictory opinions and failing to disclose the same to the DPP.



149. Despite this directive, there is no evidence adduced before this court of any further investigations conducted in relation to the ownership of the suit property or the culpability of the persons mentioned by the Director of Public Prosecutions.
150. It is trite that before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. In the case of *Republic vs Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR, it was held:
- “The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”
151. One of the grounds for the withdrawal of the criminal proceedings by the DPP against the 9th-11th Respondents was that Aureum Limited, which was formerly Horizon Hills Limited, had paid the purchase price to the initial directors of Horizon Hills Limited.
152. However, the issue of the genuine Directors of Horizon Hills Limited, which is at the core of the civil suits that are pending before this court, seems not to have been considered by the DPP. That question is awaiting determination by this court in ELC No. 100 of 2019 and ELC 227 of 2019.
153. Indeed, by the time that the criminal suit was filed in court in 2021, the civil suits had already been filed and were at an advanced stage of hearing. However, it would appear that the 5th to 7th Respondents were keen to secure the balance of the purchase price notwithstanding the pending suits, and proceeded to lodge a complaint against the 1st Petitioner’s advocates before the Advocates Complaints Commission, demanding that they honour the professional undertaking by releasing the balance of the purchase price.
154. The framing of the charges in CMCC E1264 of 2021 lead this court to conclude that this suit was particularly filed for the ulterior motive of securing the balance of the purchase price, despite the pending civil cases and the unresolved legal issues on the directorship of Horizon Hills Limited.
155. Indeed, in view of the contradictory investigation reports by the DCI, it is only after this court, in the two pending civil suits, has determined the genuine owners of the suit property, and by extension the genuine directors of Horizon Hills Limited, that the question of which of the two investigation’s report should be believed, and relied upon by the 2nd Respondent in preferring charges, if at all.
156. In the circumstances, the Petitioners’ Petition is allowed as follows:
- a. A declaration be and is hereby issued that the Respondents have violated the Petitioners’ rights guaranteed under Articles 47 of *the Constitution*.
 - b. A declaration be and is hereby issued that the 2nd Respondent has in the manner in which they preferred the decision to charge the Petitioners, 5th-7th Respondents and 1st to 5th Interested Parties while withdrawing the claim against the 9th, 10th and 11th Respondents violated Article 10 and 157 of *the Constitution*.



- c. A Declaration be and is hereby issued that the proceedings in Nairobi Criminal Case No. E1264 of 2021: Republic v Cissy Kalunde Musembi and Nairobi Criminal Case No. E289 of 2023; Republic v David Njenga Samson Kuria & 9 others are unconstitutional.
- d. An order of Certiorari does issue quashing the decision to charge and institute criminal proceedings against the Petitioners and to quash the charge sheets in Milimani Chief Magistrate Criminal Case No. E1264 of 2021: Republic v Cissy Kalunde Musembi and Milimani Chief Magistrate Criminal Case No. E289 of 2023: Republic v David Njenga Samson Kuria & 9 others.
- e. The 2nd Respondent is at liberty to bring fresh charges against any of the parties herein after the determination of ELC Case No. 100 of 2019 and ELC Case No. 227 of 2019.
- f. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29TH DAY OF MAY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Omulloh for Petitioners

Mr. Allan Kamau for Attorney General

Mr. Willis Otieno for 9th – 11th Respondents

Court Assistant: Tracy

ELC PET. NO. E019 OF 2023

JUDGMENT

